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State Standing for Equality

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INTRODUCTION

The United States Supreme Court's ruling in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez* is not generally considered an equality

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law decision.[1] Rather, *Snapp* is known as a seminal case on state standing to sue in federal court, one cited in support of state standing in litigation about climate change,[2] federal immigration policy,[3] and government ethics,[4] to name a few high profile examples. At its heart, however, *Snapp* is a case about equality. The Commonwealth of Puerto Rico sued Virginia apple growers, alleging that they had violated two federal laws by discriminating against Puerto Rican workers.[5] The Court reasoned that a state has a judicially cognizable interest "in securing residents from the harmful effects of discrimination," and treated the Commonwealth like a state, holding that it had *parens patriae* standing to sue to protect its residents.[6]

State standing for equality complicates two typical stories about the relationship between constitutional structure and individual rights. The first is about equality law. In a typical telling, state sovereignty is a barrier to achieving equal protection.[7] The structure of federalism is opposed to the realization of civil rights. This tale is well-founded.[8] Slavery and Jim Crow segregation may be the most familiar examples,[9] but they are not the only, or the most recent, examples of opposition between state sovereignty and equality law.[10] Even so, state standing for equality suggests that the

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

2. Massachusetts v. EPA, 549 U.S. 497 (2007).

3. Texas v. United States, 809 F.3d 134, 153 n.36 (5th Cir. 2015), *aff'd by an equally divided Court*, United States v. Texas, 136 S. Ct. 2271 (2016).

4. *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 737 (D. Md. 2018).

5. *Snapp*, 458 U.S. at 597–98.

6. *Id.* at 609.

7. *See, e.g.*, Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1708 (2017) ("Unsurprisingly given the treatment of civil rights protestors, religious minorities, and other dissenters in the Deep South, racism isn't the only 'ism' linked to federalism and localism."); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1277 (2004) (discussing concern that "the story of state-based racial oppression reveals a fundamental truth about the dynamics of federalism").

8. *See* Gerken, *supra* note 7; Young, *supra* note 7.

9. *See* Young, *supra* note 7, at 1277.

10. A more recent example is the Supreme Court's holding that Section 4 of the Voting Rights Act, which provided a formula to determine which jurisdictions had to preclear changes to their voting laws with the federal government, violated the "equal sovereignty" of the states. *See* Shelby Cty. v. Holder, 570 U.S. 529 (2013); Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 LA. L. REV. 83 (2015).

story of states standing for discrimination is incomplete. Before *Snapp*, some states sought to stand for equality in the lower courts.[11] And since *Snapp*, states have continued to secure their residents from discrimination by suing in federal court.[12] These cases are also part of the story of equality law.

The second incomplete story is about standing law. In this story, questions about standing are questions about Article III and the separation of powers.[13] Questions about state standing law also implicate federalism.[14] Questions about state standing, in other words, are questions about constitutional structure, not questions about individual rights. But this is not the whole story.[15] As *Snapp* and its progeny reveal, questions about state standing may also be questions about individual rights and the values they represent. The *Snapp* Court justified its recognition of a state's "substantial interest" in standing for equality by reference to the "evils" of discrimination based upon ethnicity, not by discussing Article III, the separation of powers, or federalism.[16] This history, too, is a part of the story of state standing and *Snapp*'s prominent place within it.

This Article reads *Snapp* as an equality law case in order to take stock of state standing for equality.[17] Its principal argument is that state standing

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11. *See, e.g.*, Pennsylvania v. Porter, 659 F.2d 306, 317 (3d Cir. 1981) (collecting cases and explaining that "[c]ourts in this circuit have long recognized that [a state] may bring a parens patriae action in the United States district courts to enforce the fourteenth amendment").

12. *See, e.g.*, Massachusetts v. Bull HN Inf. Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass. 1998) ("It seems indisputable that a state has a quasi-sovereign interest in preventing racial discrimination of its citizens. . . . Similarly, courts have found a quasi-sovereign interest in preventing discrimination against other protected or disadvantaged groups . . . .") (citing People v. 11 Cornwell Co., 695 F.2d 34, 39 (2d Cir. 1982); People v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996); Support Ministries for Persons with AIDS, Inc. v. Waterford, 799 F. Supp. 272, 277 (N.D.N.Y. 1992)).

13. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984).

14. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 516–22 (2007).

15. Scholars are increasingly recognizing that more than the familiar structural principles are at stake in government standing cases. *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 858 (2016); Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 589 (2015).

16. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982).

17. This Article does not discuss a state's standing to vindicate its "equal sovereignty" under the Constitution. *See* Shelby Cty. v. Holder, 570 U.S. 529 (2013); Davis, *supra* note 10, at 83. In light of the recent proliferation of state

for equality reflects a substantive vision of federalism in which states have a substantial interest in protecting their residents from discriminatory subordination.[18] The law of state standing has embraced *Snapp*'s restatement of judicially cognizable state interests, but the law of equality has moved away from *Snapp*'s understanding of equality as antisubordination.[19] This divergence creates a challenge for the future of state standing for equality.

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litigation in federal court, there is growing literature on state standing, much of it focused on a state's standing to litigate its sovereign interests. *See, e.g.*, Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739 (2017); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637 (2016); Grove, *supra* note 15, at 851; Davis, *supra* note 15, at 585; Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209 (2014); Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 72–83 (2014); Aziz Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013); Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845 (2012); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249 (2009); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995); Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79 (1996). This Article instead focuses on state lawsuits to vindicate equality norms that protect individuals, such as the Equal Protection Clause.

18. *See generally* Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 276 (2015) (contrasting antisubordination with anticlassification approach to equal protection) (citing Bertrall L. Ross, II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1597 (2013); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004); Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004)).

19. For an example of the influence of *Snapp*'s restatement of judicially cognizable state interests, see *Massachusetts v. EPA*, 549 U.S. at 516–22 (discussing proprietary, sovereign, and quasi-sovereign injuries to states). For an example of the federal courts' movement away from an antisubordination understanding of equality law, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) ("Before *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)], schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases

A state's judicially cognizable interest in standing for equality may take any one of three forms. First, as in *Snapp*, a state may seek to protect its residents from discrimination by standing for them as a *parens patriae* representative.[20] This sort of standing involves a state's unique "quasi-sovereign" interests in the health and wellbeing of its populace.[21] In addition, states may stand for equality when they vindicate their own rights,[22] such as their proprietary rights as a property owner and a party to contracts.[23] A third way in which a state may stand for equality involves a state's powers to govern.[24] A state may seek, for example, to ensure the enforceability of its own equality law.[25]

Recently, a flurry of high profile lawsuits has underscored the potential of each of these forms of state standing to protect individuals from discrimination. In *Hawaii v. Trump*, the Ninth Circuit held that the State of Hawaii had proprietary and sovereign standing to challenge the Trump Administration's second ban on travel from majority-Muslim countries.[26] In *Pennsylvania v. Trump*, the Commonwealth of Pennsylvania claimed standing as a provider of government services, including state-funded contraceptive care for its female residents, to challenge the Trump Administration's promulgation of exceptions to the Affordable Care Act's contraceptive mandate.[27] In *Aziz v. Trump*, another travel ban case, a federal district court held that the Commonwealth of Virginia had *parens patriae* standing to espouse the equal protection claims of its residents.[28]

These recent examples of state standing for equality raise practically important and normatively difficult questions. States are increasingly bringing public actions to redress alleged discrimination in controversial cases of national scope. These cases implicate hard questions of constitutional and statutory interpretation and have significant

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have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.").

20. *See Snapp*, 458 U.S. at 608–10.

21. *See id.* at 607 ("[A] State has a quasi-sovereign interest in the health and well-being . . . of its residents in general.").

22. *See infra* notes 140–159 and accompanying text.

23. *See, e.g.*, San Francisco v. Trump, 897 F.3d 1225, 1234–37 (9th Cir. 2018).

24. *See generally Snapp*, 458 U.S. at 601 (explaining that state has interest in "exercise of sovereign power over individuals and entities within the relevant jurisdiction").

25. *Cf.* Hawaii v. Trump, 859 F.3d 741, 763 (9th Cir.), *cert. granted sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

26. *See id.* at 765.

27. Pennsylvania v. Trump, 281 F. Supp. 3d 553, 566–67 (E.D. Pa. 2017).

28. Aziz v. Trump, 231 F. Supp. 3d 23, 32 (E.D. Va. 2017).

consequences for the role of the federal courts, enforcement of law, and federalism. Such questions include whether states are due "special solicitude in [the] standing analysis,"[29] particularly when they seek to stand for equality, and whether they may sue under any circumstances to secure their residents from federal discrimination.[30] The answers to these questions will help determine the future of state standing for equality. That future may look very different from the vision laid out in *Snapp*, not only in the bases for state standing, but also in the substantive vision of federalism and equality law that supports it.

This Article proceeds in three Parts. Part I offers a close reading of *Snapp* as an equality law case. Part II focuses upon state standing for equality today, showing that it has continued *Snapp*'s substantive vision of federalism and equality law. Part III offers thoughts on the future of state standing for equality.

I. *SNAPP* AND EQUALITY LAW

Snapp contains the Supreme Court's most comprehensive modern restatement of the law of state standing.[31] The Court's categorization of judicially cognizable state interests remains the touchstone of the law of state standing. As the Court explained in *Snapp*, a state may seek to litigate in federal court based upon its proprietary, sovereign, or quasi-sovereign interests.[32] In *Snapp* itself, quasi-sovereign interests afforded Puerto Rico standing to sue in a *parens patriae* capacity to protect its citizens from discrimination.[33] Thus, a state's judicially cognizable interests included "securing [its] residents from the harmful effects of discrimination."[34] This interest was "peculiarly strong" for Puerto Rico, whose residents faced discrimination based upon ethnicity, not simply upon their place of residence.[35]

This Part describes *Snapp*'s substantive vision of a state's interest in protecting its residents from discriminatory subordination. It summarizes

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

30. *See* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923). In *Mellon*, the Court reasoned that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.*

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

32. *See id.* at 602.

33. *See id.* at 608.

34. *Id.* at 609.

35. *Id.*

Snapp's framework for state standing and then discusses *Snapp* as an equality law case.

A. Snapp *as a Standing Law Case*

Private standing in federal courts has familiar constitutional and prudential limits. To have Article III standing to sue, a plaintiff must point to an injury in fact.[36] This injury must be: (1) concrete, imminent, and particularized; (2) caused by the defendant; and (3) redressable through judicial relief.[37] These standing requirements limit judicial authority and aim to protect the separation of powers.[38] Not all limits on standing are constitutional ones, however. As a prudential matter, a litigant with an Article III injury may lack access to the courthouse.[39] For example, litigants generally must sue to vindicate their own rights, not the rights of absent third parties.[40] To have third-party standing to sue, a litigant must have a unique relationship with the rights-holder.[41]

States may have Article III standing based upon any of several different types of interests. They may sue, much as a private corporation would, to protect their proprietary interests.[42] Or states may sue to vindicate their sovereign or quasi-sovereign interests.[43] In some cases, standing doctrine has shown "special solicitude" to states,[44] affording them standing even when they cannot demonstrate the sort of concrete, personal injury required of private parties or permitting them to sue in a representative capacity without satisfying the prudential requirements for third-party standing.[45] This Section illustrates the basic framework for judicially cognizable state interests and summarizes *Snapp*'s discussion of a state's interest in securing its residents from discrimination.

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36. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

37. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–11 (2013).

38. Allen v. Wright, 468 U.S. 737, 752 (1984).

39. *See, e.g.*, *Lujan*, 504 U.S. at 560 (distinguishing constitutional from prudential standing).

40. Singleton v. Wulff, 428 U.S. 106, 114–16 (1976).

41. *See id.*

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

43. *See id.* at 602.

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

45. *See* Davis, *supra* note 15, at 595–97.

1. Judicially Cognizable State Interests

Snapp distinguishes three types of judicially cognizable state interests: proprietary interests, sovereign interests, and quasi-sovereign interests.

a. Proprietary Interests

As *Snapp* discussed, "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."[46] States may own real property, enter into contracts, and so on. These proprietary or "corporate" interests support standing under Article III on the same terms that apply to private parties.[47] Thus, a state may claim standing in a "private" capacity. Like a private litigant with interests as an owner or as a party to a contract, a state may suffer a judicially cognizable injury to those interests that suffices to afford it standing in federal court.[48]

b. Sovereign Interests

A state may also sue in a uniquely public capacity as a sovereign government. It may have standing to vindicate its authority to make and enforce laws.[49] In *Massachusetts v. Mellon*, the Court held that a state could not invoke sovereign standing to challenge a federal statute under the Tenth Amendment.[50] The *Mellon* bar on state standing to vindicate sovereign interests is not absolute, as earlier and subsequent case law shows. In *Missouri v. Holland*, for example, the Court held that a state could sue under the Tenth Amendment to enjoin implementation of a federal statute on the ground that it regulated a matter reserved to state

46. *Snapp*, 458 U.S. at 601–02.

47. *See* Davis, *supra* note 17, at 17–18. In one of its earliest cases, *Georgia v. Brailsford*, the Supreme Court confirmed that a state may sue in federal court to vindicate its proprietary interests. *See* Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405–09 (1792) (permitting state to sue to vindicate its common law proprietary rights); Woolhandler & Collins, *supra* note 17, at 406–07 (discussing *Brailsford*). Today, it is well established that a state's proprietary interests are judicially cognizable. *See Snapp*, 458 U.S. at 601.

48. *See Snapp*, 458 U.S. at 601.

49. *See id.*

50. *See* Massachusetts v. Mellon, 262 U.S. 447, 484–85 (1923). The Court held that the Commonwealth of Massachusetts could not sue the federal government as a *parens patriae* representative of its citizens. *See id.* at 485–86.

regulation.[51] And more recently the Court has permitted states to sue the federal government to enforce sovereign interests, such as those arising from the Tenth Amendment ban on commandeering.[52] A state may also have standing to "demand recognition from other sovereigns,"[53] as in cases involving interstate border disputes or claims of intergovernmental immunity.[54]

c. Quasi-Sovereign Interests

The *Snapp* Court focused on a third category of justiciable state interests, one that "does not lend itself to a simple or exact definition": a state's "quasi-sovereign" interests.[55] Quasi-sovereign interests support state *parens patriae* actions in federal court. A state suing in a *parens patriae* capacity seeks to protect the "well-being of its populace."[56]

There is no "definitive list" of the quasi-sovereign interests that may support a *parens patriae* suit, the *Snapp* Court explained, but rather a set of guidelines for case-by-case determinations.[57] A state's quasi-sovereign interests include protecting the general welfare of its residents and securing for them the benefits of the federal system, such as the free flow of interstate commerce.[58] States may, for example, sue to enjoin public nuisances.[59] They may also sue to protect the "economic well-being" of their residents under the federal antitrust laws.[60] A state must allege, however, "more . . . than injury to an identifiable group of individual residents" to assert quasi-sovereign standing as a *parens patriae* representative.[61]

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51. *See* Missouri v. Holland, 252 U.S. 416, 431 (1920); Davis, *supra* note 17, at 19, 81 & n.438 (explaining that *Missouri v. Holland* is best understood as a case involving a state's sovereign interest in its institutional authority to govern).

52. *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018) (reaching merits of anti-commandeering challenge to federal statute); New York v. United States, 505 U.S. 144, 176 (1992) (same).

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

54. *Id.*; Davis, *supra* note 17, at 18 (discussing intergovernmental immunity cases).

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

56. *Id.* at 602.

57. *Id.* at 607.

58. *See id.* at 602.

59. *See id.* at 603 (citing cases).

60. *See* Georgia v. Pennsylvania R. Co., 324 U.S. 439, 450 (1945).

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

2. A State's Interest in Combatting Discrimination

In *Pennsylvania v. New Jersey*, the Court held that Pennsylvania could not invoke the original jurisdiction of the Court on behalf of Pennsylvania's residents to challenge a New Jersey tax.[62] Pennsylvania argued that New Jersey had unlawfully discriminated against its residents in violation of the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment.[63] In rejecting Pennsylvania's claim of standing to sue New Jersey for alleged equal protection violations, the Court in *Pennsylvania v. New Jersey* looked to the text of the Equal Protection Clause and the Privileges and Immunities Clause.[64] According to the Court, Pennsylvania could not sue in its own right because "both Clauses protect people, not States."[65] As a matter of constitutional interpretation, therefore, Pennsylvania had no independent interest in suing New Jersey for unlawful discrimination.[66] Instead, it was "merely litigating as a volunteer [for] the personal claims of its citizens."[67] The Court, therefore, held that Pennsylvania could not invoke the Court's original jurisdiction for that purpose.[68] To grant the state standing in an original action would be too disruptive of the constitutional scheme of limited federal jurisdiction.[69]

As the *Snapp* Court read it, *Pennsylvania v. New Jersey* implied a limit on state *parens patriae* standing in all federal courts, not just in the Supreme Court. A state must assert a "quasi-sovereign" interest to stand in *parens patriae* to protect its residents from discrimination.[70] The *Snapp*

62. Pennsylvania v. New Jersey, 426 U.S. 660, 661–62, 664–66 (1976).
63. *Id.* at 661–62.
64. *Id.* at 665.
65. *Id.*
66. *Id.* at 666.
67. *Id.* at 665.
68. *Id.* at 665–66.
69. *Id.* ("For if, by the simple expedient of bringing an action in the name of the State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, s. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.").
70. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) ("[I]f the State is only a nominal party without a real interest of its own[,] then it will not have standing under the *parens patriae* doctrine." (citing *Pennsylvania*, 426 U.S. at 660)).

Court explained that a "State has a substantial interest" in suing to protect its "residents from the harmful effects of discrimination."[71]

Snapp involved a claim of unlawful discrimination. The Commonwealth of Puerto Rico sued Virginia apple growers, alleging that they had violated two federal laws by discriminating against Puerto Rican workers in favor of non-U.S. citizens and by stigmatizing Puerto Rican citizens as "inferior" workers.[72] In particular, Puerto Rico's complaint alleged violations of the Wagner–Peyser Act of 1933, the Immigration and Nationality Act, and federal foreign labor certification regulations.[73] In a nutshell, the complaint alleged that the apple growers violated federal law by failing to treat Puerto Ricans as part of the domestic U.S. workforce when deciding to hire migrant farmworkers from Jamaica to harvest an apple crop.[74] Doing so, Puerto Rico argued, violated federal law preferences for hiring domestic over foreign workers under the interstate clearance system, which was designed to alleviate problems of high unemployment during the Great Depression.[75] At the time, Puerto Rico was facing severe problems of unemployment across the Commonwealth.[76] Hundreds of Puerto Rican workers had been placed with the defendant apple growers who subsequently refused to employ those workers, in some cases firing them before the expiration of their employment contracts and instead employing non-U.S. citizens.[77] According to the Commonwealth's complaint, the Virginia apple growers thus discriminated against Puerto Rican workers by failing to afford them the hiring preferences due to U.S. citizens.[78]

The Court held that Puerto Rico had quasi-sovereign standing to litigate these claims.[79] It recognized two quasi-sovereign bases for standing. First, the Court held that a state's interest in protecting its "residents from the harmful effects of discrimination" was justiciable.[80] Just as a state has a justiciable interest in "the health and well-being of its

71. *Id.* at 609.
72. *Id.* at 597–98, 609.
73. *Id.* at 598.
74. *See* Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc. 632 F.2d 365, 367–68 (1st Cir. 1980), *aff'd by Snapp*, 458 U.S. 592.
75. *See Snapp*, 632 F.2d at 367.
76. *See id.*
77. *See id.* at 368.
78. *Id.* at 370.
79. *See Snapp*, 458 U.S. at 609 ("This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.").
80. *Id.*

residents," it also has a justiciable interest in protecting them from discrimination.[81] The Court stated that it "had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils."[82]

Second, the Court held that Puerto Rico had a specific interest in protecting its citizens from the hiring preference violations at issue in the case. The problem of unemployment was "surely a legitimate object of the Commonwealth's concern."[83] Federal statutes and regulations specifically addressed that problem, and the "fact that the Commonwealth participates directly in the operation of the federal employment scheme" gave it an especially "compelling . . . *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents."[84]

The *Snapp* Court held that Puerto Rico had standing to represent its citizens in federal court based upon the unique rules that apply to state *parens patriae* standing, rather than, for example, the typical third-party standing rules that apply to private parties.[85] The Court did not state that it was affording Puerto Rico special solicitude in the standing analysis.[86] But its opinion, which relies on state standing precedents throughout, suggests the possibility. In his concurring opinion, Justice William Brennan spelled that possibility out: "a State is no ordinary litigant."[87]

Justice John Paul Stevens, who joined Justice Brennan's concurring opinion in *Snapp*, made good on that notion in his opinion for the Court in *Massachusetts v. EPA*.[88] In that case, Massachusetts sued the Environmental Protection Agency for failing to regulate greenhouse gas emissions.[89] Massachusetts pointed to several interests to support its standing, including the state's proprietary interest as an owner of its coastline, which was receding as sea levels rose; its regulatory interest in addressing climate change through state law, which the Clean Air Act preempted; and its interests in protecting its citizens' health and well-

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 610.
85. *Id.*
86. The Court adverted briefly to the "standing requirements of Art. III," explaining that "[a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 602.
87. *Id.* at 612 (Brennan, J., concurring).
88. Massachusetts v. EPA, 549 U.S. 497 (2007).
89. *Id.* at 505.

being.[90] The state's standing depended upon its proprietary injury as an owner of coastline property.[91] To that proprietary interest, the Court added the state's "sovereign" interest in the "exercise of its police powers"[92] and its "quasi-sovereign" interest in the "health and welfare of its citizens."[93] Lumping these distinct interests together, the Court concluded Massachusetts was "entitled to special solicitude" and had standing.[94]

Although *Snapp* may not, by itself, establish *Massachusetts v. EPA*'s premise that states are due special solicitude as litigants in federal court, it does establish that they may seek to combat discrimination against their residents by suing in federal court. In *Snapp*'s vision of federalism, this state interest is a "substantial" one rooted in recognition of the values that underlie equality law.[95] It is to those values, and *Snapp*'s vision of them, that this Article now turns.

B. Snapp *as an Equality Law Case*

Snapp's discussion of a state's substantial interest in combatting discrimination reflects a substantive understanding of federalism and equality, one that may be better understood by reading *Snapp* as an equality law case. Read in such a manner, *Snapp* has something significant to say about core questions in equality law, including equality as antisubordination, equality and poverty, affirmative action, and equality and public administration.

Perhaps the most significant and interesting aspect of *Snapp* is its substantive vision of a state's interest in advancing equality by combatting subordination. According to the Court, a state has a "substantial interest" in addressing "'[d]eliberate efforts to stigmatize the labor force as inferior.'"[96] This sort of concern with the subordinating effects of

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90. *See id.* at 519.

91. *See id.* at 522 ("Because the Commonwealth 'owns a substantial portion of the state's coastal property,' . . . it has alleged a particularized injury in its capacity as a landowner." (internal citations omitted)).

92. *See id.* at 518–19.

93. *See id.* at 519 (lumping sovereign and quasi-sovereign interests together by referring both to a state's "sovereign prerogatives" to "exercise its police powers" and to a state's quasi-sovereign interest in "the health and welfare of its citizens," which gives a "State standing to sue *parens patriae*" (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)).

94. *Id.* at 520.

95. *See Snapp*, 458 U.S. at 609.

96. *See id.* (quoting Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980)).

discrimination sounds in an antisubordination understanding of equality.[97]

Scholars have distinguished an antisubordination understanding of equality from an anticlassification understanding. The anticlassification understanding is focused upon individuals and individualized harm from discrimination.[98] On this understanding, a commitment to equal treatment is a commitment to protect individuals against discriminatory classifications. When it comes to challenges to racial discrimination under the Equal Protection Clause, for example, an anticlassification understanding focuses upon "protect[ing] individuals against all forms of racial classification."[99] While discussions of the anticlassification understanding of equality are often focused upon constitutional constraints upon government action, they are also relevant to understanding civil rights and employment law more generally, including in cases that involve constraints on private action.[100] Anticlassification offers an "individualized orientation" to equality law as opposed to one that focuses upon group harms and subordination.[101]

The anticlassification understanding of equality law is associated with judicial suspicion of affirmative governmental measures to redress group domination and subordination. Justice Clarence Thomas's concurring opinion in *Missouri v. Jenkins* nicely sums up this understanding as applied to the Equal Protection Clause: "At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny . . . ."[102] On that understanding of equal protection, Justice Thomas joined the majority in *Jenkins* to hold that a district court may not order a state to remedy school segregation by

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97. *Cf.* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 454 (2000) (discussing antisubordination understanding of equality law and explaining that "[p]ersistent group-based inequality feeds a stigma that . . . imposes psychic harm on members of stigmatized groups").

98. *See, e.g.*, Siegel, *supra* note 18, at 1472 (describing anticlassification understanding as "a particular conception of equality, one that is committed to individuals rather than to groups").

99. *Id.* at 1473; Balkin & Siegel, *supra* note 18, at 10 (explaining that anticlassification "principle holds that government may not classify people either overtly or surreptitiously on the basis of a forbidden category").

100. *See* Bagenstos, *supra* note 97, at 455–56 (describing an "orthodox account of civil rights law [that] . . . . treats civil rights law as aiming at eliminating individualized irrationality and ensuring that all candidates for positions are treated on the basis of individual merit").

101. *Id.* at 456.

102. Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring).

taking affirmative steps to attract nonminority students from one school district to enroll in schools in a different, majority-minority school district.[103] And on that same understanding, the Supreme Court has rejected voluntary efforts by state actors to integrate schools; in a plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, for instance, Chief Justice John Roberts invoked an anticlassification understanding of equal protection when he concluded that school boards may not consider race when trying to address de facto school segregation, opining that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[104]

It is not clear that the anticlassification understanding of antidiscrimination can sustain the sort of state standing that *Snapp* recognized. In recognizing state standing for equality, *Snapp* focused upon harms to Puerto Ricans as a group, not individualized harms suffered by each Puerto Rican worker who was denied employment. The logic of state standing rules demanded as much. A state, after all, lacks *parens patriae* standing to represent individuals as such; the state must point to something "more . . . than injury to an identifiable group of individual residents."[105] As the Fourth Circuit explained, in determining whether a state has *parens patriae* standing, "[i]t is the magnitude and pervasiveness of the societal harm that must be weighed—not the directness of the injury to particular individuals."[106] For a state to have such standing, a "substantial portion of the citizens" must be affected.[107] And a substantial portion—perhaps all—of Puerto Rico was affected by the apple growers' discriminatory actions: As the Fourth Circuit put it, and as the Supreme Court agreed, "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting."[108]

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103. *See id.* at 101–02.

104. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality op.). *But cf.* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1303–08 (2011) (distinguishing anticlassification understanding of Chief Justice Roberts's plurality opinion from "antibalkinization" understanding of Justice Anthony Kennedy's concurring opinion, which was concerned with the potential of both "racial stratification and its repair . . . to balkanize").

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

106. Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980).

107. *Id.*

108. *Id.*; *see Snapp*, 458 U.S. at 609 (quoting and agreeing with Fourth Circuit's analysis of Puerto Rico's interest in combatting efforts to stigmatize Puerto Rican workers).

The effect, according to the Fourth Circuit, "certainly . . . permeates the entire island of Puerto Rico."[109]

It was not, in other words, the classification of individuals that was the basis of Puerto Rico's standing for equality. To the contrary, it was Puerto Rico's interest in combatting the stigmatization of Puerto Ricans as a group. If Puerto Rico's interest had been to combat the individualized harm of arbitrary classification, then its standing should have turned upon the aggregate impacts of individualized employment discrimination. The apple growers argued that there were not enough individual acts of employment discrimination to afford Puerto Rico a judicially cognizable interest, on the theory that the limited number of instances of discrimination did not have a substantial effect on Puerto Rico's economy.[110] The Supreme Court, however, concluded that aggregating the economic impacts of individualized employment discrimination was "too narrow a view of the interests at stake."[111] Puerto Rico's judicially cognizable interest encompassed the "political, social, and moral damage of discrimination," harms that Puerto Ricans suffered as a group.[112] Those group harms supported Puerto Rico's standing to sue to protect Puerto Ricans from the "evils" of discrimination.[113]

This account of a state's substantive interest in combatting discrimination sounds not in an anticlassification understanding of equality, but instead in an antisubordination understanding. Unlike the anticlassification understanding, the antisubordination understanding of the harms of discrimination focuses upon "group-based subordination."[114] When it comes to challenging government action under the Equal Protection Clause, the antisubordination understanding focuses upon "practices that enforce the inferior social status of historically oppressed groups."[115] More generally, the antisubordination

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109. *Snapp*, 632 F.2d at 370 ("The apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico.").

110. *See Snapp*, 458 U.S. at 609.

111. *Id.*

112. *Id.*

113. *Id.*

114. Bagenstos, *supra* note 97, at 453. *But see* Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 585 (2008) (offering account of antisubordination understanding "that focuses on one's position in society [and] rejecting the focus on groups popular in the existing antisubordination literature").

115. Siegel, *supra* note 18, at 1472–73; *see* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that Equal Protection Clause prohibits state action that "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group").

understanding of civil rights law focuses upon addressing pervasive social practices and structures that maintain the subordination of particular disfavored or disadvantaged groups.[116] Discrimination, understood thus, entails treating groups as second-class citizens or subordinate castes.[117] Such persistent second-class treatment, to name but one type of harm, "feeds a stigma that . . . imposes psychic harm on members of stigmatized groups . . . ."[118] The aim of equality law is to reform social practices and structures that perpetuate this and other similar group-based harms from discrimination.[119]

On an antisubordination understanding of equality law, a state has a compelling interest in taking affirmative steps to eliminate group-based subordination.[120] In *Parents Involved*, for example, the dissenting Justices

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116. *See, e.g.*, Bagenstos, *supra* note 97, at 453–55.

117. *See, e.g.*, Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 955–57 (2012) (contrasting antisubordination and anticlassification understandings of employment discrimination law and explaining that "the antisubordination principle allows classification (or consideration of, for example, race or sex) to the extent the classification is intended to challenge group subordination"); Balkin & Siegel, *supra* note 18, at 9 ("Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups."); Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 860 (2003) (explaining that on an antisubordination understanding, "a law is objectionable on equality grounds if it has the effect of creating or reinforcing second-class citizenship on the basis of race, ethnicity, gender, or similar category"); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429 (1994) (arguing that anticaste principle of equality law poses question whether "'law or practice in question contribute[s] to the maintenance of second-class citizenship, or lower-caste status, for blacks or women'").

118. Bagenstos, *supra* note 97, at 454.

119. *See, e.g.*, Balkin & Siegel, *supra* note 18, at 9 (discussing aim of antisubordination understanding of equality law to "reform institutions and practices that enforce the secondary social status of historically oppressed groups").

120. At the risk of oversimplification, while "the anticlassification principle indicts affirmative action and allows facially neutral policies with a racially disparate impact, . . . the antisubordination principle indicts facially neutral practices with a racially disparate impact and legitimates affirmative action." Areheart, *supra* note 117, at 961. The risk of oversimplification arises from the historical relationship between the antisubordination and anticlassification rationales: "courts have deployed the presumption against racial classification to express, to disguise, and to limit constitutional concerns about practices that

advanced an antisubordination understanding of equal protection to conclude that a school board may adopt a race-conscious desegregation plan to address de facto school segregation.[121] As Justice Stevens put it, "a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason."[122] Thus, the antisubordination understanding supports a state that claims an interest in combatting persistent practices and social conditions that subordinate or stigmatize disfavored groups.[123]

That is precisely the interest that *Snapp* recognized as supporting state standing for equality. The Supreme Court concurred with the Fourth Circuit that "'[d]eliberate efforts to stigmatize the [Puerto Rican] labor force as inferior carry a universal sting,'" one that struck Puerto Ricans as a group and one that Puerto Rico's government had standing to seek to redress.[124] Puerto Rico's interest in combatting stigmatization was "peculiarly strong" because its suit challenged "invidious discrimination . . . along ethnic lines."[125] In this way, Justice Brennan suggested in his concurring opinion, Puerto Rico's standing "compared favorably with" the standing of private organizations to challenge discriminatory practices that perpetuate racial and ethnic subordination.[126]

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enforce group inequality." Siegel, *supra* note 18, at 1547. Thus, the "application of the anticlassification principle [has] shift[ed] over time" in ways that incorporate "antisubordination values" into equality law. Balkin & Siegel, *supra* note 18, at 13–14.

121. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting); *id.* at 799 n.3 (Stevens, J., dissenting); Siegel, *supra* note 104, at 1305 (explaining that dissenting Justices in *Parents Involved* adopted antisubordination understanding of equal protection).

122. *Parents Involved*, 551 U.S. at 799 n.3 (Stevens, J., dissenting). As Justice Harry Blackmun once put it, "in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

123. *See Parents Involved*, 551 U.S. at 838–45 (Breyer, J., dissenting).

124. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982) (quoting Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980)).

125. *See id.*

126. *See id.* at 611–12 (Brennan, J., concurring) (comparing Puerto Rico's standing to standing of organizations in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (holding that fair housing organization had standing to challenge "steering practices [that had] perceptibly impaired [the organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers"), *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S.

The *Snapp* Court's recognition of a relationship between poverty and discriminatory subordination also underscores its substantive vision of a state's interest in combatting discrimination. From the perspective of an antisubordination theorist, "policies promoting economic growth are an important part of equality law insofar as growth is associated with employment and the reduction of poverty."[127] According to the *Snapp* Court, not only did Puerto Rico have an interest in redressing the stigmatization of its labor force, it also had an interest in solving the problem of "[u]nemployment among Puerto Rican residents."[128] The Fourth Circuit elaborated on those intertwined interests, explaining that "[t]he island's officials are coping with an almost unmanageable unemployment problem. . . . The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low."[129] Therefore, the Fourth Circuit concluded, the apple growers' deliberate stigmatization of the Puerto Rican work force "carr[ied] a universal sting."[130] Thus, Puerto Rico's interest in combatting inequality and reducing poverty were intertwined.[131]

Affirmative litigation by Puerto Rico's government was appropriate to achieve those goals in light of the barriers to litigation by Puerto Rican migrant workers. The federal employment service scheme under which Puerto Rico sued operated for the benefit of Puerto Rican workers and, in theory, they might have claimed standing to sue in their own right. In practice, however, "[m]igrant farm workers are so destitute that . . . . [i]t cannot be said with any assurance that they are in positions to litigate the

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252, 263 (1977) (holding that nonprofit corporation had standing to sue based upon its "interest in making suitable low-cost housing available in areas where such housing is scarce"), and *NAACP v. Burton*, 371 U.S. 415, 428 (1963) (holding that NAACP could sue to challenge state law that effectively limited the its ability to advocate for racial equality)).

127. Sunstein, *supra* note 117, at 2451.

128. *Snapp*, 458 U.S. at 609.

129. *Snapp*, 632 F.2d at 370.

130. *Id.*; *see Snapp*, 458 U.S. at 609 (concurring with Fourth Circuit's holding that Puerto Rico had judicially cognizable interest in combatting discriminatory stigmatization).

131. Thus, *Snapp* does not depend solely upon a conceptualization of discrimination's harms in terms of psychological stigmatization; it also points towards the material harms of racism and ethnic prejudice. *See generally* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1058–59 (2007) (critiquing account of harms of racism that emphasizes "psychological damage" without accounting for "racism's material manifestations").

issues effectively."[132] Nor, it appeared, was the Department of Labor in a position to effectively enforce the employment scheme on behalf of Puerto Rican workers, which underscored the problem of discriminatory subordination and supported Puerto Rico's claim of standing to sue.[133]

Puerto Rico's standing to combat discriminatory subordination found further support from the connection between equality and public administration. As a government, Puerto Rico "participate[d] directly in the operation of the federal employment scheme"; this participation as a public administrator made "even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents."[134] In particular, Puerto Rico's own Department of Labor had a duty under Puerto Rican law to improve working conditions and to address problems of widespread unemployment.[135] Puerto Rico's suit was "in furtherance" of that department's responsibilities as a public administrator.[136] In the decades since *Snapp* was decided, it has become apparent that administrative agencies play a crucial role in advancing equality law, both by enforcing antidiscrimination norms[137] and by

132. *Snapp*, 632 F.2d at 370.

133. *See id.* ("The apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico."); *cf. Snapp*, 458 U.S. at 610 n.16 (noting that "the Secretary of Labor has represented that he has no objection to Puerto Rico's standing as *parens patriae* under these circumstances").

Puerto Rico's claim on the merits presents difficult normative questions about employment preferences and affirmative action. After all, Puerto Rico sought to challenge the defendants' decision to hire Jamaican migrant workers over Puerto Rican migrant workers. *See Snapp*, 632 F.2d at 367. Puerto Rico's suit thus presented complex questions about the intersections among employment preferences for domestic workers and race and ethnicity in a globalized economy.

134. *Snapp*, 458 U.S. at 610.

135. *Snapp*, 632 F.2d at 369.

136. *Id.*

137. *See, e.g.*, Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807, 1813 (2017) (discussing and defending role of federal agencies in "interpret[ing] statutes in a way that provides historically marginalized groups with protections that the Supreme Court has denied them"); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 831 (2015) (explaining that "as early as 1936, federal welfare administrators applied the Equal Protection Clause to their work"); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1898 (2013) (discussing rulemaking by Department of Housing and Urban Development that "could be seen as part of an effort to pursue the constitutional goal of equal protection" and surveying issues raised by

adopting "innovative inclusionary regulations" that do not depend upon antidiscrimination law and aim to advance "social inclusion."[138] Puerto Rico's attempt to put Depression era unemployment legislation to work in combatting discriminatory subordination through public administration and litigation was an innovative response to a problem that Puerto Rico could not address through its laws alone.[139]

In short, *Snapp*'s substantive vision of state standing for equality reflects an antisubordination understanding of antidiscrimination, one in which a state has a substantial interest in affirmative litigation designed to combat social practices and structures, including structures of poverty, that perpetuate discriminatory subordination, particularly where the state participates in a federal scheme that seeks to address these sorts of problems. Thus, there are multiple threads to *Snapp*'s standing analysis. Subsequent state litigation has picked up on these threads, advancing the substantive vision of state standing to combat subordination while revealing that state standing for equality is not limited to *parens patriae* representation based upon quasi-sovereign interests.

II. STATE STANDING FOR EQUALITY TODAY

Snapp's substantive vision of federalism and equality law is reflected in state standing for equality today. But the scope of state standing for equality is much broader than *Snapp* itself might suggest. Of course, states may seek, as in *Snapp*, to stand upon their quasi-sovereign interests in protecting their residents from discrimination. They may also, however, stand for equality on the same terms as a private party might, invoking the same doctrines that permit private litigants to sue in federal court. States may, for instance, stand for equality when they vindicate their own

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"administrative constitutionalism"); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 807 (2010) (exploring how administrative agencies "actually go about interpreting and implementing the Constitution" and its guarantee of equal protection).

138. Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115, 134 (2016); *see also* Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1775 (2017) (discussing emergence of "novel forms of regulation by civil rights agencies").

139. *Cf. Snapp*, 458 U.S. at 609–10 (concluding that Puerto Rico's standing was supported by its participation in federal scheme designed to address a problem that in theory Puerto Rico might have tried to "address . . . through its own legislation").

"private" rights or when they invoke third party standing to represent another's rights. In addition, states may stand for equality when they seek to vindicate their powers to govern, including their powers to make law and to administer regulatory programs. States may, in other words, invoke not only their quasi-sovereign interests as in *Snapp*, but also their proprietary or sovereign interests to stand for equality in federal court.

This Part explores recent examples of state standing for equality, beginning with cases in which states have claimed standing on the same terms as a private litigant might, then discussing cases involving sovereign standing to enforce equality law, and concluding with cases in which states have relied upon *Snapp*'s discussion of a state's quasi-sovereign interest in combatting discrimination. What links these cases together is their commitment to a vision of federalism in which states have substantial interests in suing to address practices or policies that would subject their residents to discriminatory subordination.

A. State Standing for Equality on the Same Terms as Private Standing

State standing for equality need not depend upon special solicitude for states in the standing analysis. In some cases, states may point to the same sorts of injuries that a private party might advert to in order to establish constitutional standing to vindicate their own rights, including their own rights as sovereigns. And states may also seek to vindicate the rights of third parties by pointing to the same prudential rules that apply to third-party standing in private litigation.

1. First-Party Standing

In some cases, states—or their subdivisions—may stand for equality on the same terms as a private party. They may, for example, point to proprietary injuries as the basis for constitutional standing while seeking to vindicate their own rights under federal law.

Recent sanctuary city litigation provides a ready example. In *County of Santa Clara v. Trump*,[140] local governments sued in the federal Northern District of California for a preliminary injunction against an executive order issued by President Trump that threatened to eliminate funding from sanctuary jurisdictions. This order, which reflected President Trump's campaign promise to deport millions of undocumented immigrants,[141] directed federal agencies to "[e]nsure" that sanctuary jurisdictions would

140. Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

141. *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 783 (2017).

not "receive Federal funds, except as mandated by law."[142] Santa Clara County, the lead plaintiff, received approximately 35% of its total annual revenue from federal funding.[143] The district court held that the local government plaintiffs suffered an injury in fact from the Administration's threat to cut off federal funding,[144] which would result in budget uncertainty and the anticipated loss of millions of dollars.[145] The district court concluded that the local governments' various constitutional challenges were likely to succeed and granted a nationwide preliminary injunction to protect them from the Trump Administration's attempt "to coerce them into changing their [law enforcement] policies in violation of the Tenth Amendment."[146]

In *City and County of San Francisco v. Trump*, the Ninth Circuit made short work of the Trump Administration's argument that San Francisco, as well as Santa Clara County, lacked standing to challenge the President's executive order on sanctuary jurisdictions.[147] Standing straightforwardly followed from the fundamental principle that "[a] 'loss of funds promised under federal law[] satisfies Article III's standing requirement.'"[148] Because both counties had "policies in place that arguably would qualify for grant withdrawal under the Executive Order, with potentially devastating consequences," they had standing to challenge that order.[149]

The California Attorney General brought a similar suit on behalf of the State of California, which also stood to lose federal funding under the Trump Administration's policy against sanctuary jurisdictions.[150] This suit likewise relied on the financial threat to the state's fiscal budget for standing purposes.[151]

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142. Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

143. *Santa Clara*, 250 F. Supp. 3d at 511–12.

144. *See id.* at 528–30.

145. *See id.* at 529 (holding that plaintiffs "have demonstrated that the Order threatens to withhold federal grant money and that the threat of the Order is presently causing [them] injury in the form of significant budget uncertainty").

146. *Id.* at 536–37.

147. *See* San Francisco v. Trump, 897 F.3d 1225, 1235–36 (9th Cir. 2018).

148. *Id.* at 1235 (quoting Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 965 (9th Cir. 2015)).

149. *Id.* at 1236.

150. *See* California v. Sessions, No. 17-cv-04701-WHO, at *1–2, *15–16 (N.D. Cal. Mar. 5, 2018) (denying preliminary injunction on the merits but concluding that financial injuries sufficed for Article III).

151. *See id.* at 15–16.

A financial injury, such as a loss of federal funds, would give a private party standing to sue under Article III.[152] In these cases, states and their subdivisions have standing on the same terms as a private party might. Such a financial injury may give a state or its subdivision standing to raise its own rights as a sovereign government. Santa Clara, for example, sought to vindicate its own rights under the Tenth Amendment.[153]

Although these cases do not seek to advance equal protection norms directly, they do seek to advance the goal of combatting discriminatory subordination. Santa Clara County, for example, had adopted a policy prohibiting its employees "from 'initiat[ing] any inquiry or enforcement action based solely on the individual's actual or suspected immigration status, national origin, race, ethnicity, and/or inability to speak English.'"[154] Its challenge to the Trump Administration's sanctuary city policy indirectly advanced that antidiscrimination norm.

More generally, by vindicating its Tenth Amendment rights, Santa Clara stood for equality insofar as the Trump Administration's sanctuary city and immigration policies would naturally, if not inevitably, lead to discrimination on the basis of race, ethnicity, or national origin. As Kevin Johnson has argued, "local criminal arrests and prosecutions influenced by police reliance on race inexorably contribute to the racially disparate removal rates experienced in the modern United States."[155] Entanglement of local police with federal immigration enforcement "has raised numerous concerns, including racial profiling and the threat of individual rights violations."[156]

Sanctuary jurisdiction policies reflect state and local goals of combatting the stigmatization of immigrants and people of color and advancing diversity and inclusivity. Such policies "reflect[] a respect for

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152. *See San Francisco*, 897 F.3d at 1234–35; Seth Davis, *The New Public Standing*, 71 STAN. L. REV. – (forthcoming 2018).

153. *See* Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017).

154. *See San Francisco*, 897 F.3d at 1236.

155. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1001 (2016).

156. Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California Trust Act*, 18 CHAP. L. REV. 481, 482 (2015); *see also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. Rev. 539, 568 (2017) ("Another significant goal of some delineation critiques [of the conflation of immigration policy with crime control]—particularly those focusing on the deeper, race-based logic of the 'criminal alien' paradigm—is to restore equal treatment for immigrants or Latinos.").

and appreciation of diverse communities," and recognize that immigration enforcement can have ramifying effects to perpetuate subordination "across workplaces, homes, schools, and neighborhoods."[157] President Trump announced his candidacy with a speech that stigmatized Mexican immigrants as rapists and drugdealers.[158] Since the inauguration, the President has doubled down on that stigmatizing rhetoric.[159] Against this backdrop, state and local litigation challenging the Administration's threats to withdraw funding from sanctuary cities should be seen as examples of state standing for equality in the vein of *Snapp*. Though these cases show that states need not point to quasi-sovereign interests to stand for equality, they share with *Snapp* a substantive vision of federalism and equality in which states have judicially cognizable interests that permit them to combat racial and ethnic subordination.

2. Third-Party Standing

In the sanctuary city litigation, states and local governments have raised their own rights to challenge federal action on the merits. A state's standing to vindicate equality need not, however, depend upon the state's own rights. Instead, a state may seek third-party standing to litigate an equal protection claim.

A private party with Article III standing may have third-party standing to raise the rights of another party in litigation.[160] Third-party standing depends on the relationship between the litigant and the third party whose rights are at stake and on the third party's ability to assert her own rights.[161] To establish third-party standing, a private litigant must show that the third party's interests are "inextricably bound up with the activity the litigant wishes to pursue"; that she is "fully, or very nearly, as effective a

157. Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1769 (2018).

158. *See id.* at 1715 & n.45 (quoting *Donald Trump Transcript: "Our Country Needs a Truly Great Leader"*, WALL STREET J. (June 16, 2015, 2:29 PM), http://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader [https://perma.cc/WK96-9X6P]).

159. *See id.* at 1716 & n.54 ("In July 2017, President Trump told community members in Suffolk County, New York that undocumented immigrants who commit crimes of violence are 'animals' that render cities 'bloodstained killing fields . . . .'") (quoting Maggie Haberman & Liz Robbins, *Trump, on Long Island, Vows an End to Gang Violence*, N.Y. TIMES (July 28, 2017), http://www.nytimes.com/2017/07/28/us/politics/trump-immigrationgangviolence-long-island.html [https://perma.cc/R2WT-RLTU]).

160. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 193–95 (1976).

161. Singleton v. Wulff, 428 U.S. 106, 114–16 (1976).

proponent of the right" as the third party; or, finally, that there is a "genuine obstacle" to the third party's assertion of her rights in court.[162]

In *Washington v. Trump*, for example, Washington and Minnesota challenged the Trump Administration's ban on travel from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—all majority-Muslim countries.[163] The Ninth Circuit held that the states had Article III standing to sue the Administration to redress a proprietary injury to their public universities arising from the President's travel ban.[164] Because of the ban, nationals of the seven affected countries could not travel to the United States to teach, research, or study at Washington's or Minnesota's public universities.[165] As a result, the states suffered financial injuries to their "proprietary interests as operators of their public universities."[166] The University of Washington, for example, stood to lose its investment on visa applications and other costs for foreign nationals denied entry under the ban.[167] Although the plaintiff states raised other interests, including their quasi-sovereign interests in protecting their citizens, the Ninth Circuit held that their proprietary interests sufficed to establish Article III standing.[168]

Although the court in *Washington v. Trump* allowed the states third-party standing to assert the rights of students and scholars, including their equal protection rights,[169] it did not afford "special solicitude" to the states.[170] Special solicitude was not necessary because, as the Ninth Circuit noted, private schools have standing to assert the rights of their students.[171] Similarly, the court of appeals reasoned, "the interests of the States' universities . . . are aligned with their students."[172] Moreover, the work of their faculty members was necessary for the running of the university, giving the states third-party standing to assert the rights of faculty denied

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162. *See id.*
163. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).
164. *Id.* at 1159–60.
165. *Id.* at 1161.
166. *Id.* at 1161 n.5.
167. *Id.* at 1161 ("We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order.").
168. *Id.*
169. *Id.* at 1160; *see also id.* at 1167–68 (reserving consideration of equal protection claim on the merits until it had been fully briefed).
170. *See id.* at 1158–61 (affording the state third-party standing without discussing "special solicitude" under *Massachusetts v. EPA*, 549 U.S. 497 (2007)).
171. *See id.* at 1160 (citing Runyon v. McCrary, 427 U.S. 160, 175 & n.13 (1976)).
172. *Id.*

entry under the ban.[173] As proprietors of their public universities, the states had third-party standing to challenge the travel ban on the same terms as a private university might have.[174]

On the merits, the states' suit challenged the Trump Administration's travel ban on several grounds, including religious discrimination.[175] Prior to the executive order announcing the first travel ban, the President had made "numerous statements . . . about his intent to implement a 'Muslim ban.'"[176] As a presidential candidate, Donald Trump repeatedly "equated Islam with terrorism," including with the flat assertion that "'Islam hates us.'"[177] Although the Ninth Circuit did not reach the merits of the religious discrimination claim in its initial decision in *Washington v. Trump*,[178] the state had standing to raise it, and the President's stigmatization of Muslims remained a central piece of subsequent state litigation challenging subsequent iterations of the travel ban, including under the Establishment Clause.[179] Just as Puerto Rico sought to challenge "[d]eliberate efforts to stigmatize the labor force as inferior" in *Snapp*,[180] so too did the states seek to challenge a policy that was based upon stigmatization and "apparent hostility toward the Islamic faith."[181] But while *Snapp* premised state standing on quasi-sovereign interests, the travel ban litigation underscores

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173. *Id.*

174. *See id.* (citing cases involving private schools).

175. *See id.* at 1167.

176. *See id.*

177. Caroline Mala Corbin, *Essay: Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 476 (2017).

178. *Washington*, 847 F.3d at 1168.

179. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting) (arguing that record of adoption of various travel bans "paints a . . . harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus towards the Muslim faith"). *But see id.* at 2418 (majority op.) (stating that "issue before us is not whether to denounce the [President's] statements" and concluding that final iteration of travel ban had a "sufficient national security justification to survive rational basis review").

180. Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980), *aff'd sub. nom.* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982).

181. *Hawaii*, 138 S. Ct. at 2439 (Sotomayor, J., dissenting); *see also* Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017) ("Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States.").

that the possibilities for state standing for equality are much broader than that, and encompass cases in which a state seeks standing based upon the same doctrines that might support private standing to sue.

B. Sovereign Standing to Enforce Equality Law

In other cases, however, a state may claim its own sovereign standing to enforce equality law. In *Hawaii v. Trump*, for example, the State of Hawaii challenged President Donald Trump's second ban on travel from several Muslim-majority countries.[182] Hawaii argued that it had standing on several bases, including proprietary interests as well as its "sovereign interests in carrying out its refugee policies" and implementing its "laws protecting equal rights, barring discrimination, and fostering diversity."[183] The Ninth Circuit held that the state had Article III standing based upon its proprietary interests in operating the University of Hawai'i.[184] But the court of appeals also went beyond the standing doctrines that would apply to private proprietors to conclude the state had standing as a sovereign to challenge the travel ban.[185]

According to the state, the Trump Administration's travel ban interfered with Hawaii's sovereign interest in implementing its refugee policies and equality laws by resettling refugees within Hawaii.[186] The Ninth Circuit held that these allegations sufficed to give the state standing to seek a preliminary injunction against the travel ban, reasoning that:

> A State has an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." [*Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).] The State contends that [the executive order banning travel] hinders the exercise of its sovereign power to enforce its laws and policies and this inflicts an injury sufficient to provide the State standing to challenge the Order. The State has laws protecting equal rights, barring discrimination, and fostering diversity. . . . Specific to refugees, the State created the Office of Community Services ("OCS"), which is directed to "[a]ssist and

182. *See* Hawaii v. Trump, 859 F.3d 741 (9th Cir.), *cert. granted sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

183. *Id.* at 765.

184. *See id.*

185. *See id.*

186. *See id.*

> coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." . . .
>
> As the State exercises "sovereign power over individuals and entities within the relevant jurisdiction" in administering OCS, we conclude, at this preliminary stage, that the State has made sufficient allegations to support standing to challenge the refugee-related provisions of [the executive order banning travel]. *See Alfred L. Snapp & Son*, 458 U.S. at 601.[187]

The Ninth Circuit's reasoning pulls on several strands of the *Snapp* Court's analysis. As in *Washington v. Trump*,[188] the state of Hawaii sought to challenge federal executive action that stigmatized and subordinated Muslims as a disfavored group.[189] In *Hawaii v. Trump*, the Ninth Circuit pointed to a state's unique sovereign status as a basis for standing to sue.[190] The court's reasoning drew not upon *Snapp*'s discussion of a state's quasi-sovereign interest in combatting discrimination, but instead upon *Snapp*'s dictum that a state has a judicially-cognizable sovereign interest in making and enforcing its own laws. Such an interest was at stake in *Hawaii v. Trump*, the court of appeals reasoned, because, as in *Snapp* itself, the state had created an agency tasked with addressing the problem that the state sought to address through federal litigation. This reasoning picks up on the *Snapp* Court's connection between equality and public administration.[191] Hawaii's administration of its own laws through OCS established, or at least supported, its standing to sue, much as Puerto Rico's administration of its own laws through its Department of Labor supported its standing in *Snapp*, or so the Ninth Circuit reasoned.[192]

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187. *Id.* (internal citations omitted).

188. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

189. *See supra* notes 175–81 and accompanying text.

190. *Hawaii*, 859 F.3d at 765.

191. *See supra* notes 134–39 and accompanying text.

192. In *Snapp*, Puerto Rico's Department of Labor "participate[d] directly in the operation of the federal employment scheme" under which Puerto Rico had sued. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 (1982). The Ninth Circuit did not discuss whether the State of Hawaii's OCS similarly participated in the administration of federal programs concerning refugee resettlement, although it concluded that the state's sovereign interest was within the zone of interests protected by the refugee admission provisions of the Immigration and Nationality Act. *See Hawaii*, 859 F.3d at 766; *see also infra* notes 258–263 and accompanying text (discussing normative importance of state's direct participation in federal regime for state standing analysis).

C. Quasi-Sovereign Standing for Equality

States have also relied on *Snapp*'s discussion of a state's quasi-sovereign interest in combatting discrimination, sometimes reading it for all it may be worth. Claims of quasi-sovereign state standing have appeared in both the travel ban litigation and litigation concerning the Trump Administration's ban on openly transgender individuals' military service.

In *Aziz v. Trump*, the Commonwealth of Virginia sued to challenge the Trump Administration's first travel ban from a number of Muslim-majority countries.[193] Virginia brought claims based upon equal protection, the First Amendment, and the Religious Freedom and Restoration Act, among others, alleging in particular that the individual rights of at least 300 people were at stake.[194] Based on these allegations, a federal district court concluded that Virginia had standing.[195] Specifically, the state pled a sufficient interest in "'secur[ing] its residents from the harmful effects of discrimination.'"[196]

As the district court saw it, Virginia's allegations presented a "textbook" case for quasi-sovereign standing under *Snapp*.[197] As in *Snapp*, the state sought to challenge discriminatory subordination.[198] In that sense, at least, Virginia's quasi-sovereign interest mirrored the interest that supported Puerto Rico's standing to sue. The district court went on to reason that "as in *Snapp*," so too in this case, "the stigma of discrimination 'carr[ied] a universal sting.'"[199] But while an antisubordination understanding would help explain how discrimination against some Puerto Ricans would stigmatize all Puerto Ricans, it is less clear in what sense discrimination against Muslims would stigmatize all Virginians, Muslim and non-Muslim alike. And in this sense, *Aziz* may not have been a textbook case for quasi-sovereign standing under *Snapp*. The district court in *Aziz* seemed to extend *Snapp*'s rationale to suggest that a state has a substantial interest in assuring all its residents, including those who are not members of the disfavored group facing discrimination, that it will act to address discriminatory subordination.

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193. Aziz v. Trump, 231 F. Supp. 3d 23, 27 (E.D. Va. 2017).

194. *Id.* at 32.

195. *Id.*

196. *Id* (quoting *Snapp*, 458 U.S. at 609).

197. *Id.*

198. *See supra* notes 175–181 (analyzing Trump Administration's travel bans under antisubordination theory of equality).

199. *Aziz*, 231 F. Supp. 3d at 32 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. at 609)).

In *Karnoski v. Trump*, by contrast, the federal district court premised a state's quasi-sovereign standing solely upon the state's interest in protecting members of the subordinated group.[200] In that case, the State of Washington asserted several bases for standing in seeking to intervene in a private lawsuit challenging the Trump Administration's ban of transgender individuals from military service.[201] The Administration's policy would have required the discharge of openly transgender individuals, denied them an opportunity to join the military, and prohibited the use of particular federal funds for certain medical procedures for transgender individuals.[202] Transgender individuals undoubtedly had standing to challenge the ban as unlawful discrimination.[203] The federal district court concluded that Washington also had standing to challenge the ban.[204] In asserting standing to sue, the state pointed to its uniquely sovereign interests, specifically its interests in constituting the Washington National Guard and in "maintaining and enforcing its own anti-discrimination laws."[205] In addition, the state pointed to a quasi-sovereign interest in protecting transgender individuals from discrimination.[206] The district court concluded that Washington had a quasi-sovereign interest in '"securing residents from the harmful effects of discrimination."'[207] More particularly, Washington had a quasi-sovereign interest in "protecting its transgender residents from a discriminatory policy."[208] Such discrimination, the district court pointed out, has been "systemic" in the United States,[209] and the state's standing permitted it to

200. Karnoski v. Trump, No. C17-01297MJP, 2017 WL 5668071, at *2 (W.D. Wash. Nov. 27, 2017).

201. *See id.*

202. *Id.* at *1.

203. Karnoski v. Trump, No. C17-01297MJP, 2017 WL 6311305, at *4 (W.D. Wash. Dec. 11, 2017).

204. *Id.* at *6.

205. *Karnoski*, 2017 WL 5668071, at *3 (determining that such interests sufficed for purposes of intervention in the suit); *see Karnoski*, 2017 WL 6311305, at *6 (holding that these sovereign interests sufficed for Article III standing); Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *9 (W.D. Wash. Apr. 13, 2018) (same).

206. *Karnoski*, 2017 WL 6311305, at *6.

207. *Id.* at *6 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982)).

208. *See also Karnoski*, 2017 WL 5668071, at *2; *Karnoski*, 2018 WL 1784464, at *9 (explaining that "Washington is also home to approximately 32,850 transgender adults, and its laws protect these residents against discrimination on the basis of sex, gender, and gender identity").

209. *See Karnoski*, 2018 WL 1784464, at *10.

challenge the Trump Administration's perpetuation of that systemic subordination of transgender people.

Taken together, *Aziz* and *Karnoski* both reflect *Snapp*'s discussion of a state's quasi-sovereign interest in combatting subordination and raise questions about its scope. *Snapp*'s substantive vision of federalism and equality law continues in the contemporary cases of state standing for equality. Federalism, in this vision, entails a substantial state interest in combatting discriminatory subordination. As the more recent cases attest, moreover, states are not limited to litigating quasi-sovereign interests when they seek to stand for equality in federal court. The multiple potential bases for state standing for equality complicate the doctrinal and normative analysis, raising questions about the future of state standing for equality.

III. THE FUTURE OF STATE STANDING FOR EQUALITY

This Part argues that the future of state standing for equality may be driven by the ways in which states frame their judicially cognizable interests in combatting discrimination. State standing for equality, particularly of the quasi-sovereign variety in *Snapp*, faces doctrinal headwinds. For one, the Court has moved considerably far from the antisubordination understanding of equality law. States standing for equality have tended to bring suits that would benefit members of subordinated groups, rather than suits that would benefit members of the majority based upon an anticlassification understanding, such as suits that challenge affirmative action or allege reverse discrimination. For another doctrinal headwind, the standing of states to sue the federal government based upon quasi-sovereign interests remains unsettled. The Court is more likely to permit states to stand for equality when the case is framed in terms of proprietary or sovereign standing. *Snapp*'s framing of state standing for equality in terms of quasi-sovereign interests may not be the future of state standing of equality, even if its substantive vision of federalism and equality law continues to support state litigation to combat discrimination.

The goal of this Part is not to resolve all the doctrinal and normative questions arising from state standing for equality,[210] but instead to focus

210. This Part does not, for example, address whether a state may stand for its residents in *parens patriae* only when those residents are unable "to obtain complete relief without intervention by the sovereign," an important question for the future of state standing for equality. Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 369 (4th Cir. 1980). Elsewhere I have argued for some limitations on the power of states to substitute themselves for their residents in the enforcement of private rights, particularly under federal law where

upon how the framing of the state's interest may determine doctrinal prospects.[211] This Part first discusses the doctrinal headwinds facing state standing for equality and then assesses the importance of framing for its prospects. It concludes by discussing the possibility that much as concerns about antisubordination have become "disguised, qualified, and bounded" in equal protection jurisprudence,[212] so too may they be embedded within a standing jurisprudence that pushes states to frame litigation on behalf of subordinated groups in terms that do not refer to that subordination directly.

A. Doctrinal Headwinds

State standing for equality faces doctrinal headwinds both in terms of the doctrine's substantive understanding of equality law and its reliance on quasi-sovereign interests to support standing to sue.

Congress has not authorized *parens patriae* litigation. *See* Davis, *supra* note 17, at 40–47.

Nor does this Part address the important question whether limits on *parens patriae* standing in suits against the federal government are constitutional or prudential. *See, e.g.*, Maryland People's Counsel v. FERC, 760 F.2d 318, 321 (D.C. Cir. 1985) (Scalia, J.) (concluding that limits are prudential). I address that question in Davis, *supra* note 152, at 64–65.

Finally, this Part does not fully explore the limits on states' standing to sue in a sovereign capacity against the federal government. Some cases involving state standing for equality push the boundaries of existing doctrine. In *Hawaii v. Trump*, for example, the Ninth Circuit adverted to the state's sovereign interest in its "laws protecting equal rights, barring discrimination, and fostering diversity" as a basis for standing to sue. Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir. 2017). Under well-established law, a state would have standing to defend its equality laws against attack in federal court. *See* Grove, *supra* note 15, at 858 (discussing "background principle[] . . . that a sovereign government must have standing to enforce and defend its laws in court"). But *Hawaii v. Trump* was not a case in which the state's equality law was on trial, and there are powerful arguments that a state should not be able to sue simply because federal law conflicts with a policy declared in state law. *See, e.g.*, Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011). In my view, Hawaii's standing depended upon its proprietary interests and the normal rules for third-party standing.

211. Richard Primus has explored a similar doctrinal and normative inquiry regarding the future of disparate impact. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1346–47 (2010).

212. Siegel, *supra* note 18, at 1547.

1. The Shift from Antisubordination to Anticlassification

The Supreme Court decided *Snapp* in 1982, during roughly the same period it was moving away from an antisubordination understanding of equal protection towards an anticlassification understanding. On the standard history, that shift began in the 1970s.[213] In 1978, the Court split over the lawfulness of affirmative action in higher education, applying strict scrutiny to the University of California, Davis School of Medicine's special admissions program that aimed to increase the number of members of historically underrepresented groups admitted to the school.[214] Justice Lewis Powell "supplied the crucial fifth vote in *Bakke* to reject an antisubordination (or 'two-class') reading of the Equal Protection Clause."[215] Justice Byron White, also the author of Court's opinion in *Snapp*, penned a concurring opinion questioning whether Title VI "create[d] a stricter standard of color blindness than the Constitution itself requires" and arguing that the statute did not imply a private right of action,[216] while also joining an opinion by Justice Brennan concluding that the Davis Medical School's affirmative action program was constitutional.[217] Justice White's apparent comfort with an antisubordination understanding in *Bakke* and *Snapp* is not easy to square with his 1976 opinion for the Court in *Washington v. Davis*,[218] which held that plaintiffs must demonstrate discriminatory intent to prove racial discrimination under the Equal Protection Clause.[219] *Snapp*'s discussion of a state's interest in combatting discriminatory subordination appeared when the antisubordination understanding of equality law was already, like the Owl of Minerva, "'passing into history.'"[220]

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213. *See* Balkin & Siegel, *supra* note 18, at 10 ("A fairly standard story about the development of antidiscrimination jurisprudence since the 1970s argues that the views of [Owen] Fiss and other antisubordination theorists were rejected by the U.S. Supreme Court, which adopted a contrary and inconsistent theory of equality. . . . sometimes called the anticlassification or antidifferentiation principle.").

214. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295–97 (1978).

215. Siegel, *supra* note 104, at 1292.

216. *Bakke*, 438 U.S. at 385 (White, J., concurring).

217. *See id.* at 326 (Brennan, J., concurring in judgment in part and dissenting in part).

218. *See* Washington v. Davis, 426 U.S. 229, 244–45 (1976).

219. *See* Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471, 476–80 (1987) (discussing evolution of Justice White's thinking).

220. *See* Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1585 (1993) (citing T.M. Knox,

Today, talk of state standing for equality may be apt to conjure the Court's discussion of a state's interest in combatting antidiscrimination law on the grounds that it offends the equal sovereignty of the states. In *Shelby County v. Holder*, the Court held that Section 4 of the Voting Rights Act ("VRA") violated the "equal sovereignty" of the states subjected to the preclearance requirements of Section 5.[221] The Court emphasized the "great strides" it believed America had made in combatting racial discrimination.[222] The *Shelby County* Court's seeming perception that racial minorities have adequate access to the political process cuts against an antisubordination understanding and in favor of anticlassification understanding of the wrongs that equality law should now address.[223]

It is not clear what work *Snapp*'s account of state standing has to do in a world where anticlassification is the harm that equality law addresses. One could imagine, of course, that one state might sue another based on an allegation of an impermissible classification, bringing, for example, a *parens patriae* suit to challenge alleged reverse discrimination. Imagine, for example, one state suing to challenge the affirmative action policies of another state's higher education system. But the cases have not followed that pattern, and for good reason. The anticlassification understanding focuses upon individualized harms.[224] According to *Snapp*, such harms do not suffice to make out a quasi-sovereign interest for *parens patriae* standing.[225] As the Court put it, "[i]nterests of private parties are obviously not in themselves sovereign interests," and in order to enjoy *parens patriae* standing, a state "must articulate an interest apart from the interests of particular private parties."[226] Such quasi-sovereign interests exist, *Snapp* explained, when a state challenges discriminatory actions that cause not only individualized harm, but also injury to "a sufficiently substantial segment of [the state's] population."[227] Quasi-sovereign standing is keyed

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Translator's Foreward, *in* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 13 (T.M. Knox ed. & trans., 1957)).

221. Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013).

222. *Id.* at 549.

223. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1598–99 (2018).

224. *See supra* notes 98–101 and accompanying text.

225. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

226. *Id.* at 602, 607.

227. *See id.* at 607 (explaining that "more must be alleged than injury to an identifiable group of individual residents" and that "the State [must] allege[] injury to a sufficiently substantial segment of its population").

to group harms in ways that resonate with an antisubordination understanding of discrimination but not with an anticlassification understanding.[228]

The shift from an antisubordination to an anticlassification understanding of discrimination has coincided with increasing conservatism on the Supreme Court, beginning with the Burger Court and continuing on the Rehnquist and Roberts Courts.[229] Bertrall Ross has argued that the cases evince less a shift from antisubordination to anticlassification than a reorientation of the Court's understanding of subordination and the political process: "Group-based domination and subordination, according to the new conservative construction of the Equal Protection Clause, [are] no longer shaped by a long history of racial oppression, but instead determined by the current political context."[230] In this reoriented understanding, the current political context may suggest that racial, or other, minorities have captured the political process to engage in self-dealing.[231] From that perspective of "renewed distrust" of the political process,[232] the recent examples of state standing for equality, including the travel ban and sanctuary city litigation, may suggest that states are not due solicitude when they seek to challenge discrimination against historically disadvantaged minorities. Rather, judicial suspicion of a state attorney general's decision to sue might be warranted, much as the Roberts Court thought suspicion of Congress was warranted in *Shelby County*.[233]

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228. To the extent that an anticlassification understanding is compatible with concerns with group harm, this point has less force. Paul Brest attempted to combine the two in Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1–2 (1976), but as Ian Haney López has pointed out, "[w]edding an anticlassification stance to a concern with group harm introduced core instabilities into [Brest's] article." Haney López, *supra* note 131, at 1058.

229. *See, e.g*, Ross, *supra* note 18, at 1597.

230. *Id.*

231. *See id.* at 1605 (arguing that Court's suspicion of affirmative action programs "reflected a conservative concern that racial minorities were engaging in a form of self-dealing that was unaccountable to the pluralist marketplace [of politics]").

232. *Id.* at 1565.

233. *Cf. id.* at 1632–33 (discussing public choice critique that would suggest *Shelby County* was rightly decided because the Voting Rights Act "insofar as it protects the representational rights of minority groups, . . . merely heightens advantages that members of these groups already have in the political process").

2. The Unsettled Law of Quasi-Sovereign Standing

Chief Justice Roberts has already laid the doctrinal groundwork for judicial suspicion of quasi-sovereign standing, particularly where a state sues the federal government.[234] Much of the normative debate surrounding state standing law today concerns whether states should be due "special solicitude in [the] standing analysis," as *Massachusetts v. EPA* put it.[235] Dissenting from the Court's judgment in that case, Chief Justice Roberts suggested that states might be due special *disfavor* in the standing analysis. He argued that "our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government."[236] In any event, the Chief Justice reasoned, a state must show that its citizens have suffered an Article III injury in their own right and many not sue simply to espouse its citizens' rights.[237]

Thus, the law concerning quasi-sovereign standing remains unsettled. Some scholars have argued that states are due special solicitude when they sue in a representative capacity because state attorneys general "are constrained by substantial fetters of political accountability."[238] But it is precisely responsiveness to historically disadvantaged minorities that might lead an increasingly conservative Roberts Court to view state standing for equality with suspicion.[239]

At a minimum, *Snapp* itself insists that there must be a distinction between simply espousing a private individual's rights, which a state lacks standing to do, and litigating quasi-sovereign interests as a *parens patriae* representative of the state's residents, which a state may have standing to pursue.[240] Although *Snapp* does not elaborate the reasons for drawing such a distinction, the Court's third-party standing cases suggest two possible concerns. First, "the courts should not adjudicate [individual] rights unnecessarily, and it may be that, in fact, the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not."[241] Second, "third parties

234. *See* Massachusetts v. EPA, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting).

235. *See id.* at 520 (majority op.).

236. *See id.* at 539 (Roberts, C.J., dissenting).

237. *See id.* at 538–39.

238. Massey, *supra* note 17, at 284.

239. *See supra* notes 229–233 and accompanying text.

240. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (requiring state to articulate a "quasi-sovereign interest" distinct from the interests of specific private parties when it seeks to sue in *parens patriae*).

241. Singleton v. Wulff, 428 U.S. 106, 113–14 (1976).

themselves will usually be the best proponents of their own rights."[242] In addition, the Court's decision in *Mellon* provides support for denying standing when a state seeks to sue the federal government as a representative of a third party's rights.[243] As a matter of principle, the *Mellon* rule is best explained by reference to concerns about states encroaching on matters that are best left to the national political branches.[244]

It is unclear how much of the *Mellon* rule survived the majority's opinion in *Massachusetts v. EPA*, which permitted the State of Massachusetts to litigate quasi-sovereign interests against a federal agency.[245] But some recent examples of state standing for equality push the boundaries of *Snapp* and *Massachusetts v. EPA* in ways that are especially vulnerable to objections based upon *Mellon*. According to Virginia's theory of standing in *Aziz v. Trump*, for example, a state has quasi-sovereign standing whenever it alleges that the federal government has violated the individual rights of an arguably non-trivial number of individuals—in that case, it was 300 individuals.[246] The normal third-party standing rules that apply to private litigants would not support standing on that basis without a special relationship between the litigant and the third parties whose rights are at stake.[247] Therefore, to grant the state standing in *Aziz* is to afford it special solicitude to represent its residents in suits against the federal government. Whether *Snapp* stretches that far is fairly debatable, if for no other reason than *Snapp* did not entail litigation against the federal government. The same objection that applied to state standing in *Mellon* might apply to quasi-sovereign standing in *Aziz v. Trump*—it is a theory of quasi-sovereign standing that knows no limit and raises a serious risk of transforming the litigation of equality law into pitched battles between states and the federal government.

By contrast, the law concerning proprietary and sovereign standing is more settled. Federal courts have long granted states proprietary standing on the same terms as private parties, including in cases against the federal government.[248] The law has also generally come to accept sovereign standing for states,[249] although some scholars have argued that the Court

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242. *Id.* at 114.
243. *See* Massachusetts v. Mellon, 262 U.S. 447, 486 (1923).
244. *See id.* at 485–86.
245. *See* Massachusetts v. EPA, 549 U.S. 497, 520 (2007).
246. *See* Aziz v. Trump, 231 F. Supp. 3d 23, 32 (E.D. Va. 2017).
247. *See Singleton*, 428 U.S. 106, 114–16.
248. *See* Davis, *supra* note 17, at 17–18.
249. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982) (discussing states' sovereign interests); Grove, *supra* note

has gone too far to permit states to embroil the federal judiciary in answering abstract questions about the allocation of authority between the states and the federal government.[250]

B. The Importance of Framing

The future of state standing equality may depend upon how states frame their interest. Recent litigation underscores that *Snapp*'s substantive vision of a state's interest in combatting discrimination need not be framed simply in quasi-sovereign terms, but may also, in many cases, be understood in proprietary or sovereign terms, including in controversial cases against the federal government. Under conditions of contemporary federalism, state and federal governance is deeply intertwined, and federal actions that may perpetuate discrimination against historically disadvantaged minorities may also inflict proprietary or sovereign injuries on the states.

The point can be illustrated with proprietary cases, such as *Washington v. Trump*,[251] as well as cases that involve sovereign interests and financial harms. Consider again *County of Santa Clara*.[252] In that case, the county sued to vindicate its Tenth Amendment rights against the Trump Administration, which, the county argued, was attempting to commandeer and coerce it into implementing the Administration's deportation policy by threatening it with the withdrawal of federal funding. The country argued that "truly local" matters were at stake, as it wanted to disentangle its law enforcement resources and devote them to other efforts.[253] This argument seems precisely the sort that a state or its subdivision should bring in federal court.

Under current doctrine, a state, or its subdivision, has justiciable interests under the Tenth Amendment. The Tenth Amendment prevents the federal government from commandeering or coercing the states into accepting conditions on federal spending.[254] States have standing to raise anti-commandeering and anti-coercion claims.[255] Such standing is

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15, at 854–55 (arguing that precedent supports state standing when states "seek to enforce or defend state law").

250. *See, e.g.*, Woolhandler, *supra* note 17, at 230.

251. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); *see supra* notes 160–181 (discussing *Washington v. Trump*).

252. Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

253. *See id.* at 511 (describing the county's policies).

254. *See* NFIB v. Sebelius, 567 U.S. 519, 585 (2012); New York v. United States, 505 U.S. 144, 187–88 (1992).

255. *See* Davis, *supra* note 17, at 72–73.

consistent with the text of the Tenth Amendment, which expressly reserves "powers . . . to the States."[256] A state is likely to be an effective litigant of the underlying merits issues that concern state sovereignty; indeed, the state may be the most effective litigant.[257]

When a state, or its subdivision, sues on a Tenth Amendment claim that happens to vindicate equality values, the most powerful objection to standing is a general one: states should not have standing to litigate Tenth Amendment claims because of the potential adverse consequences. These adverse consequences could include embroiling the judiciary in abstract political battles. This objection, however, is unrelated to the possibility that the state's suit would vindicate equality values. Instead, this objection could be leveled at any suit in which the state seeks to litigate its sovereign interests, including suits such as *Shelby County* that challenge antidiscrimination law.

Washington State's challenge to the Trump Administration's ban on openly transgender individuals in the military provides another example of sovereign standing for equality. In *Perpich v. Department of Defense*, the Court permitted a state to sue the federal government under the Militia Clauses of Article I, Section 8, which authorize Congress to provide for "organizing, arming, and disciplining, the Militia" while "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[258] The Militia Clauses afforded the state a sovereign interest in challenging federal regulation of the National Guard.[259]

In *Karnoski v. Trump*, the district court ultimately focused upon the state's sovereign interest in the National Guard in concluding that Washington could sue to challenge the Trump Administration's ban on openly transgender individuals serving in the military.[260] Though the court did not point to *Perpich*, it reasoned that the state had a judicially cognizable sovereign interest because the ban would interfere with the state's "recruitment efforts and day-to-day command over Guard members in training and most forms of active duty," as well as the state's interest in ensuring that "the Guard conforms to both federal and state laws and regulations, including the state's anti-discrimination laws."[261] As in

256. U.S. CONST. amend. X.

257. *See, e.g.*, Huq, *supra* note 17, at 1440.

258. Perpich v. Dep't of Def., 496 U.S. 334, 337 & n.3 (1990) (quoting U.S. CONST. art. I, § 8, cls. 15–16).

259. *See id.* at 336 (stating question presented on the merits).

260. *See* Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *9 (W.D. Wash. Apr. 13, 2018).

261. *See id.* at *9.

Perpich, so too in *Karnoski* did the state's sovereign interest support standing.

Comparing *Karnoski* with *Snapp* is instructive on the importance of framing the state's interest. In *Snapp*, the Supreme Court noted "the fact that the Commonwealth participates directly in the operation of the federal employment scheme," concluding that this participation made Puerto Rico's quasi-sovereign interest "even more compelling."[262] Thus, Puerto Rico's sovereign interest in public administration was a plus factor in the *parens patriae* analysis. *Karnoski* suggests that states may, in some cases, instead frame their standing for equality in sovereign terms, with quasi-sovereign concerns playing the plus factor role.[263]

Stepping back from the doctrinal details, we might see this sort of shift from quasi-sovereign to sovereign or proprietary standing as emblematic of a larger story about the antisubordination understanding of equality law. Reva Siegel has argued that the history of equal protection jurisprudence shows that "antisubordination and anticlassification are friends as well as agonists."[264] While there have been discernible shifts in understanding and emphasis, as well as the emergence of alternatives to the binary between antisubordination and anticlassification, "concerns about group subordination are at the heart of the modern equal protection tradition," even as "such concerns have been persistently disguised, qualified, and bounded."[265] Thus, as Siegel has put it with co-author Jack Balkin, "antisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice."[266] What is framed in anticlassification terms may very well vindicate values of antisubordination.

Like equality law, standing law has shifted over time in response to political and social contestation. And like equality law, the law of state standing for equality may come to embed concerns about antisubordination within frames that do not name the concern. Perhaps the result will be nothing more than a "word game played by secret rules,"[267] one in which state attorneys general find the frame that will sustain state standing for equality in an era where the assumptions of *Snapp* no longer hold.

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262. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 (1982).

263. *See Karnoski*, 2018 WL 1784464, at *9 (focusing upon enumerating several sovereign interests that sufficed for standing).

264. Siegel, *supra* note 18, at 1477.

265. *Id.* at 1547.

266. Balkin & Siegel, *supra* note 18, at 13.

267. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

Even so, games shed light on the societies that play them. In 1982, the Court treated Puerto Rico as a state with a quasi-sovereign interest in combatting discriminatory subordination.[268] Today, not only the Court,[269] but also the federal executive branch,[270] have made clear that Puerto Rico is not a state. But the principle embodied in *Snapp* remains part of our jurisprudence, one worth remembering, especially today.[271]

CONCLUSION

Understanding *Snapp* as an equality law case complicates typical stories about the relationship between constitutional structure and individual rights. Contests over the legacy of *Snapp* are contests over the meaning of our federalism and contests over the meaning of our commitments to equality under law. The future of state standing for equality may depend upon whether states frame *Snapp*'s substantive vision of federalism in ways that are likely to fit within a changed landscape of social meaning around state standing to vindicate the public interest in combatting discrimination.[272]

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268. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 n.15 (1982).

269. *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016) (holding that Puerto Rico, unlike a state, is not a sovereign separate from the United States for double-jeopardy purposes).

270. *See, e.g.*, Danny Vink, *How Trump Favored Texas Over Puerto Rico*, POLITICO (Mar. 27, 2018), https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557 [https://perma.cc/P5FN-9WVA].

271. *See generally* Peter S. Green, *Puerto Rico's Grim Prognosis: The Island May Never Recover*, CBS NEWS (Sep. 21, 2018), https://www.cbsnews.com/news/puerto-rico-hurricane-maria-by-the-numbers-cbsn-originals/ [https://perma.cc/2V7P-D75A].

272. *See* Davis, *supra* note 152 (discussing the "new public standing" doctrine affording states standing to bring public actions in federal court).