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# An Organizational Account of State Standing

Katherine Mims Crocker

*William & Mary Law School*, [kmcrocker@wm.edu](mailto:kmcrocker@wm.edu)

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# AN ORGANIZATIONAL ACCOUNT OF STATE STANDING

*Katherine Mims Crocker\**

Again and again in regard to recent high-profile disputes, the legal community has tied itself in knots over questions about when state plaintiffs should have standing to sue in federal court, especially in cases where they seek to sue federal-government defendants. Lawsuits challenging everything from the Bush administration's environmental policies to the Obama administration's immigration actions to the Trump administration's travel bans have become mired in tricky and technical questions about whether state plaintiffs belonged in federal court.

Should state standing cause so much controversy and confusion? This Essay argues that state plaintiffs are far more like at least one other category of so-called "aggregate litigants," organizational plaintiffs, than the literature has previously recognized. In short, one can see state standing and organizational standing as fitting either side by side (in the sense that state standing runs parallel to organizational standing) or hand in glove (in the sense that state standing represents a species of organizational standing). And a preliminary comparison of institutional features suggests that state plaintiffs should have at least as strong a claim to standing in federal court as associational plaintiffs do.

These contentions lead to the conclusion that if the legal community feels comfortable with the wide scope of organizational standing, it should feel equally—and probably more—comfortable with the wide scope of state standing.

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## INTRODUCTION

“It is almost de rigeur for articles on standing to quote Professor Freund’s testimony to Congress that the concept of standing is ‘among the most amorphous in the entire domain of public law.’”<sup>1</sup> But what matters for present purposes is that the concept of standing is perhaps no more amorphous than when applied to states. Again and again in regard to recent high-profile disputes, the legal community has tied itself in knots over questions about when state plaintiffs should have standing to sue in federal court. Controversy and confusion are especially evident in cases where state plaintiffs seek to sue federal-government defendants. Lawsuits challenging everything from the Bush administration’s environmental policies to the Obama administration’s immigration actions to the Trump administration’s travel bans have become mired in tricky and technical questions about whether state plaintiffs belonged in federal court.

Should state standing cause so much hand wringing and head scratching? Two aspects of many state-plaintiff suits that seem to engender special concern are their public-law nature and representational quality.<sup>2</sup> But these features are by no means limited to state-plaintiff suits. And in any event, the genies are out of their bottles: public-law litigation and representational actions are here to stay.<sup>3</sup>

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1 Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371, 1372 (1988) (quoting *Judicial Review: Hearings on S. 2097 Before the Subcomm. on Const. Rights of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966) (statement of Paul A. Freund)).

2 “[P]ublic law litigation . . . differ[s] in a number of respects from traditional private law litigation,” in that “[i]t focuses on statutory and constitutional (rather than common-law) violations, on the wrongs of the defendant more than the injury to the plaintiff, and on group rather than individual rights”; “deals with polycentric rather than bipolar issues”; and “tolerates a looser fit between right and remedy.” Ann Woolhandler & Michael G. Collins, *State Standing*, 81 *VA. L. REV.* 387, 463 (1995) (footnote omitted). “[P]ublic-law litigation is often charged with blurring the line between litigation and legislation and with establishing ongoing regulatory regimes outside the normal lawmaking process.” Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 *TEX. L. REV.* 43, 107 (2018).

3 Critics of public-law litigation point to causes including “Americans’ demand for justice and distrust of government,” as well as the nation’s “political polarization and frequent bouts of divided government.” Lemos & Young, *supra* note 2, at 108. Of course, “[n]one of these features of American public life are going away anytime soon.” *Id.* With respect to the pervasiveness of representational litigation in the damages context, see *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557–58 (1996), which mentions, inter alia, class actions, trustee suits for creditors in bankruptcy, state *parens patriae* litigation, and cases involving estate executors.

Accordingly, as Professors Margaret Lemos and Ernest Young have recently written, “[a]n important response to criticisms of state litigation . . . is to ask” a “largely ignored” question: “[C]ompared to what?”<sup>4</sup> As it turns out, so-called “aggregate litigants” are regularly allowed to accumulate the interests of individuals or entities in other contexts, like class actions.<sup>5</sup> One kind of aggregate litigant is the organizational plaintiff.<sup>6</sup> And “[w]hen states sue to enforce the Clean Air Act or the securities laws, or to challenge the [Affordable Care Act] or the Trump travel bans, they are playing a similar role to the Sierra Club [or] the ACLU.”<sup>7</sup>

This Essay explores in depth—and with a focus on standing considerations, especially in cases against federal-government defendants—the comparison between states and organizations suggested by Lemos and Young’s wider-ranging article. The Essay contends, in short, that one can see state standing and organizational standing as fitting either side by side (in the sense that state standing runs parallel to organizational standing) or hand in glove (in the sense that state standing represents a species of associational standing). Along the way, the Essay suggests that states compare favorably to other associations across multiple institutional dimensions related to representational capacity. Consequently, the Essay concludes that the legal community should feel at least as comfortable with lawsuits led by states as with lawsuits led by other associations.

This Essay proceeds as follows. Part I introduces the doctrines of state standing and organizational standing and provides a series of case studies to which the remainder of the piece refers. Part II then traces the congruence between these doctrines. This discussion touches on—and sometimes suggests doctrinal tweaks for—a number of hot-button issues. These include the asserted connection between states’ incidental proprietary injuries and generalized grievances, the purported problem of manufactured sovereign state standing, the question whether quasi-sovereign state standing requires citizen standing, the rule that quasi-sovereign state standing must involve widespread harm, and the jurisdictional bar that blocks such standing in cases against federal-government defendants. The analysis concludes that in light of the similarities in doctrine and a preliminary comparison of institutional characteristics, state standing should be at least as well accepted, and at least as wide ranging, as organizational standing is.

## I. STATE STANDING AND ORGANIZATIONAL STANDING

Before outlining state standing and organizational standing in particular, a few words on standing in general are in order. Standing is supposed to “identify those disputes which are appropriately resolved through the judicial

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4 Lemos & Young, *supra* note 2, at 49, 109 (internal quotation marks omitted).

5 *Id.* at 109

6 *Id.*

7 *Id.* at 49.

process.”<sup>8</sup> The all-too-familiar formulation for the doctrine includes three elements—an “injury in fact,” a “causal connection between the injury and the conduct complained of,” and a “‘likel[i]hood’ . . . that the injury will be ‘redressed by a favorable decision.’”<sup>9</sup> Other common aspects of standing doctrine require that plaintiffs assert an injury not shared by too large a proportion of the population and that plaintiffs litigate their own claims rather than the claims of others.<sup>10</sup>

Courts generally regard these rules as comprising both “constitutional” and “prudential” components, with the former deriving from Article III’s case-or-controversy requirement and the latter deriving from “judicial self-governance” aimed at avoiding matters where resolution by courts would be unwise or unnecessary.<sup>11</sup> As previous scholarship has argued, however, this framework seems far too facile. For one thing, the dividing lines between constitutional and prudential concerns are shadowy and shifting.<sup>12</sup> For another thing, scholars have long debated the fit between current doctrine and historical understandings of constitutional limitations on the judicial power, thus casting the contours of “constitutional” standing conditions into further doubt.<sup>13</sup>

8 *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

9 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

10 *See* *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

11 *Id.* at 500. In addition, the Supreme Court has recently reclassified a doctrine formerly known as “standing” as a matter of statutory interpretation. *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (declaring that “‘prudential standing’ is a misnomer’ as applied to the zone-of-interests analysis, which asks whether ‘this particular class of persons ha[s] a right to sue under this substantive statute’” (alteration in original) (quoting *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring))).

12 *See* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 *VAND. L. REV.* 845, 853 (2017) (“[T]he proverbial boundaries dividing ‘self-imposed’ prudential limits, constitutional limits, and statutory limits are often blurred, porous, and contested.”); *see also* Katherine Mims Crocker, Essay, *A Prudential Take on a Prudential Takings Doctrine*, 117 *MICH. L. REV. ONLINE* 39, 49–51 (2018); Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 *DUKE J. CONST. L. & PUB. POL’Y* 149, 153–56, 161–63 (2014).

13 *Compare, e.g.*, F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 *CORNELL L. REV.* 275, 277 (2008) (“[A]lthough the Court has claimed that its standing requirements are necessary to preserve the traditional limits on the judiciary, those requirements have precluded claims that courts historically would have permitted.”), Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 *MICH. L. REV.* 163, 167 (1992) (arguing that “a revisionist view of Article III, with no textual or historical support, has established injury in fact as a constitutional prerequisite” to a plaintiff’s suit), and Winter, *supra* note 1, at 1374 (“[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase ‘cases or controversies’ or that it is a prerequisite for seeking governmental compliance with the law.”), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *MICH. L. REV.* 689, 691 (2004) (“We do not claim

Reexamining standing rules from first principles, then, is a worthy endeavor.<sup>14</sup> But it is an endeavor that lies beyond the realistic range of this Essay. For present purposes, therefore, I treat the general architecture of the Supreme Court's standing (and other) jurisprudence as fixed, suggesting only modest renovations to the particular corners under consideration here.<sup>15</sup>

### A. State Standing

Questions surrounding the standing of state plaintiffs often focus on the injury element of the doctrine's tripartite expression. According to the Supreme Court, to provide standing, an injury must constitute the "invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical.'" "<sup>16</sup> As I have described elsewhere, caselaw outlines three main categories of interests that can provide states standing to sue in federal court.<sup>17</sup>

First are "proprietary" interests. Often related to a state's role as property owner, these interests are generally economic in nature, and they are ones that private plaintiffs in the state's position could also assert. As the Supreme Court has observed, "a State is bound to have a variety of proprietary interests," like "own[ing] land or participat[ing] in a business venture."<sup>18</sup> And, the Court has explained, "[a]s a proprietor, [a State] is likely to have the same interests as other similarly situated proprietors" and "may at times need to pursue those interests in court."<sup>19</sup>

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that history *compels* acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. . . . We do, however, argue that history does not *defeat* standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

14 See, e.g., Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1191 (2014) (arguing that "[c]urrent standing doctrine purports to ask only whether plaintiffs have an adequate stake in seeking judicial relief" but that in actuality, "the Supreme Court's standing decisions often turn on a relative assessment of superiority"—and that this approach "serves an array of values" and "has several advantages over an exclusively adequacy-based approach").

15 Of course, dubious aspects of standing doctrine and adjacent issues are relevant to questions about when and to what extent state standing and organizational standing matter. Other scholars have recently undertaken compelling work in such areas. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (regarding the propriety of national injunctions); Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481 (2017) (regarding the propriety of the rule that only one plaintiff needs to demonstrate standing).

16 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

17 See Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2055–67 (2011).

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

19 *Id.* at 601–02.

For a recent—and controversial—example of proprietary state standing involving federal-government defendants, consider the Texas-led lawsuit challenging the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program, which sought to delay deportation for certain immigrants with children who were American citizens or residents. The Fifth Circuit held that Texas had standing to sue because DAPA beneficiaries would have become eligible for driver’s licenses, which would have cost the State \$130.89 each.<sup>20</sup> The Supreme Court affirmed with a tie vote in *United States v. Texas*.<sup>21</sup>

Or consider the case in which Hawaii challenged the legality of a Trump-administration ban against travel to the United States by individuals from certain predominantly Muslim countries—an issue that the Supreme Court later addressed in *Trump v. Hawaii*<sup>22</sup> at the Supreme Court. Citing *Texas*, the Ninth Circuit held that “[t]he State’s standing can . . . be grounded in its proprietary interests as an operator of the University [of Hawaii]” because, among other things, “students who are unable to attend the University” because of the travel ban “will not pay tuition.”<sup>23</sup>

The second category of interests that can provide states standing to sue in federal court are “sovereign” interests. These are interests in a state’s “core ability to govern.”<sup>24</sup> The Supreme Court has described them as involving “the maintenance and recognition of borders,” as well as “the power to create and enforce a legal code.”<sup>25</sup> And scholars have described them as underlying a state’s suit “to establish its authority to exercise legislative, executive, or judicial power within a particular territory or over a particular subject matter.”<sup>26</sup> In light of these descriptions, one can think about sovereign interests as tracking a state’s stake in its *jurisdiction*, meaning “both (1) the geographic scope over which a government exercises power and (2) whether it has authority to do so.”<sup>27</sup>

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20 *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

21 136 S. Ct. 2271. The case was decided by an eight-member bench because of the vacancy associated with Justice Scalia’s death.

22 138 S. Ct. 2392 (2018).

23 *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir.) (per curiam), *vacated as moot*, 138 S. Ct. 377 (2017). Pointing to precedent saying that “[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint,” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)) (internal quotation marks omitted), the Supreme Court avoided the question of state standing for an Establishment Clause challenge in the travel-ban case by holding that the individual plaintiffs could premise standing on “the alleged real-world effect that the [policy] has had in keeping them separated from certain relatives who seek to enter the country,” *id.*

24 Crocker, *supra* note 17, at 2056.

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

26 Woolhandler & Collins, *supra* note 2, at 411.

27 Crocker, *supra* note 17, at 2057.

Border disputes provide obvious examples. In a case that the Supreme Court decided in 1838, for instance, Rhode Island sued Massachusetts on the theory that “the government of Massachusetts, about 1719, wrongfully possessed herself of a tract of land more southerly than a true line would be drawn” under a series of seventeenth-century charters tracing back to the King of England.<sup>28</sup> The Court took jurisdiction of the case, notwithstanding Chief Justice Taney’s argument in dissent that “[c]ontests for rights of sovereignty and jurisdiction between states over any particular territory”—as distinguished from “right[s] of property in the soil of the territory in controversy”—are “not within the grant of judicial power contained in the constitution.”<sup>29</sup>

For an example outside of the border context, see *South Carolina v. Katzenbach*,<sup>30</sup> where South Carolina sued the Attorney General of the United States to invalidate various provisions of the Voting Rights Act of 1965. At bottom, the Act “required States with a long history of discrimination to overhaul their state election laws.”<sup>31</sup> These measures, the Supreme Court suggested by allowing certain theories of the challenge to proceed, inflicted injury on South Carolina’s sovereign interest in creating and enforcing a legal code.<sup>32</sup>

For a failed attempt to attain sovereign state standing, consider an Obamacare case. In 2010, the Virginia legislature passed the Virginia Health Care Freedom Act (VHCFA), which provided that “[n]o resident . . . shall be required to obtain or maintain a policy of individual [health] insurance coverage.”<sup>33</sup> When the Affordable Care Act (ACA) became law, Virginia’s attorney general sued the Secretary of the U.S. Department of Health and Human Services on behalf of the Commonwealth in federal court. He contended

28 *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 679–80 (1838).

29 *Id.* at 753 (Taney, C.J., dissenting). Others have argued that treating cases decided before the middle of the twentieth century as “standing” decisions is somewhat anachronistic. See, e.g., Bradford C. Mank, *State Standing in United States v. Texas: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 219 (stating that the Supreme Court “did not develop the modern standing doctrine until the 1940s”).

30 383 U.S. 301 (1966).

31 Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 871 (2016).

32 See *Katzenbach*, 383 U.S. at 323–24; see also Woolhandler & Collins, *supra* note 2, at 492 (“[In *Katzenbach*,] the Court allowed the state to contest whether Congress could set voter qualifications in state and federal elections under the Fifteenth Amendment. Presumably the state sought to litigate its own liberty interest in setting voter qualifications, as provided by specific provisions of the Constitution that expressly contemplate state power to set such qualifications. By contrast, the Court held that the state could not assert claims that the Voting Rights Act violated either separation of powers or the Due Process and Bill of Attainder clauses. Such provisions, said the Court, protected people rather than states . . .” (footnotes omitted)); *id.* at 493 (stating that the *Katzenbach* Court “presumably viewed the state[] as asserting [its] own constitutional rights—that is, [its] power to make and apply law concerning participation in elections”).

33 VA. CODE ANN. § 38.2-3430.1:1 (West 2018).



that the ACA's individual mandate (which, of course, required people "to obtain or maintain a policy of individual [health] insurance coverage," in the words of the VHCFA<sup>34</sup>) was "unconstitutional [as] exceed[ing] the enumerated powers conferred upon Congress."<sup>35</sup> As for standing, the Attorney General argued that the Commonwealth suffered injury to its sovereign interest in creating and enforcing a legal code to the extent that the ACA superseded the VHCFA.<sup>36</sup> On appeal, the Fourth Circuit rejected this argument.<sup>37</sup> The court reasoned that because the VHCFA "simply purport[ed] to immunize Virginia citizens from federal law," it "reflect[ed] no exercise of 'sovereign power.'"<sup>38</sup>

The third foundation for state standing turns on "quasi-sovereign" interests, "a judicial construct" that the Supreme Court has acknowledged "does not lend itself to a simple or exact definition."<sup>39</sup> As the Court stated in the 1982 case *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace."<sup>40</sup> The Court explained that "[a]lthough the articulation of such interests is a matter for case-by-case development . . . certain characteristics . . . are so far evident."<sup>41</sup> Quasi-sovereign interests "fall into two general categories," the Court said.<sup>42</sup> "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."<sup>43</sup>

Fleshing out the first category of quasi-sovereign interests (regarding the health and well-being of citizens), the Court stated that it had "not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior."<sup>44</sup> And "[a]lthough more must be alleged than injury to an identifiable group of individual residents," the Court explained, "the indirect effects of the injury

34 *Id.*

35 Complaint for Declaratory and Injunctive Relief at 6, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10CV188), *vacated*, 656 F.3d 253 (4th Cir. 2011).

36 *See Cuccinelli*, 656 F.3d at 268.

37 *Id.* at 269–72.

38 *Id.* at 270. I have criticized this decision before. *See Crocker, supra* note 17, at 2095–99. But Professor Tara Grove has recently articulated an insightful rationale for it. *See Grove, supra* note 31, at 876–80 (explaining the argument that "to the extent a state law merely declares that private citizens are *not* subject to legal requirements, and does not seek to regulate private citizens, that is not sufficient for standing purposes" because "special state standing against the federal government is an extension of its 'special' standing against private parties," which "most reasonably applies only to regulatory, not declaratory, state laws").

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

40 *Id.* at 602.

41 *Id.* at 607.

42 *Id.*

43 *Id.*

44 *Id.*

must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.”<sup>45</sup> The Court suggested that “[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue . . . is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”<sup>46</sup>

As *Snapp* made clear, public-nuisance actions provide prime examples of what the Supreme Court now classifies as this type of quasi-sovereign state standing.<sup>47</sup> In one matter that the Court decided in 1901, for instance, Missouri sued Illinois and the Sanitary District of Chicago for reversing the natural flow of the Chicago River so that sewage eventually ran into the Mississippi River in Missouri rather than into Lake Michigan in Illinois.<sup>48</sup> The Court stated that “it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”<sup>49</sup>

Similarly, in *Georgia v. Tennessee Copper Co.*,<sup>50</sup> a case that the Supreme Court decided in 1907, Georgia sued copper companies operating in Tennessee for discharging noxious gases across the state line. The majority opinion by Justice Holmes declared that “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”<sup>51</sup> This interest, the Court held, allowed Georgia to seek equitable relief through the Court’s exercise of original jurisdiction.<sup>52</sup>

*Snapp* characterized the second category of quasi-sovereign interests as “ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.”<sup>53</sup> One example, the Court said, was “the State’s interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce.”<sup>54</sup> Moreover, the Court said, “federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents.”<sup>55</sup>

45 *Id.*

46 *Id.*

47 *See id.* at 603–05; *see also* Woolhandler & Collins, *supra* note 2, at 446 (stating that “[n]uisance law provided a ready mechanism” for the case-or-controversy requirement to “evolve[ ] from a traditional private law model to a public law model” because of “its alternative incarnations as a government-initiated enforcement suit and as a private action”).

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

49 *Id.* at 241.

50 206 U.S. 230 (1907).

51 *Id.* at 237.

52 *See id.* at 237–38.

53 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 (1982).

54 *Id.*

55 *Id.*

To illustrate, *Snapp* pointed to *Georgia v. Pennsylvania Railroad Co.*,<sup>56</sup> a case in which Georgia sued railroad companies for transgressing federal anti-trust laws by conspiring to fix rates to the disadvantage of Georgia shippers. In deciding that case in 1945, the Supreme Court stated that “Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States.”<sup>57</sup> The Court declared that “[t]hese are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.”<sup>58</sup>

Also instructive is *Snapp* itself. There, Puerto Rico argued that the defendants, who were Virginia apple growers and related parties, “discriminated against Puerto Ricans in favor of foreign laborers” and “denied the benefits of access to domestic work opportunities that [certain federal statutes] were designed to secure for United States workers.”<sup>59</sup> The Court concluded that these allegations fell “within the Commonwealth’s quasi-sovereign interests” and could thus support standing.<sup>60</sup>

One note is necessary here. Courts and commentators often discuss a concept called “*parens patriae*” in connection with state standing. *Parens patriae* means “parent of his or her country” in Latin, and the term traditionally referred to “the state in its capacity as provider of protection to those unable to care for themselves.”<sup>61</sup> Nowadays, the concept can apply in a variety of contexts, including when Congress provides that states may vindicate specific statutory rights of their citizens in federal court.<sup>62</sup> Most importantly for the current discussion, however, people often employ the concept as something like a synonym for quasi-sovereign state standing.<sup>63</sup>

In sum, the basic outlines of state-standing doctrine hold that there are three kinds of interests on which the injury element can rest: proprietary interests, sovereign interests, and quasi-sovereign interests. Proprietary and

56 *Id.* (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945)); *see also id.* at 605–06 (also discussing *Pennsylvania Railroad*).

57 *Pa. R.R.*, 324 U.S. at 451.

58 *Id.*

59 *Snapp*, 458 U.S. at 608.

60 *Id.*

61 *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see* Mank, *supra* note 29, at 217 (“The *parens patriae* doctrine originated as an English common law doctrine concerning the authority of the English King to protect incompetent persons . . .”).

62 *See* Lemos & Young, *supra* note 2, at 68 & n.110 (describing how “provisions of federal law” can “facilitate[ ] state litigation by authorizing state [attorneys general] to enforce federal statutes, often by suing as *parens patriae* to protect the rights of state citizens”).

63 *E.g.*, Mank, *supra* note 29, at 217 (“Beginning in the early twentieth century, the Supreme Court recognized that states may sue in their capacity as *parens patriae* to protect quasi-sovereign interests in the health, welfare, and natural resources of state citizens.”); *see* Grove, *supra* note 31, at 865 (describing the synonymous relationship between the concepts); Crocker, *supra* note 17, at 2072–74 (same).

sovereign interests lead to direct state standing, in the sense that they are held by states qua states. Quasi-sovereign interests create representational state standing, in the sense that they are held by states as caretakers of their citizens.

### B. *Organizational Standing*

The point of this Essay is to provide a comparative view of state standing and organizational standing. The typical typology for the latter, which is sometimes also called “associational standing,” includes two threads. First, the Supreme Court has explained, “[t]here is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.”<sup>64</sup> Second, “an association may have standing solely as the representative of its members.”<sup>65</sup>

The first thread—in which an association sues “in its own right”—divides into two distinct strands. Illustrative of both is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>66</sup> which the Supreme Court decided in 1977. In *Arlington Heights*, a religious order sought to sell a tract of land in a Chicago suburb with a predominantly white population to a nonprofit development corporation that “several prominent Chicago citizens” had founded “for the purpose of building low- and moderate-income housing throughout the Chicago area.”<sup>67</sup> The religious order and the developer entered into a conditional sale agreement, which would lapse if the local government refused to rezone the tract from single-family use to multiple-family use.<sup>68</sup> The local government did so refuse, and the developer sued, alleging that the denial of its rezoning request was racially discriminatory and violated the Fourteenth Amendment and the Fair Housing Act.<sup>69</sup>

The Supreme Court upheld the developer’s standing on two grounds. As an initial matter, the Court said, the developer had suffered an “economic injury” because it had “expended thousands of dollars on the plans for [the community] and on the studies submitted . . . in support of the petition for rezoning.”<sup>70</sup> In any event, “economic injury is not the only kind of injury that can support a plaintiff’s standing,” the Court continued, and the developer had also suffered a cognizable injury to its “interest in making suitable low-cost housing available in areas where such housing is scarce.”<sup>71</sup> The fact that the developer intended to build a particular project provided “that

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64 *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

65 *Id.*

66 429 U.S. 252 (1977).

67 *Id.* at 255–56.

68 *Id.* at 256–57.

69 *Id.* at 254.

70 *Id.* at 262.

71 *Id.* at 262–63.

‘essential dimension of specificity’ that informs judicial decisionmaking,” the Court concluded.<sup>72</sup>

*Arlington Heights*, therefore, outlined two kinds of direct standing that an association can pursue: standing based on injury to its economic interests and standing based on injury to what one could call its “missional” interests.<sup>73</sup> The dominant understanding of the missional variety comes from a case that the Supreme Court decided a few years later, *Havens Realty Corp. v. Coleman*.<sup>74</sup> There, a nonprofit membership corporation whose purpose, according to the complaint, was “to make equal opportunity in housing a reality in the Richmond Metropolitan Area” sued the owner of an apartment complex in a Virginia suburb.<sup>75</sup> The association alleged that the owner had violated the Fair Housing Act by engaging in “racial steering”—“a ‘practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing’” through directing individuals toward particular communities based on race.<sup>76</sup>

The Supreme Court held that “[i]f, as broadly alleged, petitioners’ steering practices have perceptibly impaired [the corporation’s] ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact” sufficient to confer standing.<sup>77</sup> The Court concluded that “[s]uch concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests.”<sup>78</sup>

As outlined above, an association can also assert standing “solely as the representative of its members.”<sup>79</sup> The Supreme Court stated the canonical test for representational organizational standing in *Hunt v. Washington State Apple Advertising Commission*.<sup>80</sup> North Carolina had passed a law requiring that certain apples show “no grade other than the applicable U.S. grade or standard.”<sup>81</sup> The Washington State Apple Advertising Commission objected on the ground that the statute unconstitutionally discriminated against interstate commerce by prohibiting the display of Washington apple grades.<sup>82</sup>

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72 *Id.* at 263 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

73 Indeed, one author has labeled the latter kind of direct standing “mission advancement standing.” Ryan Baasch, Essay, *Reorganizing Organizational Standing*, 103 VA. L. REV. ONLINE 18, 19 (2017).

74 455 U.S. 363 (1982).

75 *Id.* at 368.

76 *Id.* at 366–67, 366 n.1 (quoting Joint Appendix at 12, *Havens*, 455 U.S. 363 (No. 80-988)).

77 *Id.* at 379.

78 *Id.*

79 *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

80 432 U.S. 333 (1977).

81 *Id.* at 335 (quoting N.C. GEN. STAT. ANN. § 106-189.1 (1973)) (internal quotation marks omitted).

82 *See id.*

Summarizing precedent, the Court explained that “an association has standing to bring suit on behalf of its members” when three conditions are met: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”<sup>83</sup>

The Court held these prerequisites satisfied in *Hunt*. The Court reasoned (a) that the North Carolina statute had brought about injury to Washington apple growers and dealers by causing them to alter their packaging practices or lose accounts; (b) that “the Commission’s attempt to remedy these injuries and to secure the industry’s right to publicize its grading system” was “central to [its] purpose of protecting and enhancing the market for Washington apples”; and (c) that “neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.”<sup>84</sup>

In sum, there are three rubrics under which an association can claim standing to act as a plaintiff in federal court. The first and second forms of organizational standing involve direct injury, with one turning on harm to an association’s economic interests and the other turning on harm to its mission interests. The third form of organizational standing involves representational injury and turns on harm to members’ interests in connection with the association’s purpose.

## II. STATE STANDING ALONGSIDE ORGANIZATIONAL STANDING

Judges and observers often see state standing as a strange and suspect doctrine—especially (but not exclusively) when it comes to quasi-sovereign injury and suits against federal-government defendants.<sup>85</sup> In fact, however, the standards for attaining state standing and the standards for attaining organizational standing are nearly identical.

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83 *Id.* at 343 (citing *Warth*, 442 U.S. at 515).

84 *Id.* at 343–44.

85 With respect to quasi-sovereign injury *and* federal-government defendants, see, for example, *Texas v. United States*, 809 F.3d 134, 194–95 (5th Cir. 2015) (King, J., dissenting), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016). Judge King argued that “[b]y relaxing standing for state suits against the federal government, we risk transforming ourselves into ‘ombudsmen of the administrative bureaucracy, a role for which [we] are ill-suited both institutionally and as a matter of democratic theory.’” *Id.* (second alteration in original) (quoting John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993)). With respect to quasi-sovereign injury, see, for example, Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1851 (2000). Professor Ratliff asserts that “quasi-sovereign” is “a meaningless term absolutely bereft of utility” and “one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether.” *Id.* And with respect to federal-government defendants, see, for example, Grove, *supra* note 31, at 882 & n.161. Grove collects sources for the proposition that “[a] number of scholars . . . oppose state standing to protect state law against federal interference.” *Id.*

The basic outlines of the category-level congruence between state standing and organizational standing may be discernible by this point. Both doctrines come in three flavors, with two requiring direct harm to the plaintiff itself and one requiring representational harm to the plaintiff's constituents. In each instance, moreover, one of the direct forms of standing generally depends on what one could think of as quantitative harm to the plaintiff's economic interests, while the other direct form depends on what one could think of as qualitative harm to the plaintiff's foundational character (fuzzy as that formulation may be).

As a descriptive matter, the aim here is to explain this doctrinal similarity (and to examine any differences). On a normative level, the aim here is to explore institutional features of states and associations that may affect their aptitudes for leading representational litigation. The more modest version of my argument is that one can see state standing and organizational standing as so similar that there is little reason to view state plaintiffs with any special skepticism. The less modest version of my argument is that one can actually see state standing as a variant of organizational standing, so that if the latter is legitimate, the former is too. While advancing these claims, I examine several hot topics from recent state suits against federal-government defendants, including incidental proprietary injuries, manufactured sovereign standing, and a controversial jurisdictional bar from the quasi-sovereign context.

### A. *Proprietary State Standing*

Proprietary state standing is essentially identical to economic organizational standing, the first kind of direct standing discussed in *Arlington Heights*. Caselaw makes clear that both require the same type of property-based injury that any other litigant can assert, and the transitive property of equality tells us that if  $A = B$  and  $B = C$ , then  $A = C$ . As the Supreme Court stated in *Snapp*, "like *other associations and private parties*, a State is bound to have a variety of proprietary interests," and "like other such proprietors it may at times need to pursue those interests in court."<sup>86</sup>

One possible limitation on proprietary state standing bears noting, however. In Texas's DAPA challenge, the Obama administration attacked the State's assertion of proprietary injury on the ground that it was "incidental"—meaning that the injury was caused not by a federal-government decision concerning Texas itself, but rather by a federal-government decision concerning other parties, which caused ripple effects for the State's fiscal costs.<sup>87</sup> "If States could establish standing on the basis of the indirect effects of fed-

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<sup>86</sup> Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982) (emphasis added).

<sup>87</sup> Brief for the Petitioners at 20–22, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674).

eral policy choices . . . , federal courts would be drawn into all manner of generalized grievances,” the U.S. Solicitor General argued.<sup>88</sup>

The primary problem with the Solicitor General’s argument is not that it took a skeptical stance toward incidental injuries. Indeed, the Supreme Court’s most canonical standing case, *Lujan v. Defenders of Wildlife*,<sup>89</sup> says that when “the plaintiff is himself an object of the action (or forgone action) at issue, . . . there is ordinarily little question that the action or inaction has caused him injury”—but that “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”<sup>90</sup>

Instead, the primary problem with the Solicitor General’s argument is that it effectively sought to subject states to more rigorous standing requirements than those that other litigants face. A “generalized grievance” is not an injury shared by all members of some discrete category of potential plaintiffs—here, all fifty states. A generalized grievance is an injury shared by (to quote the Supreme Court in a litany of cases<sup>91</sup>) “every citizen”<sup>92</sup> or at least “the great body of . . . citizens,”<sup>93</sup> “people generally,”<sup>94</sup> or (perhaps the most frequent formulation) “all members of the public.”<sup>95</sup> Setting aside issues of incidentalness, an injury can provide (“constitutional”) standing so long as the injury is “concrete and particularized” and “actual or imminent”—as Texas’s license-related injury appeared to be.<sup>96</sup> The law is clear, after all,

88 *Id.* at 21.

89 504 U.S. 555 (1992).

90 *Id.* at 561–62 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)); *see also* Aziz Z. Huq, *State Standing’s Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2141 (2019) (discussing how “state efforts to challenge other jurisdictions’ actions based on allegations of fiscal impact have been divisive” more generally).

91 *See* *Lance v. Coffman*, 549 U.S. 437, 439–41 (2007) (per curiam) (collecting these quotations).

92 *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

93 *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900).

94 *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

95 *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 176–77 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam). Some cases even limit the concept to “suits ‘claiming only harm to [the plaintiff’s] and every citizen’s interest in proper application of the Constitution and laws.’” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (alteration in original) (quoting *Lujan*, 504 U.S. at 573); *see* Richard M. Re, *The Rule Against Just One Generalized Grievance*, RE’S JUDICATA (Oct. 2, 2014), <https://richardresjudicata.wordpress.com/2014/10/02/the-rule-against-just-one-generalized-grievance/> (discussing this phenomenon).

96 *See supra* note 16 and accompanying text. To be clear, I do not mean that Texas’s license-related costs necessarily provided it standing, only that they seem to have satisfied the basic injury-in-fact test. *See* Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2024 (2019) (suggesting that Texas’s license-related costs constituted a “real injur[y]” for purposes of the “injury-in-fact” standard).



that “[f]or standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’”<sup>97</sup>

Accordingly, the fact that states’ proprietary interests are so diffuse that a host of federal-government actions could cause them injuries does not make those injuries generalized grievances. As a doctrinal matter, at least, states should be able to vindicate their proprietary interests through litigation in federal court to the same extent that other litigants can.

### B. *Sovereign State Standing*

How does sovereign state standing align with organizational standing? Recall that in *Havens*, the Supreme Court recognized a form of organizational standing where the defendant’s conduct has “perceptibly impaired” the plaintiff’s missional activities, with a “consequent drain on the organization’s resources.”<sup>98</sup> As it turns out, sovereign state standing looks a lot like missional organizational standing.

Start with the first element of the *Havens* test. The interests that *Snapp* identified as sovereign—“the maintenance and recognition of borders” and “the power to create and enforce a legal code”<sup>99</sup>—are surely integral ingredients of a state’s “mission,” whatever the metaphysical boundaries of that concept might be.

Thinking through the second element of the *Havens* test, which relates to the investment of resources, is a little trickier. Consider a classic border dispute: *Rhode Island v. Massachusetts*.<sup>100</sup> As the Supreme Court wrote in 1838, the disagreement between the State and the Commonwealth had been ongoing since “a very early period,” with commissioners “appointed by each colony in 1709, and at various other periods down to 1809.”<sup>101</sup> In the early eighteenth century, the Court said, the commissioners reached an agreement “that a line should be run and marked as the[ ] boundary, which was done.”<sup>102</sup> More specifically, the Court continued, “a survey [was] made and returned” and sent “to the legislatures of the respective colonies,” where it was “accepted by Massachusetts, but . . . not accepted and ratified by Rhode Island.”<sup>103</sup> That Rhode Island had suffered a “drain on [its] resources” by the time that it sued Massachusetts in 1832 seems beyond doubt.<sup>104</sup> And it stands to reason that border disputes often involve a similar intensity of prelitigation negotiation and expenditure on the part of state plaintiffs.

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97 *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (citing *McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961) (finding standing for parties who faced a fine of five dollars plus costs)).

98 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

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

100 37 U.S. (12 Pet.) 657 (1838).

101 *Id.* at 714–15.

102 *Id.* at 715.

103 *Id.*

104 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Now consider a case presenting a classic injury to a state's lawmaking prerogatives: *Katzenbach*, which "required" some states to "overhaul" their election regimes.<sup>105</sup> An enormous amount of resources go into the legislative infrastructure that supports law creation, of course, and the same is true of the administrative apparatus that sustains law enforcement.<sup>106</sup>

But what about more exotic assertions of sovereign injury, like Virginia's argument based on enacting the VHCFA in the shadow of the ACA's individual mandate? Judges and commentators have criticized squishy applications of missional organizational standing because of the possibility that some public-interest associations could manufacture the ability to sue whenever they want.<sup>107</sup> Indeed, skepticism about "[s]ynthetic standing"<sup>108</sup> explains why courts generally disregard expenditures that organizations have made pursuing the litigation under consideration<sup>109</sup>—and why some judges have advocated shoring up the resource-investment element even further.<sup>110</sup>

So one response to questions concerning supposedly manufactured instances of sovereign state standing (which appear to be few and far between<sup>111</sup>) is that courts could recognize guardrails similar to those that restrain missional organizational standing. For her part, Professor Tara Grove has offered a forceful argument that "to the extent a state law"—like the VHCFA—"merely declares that private citizens are *not* subject to legal requirements, and does not seek to regulate private citizens, that is not sufficient for standing purposes."<sup>112</sup> An alternative response is that states paid the price to vindicate the full range of their sovereign interests in federal court by agreeing to the constitutional plan. In what has become known as

105 Grove, *supra* note 31, at 871.

106 See Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1066 & n.10 (1982) ("Enormous resources have been given to law enforcement to prevent, fight, and detect crime."); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1367 (2008) ("Passing legislation is expensive and time-consuming.")

107 See, e.g., *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 121–22 (2d Cir. 2017) (Jacobs, J., dissenting) (criticizing the majority opinion for allowing standing based on "purported organizational injury that is speculative and generalized, and—to the extent that it exists—both elective and negligible"); Baasch, *supra* note 73, at 19.

108 *Centro de la Comunidad Hispana*, 868 F.3d at 121 (Jacobs, J., dissenting).

109 See, e.g., *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)) (internal quotation marks omitted)).

110 See, e.g., *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1225–27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting) (arguing that circuit precedent "has drifted away from the requirement that an organization actually suffer an injury" by holding "that an organization with a social interest in advancing enforcement of a law was injured when the organization spent money enforcing that law").

111 See Crocker, *supra* note 17, at 2100.

112 See Grove, *supra* note 31, at 877; see also *id.* at 876–80 (developing this argument). But see Huq, *supra* note 90, at 2145–46 (disputing Grove's point).

the “sovereignty-ceding rationale,”<sup>113</sup> Justice Holmes observed in *Tennessee Copper*, for example, that “[w]hen 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.”<sup>114</sup> Rather, Holmes reasoned (regarding original jurisdiction but with logic also applicable to standing doctrine) that as an “alternative to force,” the states accepted the ability to bring “a suit in this court.”<sup>115</sup>

For all these reasons, the doctrine surrounding sovereign state standing fits well with, or even within, the doctrine surrounding missional organizational standing.

### C. *Quasi-Sovereign State Standing*

Now, how does quasi-sovereign state standing relate to organizational standing? Recall that in *Hunt*, the Supreme Court established that “an association has standing to bring suit on behalf of its members” when three factors are present: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”<sup>116</sup> In many or maybe even most cases, it appears that a state that could premise standing on quasi-sovereign injury could also satisfy these conditions for representational organizational (or “associational”) standing.

#### 1. Constituent Standing

Examining the connection between quasi-sovereign state standing and the first *Hunt* factor (regarding whether an organization’s “members would otherwise have standing to sue in their own right”) raises two subsidiary questions. First, how do a state’s citizens and an association’s members—that is, the entities’ constituents—compare? Second, does the citizen-harm component of quasi-sovereign state standing mean that such constituents have standing to sue in their own right, as required for representational organizational standing?

*Hunt* itself is relevant to the initial question, for the Supreme Court specifically addressed whether a public body could qualify for representational organizational standing. The plaintiff there, the Washington State Apple Advertising Commission, was a state agency “charged with the statutory duty

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113 Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 803–04 (2009) (discussing the provenance of this principle).

114 *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

115 *Id.*; see also *Woolhandler & Collins*, *supra* note 2, at 450–51 (stating that Justice Holmes “[r]eviv[ed] an argument from the boundary cases” by “conceiv[ing] of state-party suits as substitutes for the use of force or diplomacy—as an alternative avenue for the exercise of state power” (footnote omitted)).

116 *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

of promoting and protecting [Washington's] apple industry."<sup>117</sup> Pursuant to the state code, the commission was "composed of 13 Washington apple growers and dealers" who were "nominated and elected within electoral districts by their fellow growers and dealers."<sup>118</sup> The commission's activities included "the promotion of Washington apples in both domestic and foreign markets through advertising, market research and analysis, and public education, as well as scientific research into the uses, development, and improvement of apples."<sup>119</sup> These activities were "financed entirely by assessments levied upon the apple industry" and were "initially fixed by statute."<sup>120</sup>

"The prerequisites to 'associational standing'" were "clearly present," the Court said.<sup>121</sup> So the "only question" was whether the commission's "status as a state agency, rather than a traditional voluntary membership organization," prevented it from asserting claims on behalf of "the Washington apple growers and dealers who form its constituency."<sup>122</sup> The answer was no, the Court concluded, because "for all practical purposes," the commission "perform[ed] the functions of a traditional trade association."<sup>123</sup>

Drawing from *Hunt* and circuit precedent, one lower court has explained that "[t]hree main characteristics must be present" for "an organization with no formal members" to claim representational organizational standing as "the functional equivalent of a traditional membership organization."<sup>124</sup> These are (1) that the organization "serve[s] a specialized segment of the community"; (2) that the organization "represent[s] individuals that have all the 'indicia of membership' including (i) electing the entity's leadership[,] (ii) serving in the entity, and (iii) financing the entity's activities"; and (3) that the organization's "fortunes" are "tied closely to those of its constituency."<sup>125</sup>

States present each of these features. It is unsurprising, therefore, that *Snapp* grouped states together with "other associations" when discussing standing.<sup>126</sup> States serve their citizens, who constitute a "specialized segment" of the national community. Citizens have all the "indicia of membership" outlined above. They elect the state's leadership, serve in its government, and finance its activities. And it almost goes without saying that a state's "fortunes" are "tied closely" to those of its citizens, whose property makes up a large proportion of the tax base. To quote *Hunt*, "[i]n a very real sense," a

117 *Id.* at 336–37.

118 *Id.* at 337.

119 *Id.*

120 *Id.*

121 *Id.* at 343.

122 *Id.* at 344.

123 *Id.*

124 *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57, 69 (D.D.C. 2005) (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002)) (internal quotation marks omitted).

125 *Id.* (quoting *Fund Democracy*, 278 F.3d at 26).

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

state “provides the means by which” its citizens “express their collective views and protect their collective interests.”<sup>127</sup>

Some courts have declined to extend representational organizational standing to municipalities, largely on the ground that municipalities “do [ ] not have ‘members’ who have voluntarily associated.”<sup>128</sup> One could argue that states are unlike associations when it comes to standing for the same reason. But that line of logic would seem mistaken. For one thing, *Hunt* refused to “find it significant . . . that ‘membership’ [was] ‘compelled’ in the form of mandatory assessments.”<sup>129</sup> As the Court explained: “Membership in a union, or its equivalent, is often required. Likewise, membership in a bar association . . . is often a prerequisite to the practice of law. Yet in neither instance would it be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.”<sup>130</sup>

For another (although far more tentative) thing, people *do* “voluntarily associate [ ]” in municipalities and states, at least to some extent. An “association” is a “gathering of people for a common purpose” or “the persons so joined.”<sup>131</sup> Some people gather “for a common purpose” when choosing where to reside. Many individuals select localities based on factors like the strength of the technology sector or the diversity of religious viewpoints. And these are exactly the kinds of shared interests that private associations seek to advance. Certain people even decide where to call home with the goal of banding together with others who take the same positions on the types of policy priorities that state plaintiffs often seek to vindicate in suits against federal-government defendants, including on issues like immigration and environmental regulation.<sup>132</sup> Questions surrounding the so-called “Big Sort”—the hypothesis that there is an “intensify[ing]” trend of Americans “cluster[ing] into Democratic- and Republican-preferring communities”<sup>133</sup>—have swirled in the social-science literature for several years.<sup>134</sup> But what matters is that regardless of the extent to which people pick states based on *political* purposes, it is fair to think that they sometimes pick states based on *common* purposes.

127 *Hunt*, 432 U.S. at 345.

128 *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002); *see also* *Coldsprings Township v. Kalkaska Cty. Zoning Bd. of Appeals*, 755 N.W.2d 553, 555 (Mich. Ct. App. 2008); *see generally* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 *CONN. L. REV.* 59 (2014).

129 *Hunt*, 432 U.S. at 345.

130 *Id.*

131 *Association*, *BLACK’S LAW DICTIONARY* (10th ed. 2014).

132 *See* Emily Badger, *Political Migration: A New Business of Moving Out to Fit In*, *N.Y. TIMES* (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/upshot/political-migration-a-new-business-of-moving-out-to-fit-in.html>.

133 Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 *STAN. L. REV.* 1263, 1267–68 (2016).

134 *See* Jesse Sussell, *New Support for the Big Sort Hypothesis: An Assessment of Partisan Geographic Sorting in California, 1992–2010*, 46 *POL. SCI. & POL.* 768 (2013).

One could also think of any given state-government election as a “gathering of people for a common purpose.” During elections, citizens come together to express and effectuate their ideologies and interests by voting into office leaders who will pursue policies consistent with their values. This includes those leaders (usually attorneys general, who are elected in the vast majority of states<sup>135</sup>) who can advance such policies through affirmative litigation. As Grove has observed, “it is unsurprising that . . . the Texas attorney general focused on federal immigration law” in the DAPA challenge, for example.<sup>136</sup> After all, “state attorneys general have strong political incentives to respond to the preferences of state constituents,” and “the existing research suggests that state attorneys general often bring lawsuits that are likely to curry favor with state voters.”<sup>137</sup> The Supreme Court has characterized the primary goal of organizational-standing doctrine as allowing people who seek “to create an effective vehicle for vindicating interests that they share with others” to act in a collective manner by filing suit in federal court.<sup>138</sup> As mediated by state-government elections, state standing can theoretically achieve the same objective.

This analogy is obviously imperfect. The alignment of interests between members of an association formed to pursue a specific cause will often be stronger than the alignment of interests between citizens of a state formed largely to reflect long-ago geopolitical considerations, and elections do little to smooth over divergent values. In addition, Americans residing domestically must live in *some* state (or an effectively equivalent entity), and the analogy surely overstates people’s mobility for a host of reasons. Relatedly, exit is usually far less costly from an association than from a state. But these differences (like others between states in particular and organizations in general) are differences of degree rather than of kind. And because they are also generalizations, there is overlap between states and organizations even on these fronts. Consider an example to which the Supreme Court’s own organizational-standing jurisprudence points: bar associations. Many bar associations represent all manner of attorneys, from prosecutors to public defenders, from plaintiffs’ lawyers to defense specialists, and from corporate lobbyists to nonprofit advocates. While these attorneys probably share certain core concerns, their overall alignment of interests seems relatively weak. Some bar associations are effectively mandatory for some people. And exiting such an association can come at a steep cost: the ability legally to practice law in the pertinent jurisdiction.

So a state’s citizens and an association’s members match up relatively well in relevant ways. That leads to the second subsidiary question mentioned above, regarding whether the citizen-harm component of quasi-sover-

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135 As of 2006, attorneys general were apparently elected in forty-three states. William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2448 n.3 (2006).

136 Grove, *supra* note 31, at 898.

137 *Id.* at 897 & n.223 (collecting sources).

138 *UAW v. Brock*, 477 U.S. 274, 290 (1986).

eign state standing means that citizens have standing to sue in their own right, as required for representational organizational standing. The short answer is that reasonable minds differ on whether quasi-sovereign state standing demands citizen standing.

Chief Justice Roberts, for instance, has argued in the affirmative (joined by Justices Scalia, Thomas, and Alito). In *Massachusetts v. EPA*,<sup>139</sup> Massachusetts challenged the Environmental Protection Agency's decision not to address global warming—and, in particular, rising sea levels—by regulating motor-vehicle emissions of greenhouse gases under the Clean Air Act (CAA). Justice Stevens's majority opinion held that Massachusetts had standing to sue but was hazy on how,<sup>140</sup> suggesting that the Commonwealth could claim injuries to proprietary interests, sovereign interests, and quasi-sovereign interests.<sup>141</sup> In dissent, Roberts disagreed. Writing for the Court's four most conservative members, he argued that Massachusetts had failed to assert a sufficient injury to any cognizable interest, in part because the alleged loss of coastal land was neither particularized, actual, nor imminent.<sup>142</sup> And of special pertinence here, Roberts argued that “[j]ust as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.”<sup>143</sup>

On the opposite side of the issue stands, for example, the Second Circuit's opinion in *Connecticut v. American Electric Power Co. (AEP)*.<sup>144</sup> In *AEP*, Connecticut and others sued operators of fossil fuel-fired power plants for public nuisance, seeking a cap on their carbon dioxide emissions. In holding that Connecticut had quasi-sovereign state standing, the Second Circuit rejected the argument that “for states to sue in their *parens patriae* capacity, the citizens that the states seek to protect must themselves satisfy Article III's core requirements.”<sup>145</sup>

139 549 U.S. 497 (2007).

140 See Huq, *supra* note 90, at 2139 n.75 (“It is hard to make much of the *Massachusetts v. EPA* decision . . . given the plurality of fragmentary theories of standing in evidence there.” (citing Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 40 (2011))).

141 See *Massachusetts*, 549 U.S. at 522 (proprietary interests: stating that “[b]ecause the Commonwealth ‘owns a substantial portion of the state’s coastal property,’ it has alleged a particularized injury in its capacity as a landowner” (quoting an affidavit)); *id.* at 519 (sovereign interests: stating that “Massachusetts’ well-founded desire to preserve its sovereign territory” “supported federal jurisdiction”); *id.* at 520 (quasi-sovereign interests: stating that “Massachusetts’ stake in protecting its quasi-sovereign interests” helped sustain the suit).

142 See *id.* at 538–42 (Roberts, C.J., dissenting).

143 *Id.* at 538.

144 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

145 *Id.* at 338–39. Of note, the Supreme Court granted certiorari in *AEP* but divided equally on the question of standing (with Justice Sotomayor recusing because she participated in the case below). See *AEP*, 564 U.S. at 420, 429; *AEP*, 582 F.3d at 314 n.\*. Four Justices would have held that “at least some plaintiffs have Article III standing under *Massa-*

Even if citizen standing is not necessary for quasi-sovereign state standing, what matters most for present purposes is that the two often—and perhaps overwhelmingly—go hand in hand. Consider *Snapp* as an example. The complaint alleged that the defendants had “fail[ed] to provide employment for qualified Puerto Rican migrant farmworkers,” had “subject[ed] those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers,” and had “improperly terminat[ed] employment of Puerto Rican workers.”<sup>146</sup> Those allegations should easily have provided the workers themselves standing to sue.

Or return to *AEP*. In addition to finding state standing, the Second Circuit held that three nonprofit land trusts had established standing by alleging, among other things, that rising sea levels from global warming “will ‘permanently inundate some low-lying property along coasts and tidal rivers, including property that [they] own or on which they hold conservation easements’ and will salinize marshes on their properties, destroying fish and migratory bird habitats.”<sup>147</sup> The fact that certain large landowners had suffered sufficient injury indicates that citizen standing was available.

In short, there is good reason to think that many or most cases presenting quasi-sovereign state standing also present citizen standing.<sup>148</sup> And that makes sense. The first “general categor[y]” of interests that *Snapp* said could give rise to quasi-sovereign standing requires “injury to the health and welfare of [a state’s] citizens.”<sup>149</sup> And the two examples that the Court offered to illustrate the second “general categor[y]” involved “the removal of barriers to the participation by [a state’s] residents in the free flow of interstate commerce” and the accrual “to [a state’s] residents” of interests flowing from “federal statutes creating benefits or alleviating hardships.”<sup>150</sup> Those circumstances should all commonly produce cognizable injuries for the individuals at issue.

Nevertheless, one clear difference that makes quasi-sovereign state standing narrower than representational organizational standing bears evaluating here. While “more must be alleged than injury to an identifiable group of individual residents” for (at least the first kind of) quasi-sovereign state standing,<sup>151</sup> injury to “any one” member is adequate for representational

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*chusetts.*” *AEP*, 564 U.S. at 420. But four Justices would have held that “none of the plaintiffs have Article III standing,” either because they adhered to Roberts’s *Massachusetts* dissent or because they believed that *Massachusetts* was distinguishable. *Id.* Without creating binding precedent, the Court thus affirmed the Second Circuit’s exercise of jurisdiction. *Id.*

146 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 598 (1982).

147 *AEP*, 582 F.3d at 342 (quoting the trusts’ complaint).

148 See *Woolhandler & Collins*, *supra* note 2, at 512 (“The *parens patriae* label . . . often merely dresses up actions that private parties could easily bring.”).

149 *Snapp*, 458 U.S. at 607 (emphasis added).

150 *Id.* at 608 (emphases added).

151 *Id.* at 607.



associational standing.<sup>152</sup> Indeed, to attain standing on a quasi-sovereign basis, a state must “allege[ ] injury to a sufficiently substantial segment of its population,”<sup>153</sup> whatever that means. Current doctrine thus “erect[s] a hurdle” to state standing “that private organizations need not overcome.”<sup>154</sup>

As Lemos and Young have pointed out, this hurdle is less sensical than it may seem, given that “[m]any national organizations that frequently file claims in federal court are comparable in size to the states.”<sup>155</sup> The American Association of Retired Persons has nearly 38 million members, for instance, which approximately matches the population of California.<sup>156</sup> And the Sierra Club has 3.5 million members, putting it around the size of Connecticut or Iowa.<sup>157</sup>

It is easy to imagine circumstances, moreover, where a state could have an intense interest in fighting the mistreatment of even a single citizen (especially by a noncitizen). What if only a handful of Missourians had consumed water from the Mississippi River by the time that their state sued Illinois and the City of Chicago in 1900 for directing an upstream source toward Missouri itself? What if only one Puerto Rican had sought to secure employment harvesting apples in Virginia before his territory sued growers in 1979 for discriminating against him precisely because of his Puerto Rican background? Should the law have seen these injuries as any less worthy of protection through state-plaintiff or territory-plaintiff litigation? The dignitary harms to Missouri and Puerto Rico would hardly have been any less acute.<sup>158</sup>

At bottom, regardless of whether quasi-sovereign state standing actually *requires* constituent standing (as representational organizational standing does), quasi-sovereign state standing regularly involves constituent standing. So with respect to the first *Hunt* factor, quasi-sovereign state standing at least approximates representational organizational standing.

## 2. Germaneness to Purpose

Now consider the second *Hunt* factor for representational organizational standing—that “the interests it seeks to protect are germane to the organization’s purpose.”<sup>159</sup> This factor has been interpreted leniently, with

152 *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

153 *Snapp*, 458 U.S. at 607.

154 Lemos & Young, *supra* note 2, at 112.

155 *Id.*

156 *Id.* at 112 & n.317.

157 *Id.* at 112.

158 See *Woolhandler & Collins*, *supra* note 2, at 450 (arguing that “the nuisance suits, and related water rights cases, . . . were generally brought to protect state resources” and “could therefore be characterized as modest extensions of ones in which the [Supreme] Court allowed the state to sue to vindicate its more individualized ‘proprietary’ interests” (footnote omitted)).

159 *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

multiple courts of appeals describing it as “undemanding.”<sup>160</sup> Courts thus allow associational plaintiffs to characterize their purposes capaciously<sup>161</sup> and regularly require that cases bear only a minimal connection to those purposes.<sup>162</sup>

Pondering the “purpose” of a state in the American constitutional system leads down a path of high political theory. But the interests that *Snapp* placed under the umbrella of quasi-sovereignty would appear germane. As for the first category, the Court explained that

[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.<sup>163</sup>

Protecting health and welfare through sovereign lawmaking powers—in essence, the use of police powers<sup>164</sup>—seems as fundamental to a state’s reason for being as any other formulation. Indeed, state constitutions regularly characterize protecting health and welfare as an essential purpose of the government’s existence.<sup>165</sup>

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160 *Ass’n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quoting *Bldg. & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)) (internal quotation marks omitted); *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (quoting *Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)) (internal quotation marks omitted).

161 *See, e.g., Am. Charities for Reasonable Fundraising Regulations, Inc. v. Olsen*, No. 2:08-cv-00875, 2009 WL 5175202, at \*6 (D. Utah Dec. 18, 2009) (“The perhaps ill-defined or amorphous nature of the membership, complained of by Defendant, does not overcome the fact that the membership has at least one discrete and common purpose—advocating for reasonable fundraising regulation . . .”).

162 *See, e.g., Bldg. & Constr. Trades Council*, 448 F.3d at 148 (“We think it significant that the *Hunt* Court used the word ‘germane,’ rather than the phrase ‘at the core of,’ or ‘central to,’ or some word or phrase indicating the need for a closer nexus between the interests sought to be protected by the suit in question and the organization’s dominant purpose.”); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 286 (D.C. Cir. 1988) (per curiam) (“[T]he germaneness test is relatively loose. As recently construed by this court, it requires ‘mere pertinence between litigation subject and organizational purpose.’” (quoting *Humane Soc’y*, 840 F.2d at 58)).

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

164 *See Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Drainage Comm’rs*, 200 U.S. 561, 592 (1906) (“We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”); *see also Woolhandler & Collins, supra* note 2, at 451 (“In the nuisance suits, the Court . . . saw the government’s litigable interest as deriving not merely from common-law proprietary interests but also from the state’s ‘police power’ to regulate property for the public good.”); *id.* at 475 ([“*Parens patriae* standing] was a variant of police power standing, by which governmental power to promote the general welfare found an outlet in federal litigation rather than in state legislation and home-court enforcement.”).

165 *See, e.g., IND. CONST.* art. I, § 1 (stating that “all free governments are, and of right ought to be, . . . instituted for [the people’s] peace, safety, and well-being”); *VA. CONST.* art. I, § 3 (stating that the “purposes” for which the government “is, or ought to be, instituted”

The second category of quasi-sovereign interests that *Snapp* identified involves a state's stake "in not being discriminatorily denied its rightful status within the federal system."<sup>166</sup> The Court illustrated this category with two examples: (1) a state's interests in "the removal of barriers to the participation by its residents in the free flow of interstate commerce" and (2) a state's interests in "federal statutes creating benefits or alleviating hardships" where such interests could "accrue to its residents."<sup>167</sup> One could credibly characterize the enforcement of federalism-based barriers and benefits on behalf of the population as germane to the purpose of statehood. The Supreme Court, after all, has portrayed the protection of individual interests as a primary point of federalism.<sup>168</sup>

What is more, the second category of quasi-sovereign interests arguably folds into the first, with its focus on states' police powers. Where some source of federal law has preempted or otherwise complicated the exercise of such powers, one could see states as retaining a residual prerogative to ensure the proper enforcement of that federal law for the purpose of advancing the health and welfare interests of their citizens. Indeed, scholars have suggested similar lines of logic.<sup>169</sup> And this would hold whether the federal interven-

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are "for the common benefit, protection, and security of the people, nation, or community").

166 *Snapp*, 458 U.S. at 607.

167 *Id.* at 608.

168 See *Bond v. United States (Bond I)*, 564 U.S. 211 (2011). *Bond I* was a ("prudential") standing case that presented the question "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *Id.* at 213–14. The Court said yes, reasoning that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance." *Id.* at 222. Federalism, the Court explained, "is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Id.* at 221. Instead, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) (internal quotation marks omitted).

169 See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2038 (2008) (noting without endorsing the position that where "Congress has disabled them from asserting regulatory authority in their own right, the states have a sovereign interest in ensuring that the federal government performs its regulatory responsibilities so that regulatory gaps are avoided"); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1018, 1073 (2010) (arguing that "[b]y depriving states of their ability to regulate and leaving a federal regulatory void as well, null preemption infringes upon states' sovereignty" and "impedes the ability of states to ensure the health and safety of their constituents"—and that "[s]tates ought to have greater solicitude [to challenge the federal government's failure to regulate] where the federal government has also preempted the states' freedom to regulate"); see also Grove, *supra* note 31, at 887–88, 887 n.181 (collecting additional sources supporting this argument). Grove, however, argues that while "[s]tates have broad standing to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law," they "do *not* have a special interest in the manner in which the federal executive enforces *federal law*." Grove, *supra* note 31, at 855; see also *id.* at 886–93 (expanding on this argument).

tion operated in a structural way (such as through constitutional principles, as in *Snapp*'s first example of federalism-based quasi-sovereign interests) or in a more specific way (such as through a benefits-conferring statute, as in *Snapp*'s second example of federalism-based quasi-sovereign interests).

Another difference between quasi-sovereign state standing and representational organizational standing bears addressing here. In the 1923 case *Massachusetts v. Mellon*,<sup>170</sup> Massachusetts sued the Secretary of the U.S. Treasury to challenge the Maternity Act of 1921 as unconstitutional for exceeding Congress's enumerated powers and transgressing the Tenth Amendment.<sup>171</sup> The Maternity Act appropriated federal money to a program that provided funds to states for purposes related to maternal and infant health, created a federal agency to administer the program, required that states make reports as the agency might provide, and allowed the agency to withhold funds if states failed to comply with their obligations.<sup>172</sup> Among other things, Massachusetts alleged that "the rights of its citizens" had been "invaded and usurped."<sup>173</sup> In today's parlance, then, the Commonwealth asserted quasi-sovereign state standing.

The Court rejected this assertion, stating that while "[w]e need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress," it was "clear that the right to do so does not arise here."<sup>174</sup> The Court observed that "the citizens of Massachusetts are also citizens of the United States."<sup>175</sup> And the Court continued by saying that

[i]t 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. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.<sup>176</sup>

This is the so-called "*Mellon* bar" to federal court jurisdiction over suits in which state plaintiffs seek to challenge federal law.

The scope and strength of the *Mellon* bar are subjects of perennial debate,<sup>177</sup> but I want to make just two points here. First, comparing quasi-

170 262 U.S. 447 (1923).

171 *See id.* at 479.

172 *Id.*

173 *Id.*

174 *Id.* at 485.

175 *Id.*

176 *Id.* at 485–86 (citation omitted).

177 *E.g.*, Crocker, *supra* note 17, at 2070–88 (dissecting one such issue); *see* Grove, *supra* note 31, at 863 & n.60 (noting debate over the *Mellon* bar); Huq, *supra* note 90, at 2139–40 (same); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 225 (2014) (same).

sovereign state standing to representational organizational standing reveals a potential (post hoc) justification for the rule. By saying that “it is no part of” a state’s “duty or power to enforce [citizens’] rights in respect of their relationship with the Federal Government,”<sup>178</sup> *Mellon* in effect says that protecting citizens from the operation of federal law is not “germane” to a state’s “purpose.”<sup>179</sup>

The second point is that although this potential justification is logical as a matter of standing doctrine, it is unconvincing as a matter of constitutional theory. For one thing, there are good reasons to think that enforcing citizens’ rights in respect of their relationship with the federal government is germane to a state’s purpose. For another thing, the *Mellon* bar essentially assumes the answer to the question that Massachusetts sought to advance by suing the Treasury Secretary in the 1920s—and that states often seek to advance by suing federal-government defendants today. That is, if “it is the United States, and not the State, which represents [individuals] as *parens patriae*,”<sup>180</sup> it is only because federal law is supreme to state law in that particular area. But “the Laws of the United States” are only “the supreme Law of the Land” when they are “made in Pursuance” of the Constitution.<sup>181</sup> And that is often the precise issue that states want to litigate in suits where the *Mellon* bar becomes an issue, from red-state challenges to Obamacare’s individual mandate to blue-state challenges to the Trump administration’s travel bans.

In short, quasi-sovereign state standing aligns nicely with the second *Hunt* factor for representational organizational standing, which says that the interests an association seeks to protect must be germane to its purpose. This factor also provides a plausible but unsuccessful justification for the *Mellon* bar against quasi-sovereign suits challenging federal-government action.

### 3. Individual Participation

The third *Hunt* factor for representational organizational standing asks whether “the claim asserted” or “the relief requested” necessitates “the participation of individual members in the lawsuit.”<sup>182</sup> The Supreme Court has held that this factor is “prudential” rather than “constitutional.”<sup>183</sup> This means that courts administer it “flexibly,” allowing standing whenever “the organization can satisfy the functional concerns that might point toward a need for individual participation.”<sup>184</sup>

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178 *Mellon*, 262 U.S. at 485–86.

179 *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

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

181 U.S. CONST. art. VI, cl. 2.

182 *Hunt*, 432 U.S. at 343.

183 *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996).

184 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.9.5 (3d ed. 1999).

What “functional concerns” might necessitate individual participation in lawsuits brought by states? Two stand out. First, the Supreme Court has made clear that while “‘individual participation’ is not normally necessary when an association seeks prospective or injunctive relief for its members,” individual participation is sometimes thought essential in “action[s] for damages running solely to [an association’s] members.”<sup>185</sup> Of course, “many public suits,” from *Tennessee Copper* to *Hawaii*, “seek injunctive relief and other remedies that are unavoidably aggregate.”<sup>186</sup> It stands to reason, indeed, that a preponderance of representational state-plaintiff cases challenging federal-government action rather than private conduct pursue declaratory and injunctive relief rather than monetary remedies.<sup>187</sup> But other representational state suits, like *Pennsylvania Railroad*, “seek damages or restitution” and would thus require case-by-case consideration, like similar organizational-standing suits.<sup>188</sup>

Second, some courts hold that individual participation is necessary—and representational organizational standing unavailable—“when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests.”<sup>189</sup> There are good reasons to think that state suits suffer from conflicts of interest more often than one might expect, especially when damages are involved.<sup>190</sup> But the same is true for associational suits, and conflicts appear only occasionally to pose roadblocks to standing there.<sup>191</sup>

185 *Brown Grp.*, 517 U.S. at 546. The key word here is “sometimes.” In *Brown Group* itself, for instance, the Court allowed a union to sue under *Hunt* “for damages running to its workers.” *Id.*

186 Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 488 (2012).

187 See Woolhandler & Collins, *supra* note 2, at 512 (“[A]bsent explicit statutory authority, state *parens patriae* claims generally are limited to actions for injunctive relief.”).

188 Lemos, *supra* note 186, at 488. In *Pennsylvania Railroad*, for reasons having nothing to do with state standing, the Supreme Court held that Georgia could not recover damages. See *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 453 (1945) (discussing precedent for the proposition that “[t]he legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff” because “[i]f a shipper could recover . . . for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors” (quoting *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922)) (internal quotation marks omitted)).

189 *Md. Highways Contractors Ass’n v. Maryland*, 933 F.2d 1246, 1252 (4th Cir. 1991).

190 See Lemos, *supra* note 186, at 512–18.

191 See WRIGHT ET AL., *supra* note 184, § 3531.9.5 (stating that while “[s]everal cases deny organizational standing in such circumstances,” others “have permitted standing after examination has dispelled the fear of conflict or has persuaded the court that the conflict would not injure dissenting members”—and that standing “has been recognized not only when the conflict seems uncertain or slight but also when the conflict seems clear” (footnote omitted)).

Moreover, to the extent that the motivation for this conflicts-related caveat is “adequacy of representation,”<sup>192</sup> the Supreme Court in *UAW v. Brock*<sup>193</sup> made clear that “[s]hould an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association’s members without offending due process principles.”<sup>194</sup> The same qualification could presumably apply to states. And there are compelling reasons to think that states are as good as, or better than, other associations at advocating for their constituents.

Consider what the Supreme Court said in *Brock*. There, the U.S. Solicitor General contended that the Court should discard “the principles of associational standing set out in *Hunt*” and instead require members of associations to invoke class-action procedures under Federal Rule of Civil Procedure 23 when they wanted to pursue their collective interests as plaintiffs in federal court.<sup>195</sup>

To elaborate, the Solicitor General’s argument went like this: “Rule 23 . . . contains special safeguards to ensure that the diverse interests of class members are properly represented by the named plaintiff seeking to bring a case on their behalf.”<sup>196</sup> By contrast, “[n]o such adequacy of representation . . . is guaranteed by” the doctrine of representational organizational standing.<sup>197</sup> Instead, “an association might prove an inadequate representative of its members’ legal interests for a number of reasons,” including because it might “lack resources or experience” or might “bring lawsuits without authorization from its membership.”<sup>198</sup> Finally, “the litigation strategy selected by the association might reflect the views of only a bare majority—or even an influential minority—of the full membership.”<sup>199</sup>

The Court rejected this argument for “fail[ing] to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions.”<sup>200</sup> The Court said that “[w]hile a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital” that can aid both the association’s constituents and the court system.<sup>201</sup> “In addition,” the Court continued, “the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective

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192 *Contractors Ass’n of E. Pa., Inc. v. City of Philadelphia*, 945 F.2d 1260, 1265 (3d Cir. 1991).

193 477 U.S. 274 (1986).

194 *Id.* at 290.

195 *Id.* at 288.

196 *Id.* at 288–89.

197 *Id.* at 289.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

vehicle for vindicating interests that they share with others.”<sup>202</sup> And “[t]he only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all,” the Court concluded.<sup>203</sup>

*Brock’s* reasoning suggests that states are likely to provide advocacy that is equally effective as—and maybe more effective than—that of other associations. States face fewer of the risks that the Solicitor General described. They are less likely than many other associations to lack the requisite resources or experience to litigate well. The rise in the sum, size, and sophistication of solicitor-general offices across the nation has been well documented, for instance.<sup>204</sup> It is important not to understate the conflicts that officials litigating for states can face, including competing constituent interests and external political pressures.<sup>205</sup> But the democratic accountability built into their offices’ DNA should temper concern that state officials will sue without authorization or pursue litigation strategies that fail to represent their constituents fairly.<sup>206</sup> Put differently, “[p]olitical pressure may lead these state officials to do a better job [than other parties] of representing the State”—and its citizens—“in court.”<sup>207</sup>

Moreover, states can claim the same structural advantages toward effective advocacy that the Supreme Court referenced. Just as people “pool their capital, their interests, or their activities under a name and form that will identify collective interests” when they join private associations, so too do they “pool their capital, their interests, or their activities under a name and form that will identify collective interests” when they elect and finance state governments.

In short, as Lemos and Young have recently argued: “The most obvious, and important, difference between state and private litigation is that states are democratic governments.”<sup>208</sup> Attorneys general are subject to independent election, gubernatorial oversight, and budgetary controls, among other restraints.<sup>209</sup> So there is good reason to believe that they “should be more accountable to [their] state[s]’ citizens than the leaders of an organization like the Sierra Club are to its members”—and that they should seek to represent “broader interests than the subset of their citizens directly affected

202 *Id.* at 290.

203 *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)) (internal quotation marks omitted).

204 See, e.g., Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, NAT’L L.J., Aug. 18, 2008.

205 See Lemos, *supra* note 186, at 512–18.

206 See Lemos & Young, *supra* note 2, at 113–14.

207 Grove, *supra* note 31, at 897 (positing as an example that states may “be[ ] motivated to protect their state laws against federal interference because of state public opinion favoring those laws”).

208 Lemos & Young, *supra* note 2, at 113.

209 *Id.*



by a particular lawsuit.”<sup>210</sup> All this makes states compare favorably to other associations when it comes to the competence necessary for effective representational litigation.

Someone could argue that this paints too rosy a picture of states’ representational capabilities. As Lemos has explained, among political theorists, “[t]he standard account of political representation emphasizes three features that serve to legitimize and democratize representation.”<sup>211</sup> First, “[r]epresentatives must be *authorized* to act on the people’s behalf.”<sup>212</sup> Second, “there must be some means by which the people can hold their representatives *accountable* for their actions.”<sup>213</sup> Third, “the representatives must in fact endeavor to *advance the people’s interests*.”<sup>214</sup> One could think that states reflect these features relatively poorly. Citizens may be uninformed about their leaders’ prospective litigation positions, for instance,<sup>215</sup> which could undermine the concept of authorization. And while public elections help ensure some accountability, the multifarious nature of an attorney general’s work could make elections weak signals of the population’s feelings about litigation decisions.<sup>216</sup> Moreover, the dichotomy and antagonism of American politics give elections a winner-take-all quality that could raise doubts about the extent to which the victorious side will subsequently seek to advance the interests of the vanquished side.<sup>217</sup>

I tend to be optimistic about states’ representational capabilities. But taking competing views into account, what matters is that there are strong reasons to think that states and associations on the whole can represent at least many of their constituents’ interests in at least many instances at least relatively well.

Examining all three *Hunt* factors suggests that the heartland of quasi-sovereign state standing corresponds comfortably to the framework for representational organizational standing. Indeed, for all the reasons explored above, the same holds true about the heartland of state standing and the framework for organizational standing more broadly. The legal community, therefore, should embrace the former at least to the same extent as the latter.

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210 *Id.* at 113–14.

211 Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1743 (2017).

212 *Id.*

213 *Id.* at 1743–44.

214 *Id.* at 1744.

215 See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 980 (2017).

216 See *id.* at 980–81.

217 See Lemos & Young, *supra* note 2, at 114–15; see also Huq, *supra* note 90, at 2151 (discussing “whether changes to the availability of state standing will lead to changes in the manner in which an issue is litigated as it moves from state to private hands”).

## CONCLUSION

This Essay has surveyed the underexplored relationship between state standing and organizational standing. The doctrines exhibit significant congruence, with each available in two direct forms and one indirect form. As for the direct forms, proprietary state standing essentially matches economic organizational standing, and sovereign state standing essentially matches mission organizational standing. As for the indirect forms, quasi-sovereign state standing finds a close counterpart in representational organizational standing. At bottom, one can view these genres of aggregate-litigant standing as peas in a pod or even as one and the same.

Either way, the connections between state standing and organizational standing call into question the widespread skepticism over the former. And a comparative view of states and other associations as representational litigants provides further support for state standing. In light of states' characteristics, constitutional role, and competence, they should be able to assert standing to sue in federal court—and especially against federal-government defendants—at least to the same extent that other associations can. Regardless of whether states are “entitled to special solicitude in [the] standing analysis” (to quote a controversial line from the Supreme Court’s *Massachusetts* decision in 2007),<sup>218</sup> there are good reasons to think that they may not often need it.

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

