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SIMPLIFYING STATE STANDING: THE ROLE OF SOVEREIGN INTERESTS IN FUTURE CLIMATE LITIGATION

Abstract: As Congress has yet to enact a comprehensive legislative framework to address climate change, environmental advocates have increasingly turned to the judiciary to push for the regulation of greenhouse gas emissions. Some lawsuits have been brought against the federal government, but others have been brought against private entities under common law causes of action. This Note focuses on the state standing and separation of powers dynamics at play in this area of litigation, and considers recent arguments that states suing as *parens patriae* against private polluters should be entitled to a relaxed standing regime. It concludes that complex common law claims involve discrete separation of powers concerns that give rise to a dangerously unpredictable array of prudential justiciability limitations, and therefore proposes that state litigants invoke their sovereign interests in regulating environmentally harmful activities as the basis for standing in future climate litigation. Such interests present the types of concrete and particularized injuries that satisfy separation of powers concerns, and asserting standing on this basis reinforces federalism values by ensuring that states remain important ancillary enforcers of national environmental policies.

INTRODUCTION

Federal courts appear to be in broad agreement that climate change is happening and that humans are the primary cause.¹ Several have disagreed, however, as to whether the judiciary is the proper branch of government to resolve claims related to global warming.² In

¹ See *Massachusetts v. EPA*, 549 U.S. 497, 507–09, 521–26 (2007) (discussing international studies of climate change and reasoning that the EPA’s failure to regulate automobile emissions caused physical harm to the state); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 341–49 (2d Cir. 2009) (holding that allegations of harm caused by defendant power companies’ greenhouse gas emissions were sufficient to support standing to sue), *cert. granted*, 131 S. Ct. 813 (U.S. Dec. 6, 2010) (No. 10-174); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009) (noting that global warming “is not itself an event so much as it is a sequence of events”), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010).

² Compare *Massachusetts v. EPA*, 549 U.S. at 526 (holding that petitioners had standing to sue based on injuries related to climate change), and *Am. Elec.*, 582 F.3d at 332, 349 (holding that a climate change suit did not present nonjusticiable political questions and

its 2007 decision *Massachusetts v. EPA*, the U.S. Supreme Court held that a state petitioner had standing to sue the Environmental Protection Agency due to the agency's refusal to regulate automobile greenhouse gas emissions under the Clean Air Act.³ Less than six months later, however, the U.S. District Court for the Northern District of California dismissed a state-led public nuisance action concerning automobile greenhouse gas emissions in its 2007 decision *California v. General Motors Corp.*⁴ Although the district court did not address standing, it reasoned that *Massachusetts v. EPA* demonstrates that claims relating to greenhouse gas emissions involve policy questions reserved to the political branches, and it therefore dismissed the nuisance action by invoking the political question doctrine.⁵

Despite the California court's dismissal of the common law nuisance action, several scholars have argued that *Massachusetts v. EPA* entitles states to litigate complicated environmental suits in federal courts in their capacity as *parens patriae*,⁶ an English common law doctrine that allows states to litigate on behalf of their citizenry.⁷ This Note analyzes these arguments in light of the separation of powers principles the Supreme Court has often invoked when justifying restrictive justiciability thresholds and concludes that, insofar as Article III standing is concerned, states suing in their common law capacities should be entitled to a relaxed regime.⁸ The Note demonstrates, however, that particularly complicated common law actions give rise to separation of powers concerns embedded in the prudential justiciability doctrines, which may provide a basis for dismissal in addition to, or in lieu of, Article III

that plaintiffs had standing to sue in a common law nuisance action), *with Kivalina*, 663 F. Supp. 2d at 883 (holding that a nuisance claim was barred by the political question doctrine and that plaintiffs lacked standing to sue), *and California v. Gen. Motors Corp.*, No. 06-05755, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (dismissing a nuisance claim on political question grounds), *and Found. on Econ. Trends v. Watkins*, 794 F. Supp. 395, 401 (D.D.C. 1992) ("Notwithstanding the seriousness of the phenomenon, there is no 'global warming' exception to the standing requirements of Article III or the [Administrative Procedure Act].").

³ 549 U.S. at 526.

⁴ See 2007 WL 2726871, at *16.

⁵ See *id.* at *12–13, 16.

⁶ See, e.g., 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, 1767–68, 1775–80 (2008); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 277–80 (2009); Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1073–78 (2008).

⁷ See Zdeb, *supra* note 6, at 1068–70.

⁸ See *infra* notes 153–169 and accompanying text.

standing.⁹ Thus, as an administrative law petition adjudicated within the confines of a statutory scheme, *Massachusetts v. EPA* offers relatively little help to states suing in their common law capacities and faced with prudential justiciability challenges, which counsel dismissal when a plaintiff alleges harms that are widely shared and unfamiliar to the legal landscape.¹⁰

Ironically, *Massachusetts v. EPA* is precisely the type of case that would ordinarily give rise to a heightened justiciability threshold, as the Supreme Court's restrictive standing jurisprudence has been justified almost entirely on the separation of powers concerns implicated by lawsuits brought against the federal government.¹¹ The Court has never

⁹ See *Am. Elec.*, 582 F.3d at 321–33 (analyzing defendants' motion to dismiss a common law nuisance action on political question grounds); *Kivalina*, 663 F. Supp. 2d at 871–77 (relying on the political question doctrine to dismiss a nuisance action); *Gen. Motors Corp.*, 2007 WL 2726871, at *5–16 (same); Michael B. Gerrard, *What the Law and Lawyers Can and Cannot Do About Global Warming*, 16 SOUTHEASTERN ENVTL. L.J. 33, 39–40 (2007); Matthew Hall, *A Catastrophic Comundrum, but Not a Nuisance: Why the Judicial Branch Is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 CHAP. L. REV. 265, 267–68 (2010). Notably, in a brief filed in the Supreme Court on behalf of the Tennessee Valley Authority—a defendant in the *American Electric* nuisance lawsuit—the U.S. Solicitor General argued that the Supreme Court should dismiss the common law action on prudential standing grounds rather than Article III standing grounds. See Brief for the Tenn. Valley Auth. as Respondent Supporting Petitioners at 13–25, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (U.S. filed Jan. 31, 2011). The Solicitor General also acknowledged that the nuisance action raised separation of powers concerns addressed by the political question doctrine, but argued that the plaintiffs' lack of prudential standing provided a sufficient alternative basis for dismissal. *Id.* at 33–42.

¹⁰ See *Gen. Motors Corp.*, 2007 WL 2726871, at *12; Gerrard, *supra* note 9, at 40 (“While the United States Supreme Court in *Massachusetts v. EPA* afforded broad standing to *states* to challenge *administrative action*, that is a far cry from entertaining what could well become the largest mass tort in the history of the world.”); *infra* notes 170–190 and accompanying text. As the court in *General Motors Corp.* stated:

The underpinnings of the Supreme Court's rationale in *Massachusetts* only reinforce this Court's conclusion that Plaintiff's current tort claim would require this Court to make the precise initial carbon dioxide policy determinations that should be made by the political branches, and to the extent that such determination falls under the [Clean Air Act], by the EPA.

2007 WL 2726871, at *12.

¹¹ See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148–51 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62, 577 (1992); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463, 485–86 (2008); Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TULANE L. REV. 477, 480, 509 (2010) (noting the irony that Article III standing was initially developed in the context of lawsuits brought under statutory schemes, but has now migrated over to lawsuits seeking common law relief for private injuries); Zdeb, *supra* note 6, at 1075–78 (arguing that a requirement that states satisfy restrictive standing tests when suing as *parens patriae* would be inconsistent with the historic purpose of the state standing doctrine).

offered a similar separation-of-powers justification for restrictive standing requirements in common law actions brought by states against private parties.¹² By resurrecting the common law to combat global warming, however, climate tort litigants have uncovered a distinct separation of powers concern: the risk that the judiciary will undemocratically set policies that have consequences far beyond the actual adjudicated disputes.¹³ Unlike Article III standing, which focuses a court's attention on the parties to the lawsuit, the prudential justiciability doctrines permit a court to account for broader implications of the issues raised in the lawsuit—particularly, whether the plaintiff's claims raise issues of a “transcendently legislative nature.”¹⁴

In light of *Massachusetts v. EPA*'s limited applicability to *parens patriae* environmental lawsuits, this Note proposes that state attorneys general explore creative ways of establishing state regulatory and lawmaking interests as the basis for standing in environmental litigation.¹⁵ Rather than reading *Massachusetts v. EPA* as a *parens patriae* suit, state litigants should adopt a regulatory or sovereign interest interpretation of the case; this theory of standing suggests that where states can demonstrate injury to their ability to regulate environmentally harmful activities, they should be entitled to a relaxed justiciability regime when challenging federal agency action—or even inaction—that burdens state lawmaking interests.¹⁶ Unlike common law tort actions, such law-

¹² See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289–90 (2008); Nagle, *supra* note 11, at 479–86; see also *Lujan*, 504 U.S. at 572, 577–78 (explaining that Congress established Article III courts to adjudicate cases involving individual rights that have been harmed by private action or unauthorized administrative action); *Comer v. Murphy Oil USA*, 585 F.3d 855, 863 n.3 (5th Cir. 2009) (noting that plaintiffs asserted “private, common-law claims of the sort that have been long recognized to give rise to standing . . . [and not] any public-law claims that might raise concerns the standing doctrine is designed to guard against” (citations omitted)), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (restoring the trial court's dismissal of a nuisance action).

¹³ See, e.g., *Kivalina*, 663 F. Supp. 2d at 876; Hall, *supra* note 9, at 267–68.

¹⁴ See *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (concluding that the broad reach of issues presented to the court in global warming nuisance action revealed the “transcendently legislative nature of this litigation”), *rev'd*, 582 F.3d 309 (2d Cir. 2009); Matthew S. Melamed, *A Theoretical Justification for Special Solicitude: States and the Administrative State*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 579, 591–92 (2010) (noting that standing focuses on the litigant seeking judicial relief, whereas the political question doctrine focuses on the nature of the issues presented to the court).

¹⁵ See *infra* notes 191–235 and accompanying text.

¹⁶ See Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1072–74 (2010); Tyler Welti, Note, *Massachusetts v. EPA's Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1765–68 (2008); see also Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 311–15 (2007). Recent scholarship highlights that Supreme Court preemption

suits fall short of directly punishing private polluters, but they can offer a more direct route into federal court to achieve what creative public nuisance actions ostensibly aim for: the effective regulation and mitigation of widespread environmental harms.¹⁷

Part I of this Note provides an overview of the contemporary justiciability framework, with particular attention to the separation of powers rationales the Supreme Court has articulated as a justification for restrictive standing requirements.¹⁸ Part II then discusses the roles these justiciability doctrines played in the two most prominent global warming cases to date: *Massachusetts v. EPA* and *Connecticut v. American Electric Co.*, a 2009 decision by the U.S. Court of Appeals for the Second Circuit for that is currently under review by the Supreme Court following oral argument on April 19, 2011.¹⁹ Part II also discusses recent scholarship and lower federal court opinions restrictively interpreting *Massachusetts v. EPA*, and underscores the attention courts have paid to states' regulatory interests as a basis for relaxing standing requirements.²⁰ Part III then uses a separation of powers analysis to demonstrate why scholars are correct that states suing in their common law capacities should have as easy a time establishing Article III standing as Massachusetts did in *Massachusetts v. EPA*, but it proceeds to highlight an element that prior scholarship has largely missed—that the very nature of common law nuisance actions gives rise to justiciability concerns embedded in the prudential standing and political question doctrines.²¹ In light of the heavy burden states have faced at the threshold

decisions from the 2008–2009 term, coupled with the Court's decision in *Massachusetts v. EPA*, indicate that the Court may be comfortable providing states with greater standing rights when a federal agency claims that its actions preempt state lawmaking efforts, either under a sovereign interest or *parens patriae* standing framework. See Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 66–70 (2011).

¹⁷ See *Am. Elec.*, 582 F.3d at 330 (noting that federal common law can fill in gaps of federal regulatory frameworks); Robert H. Cutting & Lawrence B. Cahoon, *The "Gift" That Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109, 114–15 (2008) (arguing that common law litigation serves as a default tool for public plaintiffs seeking to vindicate environmental harms when federal law provides an inadequate framework for recourse); Nikhil V. Gore & Jennifer E. Tarr, Case Comment, *Connecticut v. American Electric Power Co.*, 34 HARV. ENVTL. L. REV. 577, 585 (2010) (arguing that states should be granted rights of action in the carbon tort context in part because "[w]here the federal government has chosen not to act, the power to speak in the common interest resolves to the states"); see also Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 51, 63 (2007).

¹⁸ See *infra* notes 24–96 and accompanying text.

¹⁹ See *infra* notes 97–148 and accompanying text.

²⁰ See *infra* notes 122–137 and accompanying text.

²¹ See *infra* notes 149–190 and accompanying text.

of climate tort actions, Part IV proposes that state attorneys general seek to establish standing by identifying ways in which state lawmaking and regulatory interests may have been injured by ineffective federal environmental regulation.²² Doing so would provide states with a relaxed justiciability threshold, and would more directly put the states into an ancillary role in ensuring that national policies and laws adequately counter the causes and effects of widespread pollution.²³

I. HISTORICAL REQUIREMENTS OF JUSTICIABILITY

The common law public nuisance doctrine has been characterized as an “impenetrable jungle,”²⁴ and federal courts have evaluated the justiciability of nuisance actions brought in the climate change context through two frameworks: (1) Article III standing, which seeks to ensure that the action has been brought by a proper party; and (2) the political question doctrine, which seeks to screen out cases that give rise to issues of a non-judicial nature.²⁵ This Part provides an overview of both doctrines as well as the prudential standing doctrine.²⁶ Section A introduces the constitutional requirements of standing to sue, which have largely been developed in the context of lawsuits brought by private citizens against the federal government.²⁷ It also provides an overview of state standing doctrines, which often take into account the distinct interests states have in litigating to protect public interests.²⁸ Section B then discusses the discretionary thresholds of prudential standing and the political question doctrine.²⁹

²² See *infra* notes 191–235 and accompanying text.

²³ See *infra* notes 191–235 and accompanying text.

²⁴ See P. Leigh Bausinger, Note, *Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, The Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527, 527 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 616 (W. Page Keeton ed., 5th ed. 1984)).

²⁵ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321–32, 341–49 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (U.S. Dec. 6, 2010) (No. 10-174); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871–82 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010); *California v. Gen. Motors Corp.*, No. 06-05755, 2007 WL 2726871, at *5–16 (N.D. Cal., Sept. 17, 2007).

²⁶ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (discussing the importance of prudential standing in ensuring judicial restraint when the judiciary is faced with issues of “great national significance”); *infra* notes 78–96 and accompanying text.

²⁷ See *infra* notes 30–77 and accompanying text.

²⁸ See *infra* notes 53–77 and accompanying text.

²⁹ See *infra* notes 78–96 and accompanying text.

A. The “Irreducible Minimums” of Standing

As a prerequisite to federal court jurisdiction, Article III standing is meant to ensure that courts hear only “cases” and “controversies,” the constitutional bases for judicial power.³⁰ The doctrine can be reduced to a simple question: Is the litigant entitled to have the court decide the merits of the dispute?³¹ Most federal courts, however, analyze standing under a far more complicated test first articulated in 1992 by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*: plaintiffs may proceed with a claim if they can show (1) they have suffered an “injury-in-fact” that is (a) concrete and particularized, and (b) actual or imminent; (2) that the injury is “fairly traceable” to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.³² Given the multifaceted approach to the injury-in-fact requirement alone, many suits alleging widely shared environmental harms have been dismissed for lack of standing.³³ Additionally, the “fairly traceable” causation requirement renders complicated environmental lawsuits, such as climate tort claims, particularly vulnerable to dismissal.³⁴ The level of scrutiny a court actually applies to a plaintiff under the standing test may vary, however, depending on the court’s view of the underlying separation of powers issues implicated by the suit.³⁵

³⁰ See U.S. CONST. art. 3, § 2, cl. 1.; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

³¹ See *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

³² See *Lujan*, 504 U.S. at 560–61. In *Lujan*, the Court held that environmental groups challenging a regulation promulgated under the Endangered Species Act (1) did not assert sufficiently imminent injury to have standing, and (2) claimed an injury that was not redressable. *Id.* at 562–71.

³³ See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148–53 (2009); *Lujan* 505 U.S. at 562–67, 571–78. A five-justice majority in *Summers v. Earth Island Institute* held that a group of environmental organizations suing the U.S. Forest Service did not have standing to challenge the agency’s decision to exempt a salvage sale of timber from certain procedural requirements. See 129 S. Ct. at 1147–51. The Court identified the petitioners’ failure to specify the dates they would revisit the affected forest as one of the reasons for the holding. See *id.* at 1150–51.

³⁴ See *Nagle*, *supra* note 11, at 514–15; see also *Am. Elec.*, 582 F.3d at 345–47 (relying in part on *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), a pre-*Lujan* Clean Water Act decision, for the proposition that mere contribution to an injury is sufficient for causation).

³⁵ See *Massachusetts v. EPA*, 549 U.S. 497, 547–48 (2007) (Roberts, C.J., dissenting) (noting the inherent flexibility of the modifiers “fairly” and “likely” in the *Lujan* standing test, and arguing “in considering how loosely or rigorously to define those adverbs, it is vital to keep in mind the purpose of the inquiry”); *Lujan*, 504 U.S. at 572, 577–78; Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 959–60 (2008); see also *Elliott*, *supra* note 11, at 466–68 (highlighting arguments

1. Article III Standing and the Separation of Powers

Although the Supreme Court has called Article III standing “perhaps the most important” justiciability doctrine courts use to screen out undeserving claimants,³⁶ it was not formally articulated as a way to limit disputes to “cases” and “controversies” until the middle of the twentieth century.³⁷ With the rise of statutory rights to judicial review and the liberalization of formal common law pleading standards, the Supreme Court began formulating standing requirements as a way to limit its jurisdiction.³⁸ The test articulated in *Lujan* had been earlier developed within the context of actions brought by private citizens against the federal government, and was in part a reaction to Congress’s enactment of statutory provisions allowing individuals to seek judicial review of executive agency action.³⁹ In these “public law” actions, the Court dismissed cases in which the plaintiff did not allege a violation of a personal right or traditional injury—such as a tort or property harm—but instead sought only to vindicate the public interest in assuring the proper enforcement and execution of federal laws.⁴⁰

The Supreme Court has primarily justified the restrictive standing framework on separation of powers principles.⁴¹ The attention the Court actually pays to separation of powers concerns, however, has varied depending on the justices’ underlying views of the particular issues at stake in a given case.⁴² In some cases, a majority of the justices has

that the standing doctrine hides what are essentially normative decisions about the proper scope of government action, and arguing that standing is built on several ideas of the separation of powers).

³⁶ See *Allen v. Wright*, 468 U.S. 737, 750 (1984). The other justiciability doctrines include ripeness, mootness, political question, and abstention. See Elliott, *supra* note 11, at 465.

³⁷ See Mank, *supra* note 6, at 1705 n.9 (identifying *Stark v. Wickard*, 321 U.S. 288 (1944), as the first Supreme Court case explicitly stating the Article III standing requirements); Murphy, *supra* note 35, at 968 & n.160.

³⁸ See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 792–93, 817–18 (2004); Hessick, *supra* note 12, at 290–92.

³⁹ See Hessick, *supra* note 12, at 289–90; Nagle, *supra* note 11, 486–93; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 194–95 (1992).

⁴⁰ See *Lujan*, 504 U.S. at 577–78; Hessick, *supra* note 12, at 296.

⁴¹ See *Summers*, 129 S. Ct. at 1148–49; *Lujan*, 504 U.S. at 560, 577; *Allen*, 468 U.S. at 752 (maintaining that standing “is built on a single basic idea—the idea of separation of powers”); see also Elliott, *supra* note 11, at 467–75 (suggesting that by ensuring concrete adversity between parties, standing imperfectly serves at least one separation of powers function); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891–97 (1983) (arguing that a liberalized approach to standing represents a threat to the separation of powers).

⁴² See Murphy, *supra* note 35, at 959–60.

been satisfied that the case involves “concrete adversity” between the parties, thereby diminishing the concern that the issues presented may involve more generalized grievances.⁴³ In other cases, the Court has required more than concrete adversity, emphasizing that a plaintiff must be injured in a particularized way and that the relief sought must benefit the plaintiff more directly and tangibly than it would the public at large.⁴⁴

For some observers, an overly restrictive standing regime risks granting too much power to the political branches of the government, particularly in cases where only a court order can compel an agency, such as the EPA, to fulfill its statutory obligations.⁴⁵ Some have even contended that, at best, the standing doctrine imperfectly serves separation of powers principles,⁴⁶ and have suggested the Court adopt alternative mechanisms—such as an abstention doctrine—when evaluating the propriety of reviewing executive action.⁴⁷ Other scholars, however, stress that the Court has always scrutinized whether a case has been brought by a proper plaintiff, particularly in actions where private parties seek to enforce public rights, and that the test outlined in *Lujan* is a reasonable means to ensure justiciability.⁴⁸

Despite its primary focus on the separation of powers as a justification for restrictive standing, the Supreme Court has never clearly distinguished private rights from public rights lawsuits for standing purposes.⁴⁹ Given the Court’s broad holdings that standing is a constitutional requirement for jurisdiction, it appears that the *Lujan* test should apply to parties seeking to vindicate at least some types of common law,

⁴³ See *FEC v. Akins*, 524 U.S. 11, 23–25 (1998); Murphy, *supra* note 35, at 952–60 (reviewing a series of decisions in which the Court flipped back and forth on whether to bar claims that involved generalized grievances).

⁴⁴ See *Lujan*, 504 U.S. at 573–74; Sunstein, *supra* note 39, at 226 (noting that a direct consequence of *Lujan* was that citizen-suit provisions, which are designed to allow private citizens to enforce public laws, are impermissible absent a showing of injury-in-fact).

⁴⁵ See, e.g., Elliott, *supra* note 11, at 489–90.

⁴⁶ *Id.* at 467–75; see also Murphy, *supra* note 35, at 969.

⁴⁷ Elliott, *supra* note 11, at 515–16 (proposing a prudential abstention doctrine as an alternative); see Murphy, *supra* note 35, at 979–89 (suggesting the Court adopt a “rule of deference” in lieu of standing doctrine); see also Sunstein, *supra* note 39, at 168–79 (arguing that historical practice supports the propriety of standing if the plaintiff has been granted a cause of action under governing law, regardless of whether the action is a “citizen suit”).

⁴⁸ Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 704–07, 732–33 (2004); see Bellia, *supra* note 38, at 832–38.

⁴⁹ See Hessick, *supra* note 12, at 290; Nagle, *supra* note 11, at 479–80.

private rights claims in federal court.⁵⁰ Professor Erwin Chemerinsky has argued the contrary, concluding that “[i]njury to rights recognized at common law—property, contract, and torts—[is] sufficient for standing purposes.”⁵¹ Despite the historical adequacy of such injuries for standing purposes, federal courts have recently applied the *Lujan* standing framework to litigants bringing common law claims against private parties.⁵²

2. State Standing and Article III

Although federal courts have often applied the *Lujan* test to private litigants, it was unclear until the Supreme Court’s 2007 decision *Massachusetts v. EPA* whether the test applied to state litigants.⁵³ In *Massachusetts v. EPA*, the Court required the lead state petitioner to satisfy the test, but also noted that states are not “normal litigants” for the purpose of standing and thus concluded that Massachusetts was entitled to “special solicitude” under the Article III standing framework.⁵⁴ The Court premised this relaxed mode of standing in part on the states’ historical rights to litigate broader public interests in the federal courts.⁵⁵

Historically, states have often presented legal interests that are distinct from those of “normal” private litigants, and those interests have led federal courts to treat states differently than individuals for standing purposes.⁵⁶ Prior to the twentieth century, states asserting governing

⁵⁰ See Massey, *supra* note 6, at 261 (noting that a private citizen who has suffered damage to land due to a defendant’s acts must prove the *Lujan* elements to maintain a federal court action); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 304–06 (2005) (concluding that states bringing common law nuisance actions in federal court should be required to satisfy standing requirements).

⁵¹ ERWIN CHEMERINSKY, FEDERAL JURISDICTION 69 (5th ed. 2007).

⁵² See *Comer v. Murphy Oil USA*, 585 F.3d 855, 863–67 (5th Cir. 2009) (citing CHEMERINSKY, *supra* note 51, at 69) (noting Chemerinsky’s assertion that common law injuries have historically been sufficient for standing, but nonetheless applying the *Lujan* framework to private party plaintiffs suing private entities in public nuisance action), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (restoring trial court’s dismissal of nuisance action); *Am. Elec.*, 582 F.3d at 341–49; *Kivalina*, 663 F. Supp. 2d at 877–82.

⁵³ See *Am. Elec.*, 582 F.3d at 336–38; Wildermuth, *supra* note 16, at 307; cf. Merrill, *supra* note 50, at 299–305 (reviewing types of state-led suits that historically have not given rise to standing concerns, but concluding that *parens patriae* lawsuits brought in federal court should be subject to Article III and prudential standing limitations).

⁵⁴ *Massachusetts v. EPA*, 549 U.S. at 518–20.

⁵⁵ *Id.*

⁵⁶ See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law’s Growing Shadow*, 2007 SUP. CT. REV. 111, 131–34 (discussing the Court’s historic recognition of state interests in sovereignty and territorial matters).

interests, as opposed to common law interests in contractual and property rights, were largely prohibited from litigating those interests in the federal courts.⁵⁷ This prohibition included litigating generalized grievances on behalf of their citizens.⁵⁸ At the turn of the century, however, the Supreme Court began to relax state standing requirements in public nuisance actions, reasoning that even though the state could assert no traditional common law interest, “it must surely be conceded that, if the health and comfort of the inhabitants of the State are threatened, the State is the proper party to represent and defend them.”⁵⁹ By allowing states to vindicate generalized public harms in federal court, the Court retreated from its requirement that states resemble private party plaintiffs for standing purposes.⁶⁰ Instead, the assertion of a state’s sovereignty interests—interests relating to the state’s governing and regulatory powers—became sufficient to invoke jurisdiction.⁶¹

Today, courts recognize a category of state “sovereign interests” that generally give rise to a lenient standing threshold.⁶² This category includes a state’s ability to establish and enforce laws over individuals and entities within its jurisdiction⁶³ and a state’s interest in preserving its law and regulatory jurisdiction from federal preemption.⁶⁴ Similarly, where a state identifies a direct injury to its regulatory or economic interests under a federal administrative regime, a court will rarely perform a restrictive standing analysis, if it conducts a standing inquiry at all.⁶⁵

⁵⁷ See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 410–12 (1995).

⁵⁸ See *id.* at 431–32.

⁵⁹ *Missouri v. Illinois*, 180 U.S. at 241; see Mank, *supra* note 6, at 1759–60.

⁶⁰ See Woolhandler & Collins, *supra* note 57, at 449.

⁶¹ See *id.* at 456.

⁶² See Wildermuth, *supra* note 16, at 311–15.

⁶³ *Snapp*, 458 U.S. at 601; Wildermuth, *supra* note 16, at 311; see Woolhandler & Collins, *supra* note 57, at 410–11.

⁶⁴ See, e.g., *Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443–44 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. U.S. Dept. of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *Florida v. Weinberger*, 492 F.2d 488, 492–94 (5th Cir. 1974); Wildermuth, *supra* note 16, at 311, 313–14 (noting that in several post-*Lujan* cases involving state sovereign interests, federal courts did not cite to *Lujan* or its three factors when deciding that the state had standing); see also Merrill, *supra* note 50, at 300–01 (noting that when a state vindicates its own laws in a criminal prosecution, federal courts do not require it to satisfy *Lujan*); Metzger, *supra* note 16, at 69 (arguing that recent case law suggests that states can sue in their sovereign capacities to challenge a federal agency’s policy on preemption, even before a specific preemption conflict has arisen); Nash, *supra* note 16, at 1055–56, 1072–74 (arguing that a state’s sovereign prerogatives are offended when it is preempted from lawmaking, and that states challenging federal regulatory power should be entitled to relaxed standing).

⁶⁵ See, e.g., *North Carolina v. EPA*, 531 F.3d 896, 914–15 (D.C. Cir. 2008); *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *Davis v. EPA*, 348 F.3d 772, 778 (9th Cir. 2003).

States may also assert “quasi-sovereign interests” when bringing lawsuits on behalf of their citizens, and in these *parens patriae* actions, they must satisfy a distinct standing test.⁶⁶ Unlike sovereign interests, which can be relatively easy to identify, quasi-sovereign interests are inherently broad and abstract and thus risk being too vague to survive standing requirements.⁶⁷ Therefore, in the 1982 decision *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, the Supreme Court held that a state must demonstrate that its quasi-sovereign interest is distinct and independent of the interests of the purely private parties on whose behalf the state litigates.⁶⁸ The Court has identified two principal categories of such interests: (1) the state’s interest in its citizens’ economic and physical welfare, and (2) the state’s interest in ensuring that its citizens enjoy the full benefits of participation in the federal system, to which the state has surrendered some of its sovereign prerogatives.⁶⁹ These standing requirements are intended to distinguish *parens patriae* suits from cases in which the state has no independent interest at stake—an interest it presumably would have in a sovereign interest, or even a mere proprietary interest, lawsuit.⁷⁰

Even where state plaintiffs can survive these standing requirements, however, states are generally barred from litigating as *parens patriae* against the federal government, which the Court has characterized

West Virginia v. EPA involved a dispute over the revision of a Clean Air Act state implementation plan, an instrument primarily created and administered by the state but subject to federal oversight and requirements. 362 F.3d at 865–67. Although it did not involve a traditional preemption dispute or the enforcement of a unique state law, at least one scholar has considered it to be a sovereign interests case. Wildermuth, *supra* note 16, at 313–14. Overall, the sovereign interests category appears to have some flexibility. See *id.* at 314; Woolhandler & Collins, *supra* note 57, at 410–11, 493; see also Metzger, *supra* note 16, at 69.

⁶⁶ *Snapp*, 458 U.S. at 607–08; see *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); Percival, *supra* note 56, at 131–34.

⁶⁷ *Snapp*, 458 U.S. at 602.

⁶⁸ *Id.* at 607; see Wildermuth, *supra* note 16, at 298–99. Observers have noted that a state’s “independent interest,” however potentially confusing and flexible a term, means an interest connected to the injury suffered by the state’s residents. See Wildermuth, *supra* note 16, at 298–99, 305, 317.

⁶⁹ *Snapp*, 458 U.S. at 607–08. Additionally, the state must demonstrate that the defendant’s actions have injured a sufficiently substantial segment of the population. *Id.* at 607.

⁷⁰ See Woolhandler & Collins, *supra* note 57, at 511–12.

[S]tates that now litigate on the basis of *parens patriae* often have an independent basis for standing. . . . Where a state has an independent legally protected interest, there is arguably no harm in allowing a state to sue additionally as *parens patriae*. Such standing is analogous to that of private parties who have individually suffered harms suing as representatives of a class.

Id.

as holding a superior role in the protection of the general welfare.⁷¹ Ironically, however, the historical relaxation of state standing requirements may have been driven by the Supreme Court's recognition of states' interests in preserving their regulatory powers from federal intrusion.⁷² Today, observers have noted a steady increase in state challenges to federal administrative activity, particularly in contexts where the federal government has limited a state's authority over matters affecting a state's land and citizens.⁷³ In cases where states have succeeded in overcoming standing hurdles, courts appear to have interpreted the states' interests as sovereign, rejecting the federal government's contentions that the states were suing as *parens patriae*.⁷⁴

In light of the absence of any *Lujan*-styled standing tests in many of these state lawsuits against the federal government, courts have generally not identified any separation of powers concerns similar to those at the heart of lawsuits brought by individuals seeking review of executive action.⁷⁵ Of notable exception were the dissenting opinions in *Massachusetts v. EPA*, in which Chief Justice Roberts and Justice Scalia argued that allowing a state to sue the EPA in a politically and scientifically complex regulatory context impermissibly drew the Court into an area largely reserved for executive discretion.⁷⁶ Scholars have recently ar-

⁷¹ See *Snapp*, 458 U.S. at 610 n.16; *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923). Even though some scholars have argued that the bar prohibits only state lawsuits against unconstitutional acts of the federal government, subsequent case law interpreting *Massachusetts v. Mellon* have enforced the bar more broadly. See Wildermuth, *supra* note 16, at 308–09; see also *Massachusetts v. EPA*, 549 U.S. at 539 (Roberts, C.J., dissenting). But see Mank, *supra* note 6, at 1770 & n.386 (identifying federal court decisions that have allowed *parens patriae* suits seeking to enforce rights provided to citizens under a federal statutory scheme).

⁷² See Woolhandler & Collins, *supra* note 57, at 456. The Supreme Court itself has stated that an important factor in determining whether a state has an independent, quasi-sovereign interest sufficient for standing is whether the injury the state seeks to address is one that the state would address through its sovereign lawmaking powers. *Snapp*, 458 U.S. at 607.

⁷³ See, e.g., Wildermuth, *supra* note 16, at 287.

⁷⁴ See *West Virginia v. EPA*, 362 F.3d at 868 (rejecting EPA's contention that West Virginia was suing as *parens patriae* and holding that West Virginia had standing "as a state" due to injury caused by onerous federal regulatory requirements); *Davis*, 348 F.3d at 778 (similarly rejecting EPA's claim that a state lacked standing as *parens patriae* and identifying the state's independent pecuniary and regulatory interests in litigation).

⁷⁵ See Merrill, *supra* note 50, at 299–301; Zdeb, *supra* note 6, at 1076–77 (arguing that the Court has held that traditional state standing tests are sufficient to ensure justiciability, even after it began widely applying the *Lujan* test to private litigants).

⁷⁶ See *Massachusetts v. EPA*, 549 U.S. at 536 (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion."); *id.* at 550–53 (Scalia, J., dissenting).

gued, however, that when a state brings an action challenging the preemptive or otherwise burdensome effect of federal regulatory action, principles of federalism may justify a relaxed standing regime even where separation of powers principles would otherwise give rise to a heightened threshold.⁷⁷

B. *Additional Prudential Limitations on Jurisdiction*

Establishing Article III standing is only one threshold that a plaintiff must satisfy to survive a motion to dismiss; other prudential—that is, discretionary—doctrines may come into play when the issues raised by a lawsuit implicate separation of powers concerns.⁷⁸ The prudential standing doctrine and the political question doctrine may bar lawsuits that touch upon the generalized grievances of the broader population, particularly when the political branches have not yet addressed those grievances.⁷⁹ Several federal district courts have relied on the political question doctrine in dismissing climate tort actions, even those brought by state plaintiffs, and the federal government has argued that states are barred from litigating such claims under the prudential standing doctrine.⁸⁰

Although it has been applied for different reasons in different contexts, the prudential standing doctrine generally focuses on whether it would be appropriate for the court to render judgment for one particular party when the litigation could impact a larger class of affected indi-

⁷⁷ See Massey, *supra* note 6, at 262 (“The best argument for relaxing the meaning of the *Lujan* elements when a state asserts a sovereign interest in federal court is that doing so is a necessarily implied aspect of the structural design of dual sovereignty.”); Metzger, *supra* note 16, at 70–75 (noting that separation of powers principles may need to bend to accommodate federalism interests in ensuring the proper functioning of federal agencies, but that the Court has not yet articulated a justification along these lines); Nash, *supra* note 16, at 1073–74; see also Melamed, *supra* note 14, at 607.

⁷⁸ See *Flast v. Cohen*, 392 U.S. 83, 100 (1968) (“[A] party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.”).

⁷⁹ See *Newdow*, 542 U.S. at 11–12 (discussing the importance of prudential standing in ensuring judicial restraint when the judiciary is faced with issues of “great national significance”); *Kivalina*, 663 F. Supp. 2d at 871–77 (dismissing a common law action on political question grounds); *Gen. Motors Corp.*, 2007 WL 2726871, at *12–13 (reasoning that policy questions concerning global warming emissions caps are reserved to the political branches, which had not yet acted to address them); see also Murphy, *supra* note 35, at 952–60 (analyzing the Court’s separation of powers “ping-pong” with regard to whether generalized grievances are justiciable).

⁸⁰ See *Kivalina*, 663 F. Supp. 2d at 871–77; *Gen. Motors Corp.*, 2007 WL 2726871, at *16; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *rev’d*, 582 F.3d 309 (2d Cir. 2009); Brief for the Tenn. Valley Auth., *supra* note 9, at 13–24.

viduals and potential plaintiffs.⁸¹ Because this standing doctrine is prudential, it may be overridden by Congress, and in the public law context, Congress has in many instances provided statutory authorization for private citizens to sue when issues involve more generalized harms and grievances.⁸² Thus, although the prudential standing bar against generalized grievances may complement an Article III standing inquiry, it appears most relevant to cases in which Congress has not already provided an express right of action, such as in the common law context.⁸³

Because the Court has stated that the contours of the prudential standing doctrine have not been “exhaustively defined,” the doctrine provides a malleable framework that could be used for dismissing novel claims for relief.⁸⁴ Notably, in the 2004 decision *Elk Grove Unified School District v. Newdow*, a five-justice majority of the Court identified the doctrine as a means to dismiss cases involving broad matters of public significance that would be better resolved by the political branches of the government.⁸⁵ The Court therefore upheld a district court’s dismissal of an Establishment Clause challenge, based partially on the substantial family law issues implicated by the facts of the case.⁸⁶ In a separate opinion written by Chief Justice Rehnquist, however, three justices accused the majority of creating a novel standing principle “loosely”

⁸¹ See *Newdow*, 542 U.S. at 12; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474–75 (1982) (identifying three prudential standing limitations); *Warth*, 422 U.S. at 499–500; *Murphy*, *supra* note 35, at 989. As the Supreme Court has stated:

Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”

Newdow, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751).

⁸² See *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997); *Warth*, 422 U.S. at 501 (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”); *Murphy*, *supra* note 35, at 952. Of course, for the plaintiff to satisfy Article III standing when suing under a statutory regime, the plaintiff himself must be particularly injured. See *Lujan*, 504 U.S. at 573–74; *Sunstein*, *supra* note 39, at 226, 235–36.

⁸³ See *Bennett*, 520 U.S. at 162–63; *Warth*, 422 U.S. at 501 (noting that a plaintiff may assert Article III standing under a congressional right of action even where the alleged injury is shared by a large class of other possible litigants, and “may invoke the general public interest in support of [the plaintiff’s] claim”).

⁸⁴ See *Newdow*, 542 U.S. at 11–12; *cf.* Brief for the Tenn. Valley Auth., *supra* note 9, at 13–25 (arguing that prudential standing doctrine constrains courts from hearing generalized grievances in common law global warming cases).

⁸⁵ *Newdow*, 542 U.S. at 12.

⁸⁶ See *id.* at 13–18.

based on a complex combination of state and federal law that inappropriately prevented the Court from reaching the merits of the dispute.⁸⁷

The political question doctrine is also designed to screen out disputes that would be better resolved by the political branches of the government, but it is more explicitly framed around the issues presented to the court, rather than the parties.⁸⁸ As one of the judiciary's oldest justiciability doctrines focused on the interpretation of constitutional provisions, the political question doctrine expanded as a prudential tool of judicial restraint during the New Deal era, and courts have been willing to stretch it to encompass common law actions that involve widely shared harms.⁸⁹ Thus, a court applying the doctrine today has the discretion to apply a number of factors, first outlined by the Court in its 1962 decision *Baker v. Carr*, to determine whether the issues presented may cause the court to, among other things, make an initial policy decision otherwise reserved to the political branches.⁹⁰ The central separation of powers concern in this regard is that the judiciary would establish new federal policies despite a lack of accountability to the political branches or to the voting public.⁹¹ A related but more functional analysis of the doctrine has prompted some scholars to argue that it properly allocates decisions to the branches of government that have superior expertise in particular areas, such as foreign policy.⁹²

Notably, the Supreme Court has stressed that the political question doctrine must be applied on a case-by-case basis because even

⁸⁷ See *id.* at 18–25 (Rehnquist, C.J., concurring in the judgment).

⁸⁸ See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1461 (2005); Melamed, *supra* note 14, at 579.

⁸⁹ See *Kivalina*, 663 F. Supp. 2d at 871–77; Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 246–48, 258 (2002); see also Choper, *supra* note 88, at 1463, 1472–76 (“tentatively” suggesting that constitutional injuries that are widely shared may properly be treated as political questions).

⁹⁰ *Baker v. Carr*, 369 U.S. 186, 217 (1962) (outlining six factors a court may consider to determine whether a case is justiciable, including whether the court would have to render an initial policy determination of a kind “clearly for nonjudicial discretion”); *Kivalina*, 663 F. Supp. 2d at 872–77 (applying a “distilled approach” of the *Baker* test and holding that two of the *Baker* factors were implicated by a global warming tort action).

⁹¹ See *Baker*, 369 U.S. at 210; *Kivalina*, 663 F. Supp. 2d at 876; *Gen. Motors Corp.*, 2007 WL 2726871, at *16.

⁹² See Choper, *supra* note 88, at 1465–69; Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566–67 (1966); see also Melamed, *supra* note 14, at 592–94.

seemingly politically charged cases may in fact be appropriate for judicial review.⁹³ Additionally, the doctrine is not supposed to turn on whether a case is large, complicated, or otherwise logistically difficult to manage, but instead on whether the claims could be resolved in a “principled, rational” way structured on judicial standards of review and reasoning.⁹⁴ Despite these admonitions, however, several scholars have criticized the doctrine as overly discretionary and untethered from reliable legal standards.⁹⁵ Observers have instead suggested that the “strangeness of the issue,” coupled with judicial “self-doubt,” is at the heart of courts’ application of the doctrine.⁹⁶

II. THE JUSTICIABILITY OF STATE-LED CLIMATE LAWSUITS

In light of the federal government’s failure to adequately regulate greenhouse gas emissions, several states have crafted regulatory programs to mitigate and adapt to the anticipated effects of global warming.⁹⁷ Several state attorneys general have also sought relief in federal court to combat interstate emissions.⁹⁸ This Part discusses two of these state-led climate lawsuits: the U.S. Supreme Court’s 2007 decision *Massachusetts v. EPA*; and the U.S. Court of Appeals for the Second Circuit’s 2009 decision *Connecticut v. American Electric Power Co.*, which the Su-

⁹³ See *Baker*, 369 U.S. at 209, 217.

⁹⁴ See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).

⁹⁵ See Choper, *supra* note 88, at 1460 (discussing other scholars’ criticisms of the doctrine); Gore & Tarr, *supra* note 17, at 578 (noting the “messy state” of the doctrine); see also Barkow, *supra* note 89, at 260 (highlighting that the Court has emphasized “embroilment in politics” as a basis for dismissing lawsuits under the political question doctrine).

⁹⁶ See Melamed, *supra* note 14, at 592 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1st ed. 1962)); see also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1013–14 (2002) (stating that political questions are those which the court should not consider because they are “too political . . . [they are] potentially controversial questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counterattack”).

⁹⁷ Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. REV. 1097, 1097–98, 1107–08 (2009); see *California v. Gen. Motors Corp.*, No. 06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (noting that California had expended millions of dollars “to study, plan for, monitor, and respond to impacts already caused, and likely to occur, as a result of global warming”); *Cutting & Cahoon*, *supra* note 17, at 130–31.

⁹⁸ See *Massachusetts v. EPA*, 549 U.S. 497, 514, 518–20 (2007); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314–15 (2d Cir. 2009) (eight states seeking injunctive relief against six power generation corporations, which together produced ten percent of all greenhouse gases emitted in the United States), *cert. granted*, 131 S. Ct. 813 (U.S. Dec. 6, 2010) (No. 10-174); *Gen. Motors Corp.*, 2007 WL 2726871, at *1 (state seeking damages for nuisance-related injuries caused by automobile emissions).

preme Court recently agreed to review.⁹⁹ The two decisions illustrate the different separation of powers concerns that may be implicated by state-led lawsuits involving widely shared harms and controversial policy questions.¹⁰⁰ Section A provides a brief overview of the Supreme Court decision, and also discusses different interpretations of the Court's standing analysis and its applicability to common law actions like *American Electric*.¹⁰¹ Section B then provides a brief discussion of the Second Circuit's decision in *American Electric* and the various hurdles the common law plaintiffs faced in establishing jurisdiction.¹⁰²

A. *Massachusetts v. EPA: A Novel Approach to State Standing*

The Supreme Court's decision in *Massachusetts v. EPA* demonstrated an innovative approach to state standing by announcing a rule of "special solicitude" for the lead state petitioner in an action against the federal government.¹⁰³ The Court also used the Article III standing test outlined in its 1992 decision *Lujan v. Defenders of Wildlife*¹⁰⁴ to analyze whether the state had standing to sue, a novelty in itself considering the historical relaxation of state standing requirements and the fact that several post-*Lujan* decisions had declined to apply the three-part test to state litigants.¹⁰⁵ In response, several scholars have sought to clarify the types of state interests that formed the basis for the special standing rule; these scholars have reached various conclusions as to the rule's future applicability to other state-led lawsuits, particularly *parens patriae* actions.¹⁰⁶

⁹⁹ See *infra* notes 103–148 and accompanying text.

¹⁰⁰ See *infra* notes 103–148 and accompanying text.

¹⁰¹ See *infra* notes 103–137 and accompanying text.

¹⁰² See *infra* notes 138–148 and accompanying text.

¹⁰³ See *Massachusetts v. EPA*, 549 U.S. at 518–20; *id.* at 536–37 (Roberts, C.J., dissenting) (criticizing the majority's "novel standing rule"); Wildermuth, *supra* note 16, at 318 (noting "new twists" in Court's standing analysis); see also Welti, *supra* note 16, at 1753 nn.6–7. The term "special solicitude" had been used in previous Supreme Court opinions with regard to litigants who demonstrated particularly pressing needs and claims, but it had never been used in connection with a relaxed state standing regime. Stevenson, *supra* note 17, at 20–26.

¹⁰⁴ See 504 U.S. 555, 560–61 (1992); see *supra* notes 30–35 and accompanying text (discussing this standing test).

¹⁰⁵ See *Massachusetts v. EPA*, 549 U.S. at 521–26; Wildermuth, *supra* note 16, at 306, 313–14; Woolhandler & Collins, *supra* note 57, at 456; see also Merrill, *supra* note 50, at 304–06.

¹⁰⁶ See, e.g., Mank, *supra* note 6, at 1746; Massey, *supra* note 6, at 268, 277–80; Melamed, *supra* note 14, at 581, 584; Stevenson, *supra* note 17, at 73–74; Wildermuth, *supra* note 16, at 317; Welti, *supra* note 16, at 1765–67; Zdeb, *supra* note 6, at 1073.

1. Special Solitude and the Separation of Powers

The case began in 1999, when a group of private organizations filed a rulemaking petition with the EPA, asking it to regulate greenhouse gas emissions from new motor vehicles under section 202 of the Clean Air Act.¹⁰⁷ Four years later, the EPA entered an order denying the petition, and the organizations, joined by twelve states, sought judicial review in the U.S. Court of Appeals for the District of Columbia.¹⁰⁸ Two of the three judges on the court of appeals agreed that the “EPA Administrator properly exercised his discretion” in denying the petition, but only one of them concluded that the petitioners had failed to demonstrate an injury-in-fact sufficient for standing.¹⁰⁹

Writing for a five-justice majority of the Supreme Court, Justice Stevens held that the lead state petitioner was entitled to special solicitude in the Court’s standing analysis, emphasizing the petitioner’s procedural rights to judicial review under the Clean Air Act and the state’s unique “stake in protecting its quasi-sovereign interests” in light of its inability to independently regulate harmful greenhouse gas emissions.¹¹⁰ Notably, the concept of special solicitude and its relation to quasi-sovereign interests was not briefed before the Court, and the decision does not make clear whether Massachusetts was even suing in its *parens patriae* capacity.¹¹¹ Scholars have suggested that the term “quasi-sovereign” may have been used because the Court cited to a relatively obscure U.S. Supreme Court decision from 1907, *Georgia v. Tennessee Copper Co.*,¹¹² for the proposition that states have historically been able to litigate broad environmental claims in the federal courts.¹¹³ After establishing this

¹⁰⁷ See *Massachusetts v. EPA*, 549 U.S. at 510. Section 202(a)(1) of the Clean Air Act, as codified, provides in part, “The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1) (2006).

¹⁰⁸ See *Massachusetts v. EPA*, 549 U.S. at 504–14.

¹⁰⁹ *Massachusetts v. EPA*, 415 F.3d 50, 56–59 (D.C. Cir. 2005), *rev’d*, 549 U.S. 497 (2007).

¹¹⁰ See *Massachusetts v. EPA*, 549 U.S. at 517–20 (citing to the Clean Air Act, 42 U.S.C. § 7607(b)(1)). The Court also identified section 202(a)(1) of the Act, codified at 42 U.S.C. § 7521(a)(1), as a congressional mandate to the EPA to protect Massachusetts, and thus may have considered this provision among the state’s “rights under the Act.” See *id.* at 519–20.

¹¹¹ See Stevenson, *supra* note 17, at 5; Welti, *supra* note 16, at 1762.

¹¹² 206 U.S. 230 (1907).

¹¹³ See *Massachusetts v. EPA*, 549 U.S. at 519–20; Mank, *supra* note 6, at 1738–40 (suggesting that the majority probably relied on *Tennessee Copper* because it supported the proposition that states have broader rights to invoke federal jurisdiction when they assert quasi-sovereign interests); Murphy, *supra* note 35, at 963.

special status, however, the Court did not perform a *parens patriae* standing test but instead applied the *Lujan* framework to the state's asserted loss of coastal property, an interest the Court had previously characterized as an ordinary proprietary, as opposed to sovereign or quasi-sovereign, interest.¹¹⁴ Holding that the petitioners did have standing to sue under this test,¹¹⁵ the majority concluded that the EPA had the authority to regulate automobile emissions of greenhouse gases and could only refuse to do so if it either determined that such emissions did not contribute to global warming or if it offered a reasonable explanation as to why it would not undertake such a determination.¹¹⁶

Notably, the majority and the dissents split sharply over whether the decision violated underlying separation of powers principles.¹¹⁷ In a dissent joined by three justices, Chief Justice Roberts stressed that the primary purpose of the standing inquiry was to screen out cases that present generalized grievances better resolved by the political branches and noted that “[t]he very concept of global warming seems inconsistent with [the *Lujan*] particularization requirement.”¹¹⁸ Reasoning that the majority's “special solicitude” rule simply amounted to a dilution of the *Lujan* standing requirements, the Chief Justice argued that the decision allowed the judiciary to become “a convenient forum for policy debates.”¹¹⁹ Justice Scalia joined the Chief Justice's dissent but also offered a dissent on the merits, arguing that Congress had vested the EPA with broad discretion to regulate air pollutants.¹²⁰ The majority, by contrast, disavowed the notion that any separation of powers principles counseled against resolving the petitioners' claim; stating that the “gist of the question of standing” is whether the petitioners had a sufficiently

¹¹⁴ See *Massachusetts v. EPA*, 549 U.S. at 521–26; *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (distinguishing proprietary interests from sovereign interests).

¹¹⁵ *Massachusetts v. EPA*, 549 U.S. at 526.

¹¹⁶ See *id.* at 534–35. Three years later, the EPA finally did make such a determination, and has since begun the process of establishing a regulatory framework for greenhouse gas emissions under the Clean Air Act. See, e.g., Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

¹¹⁷ See *Massachusetts v. EPA*, 549 U.S. at 517, 522; *id.* at 536 (Roberts, C.J., dissenting) (“Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such ‘special solicitude’ is conspicuously absent from the Court's opinion.”); *id.* at 550–53 (Scalia, J., dissenting); see also Murphy, *supra* note 35, at 964 (discussing the majority and dissenting justices' views of the separation of powers principles implicated by the decision).

¹¹⁸ See *id.* at 541 (Roberts, C.J., joined by Scalia, J., Thomas, J. & Alito, J., dissenting).

¹¹⁹ See *id.* at 547.

¹²⁰ See *id.* at 560 (Scalia, J., dissenting).

personal stake in the litigation to ensure concrete adversity in the adjudication, the majority concluded that the Court could resolve the claim regardless of the fact that global warming could be construed as a generalized grievance.¹²¹

2. Subsequent Interpretations of *Massachusetts v. EPA*

Several observers initially interpreted *Massachusetts v. EPA* as a decision that could signal a more relaxed standing regime for environmental lawsuits, particularly those involving procedural rights.¹²² When in 2009, however, the Supreme Court held in *Summers v. Earth Island Institute* that several environmental groups did not have standing to challenge certain U.S. Forest Service decisions, the scope of *Massachusetts v. EPA* was bridled.¹²³ Recent commentary suggests that the Court's special solicitude standing rule is restricted to states challenging federal administrative actions.¹²⁴ Several scholars, however, have concluded that the decision offers a relaxed standing regime for states suing in their common law *parens patriae* capacities as well.¹²⁵

The more restrictive readings of *Massachusetts v. EPA* generally suggest that the state had standing due to its inability to regulate green-

¹²¹ See *id.* at 517 (majority opinion) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *id.* at 522 (citing *FEC v. Akins*, 524 U.S. 11, 24 (1998)); see also Elliott, *supra* note 11, at 482–83 (noting the Court's emphasis on the "concrete adversity" model of standing).

¹²² See, e.g., Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. IN BRIEF 53, 57–58 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/cannon.pdf>; Percival, *supra* note 56, at 128–40; see also Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 121, 124–25, 156 (2008) (suggesting that *Massachusetts v. EPA* could "usher in a new era of environmental standing," but acknowledging the case's potential limitations); Richard Lazarus, *A Breathtaking Result for the Greens*, ENVTL. F. (Envl. Law Inst., Wash., D.C.), May–June 2007, at 12, available at <http://www.law.georgetown.edu/faculty/lazarus/docs/columns/ColumnMayJune07.pdf>.

¹²³ See 129 S. Ct. 1142, 1149–52 (2009). Notably, in a dissenting opinion, Justice Breyer argued that the Court should have held differently in light of the procedural rights analysis involved in *Massachusetts v. EPA*. *Id.* at 1156 (Breyer, J., dissenting).

¹²⁴ See Stevenson, *supra* note 17, at 50–52, 73–74; Welti, *supra* note 16, at 1775; see also Nash, *supra* note 16, at 1072–74 (arguing that a "null preemption" reading of *Massachusetts v. EPA* standing analysis avoids confusing aspects of alternative explanations of the decision).

¹²⁵ See, e.g., Mank, *supra* note 6, at 1767–74; Massey, *supra* note 6, at 277–80; Zdeb, *supra* note 6, at 1075–77 (arguing that *Massachusetts v. EPA* highlights that *parens patriae* suits can serve as an adequate *alternative* basis for state standing in climate change litigation); see also Matthew R. Cody, Comment, *Special Solicitude for States in the Standing Analysis: A New Type of Federalism*, 40 McGEORGE L. REV. 149, 162 (2009) (arguing that *Massachusetts v. EPA* signals a limited expansion of the *parens patriae* doctrine, allowing special solicitude for states that possess a procedural right to challenge federal action).

house gas emissions and the fact that the EPA, counter to the state's interests in addressing the problem, refused to regulate those emissions.¹²⁶ In particular, one commentator has suggested that the Court adopted a "regulatory interest" theory of standing, positing that the state was injured by the government's rulemaking decision and that this injury provided the basis for the relaxed *Lujan* analysis of the loss of coastal property.¹²⁷ This theory of standing was echoed in an amicus brief filed in support of Massachusetts by Arizona and four other states; these states contended that the EPA's regulation potentially preempted all independent state regulation of carbon dioxide emissions, thereby giving rise to an injury cognizable under *Lujan*.¹²⁸ The amicus brief stressed that states retain at least some independent lawmaking powers under the cooperative federalism model of the Clean Air Act by highlighting, for example, that states can in some contexts adopt their own emission standards as long as the federal government has established a regulatory floor for those emissions.¹²⁹ Thus, the federal government's refusal to regulate carbon dioxide emissions impermissibly impeded the states' residual abilities to enact state-specific standards.¹³⁰

Observers have also noted how, during oral argument, several justices appeared interested in a 2004 decision by the U.S. Circuit Court of Appeals for the D.C. Circuit, *West Virginia v. EPA*, for the proposition that a state may have "special standing" when federal action causes a direct injury to a state "as a state."¹³¹ Notably, the state plaintiff's stand-

¹²⁶ See Nash, *supra* note 16, at 1072–74; Stevenson, *supra* note 17, at 8, 32–36, 51; Welti, *supra* note 16, at 1765–67; see also *Gen. Motors Corp.*, 2007 WL 2726871, at *11 (noting that "inherent in the Supreme Court's reasoning" is the principle that a state, having surrendered its rights to independently regulate in certain circumstances, may challenge federal administrative decisions that it finds dissatisfying).

¹²⁷ See Welti, *supra* note 16, at 1765–68.

¹²⁸ See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 13–15, *Massachusetts v. EPA*, 549 U.S. 497 (No. 05-1120).

¹²⁹ See *id.* at 14–15, 18–20. Under section 209 of the Clean Air Act, as codified, California is the only state permitted to set emissions standards for motor vehicles. See 42 U.S.C. § 7543(a)–(b) (2006); Brief of Arizona et al., *supra* note 128, at 14–15. California may adopt its own standards if it applies for a waiver of preemption from the EPA and demonstrates that the state standards would be no less protective of public health than federal standards. See § 7543(b). Once those standards are adopted, other states can "piggyback" on California's standards. See § 7507.

¹³⁰ See Brief of Arizona et al., *supra* note 128, at 13, 20–25. The Supreme Court has held that even where a federal agency has decided *not* to regulate certain activities, such as in *Massachusetts v. EPA*, the agency's refusal to regulate can be treated as the equivalent of ruling that no such regulation, either state or federal, is appropriate, thereby preempting state regulatory power. See *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978).

¹³¹ See *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); Mank, *supra* note 6, at 1738–40; Stevenson, *supra* note 17, at 30–35; Welti, *supra* note 16, at 1768–70.

ing in *West Virginia v. EPA* did not rest on its interests as *parens patriae* but rather on its economic and regulatory interests in the outcome of the federal agency's decisions.¹³²

Although the Supreme Court in *Massachusetts v. EPA* did not cite to the D.C. Circuit decision or explicitly reference the amicus brief, it identified the preemptive effect of federal law as a basis for special solicitude, noted that the state was asserting "its rights" under federal law, and justified its analysis in part on the state's "well-founded desire to preserve its sovereign territory."¹³³ This language, which appears to distinguish the state's interests from its derivative interests in its citizenry, has led some lower courts to dismiss *parens patriae* actions against the federal government in which the state did not assert a sufficiently distinct claim of injury based on its own interests.¹³⁴

Nevertheless, some scholars have argued that *Massachusetts v. EPA*, by identifying "quasi-sovereign interests" and *Georgia v. Tennessee Copper* as the basis for special solicitude, still provides states suing as *parens patriae* a relaxed standing threshold.¹³⁵ One scholar in particular has conceded that *Massachusetts v. EPA* is most directly on point for state suits that involve a procedural right given by Congress, but has nonetheless argued that the decision "implicitly approved *parens patriae* standing in the absence of a procedural right."¹³⁶ Despite their arguments in favor of expanded *parens patriae* standing, however, several of these commen-

¹³² See *West Virginia v. EPA*, 362 F.3d at 868.

¹³³ See *Massachusetts v. EPA*, at 518–20, 520 n.17. Although the Court did not specify how states could be precluded from enforcing their own greenhouse gas regulations, two federal statutes potentially preempt state lawmaking in this respect: the Clean Air Act and the Energy Policy and Conservation Act ("EPCA"). See Clean Air Act, 42 U.S.C. § 7543(a) (prohibiting states from adopting or attempting to enforce standards related to the control of emissions from new motor vehicles); EPCA, 49 U.S.C. § 32919(a) (2006) (forbidding states from adopting or enforcing laws or regulations related to automobile fuel economy standards covered by federal law). After the Court decided *Massachusetts v. EPA*, however, two federal district courts held that, so long as EPA grants California the right to independently set greenhouse gas emissions limits under the waiver process of the Clean Air Act, neither the Clean Air Act nor the EPCA would preempt such state regulatory power. See *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1189 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 350 (D. Vt. 2007).

¹³⁴ See *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008); *Colorado ex. rel. Suthers v. Gonzalez*, 558 F. Supp. 2d 1158, 1165 (D. Colo. 2007); see also *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2008).

¹³⁵ See Mank, *supra* note 6, at 1767–74; Massey, *supra* note 6, at 277–80; Zdeb, *supra* note 6, at 1073–78; see also Cody, *supra* note 125, at 162.

¹³⁶ Massey, *supra* note 6, at 277.

tators have acknowledged that, as a *parens patriae* decision, *Massachusetts v. EPA* is unconventional—and even confusing.¹³⁷

B. American Electric: *Parens Patriae Standing and Global Warming*

The Second Circuit in *American Electric* similarly expressed confusion about the standing analysis in *Massachusetts v. EPA* and how it applies to *parens patriae* lawsuits.¹³⁸ And unlike the state petitioner in *Massachusetts v. EPA*, the state plaintiffs in *American Electric* sought injunctive relief against six power generation companies, alleging that the utilities' collective greenhouse gas emissions constituted a public nuisance under federal common law.¹³⁹ Unlike the Supreme Court in *Massachusetts v. EPA*, the Second Circuit attempted to avoid ambiguity in its standing analysis by analyzing the states' standing in two distinct capacities: *parens patriae* and proprietary.¹⁴⁰ In so doing, the Second Circuit held that the states satisfied the *parens patriae* standing test articulated under the Supreme Court's 1982 decision *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,¹⁴¹ and also demonstrated a sufficient proprietary injury under the *Lujan* test.¹⁴² Furthermore, in evaluating the states' standing under *Lujan*, the Second Circuit incorporated reasoning from *Massachusetts v. EPA* into each prong of its analysis, ultimately relying on strands of the Court's decision based on the similarities between the physical harms the states suffered in both cases.¹⁴³

By bringing their claims under common law, however, the *American Electric* plaintiffs also faced several additional hurdles not encountered by the petitioners in *Massachusetts v. EPA*—in particular, whether the suit would force the court to render policy decisions more appropriate for the political branches, and whether their federal common law claims were displaced by the Clean Air Act or other federal legislation concerning greenhouse gas emissions.¹⁴⁴ In reversing the judgment of

¹³⁷ See Mank, *supra* note 6, at 1746; Massey, *supra* note 6, at 268; Zdeb, *supra* note 6, at 1073.

¹³⁸ See *Am. Elec.*, 582 F.3d at 338 (noting that the Court in *Massachusetts v. EPA* used “language that hearkened to a state’s quasi-sovereign interests” while applying the *Lujan* test to a proprietary injury, and asking, “Must a state asserting *parens patriae* standing satisfy both the *Snapp* and *Lujan* tests?”).

¹³⁹ See *id.* at 316.

¹⁴⁰ See *id.* at 338–49.

¹⁴¹ 458 U.S. 592 (1982); see *supra* notes 66–70 and accompanying text.

¹⁴² See *Am. Elec.*, 582 F.3d at 338–49.

¹⁴³ See *id.* at 341–42, 344, 347–49.

¹⁴⁴ See *id.* at 324, 369–88. The displacement question may become more relevant now that the EPA has begun establishing regulations for greenhouse gas emissions. See *supra*

the lower court, the Second Circuit held that the political question doctrine did not counsel dismissal, concluding that the judiciary possesses the institutional competence to resolve climate tort claims regardless of their novelty or complexity.¹⁴⁵ Noting that the Supreme Court has rarely dismissed these cases as political questions, the Second Circuit reasoned that the common law claims did not involve policy questions that could only be determined by Congress or the Executive.¹⁴⁶ Thus, the Second Circuit's analysis differed substantially from the decisions of several lower courts that dismissed similar climate tort claims based on the political question doctrine.¹⁴⁷ The Supreme Court granted certiorari the following year.¹⁴⁸

III. PRUDENTIAL LIMITATIONS AND *PARENS PATRIAE* LAWSUITS

As the Second Circuit's 2009 decision in *Connecticut v. American Electric Power Co.* illustrates, states may attempt to pursue their interests in combating widespread environmental harms under the common law rather than in administrative actions against the federal government.¹⁴⁹ And, as noted above, several commentators have concluded that states suing in their *parens patriae* capacities should be entitled to as relaxed a standing regime as Massachusetts received in the U.S. Supreme Court's 2007 decision *Massachusetts v. EPA*.¹⁵⁰ Section A of this Part explores the

note 116. In *American Electric*, the Second Circuit held that the plaintiffs had stated a valid tort claim under federal common law, and that this claim had not been displaced by the Clean Air Act, which had not yet been used to address directly the types of emissions at issue in the case. 582 F.3d at 371, 381, 387–88. However, if the Supreme Court were to hold otherwise with regard to federal common law claims, states could possibly pursue state common law claims seeking substantially the same relief on the similar theories of harm; indeed, the plaintiffs in *American Electric* identified state common law as an alternative basis of relief in their lawsuit. *See id.* at 314.

¹⁴⁵ *See* 582 F.3d at 329.

¹⁴⁶ *Id.* at 321, 330–31. Interestingly, the court also linked the political question doctrine to the displacement issue, reasoning that where Congress or the executive branch can displace common law standards with their own legislative or regulatory standards, “there is no need for the protections of the political question doctrine.” *Id.* at 332.

¹⁴⁷ *See id.* at 324–30 (reversing lower court decision); *Native Village of Kivalina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863, 871–77 (N.D. Cal. 2009) (reasoning that a climate nuisance claim presented lack of judicially discoverable and manageable standards, and required the court to make an initial policy decision better reserved to the political branches), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010); *Gen. Motors Corp.*, 2007 WL 2726871, at *12–13, 16.

¹⁴⁸ 131 S. Ct. 813 (U.S. Dec. 6, 2010).

¹⁴⁹ *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314–15 (2d Cir. 2009).

¹⁵⁰ *See Massachusetts v. EPA*, 549 U.S. 497, 517–26 (2007); *supra* notes 135–137 and accompanying text.

boundaries of the separation of powers principles often invoked in restrictive standing decisions, and concludes that a relaxed standing regime in state *parens patriae* actions would be consistent with these principles.¹⁵¹ Section B demonstrates, however, that this is not the end of the story: common law actions that raise complex environmental issues involving widespread harms and grievances may give rise to discrete separation of powers concerns not implicated by statutory suits brought directly against the federal government.¹⁵²

A. *Parens Patriae Standing and the Separation of Powers*

The Supreme Court has consistently identified separation of powers concerns as the basis for its restrictive standing regimes; therefore, a restrictive standing threshold for state litigants bringing common law actions would have to be justified on a theory of separation of powers.¹⁵³ Most decisions involving Article III standing, however, have involved parties seeking to vindicate more generalized public rights by forcing the government to better enforce or comply with its own laws, particularly when it is unclear the party has suffered a distinct harm.¹⁵⁴ As a statutory petition for judicial review of agency action, *Massachusetts v. EPA* fits into this public law framework of cases.¹⁵⁵ In a common law suit brought against a private polluter, however, the relationship between the plaintiff, the defendant, and the role the court is asked to play in resolving the dispute changes.¹⁵⁶ Rather than collaterally attacking government policy by asking the court to review an agency's actions, the plaintiffs in a tort or property action seek relief from a harm directly caused by the defendants; the chains of causation and redress-

¹⁵¹ See *infra* notes 153–169 and accompanying text.

¹⁵² See *infra* notes 170–190 and accompanying text.

¹⁵³ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); see *supra* notes 36–52 and accompanying text.

¹⁵⁴ See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148–51 (2009); *Lujan*, 504 U.S. at 562–71; Hessick, *supra* note 12, at 296.

¹⁵⁵ See *Massachusetts v. EPA*, 549 U.S. at 516–20 (discussing the statutory framework at issue in the case and the relation between the Article III standing inquiry and statutory rights to judicial review); Nagle, *supra* note 11, at 494 (characterizing *Massachusetts v. EPA* as “the quintessential public law case”).

¹⁵⁶ Compare *Massachusetts v. EPA*, 549 U.S. at 514, 516–18 (discussing petitioners' request for judicial review of the agency decision), with *Am. Elec.*, 582 F.3d at 316–19 (reviewing plaintiffs' claims of injuries caused by defendants' emissions, and their request for injunctive relief).

ability are thus “shorter” than those alleged in Supreme Court cases like *Massachusetts v. EPA* and *Lujan v. Defenders of Wildlife*.¹⁵⁷

As the judiciary is less likely to be asked to “oversee” the executive branch in common law suits, a moderate application of the *Lujan* factors in common law global warming lawsuits is sufficient to ensure that separation of powers values are protected.¹⁵⁸ As illustrated by cases like *Massachusetts v. EPA*, *Lujan*, and the Court’s 1997 decision *FEC v. Akins*, the Court may apply the Article III standing test with varying degrees of intensity and scrutiny, depending on the majority’s sensitivity to the underlying separation of powers issues implicated by the suit.¹⁵⁹ In both *Massachusetts v. EPA* and *Akins*, the majority identified the crux of the standing inquiry as whether the plaintiffs presented a sufficiently personal stake in the claim so as to ensure concrete adversity between the parties.¹⁶⁰ This in turn diminished the concern that the adjudication would impact a larger group of people.¹⁶¹

Furthermore, several Supreme Court justices have likened the concrete adversity model of standing to the more traditional threshold inquiry of whether a particular victim of a “widespread mass tort” has standing to sue.¹⁶² Even Justice Scalia, whom many consider to be the principal architect of the restrictive standing framework, has conceded that each plaintiff in a mass tort action will likely suffer a sufficiently particular injury, despite the widespread nature of that injury.¹⁶³ Not surprisingly, the “widespread mass tort” analogy provides a strong foundation for a relaxed standing regime in state-led tort actions.¹⁶⁴

¹⁵⁷ Compare *Massachusetts v. EPA*, 549 U.S. at 510–14, 516–18, and *Lujan*, 504 U.S. at 559, 561–62, with *Comer v. Murphy Oil USA*, 585 F.3d 855, 865 n.5 (5th Cir. 2009) (noting a shorter chain of causation in a tort claim for relief compared to a public law challenge), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (restoring the trial court’s dismissal of a nuisance action).

¹⁵⁸ *Cf. Am. Elec.*, 582 F.3d at 338–49.

¹⁵⁹ See *Massachusetts v. EPA*, 549 U.S. at 520 (stating that *Massachusetts* was entitled to special solicitude in the Court’s standing analysis); *FEC v. Akins*, 524 U.S. 11, 23–25 (1998) (framing the issue of standing as whether the plaintiff’s claim is sufficiently concrete or too “abstract,” and then holding that a claim of informational injury was sufficiently concrete to support standing); *Lujan*, 504 U.S. at 573–74, 577 (stating that claims involving generalized public grievances are nonjusticiable); *Murphy*, *supra* note 35, at 959–60.

¹⁶⁰ See *Massachusetts v. EPA*, 549 U.S. at 517 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Akins*, 524 U.S. at 24–25; *Murphy*, *supra* note 35, at 958–59.

¹⁶¹ See *Massachusetts v. EPA*, 549 U.S. at 522; *Akins*, 524 U.S. at 24.

¹⁶² See *Akins*, 524 U.S. at 24–25.

¹⁶³ See *id.* at 35 (Scalia, J., dissenting) (noting that in a mass tort situation, every victim suffers particular injuries); *Murphy*, *supra* note 35, at 975–76.

¹⁶⁴ See *Akins*, 524 U.S. at 24–25; *Am. Elec.*, 582 F.3d at 317–18 (listing different types of injuries suffered by states as result of climate change); see also *Native Village of Kivalina v.*

The theory of harm in a case like *American Electric* essentially maps onto this private law “mass tort action” framework and, as such, does not implicate the separation of powers concerns embedded in public law litigation.¹⁶⁵ But even if one were to believe that a *parens patriae* suit presents the same problems as a public law action, the special nature of *parens patriae* litigation suggests that any lingering separation of powers concerns could be resolved by a moderate application of the *Lujan* factors, particularly when they are coupled with the standing test outlined in the Court’s 1982 decision *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.¹⁶⁶ As the Court has specifically recognized, the *Snapp* standing test already ensures that lawsuits like *American Electric* contain a concrete interest that is judicially cognizable.¹⁶⁷ In fact, the *Snapp* test was the only threshold for states suing as *parens patriae* throughout the period during which the Court began applying the three-pronged *Lujan* test to private citizens and associations bringing public law actions.¹⁶⁸ Nevertheless, assuming that the *Lujan* test will continue to play a part in complicated *parens patriae* lawsuits, a moderate application of the test would be sufficient to ensure concrete adversity.¹⁶⁹

B. Prudential Limitations on *Parens Patriae* Actions

Even though state *parens patriae* litigants should be able to establish Article III standing under the Court’s separation of powers rationale, they may still have to overcome prudential justiciability thresholds; indeed, recent case law suggests that defendants will continue to rely on these doctrines to obtain dismissals of common law environmental actions.¹⁷⁰ Regardless of whether the judiciary is ill-suited to adjudicate

ExxonMobil Corp., 663 F. Supp. 2d 863, 868–69 (N.D. Cal. 2009) (discussing the impacts of climate change on a village of Inupiat Eskimos in a climate tort action), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010).

¹⁶⁵ See Nagle, *supra* note 11, at 511–13.

¹⁶⁶ 458 U.S. 592, 607–08 (1982) (outlining the standing test for *parens patriae* lawsuits); see *Am. Elec.*, 582 F.3d at 338–49; cf. *Massachusetts v. EPA*, 549 U.S. at 538 (Roberts, C.J., dissenting) (arguing that the state must satisfy both the *Snapp* and *Lujan* standing tests when suing as *parens patriae*).

¹⁶⁷ *Snapp*, 458 U.S. at 602.

¹⁶⁸ See Zdeb, *supra* note 6, at 1076–77.

¹⁶⁹ See Merrill, *supra* note 50, at 304–05 (noting that the *Lujan* requirements were not developed in the state standing context, but should apply to *parens patriae* suits where a state sues outside of its own courts); Wildermuth, *supra* note 16, at 306–07; see also *Am. Elec.*, 582 F.3d at 338–49 (analyzing, though not requiring, state standing under both the *Snapp* and *Lujan* tests).

¹⁷⁰ See *Kivalina*, 663 F. Supp. 2d at 871–77; *California v. Gen. Motors Corp.*, No. 06-05755, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007); see also *Am. Elec.*, 582 F.3d at

complex climate tort suits or not, these lawsuits operate outside the safeguards and limitations of a national statutory framework, and (as in cases like *American Electric*) may call on the judiciary's equity powers to establish a cap on the greenhouse gas emissions of regulated entities.¹⁷¹ Additionally, the fact that the claims are non-statutory renders more problematic the fact that these cases involve "generalized grievances," including the related problem that the injuries are caused by a large—and potentially global—combination of actors.¹⁷² Therefore, unlike the separation of powers concern embedded in public law litigation where the judiciary is asked to monitor executive action to ensure it satisfies congressional commands, common law actions give rise to a distinct separation of powers concern: that the judiciary will undemocratically create far-reaching law and policy.¹⁷³

Overall, the federal judiciary's reluctance to entertain climate tort suits seems to have less to do with the Article III standing of the parties and more to do with the complex and unprecedented nature of the issues that arise in the cases.¹⁷⁴ Most importantly, recent case law illustrates that the prudential standing and political question doctrines are still—even after hundreds of years—undefined at their outer boundaries, and invite courts to apply a fairly loose set of policy goals to dismiss

324–32 (evaluating defendants' claims that a climate tort lawsuit violated the political question doctrine). Notably, a panel of the U.S. Court of Appeals for the Fifth Circuit took a particularly strong stance against the applicability of the political question doctrine to common law tort claims, even singling out the *General Motors* decision and district court decision in *American Electric* as "legally flawed." See *Comer*, 585 F.3d at 873–76. It similarly refused to apply the prudential standing doctrine to the plaintiff's nuisance claims. *Id.* at 868 n.7. This decision, however, was soon vacated by an en banc panel of the Fifth Circuit. See 607 F.3d at 1055 (restoring trial court's dismissal of nuisance action). For a helpful treatment of justiciability concerns in *parens patriae* actions brought in the product litigation context, see Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 947–50 (2008).

¹⁷¹ See *Am. Elec.*, 582 F.3d at 318.

¹⁷² See *Kivalina*, 663 F. Supp. 2d at 875–77; *Gen. Motors Corp.*, 2007 WL 2726871, at *15; see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (affirming that the bar on generalized grievances is still a viable prudential standing tool); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

¹⁷³ See, e.g., *Kivalina*, 663 F. Supp. 2d at 876 (noting that the doctrine is in part aimed at preventing a court from removing an important policy determination from the legislature); *Gen. Motors Corp.*, 2007 WL 2726871, at *16 (emphasizing that the judiciary is not accountable to any other branch or to the people).

¹⁷⁴ See *Kivalina*, 663 F. Supp. 2d at 871–77 (relying primarily on the political question doctrine to dismiss a nuisance action); *Gen. Motors Corp.*, 2007 WL 2726871, at *6–8, 15–16; Gerrard, *supra* note 9, at 40; see also *Massachusetts v. EPA*, 549 U.S. at 541 (Roberts, C.J., dissenting) (arguing that climate change, by its very nature, is nonjusticiable).

claims that involve widespread injuries or complex chains of causation.¹⁷⁵

Although not intended to dismiss claims merely because they are politically charged, the political question doctrine does make it easier for a court to decline jurisdiction when it is faced with an unfamiliar or complex issue of law.¹⁷⁶ The six factors the Court originally articulated in its 1962 decision *Baker v. Carr* operate independently of one another to dismiss political questions; among these factors is the consideration of whether the issues presented may cause the court to make an initial policy decision otherwise reserved to the political branches—a fairly loose concept in itself.¹⁷⁷ What the *Baker* factors really boil down to is that where the political branches have not yet enacted clear standards and policies by which to address a widespread problem, the judiciary should avoid resolving even portions of that problem.¹⁷⁸ Whereas some observers have championed the common law of nuisance as a mechanism to fill the gaps left by legislative and regulatory inaction,¹⁷⁹ the ongoing failure of the legislature to pass climate legislation—coupled with recent congressional attempts to prevent the EPA from regulating such emissions—suggests that defendants will continue to invoke the political question doctrine to dismiss climate tort lawsuits.¹⁸⁰ Therefore, even in cases like *American Electric*, where states allege injuries similar to those found sufficient in *Massachusetts v. EPA*, plaintiffs will likely face

¹⁷⁵ See *Newdow*, 542 U.S. at 11–12; *id.* at 18–25 (Rehnquist, C.J., concurring in the judgment); *Kivalina*, 663 F. Supp. 2d at 871–77 (applying a “distilled” version of the doctrine to common law tort claims); Choper, *supra* note 88, at 1460 (noting scholarly criticism of the Court’s political question doctrine as overly discretionary and not bound by rule of law); see also Cutting & Cahoon, *supra* note 17, at 141 (arguing that in terms of the lower courts’ dismissals of climate tort claims on political question grounds, “the justiciability issue is bogus . . . the courts probably just thought the cases were way too much work and that the legislative or executive action would eliminate need to decide the cases”).

¹⁷⁶ See Barkow, *supra* note 89, at 260; Choper, *supra* note 88, at 1460; see also Ferejohn & Kramer, *supra* note 96, at 1013–14 (characterizing political questions as those which the court should not consider because they are “too political . . . [they are] potentially controversial questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counter-attack”).

¹⁷⁷ See 369 U.S. 186, 217 (1962); accord *Gen. Motors Corp.*, 2007 WL 2726871, at *6.

¹⁷⁸ See *Baker*, 369 U.S. at 217; *Gen. Motors Corp.*, 2007 WL 2726871, at *14–16; Melamed, *supra* note 14, at 591–94.

¹⁷⁹ See, e.g., Cutting & Cahoon, *supra* note 17, at 114–15, 139.

¹⁸⁰ See, e.g., Michael B. Gerrard, *Climate Regulation Without Congressional Action*, N.Y. L.J., Oct. 6, 2010, <http://www.law.com/jsp/nlj/PubArticleNY.jsp?id=1202472923986> (discussing the failure of Congress to pass climate legislation and congressional attacks on EPA efforts to regulate greenhouse gas emissions).

an array of political factors when bringing common law actions against private polluters.¹⁸¹

Similarly, the prudential standing doctrine applies more flexibly to parties than Article III standing because it allows a court to shift its inquiry away from whether the plaintiff has been sufficiently injured to whether the plaintiff is the right party to bring the lawsuit—essentially, whether the suit should be litigated at all.¹⁸² One might argue that there is no better party to bring a complex environmental suit than a state, but if a court is motivated to dismiss a lawsuit based on the underlying nature of the issues presented—as in the Supreme Court’s 2004 decision *Elk Grove Unified School District v. Newdow*—then it logically follows that no party could be entitled to litigate it.¹⁸³ In other words, if the underlying separation of powers concern is that the court will render a decision with broad policy implications, then it makes no difference whether the plaintiff is a state or a private citizen.¹⁸⁴

This sort of analysis—framing the inquiry around the issues raised by the lawsuit rather than the injuries alleged by the parties themselves—is one that scholars criticize the Court for importing into the *Lujan* standing test.¹⁸⁵ But the prudential standing doctrine allows a court to engage in such an overlapping mode of analysis; even scholars who have criticized the disingenuousness and incoherence of the Article III standing doctrine have conceded that the prudential justiciability doctrines may provide a more legitimate and transparent means with which to dismiss complicated lawsuits involving widespread harms.¹⁸⁶

Underlying these significant drawbacks to state-led climate tort litigation is the reality that *Massachusetts v. EPA*, a statutory lawsuit that did not involve prudential justiciability thresholds, can be of no assistance to

¹⁸¹ See *Am. Elec.*, 582 F.3d, at 321–32; *Gen. Motors Corp.*, 2007 WL 2726871, at *6–16.

¹⁸² See *Warth*, 422 U.S. at 499–500; Murphy, *supra* note 35, at 989.

¹⁸³ See *Newdow*, 542 U.S. at 13–18.

¹⁸⁴ *Cf. Massachusetts v. EPA*, 549 U.S. at 536, 547 (Roberts, C.J., dissenting) (arguing that doctrinal support for relaxed state standing is lacking, and that such a relaxed regime impermissibly allowed the Court to become a forum for public policy debates).

¹⁸⁵ See, e.g., Elliott, *supra* note 11, at 466–67 (discussing other scholars’ criticisms of standing doctrine, including that it “cloaks in technical doctrine what are actually normative decisions about the proper scope of government action,” and noting that even dissenting members of the Court have accused majorities of using standing as a “cover” for improper analysis). Indeed, in his dissent in *Massachusetts v. EPA*, Chief Justice Roberts seemed to conflate the prudential justiciability doctrines with Article III standing when he argued that climate change, by its very nature, is nonjusticiable. See 549 U.S. at 541, 547 (Roberts, C.J., dissenting); accord Melamed, *supra* note 14, at 586.

¹⁸⁶ See Murphy, *supra* note 35, at 989–90; see also Elliott, *supra* note 11, at 508–10, 515–16.

state litigants in common law actions.¹⁸⁷ In fact, at least one court has cited to the case for the opposite effect by highlighting how the decision underscores the complex political nature of climate change litigation.¹⁸⁸ The lack of statutory guidelines and standards makes climate tort lawsuits more likely to implicate these separation of powers concerns; in short, despite several scholars' well-reasoned arguments to the contrary, *Massachusetts v. EPA* does very little to help states suing in their common law *parens patriae* capacities.¹⁸⁹ Recognizing this should help motivate scholars—as well as state attorneys general who are concerned about global warming—to reevaluate how *Massachusetts v. EPA* can still help states combat climate change and other widespread environmental problems.¹⁹⁰

IV. SOVEREIGN INTERESTS AND SPECIAL SOLICITUDE

As Part III demonstrates, common law climate change lawsuits risk implicating particular separation of powers concerns, thereby rendering the preliminary stages of these lawsuits more complicated than statutory challenges like the U.S. Supreme Court's 2007 decision *Massachusetts v. EPA*.¹⁹¹ This Part therefore proposes that scholars and future litigants shift their focus away from how *Massachusetts v. EPA* expanded *parens patriae* litigation to instead focus on how it provides a stronger basis for states asserting that the federal government has directly injured their lawmaking and regulatory capacities.¹⁹² Section A of this Part argues that *Massachusetts v. EPA* suggests a broader conception of sovereign interest lawsuits, as opposed to *parens patriae* actions, as the basis for special solicitude.¹⁹³ Section B then provides an overview of the types of sovereign interest injuries that may be identified in future climate change litigation.¹⁹⁴

A. *Massachusetts v. EPA as Sovereign Interests Precedent*

Although several commentators have argued that *Massachusetts v. EPA* signals expanded *parens patriae* standing for states vindicating envi-

¹⁸⁷ See *supra* notes 170–184 and accompanying text.

¹⁸⁸ See *Gen. Motors Corp.*, 2007 WL 2726871, at *10–13.

¹⁸⁹ See Mank, *supra* note 6, at 1767–74; Massey, *supra* note 6, at 277–80; Zdeb, *supra* note 6, at 1076–77.

¹⁹⁰ See *infra* notes 191–235 and accompanying text.

¹⁹¹ See *supra* notes 149–190 and accompanying text.

¹⁹² See *infra* notes 191–235 and accompanying text.

¹⁹³ See *infra* notes 195–219 and accompanying text.

¹⁹⁴ See *infra* notes 220–235 and accompanying text.

ronmental injuries,¹⁹⁵ limiting the decision to *parens patriae* standing overlooks a simpler reading that could prove more useful to states developing future climate litigation strategies: *Massachusetts v. EPA* as a sovereign interests precedent.¹⁹⁶ Although the decision itself is not a traditional sovereign interest case in which a state asserts a discrete legal right or regulatory power as its basis for standing, it does suggest a right to judicial review when the state's lawmaking interests diverge from the federal government's.¹⁹⁷ Other scholars have identified similar rationales for the Court's standing analysis, likening the decision to cases in which states assert direct injuries to their regulatory interests.¹⁹⁸

Both the language of the opinion and the procedural background of the case support this sovereign interest conception of *Massachusetts v. EPA*.¹⁹⁹ In opening its discussion of the state's standing, the Court characterized Massachusetts as a "sovereign state" and emphasized the state's "well-founded desire to preserve its sovereign territory" in bringing the action against the EPA.²⁰⁰ After conceding that the state had surrendered certain sovereign rights to the federal government as a condition of federalism, the Court nonetheless insisted that the state was asserting its own rights under federal law when it distinguished the suit from actions where a state litigates to "protect her citizens," as in traditional *parens patriae* lawsuits.²⁰¹ Thus, the Court strove to identify a concrete harm to the state's unique interests—its ability to exercise its rights to regulate and protect its territory—and coupled this interest with the state's rights under the Clean Air Act to seek review of harmful agency action.²⁰² This line of reasoning is strikingly similar to cases wherein the state's interest was considered sovereign, including cases in

¹⁹⁵ See Mank, *supra* note 6, at 1767–74; Massey, *supra* note 6, at 277–80; Zdeb, *supra* note 6, at 1076–77; see also Cody, *supra* note 125, at 162.

¹⁹⁶ See *Massachusetts v. EPA*, 549 U.S. 497, 516–20 (2007); Welti, *supra* note 16, at 1773–74.

¹⁹⁷ See *Massachusetts v. EPA*, 549 U.S. at 516–21; *West Virginia v. EPA*, 362 F.3d 861, 865–68 (D.C. Cir. 2004); Welti, *supra* note 16, at 1765–68, 1774.

¹⁹⁸ See Nash, *supra* note 16, at 1073–74; Welti, *supra* note 16, at 1765–68; see also Mank, *supra* note 6, at 1729; Melamed, *supra* note 14, at 584, 607; cf. Massey, *supra* note 6, at 262 ("The best argument for relaxing the meaning of the *Lujan* elements when a state asserts a sovereign interest in federal court is that doing so is a necessarily implied aspect of the structural design of dual sovereignty.")

¹⁹⁹ See *Massachusetts v. EPA*, 549 U.S. at 516–21.

²⁰⁰ *Id.* at 518–19.

²⁰¹ See *id.* at 519–20, 520 n.17; see also *West Virginia v. EPA*, 362 F.3d at 868 (concluding that state was suing "as a state" and not as *parens patriae*); *Davis v. EPA*, 348 F.3d 772, 778 (9th Cir. 2003) (distinguishing a state's direct interests in litigation from *parens patriae* standing).

²⁰² See *Massachusetts v. EPA*, 549 U.S. at 518–20; Welti, *supra* note 16, at 1766–67.

which the state retained only a residual lawmaking power under a federal regulatory program like the Clean Air Act.²⁰³ Additionally, the Court noted that another basis for special solicitude was the fact that the state's lawmaking powers to reduce greenhouse gas emissions "might well be preempted," and decisions involving preemption disputes have largely been categorized as sovereign interests cases.²⁰⁴

The most confusing language in the Court's opinion, therefore, is its use of the term "quasi-sovereign" when it appeared to identify a regulatory or sovereign right in the litigation as the basis for standing.²⁰⁵ The majority's characterization of quasi-sovereign interests as a state's own rights under federal law is inconsistent with how the Court has previously defined the concept—as fundamentally a derivative interest in the welfare of the state's citizens.²⁰⁶ Additionally, Chief Justice Roberts correctly asserted in dissent that states suing in their *parens patriae* capacities are ordinarily barred from suing the federal government—a claim that prompted the majority to stress further that it was premising its standing analysis on the state's unique interests.²⁰⁷

Although future litigants and scholars could continue to grapple over whether *Massachusetts v. EPA* is a quasi-sovereign or a sovereign interests case, the Court's use of the term "quasi-sovereign" does nothing to diminish the well-established leniency shown toward states that assert their own lawmaking and regulatory interests as a basis for standing.²⁰⁸ In fact, the main problem with the Court's use of the term is not how it impacts future sovereign interests litigation, but how it affects *parens patriae* suits such as *American Electric*, in which a perplexed Second Circuit ultimately resorted to a traditional *Snapp* analysis of the

²⁰³ See *West Virginia v. EPA*, 362 F.3d at 865–68; Wildermuth, *supra* note 16, at 313–14; *supra* note 65 and accompanying text.

²⁰⁴ See *Massachusetts v. EPA*, 549 U.S. at 519; *Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443–44 (D.C. Cir. 1989) (holding that states suffered injury to their sovereign power to enforce state law because administrative rules threatened to preempt state statutes); *Florida v. Weinberger*, 492 F.2d 488, 492–94 (5th Cir. 1974) (reasoning that a state had standing because a new federal law conflicted with state law and the state faced sanctions if forced to comply with federal standard).

²⁰⁵ See *Massachusetts v. EPA*, 549 U.S. at 518–21, 520 n.17; Wildermuth, *supra* note 16, at 317; see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (defining state sovereign interests).

²⁰⁶ See *Snapp*, 458 U.S. at 602; Wildermuth, *supra* note 16, at 298–99, 305, 317.

²⁰⁷ See *Massachusetts v. EPA*, 549 U.S. at 520 n.17; *id.* at 539 (Roberts, C.J., dissenting).

²⁰⁸ See, e.g., *West Virginia v. EPA*, 362 F.3d at 868; *Davis*, 348 F.3d at 778; *Alaska v. Dept. of Transp.*, 868 F.2d at 443–44; *Ohio ex rel. Celebrezze v. U.S. Dept. of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985) (concluding that a state had standing to seek judicial review of federal regulation that claimed to expressly invalidate a state statute); *Weinberger*, 492 F.2d at 492–94; Merrill, *supra* note 50, at 299–301; Wildermuth, *supra* note 16, at 318–20.

states' quasi-sovereign interests rather than granting the states a blanket "special solicitude."²⁰⁹ As discussed in Part III, *parens patriae* suits like *American Electric* involve separation of powers concerns that can give rise to a more stringent justiciability threshold.²¹⁰ Sovereign interests lawsuits, however, do not similarly invite a court to render initial policy decisions independent of a pre-established regulatory framework; they instead focus a court's analysis on the concrete injuries to the state's own interests.²¹¹ Sovereign interests suits, therefore, are particularized the way the Supreme Court requires public law litigation to be, and do not undermine separation of powers values.²¹² This places them comfortably within the realm of the "special solicitude" the Court articulated in *Massachusetts v. EPA*.²¹³

Similarly, a sovereign interest approach that frames the standing inquiry in terms of federalism concerns and states' rights would likely appeal even to advocates of more restrictive standing regimes.²¹⁴ Supporters of heightened standing tests concede that where states challenge federal laws that directly impact state administrative machinery, standing requirements should be relaxed.²¹⁵ "Special solicitude" standing in such actions would reflect the reality that in the modern administrative state, states challenging federal regulatory actions often are not concerned with the substance of the action itself but with how the action impacts the state's ability to regulate.²¹⁶

Overall, future state litigants will increase their chances of invoking a relaxed standing regime if they forgo further manipulation of the scope of quasi-sovereignty, thereby avoiding the additional restrictions on states suing as *parens patriae*, and instead allege an injury to state lawmaking or regulatory capabilities.²¹⁷ Under this framework, a state could satisfy the *Lujan* test by asserting: (1) an injury-in-fact to the

²⁰⁹ See *Am. Elec.*, 582 F.3d at 338–49.

²¹⁰ See *supra* notes 149–190 and accompanying text.

²¹¹ Compare *West Virginia v. EPA*, 362 F.3d at 868, and *Davis*, 348 F.3d at 778, with *Gen. Motors Corp.*, 2007 WL 2726871, at *10–13, 16.

²¹² See Metzger, *supra* note 16, at 42.

²¹³ See *Massachusetts v. EPA*, 549 U.S. at 519–20.

²¹⁴ See *Woolhandler & Collins*, *supra* note 57, at 508; see also Welti, *supra* note 16, at 1774–79.

²¹⁵ See *Woolhandler & Collins*, *supra* note 57, at 508.

²¹⁶ Wildermuth, *supra* note 16, at 321; see Metzger, *supra* note 16, at 66.

²¹⁷ See Wildermuth, *supra* note 16, at 313–14 (noting that even where states asserting sovereign interests had to meet *Lujan* requirements, those requirements were easily met); see also Merrill, *supra* note 50, at 305 (suggesting that even though states suing in federal courts would have to satisfy *Lujan*, they "could satisfy these limitations . . . by showing that the State itself had suffered some injury in fact from the challenged action").

state's particular regulatory interests, (2) that the federal government's actions caused the injury, and (3) that a favorable court decision would redress the injury.²¹⁸ Specifically, as the following Section demonstrates, sovereign interests may be invoked in precisely the types of circumstances that cause states to seek vindication for injuries the federal government has refused to regulate adequately—such as in the climate change context.²¹⁹

B. *Identifying Sovereign Interests in Future Litigation*

As described above, a state could merit special solicitude at the threshold of a climate change lawsuit by asserting that it has suffered an injury to its interests in regulating and safeguarding its territory and citizenry, and that the federal government's actions—or even inaction—is the cause of that injury.²²⁰ Such a regulatory dispute could arise where a state retains a concrete lawmaking or regulatory power under a federal administrative scheme, such as the Clean Air Act, and the federal government's actions deprive the state from fully exercising its residual rights.²²¹ Similarly, where a state alleges that federal regulation threatens to preempt the state's independent regulatory efforts, federal courts would likely recognize that a sovereign interest is at stake and would therefore relax standing requirements.²²²

The most direct route for incorporating sovereign interests into future environmental litigation would be to identify an injury to a specific statutory right or duty retained by the state that would give rise to a concrete governing interest.²²³ The Clean Air Act does grant states some residual lawmaking capabilities, and in other regulatory schemes where states might seek to challenge federal power, states often retain similar levels of independence.²²⁴ In particular, California has been

²¹⁸ Indeed, this is essentially the test articulated by several amicus states in *Massachusetts v. EPA*. See Brief of Arizona et al., *supra* note 128, at 14–15.

²¹⁹ See *infra* notes 220–235 and accompanying text.

²²⁰ See *West Virginia v. EPA*, 362 F.3d at 868; Nash, *supra* note 16, at 1055–56, 1072–74; Welti, *supra* note 16, at 1765–68.

²²¹ See *Davis*, 348 F.3d at 778 (state had a direct interest because it was a direct recipient of denial of waiver of a federal oxygen level requirement); Brief of Arizona et al., *supra* note 128, at 18–19; Wildermuth, *supra* note 16, at 318–20.

²²² See *Alaska v. Dept. of Transp.*, 868 F.2d at 443–44; *Celebrezze*, 766 F.2d at 232–33; *Weinberger*, 492 F.2d at 494; see also Metzger, *supra* note 16, at 69; Nash, *supra* note 16, at 1073–74.

²²³ See Wildermuth, *supra* note 16, at 318–20.

²²⁴ See Clean Air Act, 42 U.S.C. § 7410(a)(1) (2006) (outlining state involvement in creating plans to meet national air standards); *id.* § 7543(a)–(b) (allowing eligible states to apply for waivers from EPA in order to set independent emissions standards); Brief of Arizona et al., *supra* note 128, at 18 (clarifying that “not all state regulation in this area is fore-

granted significant regulatory authority under the Clean Air Act to establish emissions standards independent of the federal government, and observers have characterized California's interests as "sovereign."²²⁵ But even where the state's interest may be less explicit, recent case law indicates that federal courts will nonetheless consider the state's interests under the statutory scheme to be substantial enough to merit a relaxed standing threshold.²²⁶ These cases suggest that where a federal agency's actions are onerous, burdensome, or otherwise damaging to the state's regulatory interests, special solicitude is warranted.²²⁷ A state may even have a sovereign interest where the federal agency *abstains* from action and refuses to enforce its own regulations, thereby causing injury to the state's interests in ensuring it receives the benefits of the federally administered regulatory scheme.²²⁸

A more generally applicable source of regulatory interest standing is a state's claim that federal law threatens to preempt the state's independent efforts to regulate an environmental harm.²²⁹ Several federal appellate court decisions indicate that a state has a sovereign interest in preserving its lawmaking and regulatory powers, even where the federal government's laws may ultimately preempt those powers.²³⁰ None

closed" in discussing the Clean Air Act); Carlson, *supra* note 97, at 1107–08, 1125–28; Wel-
ti, *supra* note 16, at 1779 (noting that the Clean Air Act creates a high degree of "cooperative
federalism"); *see also* Clean Water Act, 33 U.S.C. § 1370 (2006) (reserving state author-
ity under the Clean Water Act).

²²⁵ *See* Brief of Arizona, *supra* note 128, at 13–14; Wildermuth, *supra* note 16, at 318–20.

²²⁶ *See* North Carolina v. EPA, 531 F.3d 896, 914–15 (D.C. Cir. 2008); *West Virginia v. EPA*, 362 F.3d at 865–66, 868 (detailing the emissions budget process under a federal administrative scheme and the consequent economic burden on states to meet the standards); *see also* Massachusetts v. EPA, 549 U.S. at 519–20.

²²⁷ *See* North Carolina v. EPA, 531 F.3d at 914–15; *West Virginia v. EPA*, 362 F.3d at 865–66, 868; *Davis*, 348 F.3d at 778.

²²⁸ *See* Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 449 (5th Cir. 1999); *see also* Nash, *supra* note 16, at 1055–56, 1072–74 (offering a theory of "null preemption" and linking it to relaxed state standing); *cf.* Massachusetts v. EPA, 549 U.S. at 511–13 (administrative agency abstained from regulating harmful pollutant). As the Fifth Circuit has stated:

Moreover, the FCC's refusal to exercise its declared authority does not deprive states of standing. The states point out that the District of Columbia Circuit will not find a lack of standing simply because an agency has refused to enforce its own regulations. . . . For the same reasons, we also reject the FCC's standing defense.

Texas Office, 183 F.3d at 449.

²²⁹ *See* Brief of Arizona et al., *supra* note 128, at 13, 20–25; Wildermuth, *supra* note 16, at 313–14, 318; *see also* Melamed, *supra* note 14, at 606–07; Metzger, *supra* note 16, at 69.

²³⁰ *See, e.g.,* Alaska v. Dept. of Transp., 868 F.2d at 443–44; Weinberger, 492 F.2d at 494; Wildermuth, *supra* note 16, at 313–14 (concluding that preemption cases illustrate the

of these cases dilute the state's interests to a "quasi-sovereign" status, despite the fact that the federal government's power is often treated as superior under the Supremacy Clause of the Constitution.²³¹ Thus, many federal courts would likely determine that states do retain a sovereign interest in their lawmaking and regulatory powers when the states are either subjected to claims of federal preemption or assert the claim themselves to establish that their independent regulatory efforts are allowed.²³²

The precise contours of sovereign interest standing in the climate change context will evolve as the federal government develops a framework for regulating greenhouse gas emissions under the Clean Air Act or another statutory scheme; once the federal framework has matured, states likely will, if anything, be more able to identify concrete interests in litigation.²³³ Thus, sovereign interest lawsuits would in the long run achieve the same goal the climate tort lawsuits are ostensibly trying to achieve today: filling the gaps of federal environmental regulation.²³⁴ In that sense, these lawsuits would not signify a shift away from directly punishing the nation's worst polluters, but would instead ensure that states continue to play a meaningful role as ancillary enforcers in administering a comprehensive federal scheme.²³⁵

CONCLUSION

By examining separation of powers dynamics in both the common law and the statutory law contexts, this Note provides an analysis of justiciability that extends beyond recent climate change litigation to help

"special nature of sovereign interests" in that "a state has a sovereign interest in preserving its law and its jurisdiction over lands and waters, even if ultimately unsuccessful").

²³¹ U.S. CONST. art. VI, cl. 2; see Wildermuth, *supra* note 16, at 314.

²³² See *Alaska v. Dept. of Transp.*, 868 F.2d at 443–44; *Weinberger*, 492 F.2d at 494; cf. Nash, *supra* note 16, at 1076–77 (proposing that courts recognize a new cause of action under which a state could challenge a government's refusal to regulate in an area where the state may be preempted from regulating, and arguing that the reviewing court should allow states to regulate if the applicable statute could not be read to provide the federal government with the power to regulate).

²³³ See *North Carolina v. EPA*, 531 F.3d at 914–15; *West Virginia v. EPA*, 362 F.3d at 865–66, 868. As mentioned above, the EPA is currently in the early stages of implementing greenhouse gas regulations under the Clean Air Act. See *supra* note 116.

²³⁴ See *Am. Elec.*, 582 F.3d at 330 (noting that federal common law can fill in gaps of federal regulatory frameworks); Cutting & Cahoon, *supra* note 17, at 114–15; Gore & Tarr, *supra* note 17, at 585.

²³⁵ Cf. Carlson, *supra* note 97, at 1125–28 (describing how California has been the national leader in setting higher mobile source emissions standards under the Clean Air Act).

guide states in proactively litigating for better regulatory protection of their citizens and environments. Specifically, the Note argues that state attorneys general should focus on asserting injury to their states' unique interests in regulation in order to establish Article III standing. By doing so, state litigants could shift federal courts' attention from the complexity and widespread nature of the *issues* implicated by the lawsuits, to the merits of the state as the proper *party* to pursue such claims. Overall, by framing state-led lawsuits in terms of statutory law, federalism, and sovereignty, rather than in science and widespread environmental harm, state plaintiffs should have an easier time invoking a relaxed standing threshold, and should thus be able to dedicate more effort to the merits of their claims.

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