Assessing the Rise of the Governmental Plaintiff

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Seth Davis, *The New Public Standing*, 71 **Stan. L. Rev.** 1229 (2019).

Seth Davis's *The New Public Standing* canvasses and interrogates ways that state and local governments allege financial injuries to challenge the constitutional validity of federal law. Federal courts are often quite generous in entertaining private litigants' claims based on economic injuries (as opposed to ideological or "conscience-based" injuries). Across a wide range of domains, states have relied on this generosity to allege creative economic injuries, even when the states' actual objections to the relevant federal law are based on ideology. In Davis's view, this kind of "new public standing presents constitutional, prudential, and remedial issues that are distinct from those raised by private standing for the public and by private standing based upon financial injuries."

Previous scholars have examined ways that state governments allege injuries to their sovereignty or "quasi-sovereignty." States sometimes invoke the doctrine of *parens patriae* to allege injuries to the health and welfare of their citizenry; states allege injuries to the geographic reach of their sovereign territories; and states allege injuries to their lawmaking authority. It has been said that states receive "special solicitude" as quasi-sovereigns, permitting them to command the jurisdiction of federal courts under circumstances that private litigants would not.

But Davis's focus is different—he targets cases in which state and local governments allege economic injuries. By way of example, states challenging President Trump's potential violations of the Emoluments Clause contended the President's actions put them at an unfair competitive advantage, given their ownership stake in properties. States challenging President Trump's seven-country travel ban contended that the ban would affect revenue their public universities would otherwise receive from students who could not enter the United States. And at least one state challenging President Obama's Deferred Action for Childhood Arrivals ("DACA") policy argued that to comply with federal and state law, the policy would require the expenditure of funds to provide drivers' licenses to individuals who would otherwise be ineligible.

To help explain these moments, Davis offers what Richard Fallon calls a "doctrinal Realist" account of this phenomenon. He seeks to "pars[e] … opinions to identify their operative facts against background patterns that could also facilitate predictions of results in future cases." In Davis's view, the new public standing will be more durable than previous attempts to open the courthouse doors for litigants with ideological or conscience-based objections to governmental policies. He contrasts the extant phenomenon to the Supreme Court's expansion of standing for taxpayers in the late 1960's, from which the Court sharply retreated. The new public standing is distinguishable in its origins and in the scope of its ideological consequences. In contrast to taxpayer-standing doctrine, conservative states were early innovators in making expansive and creative accounts of economic harm. Moreover, so-called "blue states" and "red states" have claimed economic injury against Republican and Democratic policies. As Davis explains, the "new public standing is an important vehicle not only for progressive legal mobilization, but also for conservative legal mobilization—a vehicle that allows state executive officials of any ideology to bring partisan battles over the national public interest before the federal courts."

At the same time, Davis contends that courts and commentators should be skeptical of states' claims for a form of highly deferential "special solicitude" with respect to alleged financial injuries. He acknowledges that for states, a "loss of revenue may directly implicate the state's uniquely public capacities to make and enforce law and to provide government services." But relaxing standing requirements for states' economic injuries could result in relatively few limits to enterprising state attorneys general seeking to challenge federal laws they do not like. "Given the

interdependence of state governments and the federal government, any number of federal actions will affect a state's finances to some degree, and, therefore, any number of state attorneys general will be able to point to financial injuries as a basis for suing the federal government." Davis predicts that courts will rely on doctrines such as third-party standing and rules against manufacturing self-inflicted injuries to tame the new public standing. And he implies that this is a salutary development.

Davis also offers insights into what the new public standing might teach us about broader Article III doctrine. Given that states are relying on purported economic injuries to raise ideological objections, he contends that the rise of new public standing should encourage courts to revisit the distinction between financial and ideological injuries in private standing doctrine. Otherwise, by insisting on "concrete" injuries for private litigants who are less equipped to articulate structurally based financial arguments, public law litigation will be increasingly funneled through (sometimes highly partisan) state attorney generals' offices.

These insights will undoubtedly prove influential, as Article III courts attempt to braid the power and flexibility that the new public standing gives them with the ever-present need to tailor the role of an unelected federal judiciary to resolving actual cases and controversies. Those who care about the enforcement of public law, and those who care about the proper role of courts in a democratic society, can benefit from Davis's balanced, nuanced, and realistic analysis.

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