WHAT HAPPENED TO TRACEABILITY?

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In a Comment here last November, Professors William Baude and Samuel Bray reimagined a twenty-five-year-old trend of state-initiated public law litigation as the consequence of liberal overreach.¹ Justice Stevens’s 2007 decision in Massachusetts v. EPA,² they argued, invented a standing loophole by extending an ill-defined “special solicitude” to state litigants.³ That transgression (ostensibly) helped drive a trend that Baude and Bray decry, where warring coalitions of states sue the federal government to set national policy on everything from the decennial census to child welfare law.⁴ Their prescription for a fix: the Supreme Court needs to memory-hole EPA; internalize traditional standing doctrine, with a renewed fidelity to traceability, and get those states out of court.⁵

But the trend of multistate litigation isn’t traceable to EPA. And the mistaken attribution of today’s judicial aggression — “activism” seems too tame — to EPA blurs causes, effects, and possible solutions. Among other things: it finds a way to blame liberals for a largely one-sided conservative judicial deviation from historical norms.

Are some of today’s judges unusually egotistical, cynical, instrumentalist, revanchist? Lots of progressives think so, of course.⁶ But to

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¹ See William Baude & Samuel L. Bray, Proper Parties, Proper Relief, 137 HARV. L. REV. 153, 153–54 (2023). I won’t discuss every aspect of Baude and Bray’s analysis in this Response, and while there is much to admire, my silence doesn’t always mean agreement. For instance, Biden v. Nebraska, 143 S. Ct. 2355 (2023), the student loan case, was both wrong on standing (as Baude and Bray observe) and wrong on the merits (as they do not). An avowedly textualist Court should have applied the letter of a straightforward statute empowering the Secretary of Education to “waive or modify any statutory or regulatory provision” relating to federal student loan repayment. See id. at 2384 (Kagan, J., dissenting).


³ See Baude & Bray, supra note 1, at 177.

⁴ Id. (“In that case, a narrow majority of the Court read state standing broadly, saying states were to be given ‘special solicitude in our standing analysis.’ The consequences have been predictable.”) (quoting Massachusetts v. EPA, 549 U.S. at 520); see, e.g., Dep’t of Com. v. New York, 139 S. Ct. 2551 (2019) (New York’s challenge to citizenship question on census); Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Texas’s lawsuit challenging the Indian Child Welfare Act).

⁵ Baude & Bray, supra note 1, at 153.

⁶ See, e.g., Pamela S. Karlan, The Supreme Court, 2011 Term — Foreword: Democracy and Disdain, 126 HARV. L. REV. 1, 4 (2012) (“The Justices are becoming umpires in the tradition of Bill Klem, who when asked whether a particular pitch was a ball or a strike, replied that ‘[i]t ain’t nothin’ till I call it.’”) (quoting Bill Klem Quotes, BASEBALL ALMANAC, https://www.baseball-almanac.com/quotes/quokleml.shtml [https://perma.cc/57N7-Q972]); Mark A. Lemley, The Imperial Supreme Court, 136 HARV. L. REV. E 97, 97 (2022) (“The Court has begun to implement the policy
Baude, at least, we’re just seeing the same ill-fitting shoe on a different foot, with conservatives using the same tactics and coming to the same partisan results that liberals have for years. “What has really changed,” he argues in one essay, “is not that the Court is newly imperial, or newly lawless, or newly political. What has changed is that many more folks inside the Ivory Tower have noticed . . . .”

Baude and Bray’s state standing analysis fits neatly into that worldview. In their narrative, EPA’s liberals are the ones who opened the door to outcome-oriented judging. Shame. But now we need a course correction. States, writ large, should not seek to remake national policy through tenuous litigation. And courts, writ large, should resist the temptation of a liberal mistake that led them astray from age-old standing principles.

This pox-on-all-their-houses take flattens crucial distinctions and conceals more than it reveals. EPA was correctly decided on normal standing principles. But even if it wasn’t: as Part I of this Response shows, the recent wave of multistate public law litigation neither started nor accelerated with EPA. The decision has had little if any impact on standing analysis outside of one hyperconservative circuit — the Fifth, which looks to be the only federal appellate court that routinely invokes “special solicitude” to facilitate otherwise nonjusticiable litigation, and in particular Texas’s crusade against Democratic administrations. And, in Part II, I observe that courts’ flexibility on standing isn’t really driven by special solicitude for state litigators. Instead, as we’ve seen this Term and last, motivated courts will bend standing rules for sympathetic private plaintiffs as quickly as for sympathetic states.

Baude and Bray get so much right about civics, public law litigation, and standing. Yes, policy is better made by elected officials in Washington than by ideologically rigid but doctrinally flexible federal preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself."

Without taking a position here, believing this Court — and some lower courts — are aberrationally, extravagantly, world-historically wrong doesn’t have to mean embracing or pretending to embrace an embarrassing, if touching, naivete about courts and politics. But see Jesse Wegman, Opinion, The Crisis in Teaching Constitutional Law, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html [https://perma.cc/SXJN-UJ23](https://perma.cc/SXJN-UJ23) (citing professors distressed at the intrusion of politics into constitutional law). You can be a realist, recognizing that courts have always been goal-oriented political entities and that justice has never been a pure and objective pursuit of nonpartisan truth, and still be deeply concerned about the behavior of some courts today.


8 See Baude & Bray, supra note 1, at 191.

9 Infra pp. 320–21.


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Courts selecting among partisan coalitions of states.\textsuperscript{13} (I acknowledge putting a slight gloss on their arguments.) Yes, courts face far too much pressure to make or break policy.\textsuperscript{14} Yes, too often, courts have lost their way on preliminary injunctions — which are now often decided on a single factor, the merits — and on nationwide relief, which should be granted only in extraordinary circumstances.\textsuperscript{15} And yes, two decisions from last Term — \textit{United States v. Texas}\textsuperscript{16} and \textit{Haaland v. Brackeen}\textsuperscript{17} — properly reversed the Fifth Circuit’s indefensible expansion of standing, leaving intact the Biden Administration’s immigration priorities and the Indian Child Welfare Act.\textsuperscript{18}

But that last point, where I stand foursquare with Baude and Bray, suggests we’re not dealing with an equal-opportunity, cross-partisan problem. It’s not all courts. It’s mostly the Fifth Circuit, and a Supreme Court that too often tolerates an idiosyncratic approach to justiciability. It’s not all states, either. And since \textit{EPA} is not to blame, erasing \textit{EPA} won’t solve anything.

Instead, as I conclude in Part III: while we should be grateful that the Supreme Court got standing right in a couple of cases last Term, we shouldn’t count on courts to restrain themselves.\textsuperscript{19} Standing will always be malleable and manipulable. We need neutral rules that individual judges cannot change. That is a more dependable way to restore federal courts to their properly limited role — both in relation to the other branches and in relation to the states.\textsuperscript{20}

I. \textit{EPA} Has Had Almost No Impact on Standing Analysis — Except in the Fifth Circuit

In \textit{Massachusetts v. EPA}, a twelve-state coalition\textsuperscript{21} tried to compel President George W. Bush’s Environmental Protection Agency (EPA) to regulate greenhouse gases.\textsuperscript{22} The States claimed that EPA’s failure contributed to the ecological disaster of climate change — and the lead State, Massachusetts, alleged that EPA’s reticence led to rising seas that ate away at its coastal lands.\textsuperscript{23}

Baude and Bray question “the specific nature” of Massachusetts’s injury,\textsuperscript{24} but it’s hard to imagine anything much more important to a

\begin{footnotesize}
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\item See Baude & Bray, supra note 1, at 165, 173–74.
\item See id. at 191.
\item See id. at 168–70.
\item \textit{143 S. Ct.} 1609 (2023).
\item Id. at 522 (“These rising seas have already begun to swallow Massachusetts’s coastal land.”).
\item See Baude & Bray, supra note 1, at 165.
\end{enumerate}
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government’s sovereignty than territorial integrity. How could the State respond, though? When a sovereign seizes another sovereign’s territory, they come to blows. But for states, joining the Union meant ceding the power to defend themselves by force: “When a State enters the Union,” the Supreme Court explained, “it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . . .”25 Justice Stevens, writing for the 5–4 EPA majority, recognized Massachusetts’s entitlement to special standing “solicitude” in that context: a territorial invasion against which federalism itself left the state defenseless other than through the courts.26

EPA’s flaws were not substantive but stylistic — imprecision and redundancy.27 Language in the majority opinion suggests that standing turned in part on Massachusetts’s quasi sovereign interest in the health and safety of residents.28 If that alone had been at stake, standing might have been a closer call. Instead, the real touchstones of standing were the State’s sovereign and proprietary interests.29 So EPA might have committed a taxonomical error. And in calling for “special solicitude,” EPA likely said more than it needed to, and more vaguely. But it wasn’t wrong. Sovereign integrity is indeed a unique (or “special”) concern that states don’t share with private parties, and that the federal government is bound to take seriously.30

Baude and Bray’s disagreement with EPA focuses mostly on traceability. “[T]he nature of the problem,” they contend, “is so global and systemic that it is hard to connect a future hypothetical EPA rulemaking to exact fluctuations in the coastline of the state of Massachusetts.”31 This seems like a misplaced quibble not with traceability but with the specificity of Massachusetts’s pleading. A party alleging financial injuries, after all, doesn’t need to prove the “exact” extent of its injuries to

25 Massachusetts v. EPA, 549 U.S. at 519.
26 At least one circuit court has deployed this reading of EPA. Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130, 146 (2d Cir. 2021) (“Additionally, we note that the considerations in Massachusetts v. EPA were quite different from those presented in this case. In particular, there, Massachusetts had experienced an actual injury in fact — namely, ‘rising seas ha[d] already begun to swallow Massachusetts’ coastal land . . . .’” (alteration in original) (quoting Massachusetts v. EPA, 549 U.S. at 522)).
29 See Stephen I. Vladeck, States’ Rights and State Standing, 46 U. RICH. L. REV. 845, 856–57 (2012) (“Because Mellon did not apply, the majority turned to ordinary Article III analysis — relying on the conclusion that rising sea levels would directly injure Massachusetts’s proprietary interests as a coastal property owner.”).
30 See, e.g., California v. Trump, 963 F.3d 926, 935–36 (9th Cir. 2020) (finding standing in border wall suit against the federal government because states have a sovereign interest in avoiding environmental harm inflicted on their land).
31 Baude & Bray, supra note 1, at 166.
show standing. It only needs to show that it will lose something because of the defendant’s actions.32 Massachusetts did that — in land, not dollars.33 But sovereign states care a lot about their land, and the federal courts should too.

Even if Baude and Bray are right and EPA was wrongly decided, though, there’s no harm and no foul, since EPA has had no measurable impact on states’ litigation behavior or (almost all) courts’ standing decisions.

Many multistate lawsuits against the federal government have a lot in common with EPA: they’re unremarkable assertions of standing based on states’ clear sovereign and proprietary interests.34 States often plead and prove injury the same way that people and corporations do — by showing that federal policy hurts their pocketbooks.35 And states, with vast and varied proprietary interests, can often make their case more readily than individuals.36

Still, scholars have stayed fixated on EPA — maybe because it flatters (what seems to a litigator as) an academic preoccupation with the power of doctrine. “The case,” noted the introduction to a law review volume dedicated to state standing,37 “spurred an explosion in commentary and, it seems, litigation.”38 “[I]t seems” does a lot of heavy lifting there. Only two Supreme Court cases since EPA have even mentioned “special solicitude” for states.39 None has relied on it.40 But almost four hundred law review articles lean on that slender reed.41

In Baude and Bray’s narrative, EPA’s “special solicitude” helped drive a surge in state litigation against the federal government.42 True,

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33 See Massachusetts v. EPA, 549 U.S. at 521–23.
35 See Seth Davis, The New Public Standing, 71 STAN. L. REV. 1229, 1233 (2019) (“State standing to sue the federal government for financial injuries is ‘the new public standing.’”).
38 Id. at 1884.
40 United States v. Texas, 143 S. Ct. at 1977 (“Nor has ‘special solicitude’ played a meaningful role in this Court’s decisions . . . .”)
41 This is a LEXIS search for law review articles citing Massachusetts v. EPA and using the phrase “special solicitude,” resulting in 385 law review articles.
42 Baude & Bray, supra note 1, at 164–65.
they acknowledge other contributing causes. On the doctrinal side, for instance, the “dramatic growth of the national injunction” creates a powerful incentive to litigate national policy issues. Institutional mobilization matters too, with some ambitious state attorneys general, and shady solicitors general, looking to make their bones with high-profile litigation. And a confluence of polarization and congressional gridlock — with a concomitant shift of policymaking from the legislative to the executive branch — sends states to court to shape national policy through galvanizing or blocking executive action.

Still, in the end, Baude and Bray know where to point the finger: “Whatever the exact mix of doctrinal details and institutional dynamics that got us to this point,” they conclude, “the cumulative effect of the Massachusetts v. EPA era has been stunning.” The mix matters, though, and all the caveats and acknowledgements of multicausal complexity still leave one supposedly erroneous holding at the center of the story. For Baude and Bray, it’s the “EPA era” — not (sadly for some of us) the solicitor general era. And the Court’s supposed turn away from EPA is cause for celebration.

Let’s get to traceability. Like Baude and Bray, many critics of state standing point to what seems at first like a compelling correlation. “Since Massachusetts v. EPA’s declaration of special solicitude for the states,” one commentator recently put it, “state lawsuits against the

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43 Id. at 165.
44 Id. at 168; see Bradford Mank & Michael E. Solimine, State Standing and National Injunctions, 94 NOTRE DAME L. REV. 1955, 1956–57 (2019) (worrying about “the pathologies” of partisan, state-driven litigation seeking to enjoin presidential action nationwide, id. at 1956); Elysa M. Dishman, Generals of the Resistance: Multistate Actions and Nationwide Injunctions, 54 ARIZ. ST. L.J. 359, 365 (2022) (“This article is the first to directly link common criticisms of the nationwide injunction to states and AGs and to propose reforms focused on state litigants and litigators.”).
45 Baude & Bray, supra note 1, at 172 (noting “the growth and polarization of litigating arms within each state (usually the state solicitor general’s office) as a relevant “institutional development”); see, e.g., Scott Keller, Federalism as a Check on Executive Authority: The Perspective of a State Solicitor General, 22 TEX. REV. L. & POL. 297 (2017–2018) (former Texas solicitor general explaining multistate litigation strategy), Davis, supra note 35, at 1257 (“State attorneys general and solicitors general — both progressive and conservative — have emerged as significant participants in legal mobilization.”). These descriptions of incentives, and many of the characterizations, echo my own experience and maybe even feelings. But like a lot of the polarization of state courts — and like a lot of the politicization of federal courts — it turns out the intentional weaponization of state solicitors general is not really a bipartisan phenomenon. See On the Media, Part 5: A Bobblehead Doll of Leonard Leo, WNYC STUDIOS (Oct. 6, 2023), https://www.wnycstudios.org/podcasts/otm/segments/we-dont-talk-about-leonard-episode-2-part-1-on-the-media?tab=summary [https://perma.cc/U8ZU-PPGU] (documenting a program to install conservative advocates in state solicitor general offices).
47 Baude & Bray, supra note 1, at 173.
48 Id.
49 See, e.g., id. at 177 (“It appears that the Chief Justice’s dissent in Massachusetts v. EPA is now considered more authoritative than the majority opinion.”).
federal government have exploded.\textsuperscript{50} The causal mechanism is supposed to be clear. Special solicitude makes it easier for states to establish standing, get into court, and wreak havoc.\textsuperscript{51} But neither the historical nor the doctrinal narrative for blaming \textit{EPA} holds up.

Start with the data. Using \textit{EPA} as their starting point, Baude and Bray contend that “[i]n just the last decade and a half, states have come to dominate the public law scene. . . . The last decade and a half is not normal.”\textsuperscript{52} But \textit{EPA} didn’t mark an inflection point. The Court handed down \textit{EPA} in 2007, toward the end of the George W. Bush Administration. From 2001 through 2008, the whole of President Bush’s presidency, states filed seventy-six multistate lawsuits against the federal government.\textsuperscript{53} During the eight years of President Barack Obama’s presidency, when multistate litigation supposedly ran on \textit{EPA} jet fuel, states sued the federal government eighty times.\textsuperscript{54} Zoom in a little closer. During President Bush’s second term, from 2005 to 2008, forty-one multistate lawsuits got started; from 2009 through 2013, during President Obama’s first term, just twenty-five, up only one from the twenty-four filed in President Clinton’s last four years.\textsuperscript{55} The real jump started toward the end of the Obama Administration, with a crescendo during the Trump Administration.\textsuperscript{56} If there’s a way to frame those numbers that makes \textit{EPA} look guilty, I couldn’t find it.\textsuperscript{57}

\textsuperscript{51} Baude & Bray, \textit{supra} note 1, at 173 (“[P]laintiff States will wrap themselves up in ‘special solicitude’ to get into court and “seek a preliminary injunction shutting down the federal policy everywhere.”); see, e.g., Dishman, \textit{supra} note 44, at 384 (“States have special solicitude in federal courts which provides them another avenue to establish standing not available to private litigants.”).
\textsuperscript{52} Baude & Bray, \textit{supra} note 1, at 154.
\textsuperscript{54} \textit{Id.} (counting twenty-five and fifty-five multistate lawsuits during the first and second terms of the Obama Administration, respectively).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} (counting 160 multistate lawsuits during the Trump Administration).
\textsuperscript{57} One \textit{Harvard Law Review} Note has at least tried to advance some (confusing) mathematical evidence: “In 2008, the year after \textit{Massachusetts} was decided, state attorneys general, relying on the new rule of special solicitude, brought a record-setting forty cases against the federal government and other entities.” Note, \textit{An Abdication Approach to State Standing}, 132 HARV. L. REV. 1301, 1306 (2010). I do not know what “other entities” means here. States sue a lot of people and corporations. But \textit{EPA} was about lawsuits against the federal government. And forty-one is the number of multistate lawsuits against the federal government in the last four years of the George W. Bush Administration, including 2008. \textit{Multistate Lawsuits vs. the Federal Government — Totals, supra} note 53.
Next, doctrine. Since EPA, the Supreme Court has never extended special standing solicitude to any state. The Court has only even mentioned the concept twice — mostly to swipe at it. In 2015, Arizona State Legislature v. Arizona Independent Redistricting Commission cited EPA as an example of the Court’s inconsistent state standing jurisprudence. And in United States v. Texas, last Term, Justice Gorsuch brought up EPA only to suggest forgetting about it forever. Special solicitude, he observed, has not “played a meaningful role in this Court’s decisions in the years since” EPA. Justice Alito’s solitary dissent in the same case accused the majority of hypocrisy: “The reasoning in [EPA] applies with at least equal force in the case at hand.” But that is an odd complaint from a Justice who never liked special solicitude in the first place, and who has never had any occasion since then to dissent from an opinion deploying it. So the Court did not “abandon[]” EPA. It never embraced it.

Neither, for the most part, did the lower courts. The Second Circuit, home to multistate litigation powerhouse New York, appears never to have invoked special solicitude to give states an advantage in the standing analysis. Ditto for the First Circuit, where Massachusetts brings its cases. In fact, the First Circuit once went out of its way to note that it was denying Massachusetts special solicitude. True, the Ninth Circuit, kept busy by multistate repeat players California and Washington, has invoked special solicitude for states in a couple of cases. But it’s not so surprising that the country’s largest circuit would cite a Supreme Court case a few times in fifteen years — and, in one of those two cases, California’s challenge to the Trump Administration’s border wall,

58 See The Supreme Court, 2020 Term — Leading Cases, 135 HARV. L. REV. 343, 343 (2021) (noting that no party or court in California v. Texas, 141 S. Ct. 2104 (2021), a multistate battle royale over the Affordable Care Act, ever mentioned special solicitude, suggesting “that the doctrine may, functionally, no longer be good law”).
60 Id. at 802 n.10 (citing EPA in a footnote as an example that the decisions are “hard to reconcile”).
61 United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring) (“Even so, it’s hard not to wonder why the Court says nothing about ‘special solicitude’ in this case. And it’s hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.”).
62 Id. at 1997 (Alito, J., dissenting).
63 Baude & Bray, supra note 1, at 176.
Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013) (extending special solicitude to a Native American tribe); Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130, 145 (2d Cir. 2021) (reiterating the principle but finding that the plaintiff state agency lacked standing).
65 Massachusetts v. U.S. Dep’t of Health & Hum. Servs., 923 F.3d 290, 222 (1st Cir. 2019) (“[T]he Commonwealth has demonstrated Article III standing for its substantive claim based on an imminent fiscal injury that is fairly traceable to the federal regulations and redressable by a favorable decision. We do not afford the Commonwealth ‘special solicitude in [the] standing analysis . . . .’” (alterations in original)).
special solicitude was just as unnecessary as in EPA itself, since the State’s interest was rooted in an actual incursion on sovereign territory.66

Only one circuit stands out for its persistence in making the most of special solicitude. Repeatedly in the past decade, the Fifth Circuit has specially solicited standing for Texas lawsuits challenging federal policies around everything from immigration67 to equal employment opportunity68 to the Indian Child Welfare Act.69

If EPA’s only effect on standing outcomes manifests in a single state’s ideological crusade, facilitated by a single rogue circuit, should we really worry so much about “special solicitude”? I admit, somewhat unfashionably, that I think states should get special solicitude in suing the federal government, at least in some kinds of cases. States struck a deal, and they are uniquely entitled and situated to enforce its terms. But that argument is beyond this Response. My point here is that whatever EPA said or should have said, states — outside of Texas and the Fifth Circuit — don’t usually get any more solicitude than private plaintiffs. EPA was more likely a symptom than a cause of a trend that began well before 2007. So walking back EPA is not, by itself, likely to change anything.

66 Compare Sierra Club v. Trump, 977 F.3d 853, 866 (9th Cir. 2020) (“California and New Mexico will suffer injuries similar to those asserted in the prior appeals. States are ‘entitled to special solicitude in our standing analysis.’ ” (quoting Massachusetts v. EPA, 549 U.S. at 520)) (finding standing for California and New Mexico in their suits against Trump’s border wall, which was built on the states’ land), with Arizona v. Yellen, 34 F.4th 841, 851 (9th Cir. 2022) (“We examine Arizona’s sovereign injury theory of standing in the alternative. In our dual sovereign system, Arizona enjoys ‘special solicitude in our standing analysis.’ ” (quoting Massachusetts v. EPA, 549 U.S. at 520)).

67 Texas v. United States, 787 F.3d 733, 752 (5th Cir. 2015) (affording Texas special solicitude in its challenge to DAPA, the Obama Administration’s Deferred Action for Parents of Americans program); Texas v. United States, 809 F.3d 134, 151 (5th Cir. 2015) (same) (“We begin by considering whether the states are entitled to ‘special solicitude’ in our standing inquiry under Massachusetts v. EPA. They are.”); Texas v. Biden, 10 F.4th 538, 549 (5th Cir. 2021) (“To eliminate any doubt as to standing, we emphasize that the States are entitled to ‘special solicitude’ in the standing analysis.” (quoting Massachusetts v. EPA, 549 U.S. at 520)) (affording Texas special solicitude in its challenge to the rescission of the Biden Administration’s Migrant Protection Protocols); Texas v. United States, 50 F.4th 498, 517 (5th Cir. 2022) (“Texas warrants special solicitude because of its procedural right under the APA to challenge DACA and Texas’s quasi sovereign interest in alien classification, an area in which the State would like to, but cannot, regulate.”).

68 Texas v. EEOC, 827 F.3d 372, 378 (5th Cir. 2016) (affording Texas special solicitude to challenge EEOC enforcement guidance) (“Furthermore, because Texas is bringing this action in its capacity as a sovereign state being pressed to reevaluate state law or incur substantial costs, it ‘is entitled to special solicitude in our standing analysis.’ ” (quoting Massachusetts v. EPA, 549 U.S. at 520)).

II. THE DISTORTION OF STANDING DOCTRINE IS ABOUT ROGUE COURTS, NOT RUNAWAY STATE LITIGATION

Chief Justice Roberts’s EPA dissent accused the majority of reducing standing to a manipulable “lawyer’s game.” The dissent in Biden v. Nebraska, the student loan case from last Term, threw that accusation back in his face. At the highest level of generality, they’re both right. Too often, some courts do treat standing like a game. But lawyers like to play lawyers’ games — so, as Baude and Bray observe, standing still gets litigated hard in a lot of cases. Not always, though. Look at what happened in 303 Creative v. Elenis, the 2023 decision that invented a free speech right to discriminate in public accommodations.

The 303 Creative plaintiff, a web designer, claimed an ideological opposition to designing wedding websites for gay couples. Colorado law forbids places of public accommodation — businesses like hers — from discriminating on the basis of sexual orientation. And if Colorado had tried to enforce its law against her, standing could hardly have been an issue. But it never did. She sued Colorado preemptively. Her desire to discriminate would have been frustrated by Colorado’s law had she been approached by a gay customer, though, so Baude and Bray think her speculative standing “was entirely orthodox and unremarkable.” And maybe they’re right — but only because, as one prominent commentator puts it, “[t]he parties entered joint stipulations on the key facts, without expending limited time on side issues.”

Colorado, it turns out, didn’t really fight about standing.

But my experience as a state solicitor general suggests that states, which defend far more cases than they bring, can be pretty finicky about “side issues” like a hostile federal court’s jurisdiction to strike down democratically enacted laws. And states, whatever their flaws as

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70 Massachusetts v. EPA, 549 U.S. at 548 (Roberts, C.J., dissenting).
71 143 S. Ct. 2355 (2023).
72 Id. at 2389 (Kagan, J., dissenting) (“All in all, the majority’s justifications turn standing law from a pillar of a restrained judiciary into nothing more than ‘a lawyer’s game.’” (quoting Massachusetts v. EPA, 549 U.S. at 548 (Roberts, C.J., dissenting))).
73 Baude & Bray, supra note 1, at 162 (“In important public law cases, the issue is almost always amply litigated by ideologically motivated parties and armies of amici.”).
74 143 S. Ct. 2298 (2023).
75 Id. at 2322 (Sotomayor, J., dissenting) (“Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.”).
76 Id. at 2308 (majority opinion).
77 Id. at 2309.
78 Adam Unikowsky, Contrived Cases Make Bad Law: Why the Supreme Court Should Never Have Heard 303 Creative — Part 1 of 2, ADAM’S LEGAL NEWSL. (July 6, 2023), https://adamunikowsky.substack.com/p/contrived-cases-make-bad-law [https://perma.cc/3YRH-MF] ("At the time it filed its lawsuit, 303 Creative had never turned down any same-sex couple’s request for a wedding website; indeed, it had never made a wedding website of any kind.").
79 Baude & Bray, supra note 1, at 153 n.5.
policymaking plaintiffs, have the resources to walk and chew gum at the same time, litigating both standing and the merits. So why would Colorado stipulate away so much of its standing argument? Unless, that is, the state perceived that a motivated court would go wherever it wanted anyhow. What’s the point of playing, even a fun lawyer’s game, if it’s not just cynical but also rigged?81

Or look at *Kennedy v. Bremerton School District*,82 the 2022 case that kneecapped the Establishment Clause by innovating yet another previously unimagined constitutional right — here, for a public school football coach to lead students in midfield Christian prayer.83 Kennedy likely had standing to pursue an injunction — if, as he claimed, he was fired for exercising a First Amendment right, and if, as he claimed, he wanted his job back.84

But he wasn’t and he didn’t. The school district never fired him.85 And by the time the case reached the Supreme Court, he had permanently moved from Washington to Florida.86 As it ultimately devolved, Kennedy at first did not show up for the start of the football season after he’d been “reinstated,” and when he did show, he coached a single game and then quit.87 So the case, as Bremerton’s lawyers argued, was moot, right?88 That argument didn’t even get mentioned by a Supreme Court eager to entrench religion in public schools.

Zoom out from the reductive EPA frame, then, and this is not a story about state litigation distorting standing jurisprudence. It’s a story about courts eager to hear certain cases and not very particular about how they get there. And one troubling takeaway is that this instrumental approach to standing can distort not just doctrine but every aspect

81 Baude and Bray write off the concealed standing evidence in *303 Creative* as immaterial. *Baude & Bray, supra* note 1, at 153 n.5. But as Supreme Court litigator Adam Unikowsky noticed, if Colorado had known about the plaintiff’s concealments and fabrications and had actually litigated and pressed the point, things might have gone differently — at least in front of a neutral tribunal. *See Unikowsky, supra* note 78.

82 142 S. Ct. 2407 (2022).

83 Id. at 2407–08.

84 Id. at 2419.


87 Id. (“At first, Kennedy appeared to have little interest in taking back his old job, which was supposedly what he was fighting for. Then he acknowledged that he had sold his house and moved across the country, with no plans to move back. Finally, on Friday, Kennedy returned to coach one football game. Then he quit, as the Seattle Times reported on Wednesday.”).

of litigation strategy and outcomes. True, a lot of important litigation gets brought by states, so maybe standing law gets bent out of shape in a lot of state-initiated cases. But states as plaintiffs aren’t the problem.

Consider *FDA v. Alliance for Hippocratic Medicine* (AHM), which the Court will hear this Term. An antichoice group of doctors incorporated in Amarillo, Texas, to draw a sympathetic judge in a one-judge division and effectively block the FDA’s approval of the abortion medication mifepristone nationally. But how would doctors have standing to challenge the FDA’s mifepristone approval? They’re not the ones who take it or buy it, and nobody makes them prescribe or dispense it. That’s where District Court Judge Kacsmaryk — a former antichoice advocate who gets virtually all cases filed in Amarillo — and the Fifth Circuit come in, treating the private plaintiffs with a tender solicitude that many states could only dream of. Some of the plaintiff doctors, they explained, might someday have to treat some of the few women who take mifepristone and suffer rare side effects.

“To describe those theories,” as the federal government explained in seeking a Supreme Court stay, “is to refute them.” Even if the plaintiffs had treated mifepristone side effects before, a plaintiff cannot obtain a future-looking remedy (a nationwide injunction, no less) on wild speculation about the contingent recurrence of past events. And who knows? Maybe the Supreme Court — which imposed a stay and granted certiorari — will uphold its own standing precedent and reverse. That would be a step toward restoring sanity and would vindicate some of Baude and Bray’s measured optimism about standing doctrine going forward. But it wouldn’t tell us much about states.

Which is not to say the states stayed out of it. With the case already stayed and up for certiorari consideration, some states, afraid that the private plaintiffs would lose for lack of standing, decided to join the party. Idaho, Missouri, and Kansas filed a motion to intervene in the district court, arguing:

89 Lemley, *supra* note 6, at 108 (“The Court took the remarkable step of rewriting the facts of the case, ignoring what actually happened (as found by both the district court and the court of appeals and documented with photographs), and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach.”).
91 See id. at *1.
93 See *All. for Hippocratic Med.*, 2023 WL 2913725, at *6–9.
The Federal Government’s recent petition for certiorari spends the brunt of its analysis attacking the private plaintiffs’ theories of standing. But in this motion, the States press sovereign and economic harms that cannot be asserted by private plaintiffs. . . . Presenting all theories of standing at once ensures that this Court (or appellate courts) can more cleanly get to the merits of this incredibly important issue.97

The district court let them in, over the FDA’s objections.98 Meanwhile, a group of blue states sued the FDA in a parallel proceeding, seeking to expand and preserve access to medication abortion.99 But their process was quite different. They weren’t judge shopping. They sued in the Eastern District of Washington,100 where the state’s lead counsel — Washington’s Attorney General — has his main office,101 and where cases are allotted among three active judges and six senior judges.102 They didn’t ask for a nationwide injunction. Instead they only sought, and only got, an injunction tailored to their actual proprietary injuries: it applies only to the suing states and only freezes the status quo.103 And they actually had proprietary injuries, since — among other things — the states operate pharmacies and run healthcare operations that (unlike the plaintiff doctors) prescribe and dispense mifepristone.104

Dueling injunctions are messy. But it would be astonishing to look at the mess and blame states, generally. Everyone didn’t act the same here. And we would be at the Supreme Court, asking whether a single judge can second-guess FDA experts, even without states. After all: the state interveners in Amarillo are just piggybacking on carpetbagging private plaintiffs who lack standing under traditional principles but got as far as a nationwide injunction from the Fifth Circuit.

So if we’re concerned about careful standing analysis and proper remedies — and we should be — it’s not because states are involved. It’s because some courts give too much leeway to bad faith plaintiffs — individuals and states alike. To stop policy from being made in courts, stop courts from making policy. But our democracy isn’t worse off just

97 The States of Missouri, Kansas, and Idaho’s Suggestions in Support of Their Motion to Intervene at 1, All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 22-223).
98 Order Granting Motion to Intervene at 1, All. for Hippocratic Med., No. 22-233 (N.D. Tex. Jan. 12, 2024). The Supreme Court, to its credit, did not allow the states to intervene before it.
100 Id. at 1125.
103 Order Granting in Part Plaintiffs’ Motion for Preliminary Injunction at 30, Washington v. FDA, 668 F. Supp. 3d at 1133.
104 Id. at 13–14.
because an antichoice state, rather than a group of antichoice doctors, files the complaint inviting judicial overreach.  

In their intervention motion, Missouri, Idaho, and Kansas openly portrayed standing not as a critical jurisdictional barrier to judicial policymaking but as a pro forma box to be checked on the way to the policy merits. And for a little glimpse of where they got the sense that their attitude might have traction, look at another deeply troubling standing case from this Term — one, again, where the underlying problem can’t really be pinned on states. 

In Murthy v. Missouri, individual plaintiffs joined forces with Missouri and Louisiana to sue Biden Administration officials who supposedly violated the First Amendment by jawboning social media companies into restricting public health misinformation. A Louisiana district court responded by enjoining thousands of federal officials from speaking to social media companies about matters of indisputable public importance. The Fifth Circuit largely affirmed. The Murthy plaintiffs have no standing for reasons that Baude and Bray anticipated well. None of the claimed injuries are traceable to the federal government. Even if they were, plaintiffs can’t seek prospective relief for past violations absent an immediate threat of recurrence. And, at least according to the federal government, the state plaintiffs’ asserted right to hear their constituents’ speech was doubly vexed, since states qua states have no First Amendment rights — they have powers, prerogatives, and responsibilities instead — and nobody, state or otherwise, has a generalized right to hear speech from any speaker at any time whatsoever. Maybe the Supreme Court, which stayed the injunction and granted certiorari, understands that. If so, as I said earlier, the Court’s intervention will again vindicate Baude and

105 See Katherine Mims Crocker, An Organizational Account of State Standing, 94 NOTRE DAME L. REV. 2057, 2059 (2019) (“The legal community should feel at least as comfortable with lawsuits led by states as with lawsuits led by other associations.”).

106 See The States of Missouri, Kansas, and Idaho’s Suggestions in Support of Their Motion to Intervene, supra note 97, at 1 (“Presenting all theories of standing at once ensures that this Court . . . can more cleanly get to the merits . . . .”).

107 No. 23–411 (U.S. argued Mar. 18, 2024).

108 Missouri v. Biden, No. 22-CV-01123, 2023 U.S. Dist. LEXIS 114585, at *11 (W.D. La. July 4, 2023) (granting preliminary injunction). States have collaborated in multistate litigation against the government for a long time, but almost always without private partners. AHM and Murthy could evidence a relatively new phenomenon: states partnering with individual plaintiffs and interest groups as co-plaintiffs in litigation against the federal government. States have usually avoided that risky alliance, and for good reason. Whether or not standing rules apply the same way to states as to anyone else, states are not anyone else. They have a unique role in federalism, and their litigation is driven by different concerns and interests.

109 Id. at *209.

110 Missouri v. Biden, 80 F.4th 641, 689 (5th Cir. 2021).


113 Brief for the Petitioners, supra note 111, at 22 (collecting cases).
Bray’s modest contention that some members of the Court have not entirely abandoned standing principles and will sometimes push back on the Fifth Circuit’s overreach.\textsuperscript{114}

But \textit{Murthy} shows, again, why it’s hard to understand pointing the finger at states or at EPA. The case would be at the Court even if Missouri and Louisiana hadn’t come along for the ride, since the Fifth Circuit thought the private plaintiffs had standing too.\textsuperscript{115} And while the district court extended special solicitude to the states, the circuit court didn’t.\textsuperscript{116}

There’s one final twist in \textit{Murthy}. With the case already at the Supreme Court, third-party presidential candidate Robert Kennedy Jr. sought to intervene.\textsuperscript{117} He said that he was uniquely injured by the alleged jawboning\textsuperscript{118} — and maybe so. He is, after all, a cynical vaccine denier whose dangerous campaign to spread lies has sometimes been slowed by social media companies.\textsuperscript{119} So maybe he is better situated than the other individual plaintiffs to show an injury, even if he still cannot show traceability. The Court denied his request, but Justice Alito’s dissent gave the game away, echoing the states’ intervention motion in \textit{AHM}: “[A]llowing Mr. Kennedy to intervene,” he protested, “would ensure that we can reach the First Amendment issues, notwithstanding the Government’s contention that respondents lack standing.”\textsuperscript{120}

I agree with Baude and Bray: judges (and Justices) are not supposed to be motivated to reach the merits at all costs, manipulating justiciability to get there. But even if Baude and Bray are right, and EPA was an example of that kind of manipulation, it has made a much bigger impression in lecture halls than in courtrooms. Why focus so much energy on the (absent) legacy of a Justice Stevens one-off? Why pretend that this epidemic goes back to 2007? Why not point out what we should all be able to see — that some members of this Court, and the Fifth Circuit behind it, are sharply breaking from longtime norms?

\textsuperscript{114} See Baude & Bray, supra note 1, at 174.
\textsuperscript{115} Missouri v. Biden, 80 F.4th at 658–62.
\textsuperscript{116} See id. at 662–64.
\textsuperscript{117} Kennedy Plaintiffs’ Motion to Intervene as Respondents and to File a Brief in Opposition, Murthy v. Missouri, No. 23–411 (U.S. argued Mar. 18, 2024).
\textsuperscript{118} Id. at 3.
\textsuperscript{120} Murthy v. Missouri, 144 S. Ct. 32, 33 (2023) (mem.) (Alito, J., dissenting from the denial of the motion to intervene).
III. WE NEED FIXES THAT INDIVIDUAL JUDGES AND COURTS CAN’T FRUSTRATE

Baude and Bray see the problem too broadly, blaming all courts for following EPA.121 They also see the problem too narrowly, focusing on states and not on a whole range of litigants who seek to remake public policy in their image and the handful of courts too eager to help them do it. And perhaps because of those mistaken perspectives, they hope (if guardedly) that judges’ internalization of standing principles offers a solution.122

I’m skeptical. Standing, as Baude and Bray acknowledge, is uniquely susceptible to judicial manipulation.123 Judges made it up and judges decide how it applies. We can hope, as Baude and Bray do, that things will get better if judges internalize standing principles.124 Courts would work better, and public litigation — including litigation by states — would have a more appropriate role in setting national policy if courts routinely and evenhandedly applied neutral standing principles to all litigants. But we can’t rely on judicial discretion to fix the problem of judicial abuse of discretion. For that, we need consistent rules that apply the same way in every case, regardless of a particular judge or panel’s motivated reasoning. And states have every reason to insist on those neutral rules. The Roberts Court’s accumulation of power im-pinges not just on the other federal branches but also on the states.125 The same Court that invented the major questions doctrine126 and hunted Chevron and Auer to the brink of extinction127 is the Court that seized the prerogative to determine when state courts have gone too far in interpreting their own election laws.128

Go back for a moment to AHM, the mifepristone case. A group of ideologues gets Amarillo on their mind129 and elicits a predictable ruling

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121 Baude & Bray, supra note 1, at 190–91 (“Massachusetts v. EPA is recognized as a wrong turn that threw the standing jurisprudence of the federal courts into confusion.”).
122 See id. at 190.
123 Id. at 189–90.
124 Id. at 190 (“In the words of the Prophet Jeremiah, the law needs to be written on our hearts.”).
125 See Lemley, supra note 6, at 97 (“The Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices’s own, but by undercutting the ability of any entity to do something the Justices don’t like. We are in the era of the imperial Supreme Court.”).
128 Moore v. Harper, 143 S. Ct. 2065, 2088 (2023) (holding “state courts do not have free rein” to interpret their own statutory and constitutional provisions about elections).
129 GEORGE STRAIT, Amarillo by Morning, on STRAIT FROM THE HEART (MCA Records 1982) (“But I’ll be lookin’ for eight / when they pull that gate / and I hope that / Judge ain’t blind / Amarillo by mornin’ / Amarillo’s on my mind.”).
from a handpicked judge, rolling the clock back twenty-three years and threatening to block abortion medication nationwide. The Fifth Circuit obliges them too, unrecognizably disfiguring standing rules to impose antichoice dogma on women from Seattle to Hartford. So Washington, Connecticut, and a number of other states fight back, filing a federal lawsuit in Seattle and getting an injunction that freezes the pre-litigation status quo in the suing states.\textsuperscript{130}

Didn’t the blue states do exactly what their constituents should expect and want them to do in a federal system? They insisted that a single district court judge and an aberrant circuit cannot set policy for an entire country. And they did it in the face of a judicial branch that has too often simultaneously demanded localized rules and national reach — meaning that a politicized regional judiciary can impose its will on everyone else, and there’s nothing the rest of the country can do about it.

We can, though — even if Congress is too paralyzed and polarized to help, though congressional action would be the best way to mandate standards of review that respect administrative expertise; restrain runaway injunctions; institute centralized forums for cases with nationwide impact; randomize case assignments; and, if necessary, rejigger circuit borders.

But, failing congressional action, a place to start is court rules. This March, the Judicial Conference of the United States’s Committee on Court Administration and Case Management released “guidance” advising district courts to randomly assign judges to “civil actions seeking to bar or mandate nationwide enforcement of [...] federal law.”\textsuperscript{131} That non-binding guidance is just a first step, though — and if compliance isn’t forthcoming, the committee behind the Federal Rules of Civil Procedure should step in.\textsuperscript{132} If we are truly playing national constitutional rights roulette with all chambers loaded every time the Alliance Defending Freedom walks into Judge Kacsmaryk’s courtroom, why should the Northern District of Texas’s administrative rules effectively set policies that condemn Connecticut, and every other state, to an unequal playing field? That’s an insult to federalism. States submitted (some of) their disputes to what they were told would be a neutral federal forum. When that forum is held hostage, it matters to states. And it should. Right now, Texas has more power over federal policy than California — and much more than Connecticut — in part because a few of its judges want

\textsuperscript{130} See generally Washington v. FDA, 668 F. Supp. 3d 1125 (E.D. Wash. 2023).
it that way. But Texas judges’ administrative decisions should not set national policy.

In 2013, the Roberts Court articulated a principle of “equal sovereignty,” dictating that the federal government must treat each state the same as its peers — at least absent a good reason not to.\textsuperscript{133} I won’t relitigate whether equal sovereignty was a real thing before 2013 or should be a real thing going forward. Like “special solicitude,” it is doctrine now. The question is whether equal sovereignty is also a dead letter — whether the principle and the ideas behind it mean anything and whether it applies the same way to the courts as to the other branches of federal government. Each state “has an interest in securing observance of the terms under which it participates in the federal system.”\textsuperscript{134} What happens when the supposedly neutral federal forum is captured, at least in part, by a regionally distinct set of aggressive litigants dedicated to imposing their agenda on the rest of the country? Is it enough to hope that those litigants and their courts will check themselves, or does our federalist bargain offer states any recourse?

Baude and Bray offer a much-needed lifeline of hope for the short-term direction of the Supreme Court, which could at least do less harm if it applied standing rules rigorously. But the problem they diagnose isn’t traceable to EPA. Its most noxious manifestations right now emanate from a small, heavily partisan segment of the bench, which will do what it wants whether the litigants are individuals or corporations or states. States, as such, aren’t the problem. Instead, state litigation, and states’ insistence on courts’ abiding by the neutral rules that they signed on for, can recall us to a federalism where the judiciary, too, abides by principles of restraint and respect.

\textsuperscript{133} Shelby County v. Holder, 570 U.S. 529, 542, 544 (2013).