

SHOULD STATES HAVE GREATER STANDING RIGHTS  
THAN ORDINARY CITIZENS?: MASSACHUSETTS V. EPA'S  
NEW STANDING TEST FOR STATES

BRADFORD MANK\*

ABSTRACT

*In Massachusetts v. EPA, the Supreme Court for the first time clearly gave greater standing rights to states than ordinary citizens. The Court, however, failed to explain to what extent or when states are entitled to more lenient standing. This Article concludes that the Court has historically given states preferential status in federal courts when a state files a parens patriae suit based on the state's quasi-sovereign interest in the health and welfare of its citizens or the natural resources of its inhabitants and territory. A quasi-sovereign interest is inherently less concrete and particularized than the types of injuries that individual citizens need for standing, yet the Court has allowed states standing to protect their general interest in their citizens' health and welfare. This Article proposes that courts relax the immediacy and redressability prongs of the standing test when states bring parens patriae suits to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens. This proposed standing test would be similar to the relaxed standing test for procedural rights plaintiffs but is based on the Court's historic parens patriae decisions. By using and refining the Court's procedural rights standing test as a model, this Article proposes a workable standing test for states.*

---

\* James Helmer, Jr., Professor of Law, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040; Tel: 513-556-0094; Fax 513-556-1236; E-mail: brad.mank@uc.edu. I thank Michael Solimine for his comments and my faculty for their comments at a summer workshop.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1704
I. A BRIEF INTRODUCTION TO STANDING . . . . .	1709
A. <i>Constitutional Standing</i> . . . . .	1709
B. <i>Generalized Injuries</i> . . . . .	1710
C. <i>Relaxed Standing in Procedural Rights Cases</i> . . . . .	1716
II. THE COURT OF APPEALS' DIVIDED . . . . .	
OPINION IN <i>MASSACHUSETTS</i> . . . . .	1721
A. <i>Judge Randolph</i> . . . . .	1722
B. <i>Judge Sentelle</i> . . . . .	1723
C. <i>Judge Tatel</i> . . . . .	1724
III. THE SUPREME COURT'S NEW STANDING . . . . .	
TEST FOR STATES . . . . .	1725
A. <i>Justice Stevens' Majority Opinion on Standing</i> . . . . .	1725
1. <i>Congress May Broadly Define What</i> <i>Constitutes an Injury</i> . . . . .	1725
2. <i>The Special Standing Rights of States</i> . . . . .	1727
3. <i>Massachusetts Meets the Tests for Injury,</i> <i>Causation, and Redressability</i> . . . . .	1730
B. <i>Chief Justice Roberts' Dissenting Opinion</i> . . . . .	1734
1. <i>Massachusetts Lacks Standing Because</i> <i>Global Warming Is a Generalized Grievance</i> . . . . .	1734
2. <i>States Do Not Have Greater Standing Rights</i> <i>Under the Parens Patriae Doctrine</i> . . . . .	1735
3. <i>Massachusetts Failed To Prove Injury,</i> <i>Causation, or Redressability</i> . . . . .	1740
4. <i>Chief Justice Roberts Accuses the Majority of</i> <i>Intruding upon the Role of the Political Branches</i> . . .	1743
C. <i>Analysis</i> . . . . .	1746
1. <i>The Court Does Not Provide a Clear Test for</i> <i>State Standing</i> . . . . .	1746
2. <i>It Is Questionable Whether Massachusetts Is a</i> <i>Procedural Rights Plaintiff, but the Court Has</i> <i>Never Provided a Good Definition of When</i> <i>Footnote Seven Applies</i> . . . . .	1747
3. <i>Did Massachusetts Meet the Traditional</i> <i>Three-part Standing Test?</i> . . . . .	1752

2008]	NEW STANDING TEST FOR STATES	1703
IV. DOES THE PARENS PATRIAE STANDING DOCTRINE		
	SUPPORT BROADER STANDING RIGHTS FOR STATES? . . . . .	1756
	<i>A. The Historical Development of Parens Patriae</i> . . . . .	1756
	<i>B. Parens Patriae and Quasi-sovereign Interests</i> . . . . .	1757
	<i>C. Parens Patriae and Suits To Enjoin Public Nuisances</i> . .	1759
	<i>D. Parens Patriae Actions Other than Public Nuisances</i> . .	1762
	<i>E. Justice Brennan’s Broader Concurring</i>	
	<i>Opinion in Snapp</i> . . . . .	1764
	<i>F. Standing in Public Nuisance Cases</i> . . . . .	1764
	<i>G. States Are Entitled to Greater Standing Rights in</i>	
	<i>Parens Patriae Cases Involving</i>	
	<i>Quasi-sovereign Interests</i> . . . . .	1767
	<i>H. Can States File Parens Patriae Suits Against the</i>	
	<i>Federal Government?</i> . . . . .	1769
	<i>I. Limits on Parens Patriae Suits</i> . . . . .	1774
V. A PROPOSED STANDING TEST: RELAXING THE		
	IMMEDIACY AND REDRESSABILITY REQUIREMENTS	
	FOR STATES . . . . .	1775
VI. POLICY IMPLICATIONS . . . . .		
CONCLUSION . . . . .		1785

## INTRODUCTION

In *Massachusetts v. EPA*,<sup>1</sup> the Supreme Court held that carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHGs) are air pollutants within the meaning of the Clean Air Act (CAA).<sup>2</sup> The Court determined that the U.S. Environmental Protection Agency (EPA) has a presumptive statutory duty under the Act to issue regulations for emissions of GHGs from new motor vehicles and remanded the case so that the EPA can reconsider its denial of a petition to regulate GHGs from new vehicles.<sup>3</sup> Although its decision on the merits is important, the Court's conclusion that Massachusetts had standing to file suit because states are entitled to more lenient standing criteria may have a greater impact in the long-term on legal doctrine.<sup>4</sup> In *Massachusetts*, the Supreme Court clearly gave, for the first time, greater standing rights to states than ordinary citizens.<sup>5</sup> The Court, however, failed to explain to what extent or when states are entitled to more lenient standing. This Article proposes that courts relax the immediacy and redressability prongs of the standing test when states bring *parens patriae* suits to protect their quasi-sovereign interest in the health, welfare, and

---

1. 127 S. Ct. 1438 (2007).

2. *Id.* at 1462. See generally Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671 (2000).

3. See *Massachusetts*, 127 S. Ct. at 1459-60, 1463; Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 69-70 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>; Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 2 (2007).

4. See Adler, *supra* note 3, at 63-69; Stevenson, *supra* note 3, at 4-5; Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript at 2), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/17/LRColl2007n17Watts.pdf> ("We believe that the long-term significance of the case is likely to be the opinion's impact on two doctrinal areas of the law: (1) the standing of states; and (2) the standard of review applied to denials of petitions for rulemaking.").

5. See Adler, *supra* note 3, at 64 ("Although many assumed the Court would focus on the specific claims of standing put forward by Massachusetts, few expected the Court to announce a new rule for state standing in lawsuits brought against the federal government."); see also Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 304 (2005) ("What the Court has *not* made clear is whether State AGs who bring *parens patriae* public nuisance suits in federal court are subject to the same standing rules as apply to citizen suits, or whether they are exempt from such limitations by analogy to public actions filed by public officers in the courts of their own sovereign.").

natural resources of their citizens.<sup>6</sup> This proposed standing test would be similar to the relaxed standing test for procedural rights plaintiffs but is based on the Court's historic *parens patriae* decisions.<sup>7</sup>

In *Massachusetts*, twelve states, with Massachusetts as lead petitioner, joined other plaintiffs in challenging the EPA's denial of a petition to regulate GHGs from new vehicle emissions on the grounds that the EPA lacked authority under the Act to regulate those gases.<sup>8</sup> Before reaching the question of whether the EPA had statutory authority to regulate GHGs, the Court had to first decide the difficult issue of whether the petitioners had standing. The Constitution does not by its terms require that a plaintiff have standing to file suit in federal court, but since 1944 the Supreme Court has explicitly imposed standing requirements that it has inferred from Article III's limitation of judicial decisions to cases and controversies to ensure that the plaintiff has a genuine interest and stake in a case.<sup>9</sup> Because GHGs from vehicles or other sources

---

6. See *infra* Part V.

7. See *infra* Part V.

8. Twelve states were allied as petitioners: California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Massachusetts*, 127 S. Ct. at 1446 n.2. Ten states intervened on the side of the EPA: Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah. *Id.* at 1446 n.5. Six states filed briefs as amici curiae in support of the petitioner states: Arizona, Delaware, Iowa, Maryland, Minnesota, and Wisconsin. Stevenson, *supra* note 3, at 3 n.6.

9. U.S. CONST. art. III (limiting the federal judiciary's power to "cases" or "controversies"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-42 (2006) (explaining why the Supreme Court infers that Article III's case or controversy requirement necessitates standing limitations); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("Article III standing ... enforces the Constitution's case-or-controversy requirement ...."); *Stark v. Wickard*, 321 U.S. 288, 304, 310 (1944) (first Supreme Court case explicitly stating Article III standing requirements); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1868 (1996); see Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 22 (2005) (noting that since 1944 the Supreme Court has interpreted Article III to require plaintiffs to satisfy standing criteria). But see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-79 (1992) (arguing the Framers of the Constitution did not intend that Article III would require standing). In its 1923 decision, *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Supreme Court refused to allow a suit by the Commonwealth of Massachusetts under the *parens patriae* doctrine to challenge a federal appropriations act because it was a political issue and thus not judicially cognizable under Article III. *Id.* at 484-85; see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, at 184 (1990). The

have global rather than localized impacts, there are serious questions about whether any individual has sufficiently unique harms to justify standing.<sup>10</sup>

In his majority opinion, Justice Stevens, who was joined by Justices Kennedy, Souter, Ginsburg, and Breyer, “stress[ed] ... the special position and interest of Massachusetts.”<sup>11</sup> He stated that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual.”<sup>12</sup> Justice Stevens contended that the Court, in its 1907 decision in *Georgia v. Tennessee Copper Co.*,<sup>13</sup> “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>14</sup> In *Tennessee Copper* and several other cases, the Court recognized a special standing doctrine of *parens patriae* standing to allow states to protect certain quasi-sovereign interests including the health, welfare, or natural resources of their citizens.<sup>15</sup> Just as Georgia had a right to invoke federal jurisdiction to protect its quasi-sovereign interest in protecting the health of its citizens from air pollution emanating from another state, Justice Stevens maintained that “Massachusetts’ well-founded desire to preserve its sovereign territory today” gave it standing to invoke federal jurisdiction.<sup>16</sup> In light of both its statutory right to petition the EPA and “Massachusetts’ stake in protecting its quasi-sovereign interests,” Justice Stevens concluded that “the Commonwealth is entitled to

---

*Mellon* Court also refused to allow taxpayers to challenge the act because

[t]he party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

262 U.S. at 488; see also CURRIE, *supra*, at 184. *Mellon* implied standing requirements, but never explicitly used the term. See CURRIE, *supra*, at 183-86.

10. See *infra* Part III.C.3. Compare Mank, *supra* note 9 (arguing that at least some individuals have standing to challenge injuries from global warming, but acknowledging that standing for global phenomena raises complex standing issues), with Blake R. Bertagna, Comment, “Standing” Up for the Environment: The Ability of Plaintiffs To Establish Legal Standing To Redress Injuries Caused by Global Warming, 2006 BYU L. REV. 415, 444-46 (arguing that plaintiffs asserting global warming claims fail to meet standing requirements).

11. *Massachusetts*, 127 S. Ct. at 1454.

12. *Id.*

13. 206 U.S. 230 (1907).

14. *Massachusetts*, 127 S. Ct. at 1454.

15. *Id.*

16. *Id.*

special solicitude in our standing analysis.”<sup>17</sup> Because only one petitioner needed to have standing for the case to go forward on the merits, the Court concluded that the Commonwealth of Massachusetts’ allegations that increasing levels of GHGs from vehicles were causing rising sea levels that were damaging its coastline was sufficient to meet standing requirements.<sup>18</sup> The Court did not clearly explain whether Massachusetts could have met normal standing criteria or needed to rely on the special standing criteria for states.<sup>19</sup>

In his dissenting opinion, Chief Justice Roberts, who was joined by Justices Scalia, Thomas, and Alito, criticized the majority for relaxing standing requirements for states because he argued that there was no basis in the Court’s precedent for applying a more lenient standard for states.<sup>20</sup> He maintained that, in *Tennessee Copper* the Court treated states differently from private individuals with regard to available remedies, but that the case did not address Article III standing.<sup>21</sup> Chief Justice Roberts acknowledged that the Court had recognized the doctrine of *parens patriae* standing to permit states to protect certain quasi-sovereign interests, but he contended that this type of standing requires a state to prove the additional requirement of having a quasi-sovereign interest and still requires the state to show that its citizens meet Article III standing.<sup>22</sup> He argued that Massachusetts was not asserting a quasi-sovereign interest, but rather a “nonsovereign interest” as the owner of coastal property.<sup>23</sup> Further, he claimed that *parens patriae* standing is not allowed against the federal government.<sup>24</sup>

Finally, Chief Justice Roberts contended that the majority applied a relaxed standing analysis because Massachusetts could not meet the three requirements for Article III standing: (1) injury in fact, (2) causation, and (3) redressability.<sup>25</sup> He was especially concerned that

---

17. *Id.*

18. *See id.* at 1453-58.

19. *See infra* Part III.C.3.

20. *Massachusetts*, 127 S. Ct. at 1464 (Roberts, C.J., dissenting).

21. *See id.* at 1465.

22. *See id.* at 1465-66. *But see infra* Parts III.B-C.

23. *See Massachusetts*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

24. *See id.*

25. *Id.* at 1466-67.

the majority weakened precedent concerning causation and redressability.<sup>26</sup> He accused the majority of adopting weakened standing criteria that inappropriately allowed federal courts to hear complex policy disputes more appropriately addressed by the political branches of government.<sup>27</sup>

This Article concludes that the Court has historically given states preferential status in federal courts when a state files a *parens patriae* suit based on the state's quasi-sovereign interest in the health and welfare of its citizens or the natural resources of its inhabitants and territory.<sup>28</sup> There are sound reasons to apply lesser standing requirements to enable states to protect their quasi-sovereign interest in the health and welfare of their citizens or the natural resources of their inhabitants and territory. Chief Justice Roberts' dissenting opinion is correct on many details, but fails to understand that the theoretical grounds for *parens patriae* standing also support a more relaxed standing test for states.<sup>29</sup> A quasi-sovereign interest is inherently less concrete and particularized than the type of injuries that individual citizens need for standing,<sup>30</sup> yet the Court has allowed states standing to protect their general interest in their citizens' health and welfare.<sup>31</sup> Although it is not technically a standing case, *Tennessee Copper* is based on the fundamental distinction that states have different and greater rights than individual citizens.<sup>32</sup> Thus, the *Massachusetts* majority correctly used the Court's *parens patriae* decisions as the basis for giving states preferential access to federal courts even though none of the *parens patriae* cases explicitly applied a lower standing threshold for states.

---

26. See *id.* at 1468-70; Adler, *supra* note 3, at 66, 69.

27. *Massachusetts*, 127 S. Ct. at 1464, 1470-71.

28. See *infra* Part IV.G.

29. See *infra* notes 349-52 and accompanying text.

30. For standing in an Article III court, the Court currently requires a plaintiff to show:

(1) [she] has suffered "an injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

31. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237-38 (1907).

32. *Id.*



The most serious weakness of the majority opinion is that it fails to define to what extent and under what circumstances federal courts should relax standing requirements for states.<sup>33</sup> The Court currently relaxes the immediacy and redressability portions of the standing test for procedural rights plaintiffs.<sup>34</sup> The *Tennessee Copper* decision and other *parens patriae* cases justify a similar relaxation of the immediacy and redressability requirements for states filing *parens patriae* suits.<sup>35</sup> By using and refining the Court's procedural rights standing test as a model, this Article proposes a workable standing test for states.

Part I provides a brief overview of standing. Part II discusses the court of appeals' decision in *Massachusetts*. Part III examines Justice Stevens' majority opinion and Chief Justice Roberts' dissenting opinion in *Massachusetts*. Part IV explores the Court's *parens patriae* decisions and concludes that they support the *Massachusetts* decision in lowering standing barriers for states. Part V proposes a new test for states that relaxes the normal immediacy and redressability requirements. Part VI examines the policy implications for giving states and especially state attorneys general greater standing rights than ordinary citizens.

## I. A BRIEF INTRODUCTION TO STANDING

### A. *Constitutional Standing*

Part I will provide only a brief overview of standing because the court of appeals' decision and the Supreme Court opinions in *Massachusetts* discuss standing requirements at great length. Standing doctrine defines "the characteristics a person or another juridical entity must possess to bring a suit."<sup>36</sup> Standing requirements ensure that "a matter before the federal courts is a proper

---

33. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for *Massachusetts* plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.").

34. See *infra* Part I.C.

35. See *infra* Part II.

36. Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 533 (2004).

case or controversy under Article III” and that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>37</sup> The federal courts have jurisdiction over a case only if at least one plaintiff can prove that it has standing for each form of relief sought.<sup>38</sup> A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.<sup>39</sup>

For standing in an Article III court, the Court presently requires a plaintiff to show:

- (1) [she] has suffered “an injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>40</sup>

A plaintiff has the burden of establishing all three prongs of the standing test.<sup>41</sup>

### *B. Generalized Injuries*

In cases involving generalized, abstract injuries that affect the public as a whole, especially cases involving alleged misuse of taxpayer funds,<sup>42</sup> the Supreme Court has sometimes stated that

---

37. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

38. *See id.* at 351-53; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing for each form of relief sought.”).

39. *See DaimlerChrysler*, 547 U.S. at 340-41; *Friends of the Earth*, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”); Mank, *supra* note 9, at 23.

40. *Friends of the Earth*, 528 U.S. at 180-81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also* Mank, *supra* note 9, at 23-24.

41. *See DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561; Mank, *supra* note 9, at 24.

42. *See* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (holding that taxpayers do not have standing to challenge the White House program on federal aid to faith-based organizations and limiting taxpayer challenges under the First Amendment’s Establishment Clause to congressional legislation benefiting religion); *DaimlerChrysler*, 547 U.S. at 342-46 (denying standing in a state taxpayer suit in part because plaintiffs’ alleged

such injuries are more appropriately remedied by the political branches than the judiciary pursuant to the separation of powers doctrine.<sup>43</sup> In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>44</sup> the Supreme Court stated that “we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure” because such suits raised “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society.’”<sup>45</sup> In *Gladstone Realtors v. Village of Bellwood*,<sup>46</sup> the Court explained that the generalized grievance doctrine enables “the judiciary ... to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.”<sup>47</sup> Additionally, the generalized grievance doctrine assists courts in avoiding broader remedies than that “required by the precise facts to which the court’s ruling would be applied.”<sup>48</sup>

There are serious problems with the Court’s decisions discussing the issue of generalized grievances and standing.<sup>49</sup> Before 1998, the

---

injuries were common to the public at large and stating that federal taxpayers generally lack standing unless suit is based on the Constitution’s Establishment Clause). *But see* *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (holding that a federal taxpayer had standing to challenge spending allegedly in violation of the Constitution’s Establishment Clause because “the Establishment Clause ... specifically limit[s] the taxing and spending power conferred by Art. I, § 8”).

43. *Lujan*, 504 U.S. at 560-61, 575-77 (requiring “particularized” injury and stating that the Constitution assigns the political branches of government the responsibility for addressing grievances affecting the public at large); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 n.10 (1974) (stating that the judicial role of deciding cases involving particularized injuries “is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.”); Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, Standing and Equitable Discretion*, 34 OHIO N.U. L. REV. (forthcoming 2008); Mank, *supra* note 9, at 21-22.

44. 438 U.S. 59 (1978).

45. *Id.* at 80 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

46. 441 U.S. 91 (1979).

47. *Id.* at 99-100.

48. *Schlesinger*, 418 U.S. at 222.

49. *See generally* *Guilds*, *supra* note 9, at 1876-85.

Court's generalized grievance decisions did not clearly explain whether the doctrine is a prudential limitation that Congress can override to allow such suits,<sup>50</sup> or whether it is a mandatory constitutional doctrine.<sup>51</sup> The *Lujan* Court's requirement under Article III that a plaintiff demonstrate a particularized injury arguably requires that a plaintiff establish that its injury is different from the public at large, but the Court also suggested that victims of mass tort are entitled to sue.<sup>52</sup> Before 1998, the Court did

---

50. In addition to the three-part test for constitutional Article III standing suits, courts can impose policy-based prudential limits on standing, for example, by requiring a suit to be within the "zone of interests" of the relevant statute, prohibiting third-party suits, or restricting suits asserting generalized grievances. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997) (describing the "zone of interests" standard as a "prudential limitation" rather than a mandatory constitutional requirement); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (stating that a court may reject standing if plaintiff is asserting the rights of a third-party not before the court); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978) (stating that a court may deny standing if a suit would raise "general prudential concerns 'about the proper—and properly limited—role of the courts in a democratic society.' Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure." (quoting *Warth*, 422 U.S. at 498) (citations omitted)); *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based "in policy, rather than purely constitutional, considerations"); *Guilds*, *supra* note 9, at 1875-76, 1878-80 (noting that it is not always clear whether the Court's reservations about generalized grievances are a prudential limitation or a constitutional objection); *Mank*, *supra* note 9, at 28 (discussing prudential limitations as including restrictions on generalized grievances); *Zachary D. Sakas, Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 179 (2006) (stating that prudential limitations are policy-based). Unlike constitutional limits on standing, however, Congress may expressly override prudential limitations by, for example, providing expansive citizen suit provisions that reach the limits of Article III standing. *See, e.g.*, *Bennett*, 520 U.S. at 162, 166 (holding that "unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress," and concluding that a citizen suit provision abrogated the zone of interest limitation); *Warth*, 422 U.S. at 501; *see also* *Mank*, *supra* note 9, at 28; *Sakas*, *supra*, at 179. The Clean Air Act contains an express citizen suit provision that allows both citizens and states to sue. 42 U.S.C. § 7607(b)(1) (2000).

51. *See* *Guilds*, *supra* note 9, at 1878-84 (discussing confusion over whether the Court's standing cases prohibiting generalized grievances are constitutional or prudential limitations); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 643-44 (1999) (arguing that earlier cases implied that prohibition against generalized grievances was prudential in nature, but that *Lujan* suggested that prohibition might be constitutional in nature).

52. *Lujan*, 504 U.S. at 560-61, 572-77 (requiring "particularized" injury and stating that the Constitution assigns the political branches of government the responsibility for addressing grievances affecting the public at large, but also implying that plaintiffs who have concrete injuries from a mass tort or mass fraud have standing to sue); *Guilds*, *supra* note 9, at 1881-84

not provide a clear definition of which types of injuries are particularized enough for judicial redress, and which injuries are too general for judicial relief.<sup>53</sup> For example, the Court suggested that victims of mass torts are eligible for standing because each has his own unique personal injuries even if large numbers of people share similar injuries, but certain language in some of its decisions also suggested that if all members of the public received the same type of injury then there is no judicial redress.<sup>54</sup>

In its 1998 decision, *Federal Election Commission v. Akins* (*Akins*), the Court clarified which types of mass or general injuries are appropriate for judicial redress.<sup>55</sup> The Court granted standing to voters who requested information from the Federal Election Commission, even though the plaintiffs were similarly situated to other voters, because the statute at issue overcame any prudential limitations against generalized grievances.<sup>56</sup> The Court explained that it would deny standing for widely shared, generalized injuries only if the harm is both widely shared and “of an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’”<sup>57</sup> The *Akins* Court stated that its prior decisions

---

(discussing whether the *Lujan* decision established a constitutional prohibition against generalized grievances).

53. *Guilds*, *supra* note 9, at 1884-92 (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”).

54. *See id.* at 1884-92. *Compare Lujan*, 504 U.S. at 572 (implying that plaintiffs who have concrete injuries from a mass tort or mass fraud have standing to sue), *Warth*, 422 U.S. at 501 (holding that a plaintiff may be able to satisfy Article III standing requirements, “even if it is an injury shared by a large class of other possible litigants”), and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973) (“[T]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread ... actions could be questioned by nobody.”), with *Lujan*, 504 U.S. at 560-61, 572-77 (requiring “particularized” injury and stating that the Constitution assigns the political branches of government the responsibility for addressing grievances affecting the public at large), and *Duke Power*, 438 U.S. at 80 (“[W]e have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure.”).

55. 524 U.S. 11, 21-25 (1998); see David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. L. 451, 471 (2000) (discussing *Akins*); Mank, *supra* note 9, at 37-40; Sunstein, *supra* note 51, at 634-36, 644-45.

56. *Akins*, 524 U.S. at 19-21; see Hodas, *supra* note 55, at 471; Mank, *supra* note 9, at 37; Sunstein, *supra* note 51, at 634-36, 642-45, 671-75 (discussing *Akins* and concluding that the statute at issue overrode any prudential limitations against generalized grievances).

57. *Akins*, 524 U.S. at 23-25 (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)); see Hodas, *supra* note 55, at 471-72; Mank, *supra* note 9, at 37-40 (discussing

denied standing only if an alleged injury was too abstract, but approved standing even in cases in which many people suffered the same injury if the harm was concrete.<sup>58</sup> Justice Breyer's majority opinion, which was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg, observed that the fact that "an injury is widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, *where sufficiently concrete*, may count as an 'injury in fact.'"<sup>59</sup> The *Akins* decision stated that a plaintiff who suffers a concrete actual injury can normally fulfill the injury in fact requirement even though many others have suffered similar injuries:

[T]he fact that a political forum may be more readily available where an injury is widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes.... This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.<sup>60</sup>

In *Pye v. United States*,<sup>61</sup> the Fourth Circuit summarized *Akins* as holding that "[s]o long as the plaintiff ... has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."<sup>62</sup>

The *Akins* decision did not settle all questions about when plaintiffs alleging generalized grievances are entitled to standing. *Akins* suggested that the Court's reservations about standing for

---

*Akins*); Sunstein, *supra* note 51, at 634-36.

58. *Akins*, 524 U.S. at 24-25; see Mank, *supra* note 9, at 38; Sunstein, *supra* note 51, at 636, 644.

59. *Akins*, 524 U.S. at 24 (emphasis added); see Mank, *supra* note 9, at 38.

60. *Akins*, 524 U.S. at 24-25 (citations omitted); see Hodas, *supra* note 55, at 472; Mank, *supra* note 9, at 38.

61. 269 F.3d 459 (4th Cir. 2001).

62. *Id.* at 469.

generalized grievances are usually prudential limitations that Congress may override in a statute, but the decision did not completely eliminate the possibility that Article III, in some circumstances, places constitutional limits on generalized grievances.<sup>63</sup>

In his dissenting opinion in *Akins*, Justice Scalia, who was joined by Justices O'Connor and Thomas, argued that "undifferentiated" grievances, "common to all members of the public' ... must be pursued by political, rather than judicial, means."<sup>64</sup> He contended that all generalized grievances that affect the public at large should be addressed by the political branches even if the injuries are concrete.<sup>65</sup> Under his approach, an injury must be particularized if it is to be heard in the federal courts.<sup>66</sup> In a law review article he wrote several years before *Akins*, then-Judge Scalia argued that separation of powers principles require courts to limit standing to prevent judicial overreaching into the domain of the political branches. His *Akins* dissent follows that approach in contending that federal courts should never address general grievances because they are more appropriately the subject of the political branches.<sup>67</sup>

The majority opinion in *Massachusetts* cited *Akins* with approval.<sup>68</sup> Like *Akins*, the *Massachusetts* decision emphasized that the statute at issue "authorized this type of challenge to EPA action" to overcome any prudential questions about whether the issue was too general and better suited for political resolution.<sup>69</sup> By contrast, Chief Justice Roberts did not cite *Akins* and instead cited cases in which the Court had warned of the dangers of the federal courts

---

63. See Sunstein, *supra* note 51, at 637, 643-45, 671-75.

64. *Akins*, 524 U.S. at 35 (Scalia, J., dissenting) (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)); see Hodas, *supra* note 55, at 472-73; Mank, *supra* note 9, at 39; Sunstein, *supra* note 51, at 637, 646-48.

65. *Akins*, 524 U.S. at 35 (Scalia, J., dissenting); see Hodas, *supra* note 55, at 473; Mank, *supra* note 9, at 39; Sunstein, *supra* note 51, at 637, 646-48.

66. See *Akins*, 524 U.S. at 35 (Scalia, J., dissenting); Mank, *supra* note 9, at 39; Sunstein, *supra* note 51, at 637.

67. See *Akins*, 524 U.S. at 35-37 (Scalia, J., dissenting); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881, 896 (1983); see also Mank, *supra* note 9, at 29, 38-39 (discussing then-Judge Scalia's law review article on standing and his subsequent standing opinions as a member of Supreme Court); Sunstein, *supra* note 51, at 643-44.

68. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007).

69. *Id.* at 1453 (citing 42 U.S.C. § 7607(b)(1) (2000)).

addressing generalized policy issues that are better left to the political branches of government.<sup>70</sup>

*C. Relaxed Standing in Procedural Rights Cases*

The Court has relaxed the immediacy and redressability standing requirements for procedural rights plaintiffs who could plausibly suffer a concrete injury in the future.<sup>71</sup> In footnote seven of the *Lujan* decision, Justice Scalia explained that litigants who may suffer a concrete injury from a procedural error by the government are entitled to a more relaxed application of the redressability and immediacy standing requirements because there is often a significant time lag between when a procedural error may occur and when that error might affect the plaintiff. He stated:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.<sup>72</sup>

Justice Scalia limited footnote seven standing to plaintiffs who will suffer concrete injuries if the government builds the dam. According to footnote seven, a plaintiff living next to a dam has a potential concrete injury that is real enough to justify standing, but “persons who live (and propose to live) at the other end of the country from the dam” do not have “concrete interests affected” and, therefore, do not have standing to challenge a procedural violation.<sup>73</sup>

---

70. See *id.* at 1464-71 (Roberts, C.J., dissenting); see also *infra* Part III.B.

71. See Mank, *supra* note 9, at 35.

72. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); see *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (discussing relaxed standing requirements for procedural injuries); Bertagna, *supra* note 10, at 457; Mank, *supra* note 9, at 35-36 n.240.

73. *Lujan*, 504 U.S. at 572 n.7; see also *id.* at 573 n.8 (“We do not hold that an individual



In footnote seven of the *Lujan* decision, Justice Scalia used the example of a plaintiff requesting, under the National Environmental Policy Act (NEPA),<sup>74</sup> an environmental impact statement (EIS) studying the potential effects of a proposed dam located near the plaintiff's home as the classic example of a procedural injury.<sup>75</sup> NEPA is a purely procedural statute that requires the government to examine the environmental consequences of its actions and to give the public an opportunity to comment on proposed government projects, but gives the agency the sole authority to decide whether to build the project.<sup>76</sup> If a plaintiff demonstrates that the government has failed to adequately examine the environmental consequences of a proposed project, a judge can order the government to conduct an environmental assessment or a more detailed EIS to study the environmental impacts of a proposed government action, but cannot order the government to take any substantive action, because the agency has the sole policy-making discretion to decide whether the value of the proposed action outweighs any environmental consequences.<sup>77</sup> Thus, even if a plaintiff is successful in forcing the government to write an EIS addressing the environmental impacts of a proposed dam, the government may still decide to build the dam. Without the relaxed standards for redressability and immediacy in footnote seven, most NEPA plaintiffs could not establish standing.<sup>78</sup>

---

cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”); William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL’Y F. 247, 257 (2001).

74. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2000).

75. *Lujan*, 504 U.S. at 572 n.7; see Mank, *supra* note 9, at 35-36.

76. See National Environmental Policy Act §§ 4321-4370f; see also Sakas, *supra* note 50, at 187; Miriam Wolok, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 NAT. RESOURCES J. 163, 182 (1992) (“Generally, the procedural injuries that plaintiffs allege under NEPA are an increased risk that an agency overlooked environmental consequences in its decision-making process and the lost opportunity to participate in that process.” (footnotes omitted)).

77. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process.”); Mank, *supra* note 9, at 47; Matthew William Nelson, Comment, *NEPA and Standing: Halting the Spread of “Slash-and-Burn” Jurisprudence*, 31 U.C. DAVIS L. REV. 253, 257, 279-80 (1997) (“Therefore, while environmental groups can challenge the procedural adequacy of an EIS, they cannot use the courts to impose or require any particular results.”).

78. See Mank, *supra* note 9, at 36.

The *Lujan* case provides little guidance on how to apply footnote seven, in part because the Court did not actually employ it in that case.<sup>79</sup> In *Lujan*, the plaintiffs challenged the government's failure to follow a mandated consultative procedure in the Endangered Species Act that requires federal agencies to first consult with the Secretary of Interior to prevent or mitigate any harm before the agency finances, authorizes, or pursues an action that may harm a threatened or endangered species or its habitat.<sup>80</sup> The plaintiffs failed to establish the immediacy and concreteness portions of the standing test because neither affiant had immediate plans to return to visit endangered species in Egypt and Sri Lanka that were allegedly threatened by foreign construction projects funded in part by United States agencies; therefore, they could not allege any concrete harm from the agencies' failure to consult the Secretary about the endangered species.<sup>81</sup> Because the plaintiffs lived so far from the alleged harms and failed to demonstrate an injury in fact, the *Lujan* Court did not need to address any hard questions or implications involving footnote seven. Furthermore, in *Lujan*, Justice Scalia's discussion of redressability garnered support from only a plurality of the Court—Chief Justice Rehnquist, Justice White, and Justice Thomas—because Justices Kennedy and Souter declined to join that portion of the opinion, and thus the decision does not provide clear guidance on this issue.<sup>82</sup> Although footnote

---

79. Douglas Sinor, *Tenth Circuit Surveys: Environmental Law*, 75 DENV. U. L. REV. 859, 879 (1998) ("Footnote seven, however, is confusing and raises more questions than it answers, since the court did not apply the standards it set forth ... because *Lujan* was not a procedural rights case. Thus, the lower courts are given the task of interpreting and applying the standards it set forth." (footnote omitted)).

80. See *Lujan*, 504 U.S. at 558-59 (discussing Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1988)); Bertagna, *supra* note 10, at 456.

81. See *Lujan*, 504 U.S. at 562-64; see also *id.* at 579-80 (Kennedy, J., concurring); Brian J. Gatchel, *Information and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVT'L L. 75, 92-94 (1995) (arguing that the plaintiffs in *Lujan* failed to meet the immediacy requirement of standing); Mank, *supra* note 9, at 30-31 (stating that the *Lujan* decision found that plaintiffs failed to establish a concrete or imminent injury).

82. See *Lujan*, 504 U.S. at 568-71 (Part II-B of the opinion); *id.* at 580 (Kennedy, J., concurring); Buzbee, *supra* note 73, at 258; Mank, *supra* note 9, at 32-33; Sunstein, *supra* note 9, at 206.

seven is arguably dicta in the *Lujan* case,<sup>83</sup> the *Massachusetts* Court treated footnote seven as binding precedent.<sup>84</sup>

A serious weakness of footnote seven is that it does not clearly explain the degree to which redressability and immediacy requirements for standing are waived or relaxed in procedural rights cases, the plaintiff's burden of proof to establish standing in a procedural rights case, or how to define a procedural right.<sup>85</sup> In the dam hypothetical, for example, the immediacy requirement arguably should be eliminated for plaintiffs because they have no control over how quickly the government will build the dam; but the Court never expressly addresses that issue.<sup>86</sup>

The redressability portion of the *Lujan* opinion only gathered a plurality and thus is not binding precedent.<sup>87</sup> Additionally, the Court's plurality opinion on that point implicitly appears to address normal redressability requirements rather than the relaxed requirements of footnote seven.<sup>88</sup> Footnote seven does not provide any clear guidelines concerning the extent to which courts are to relax or eliminate redressability requirements for procedural rights

---

83. Even though footnote seven was technically dicta in the *Lujan* case, many commentators believe that it likely represents the thinking of a majority of the Court because the dissenters in the case probably agreed with it. See William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis after Bennett v. Spear*, 49 ADMIN. L. REV. 763, 808-10 (1997); Mank, *supra* note 9, at 36 n.241; Sakas, *supra* note 50, at 185.

84. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (majority opinion); see also *infra* notes 131-33 and accompanying text.

85. See Gatchel, *supra* note 81, at 99-100 (criticizing footnote seven in *Lujan* for failing to explain to what extent the immediacy and redressability standing requirements are relaxed or eliminated for procedural rights plaintiffs); Mank, *supra* note 9, at 36 n.244 (criticizing footnote seven and citing commentators); Sinor, *supra* note 79, at 879-81; Sunstein, *supra* note 9, at 208, 225-26; Christopher T. Burt, Comment, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 285 (1995) ("*Lujan's* procedural injury dicta is not without its problems, however. At best, it is vague and provides little guidance for prospective plaintiffs and the lower courts ....").

86. See Gatchel, *supra* note 81, at 93-94, 99-100; Sinor, *supra* note 79, at 880.

87. See Sunstein, *supra* note 9, at 206; see also *supra* note 82 and accompanying text.

88. See Gatchel, *supra* note 81, at 95-96, 108 ("Implicitly, Justice Scalia's opinion suggests that he was applying the regular standard of redressability rather than the relaxed standard of redressability that a 'person who has been accorded a procedural right to protect his concrete interests' is entitled. Presumably, the *Defenders* plaintiffs did not receive the relaxed redressability requirements because they failed to demonstrate the prerequisite injury in fact sufficiently concrete to violate a procedural right which redressability was designed to protect.").

plaintiffs.<sup>89</sup> The simplest solution would be to eliminate redressability requirements for procedural rights plaintiffs who meet footnote seven requirements rather than to establish a complicated intermediate redressability test for such plaintiffs;<sup>90</sup> but it is not clear whether *Lujan* intended to eliminate that requirement.

The courts of appeals are divided regarding how to apply footnote seven to NEPA cases; they disagree about the burden of proof a plaintiff must meet to demonstrate that she is likely to be harmed by the agency's action.<sup>91</sup> As is discussed in Part III, there is also uncertainty about which cases are procedural rights cases that are governed by footnote seven, and which are substantive cases in which the relaxed approach is inapplicable.<sup>92</sup> *Lujan* did not provide a comprehensive definition of a "procedural rights case." Lower courts have sought to define a "procedural injury,"<sup>93</sup> but the Supreme Court has not provided a definitive answer.

---

89. See *id.* at 100-06, 108; Sinor, *supra* note 79, at 880.

90. See Gatchel, *supra* note 81, at 105-06, 108.

91. Compare Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 666-72 (D.C. Cir. 1996) (applying a strict four-part test for standing in procedural rights cases, including requiring a procedural rights plaintiff to demonstrate a particularized injury—that there is a "particularized environmental interest of the plaintiff, and that it is a substantial probability that the government act ... will cause that demonstrably increased risk of injury" alleged by the plaintiff), with Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 972-75 (9th Cir. 2003) (rejecting *Florida Audubon's* standing test for procedural rights plaintiffs and quoting *Lujan* to explain that such plaintiffs "need only establish 'the reasonable probability of the challenged action's threat to [their] concrete interest'"), and Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447-52 (10th Cir. 1996) (disagreeing with *Florida Audubon's* "substantial probability" test for procedural rights plaintiffs and instead adopting a test that plaintiff must establish an "increased risk of adverse environmental consequences" from the alleged failure to follow NEPA). See Bertagna, *supra* note 10, at 461-64 (discussing the split between the Ninth and District of Columbia Circuits on the causation portion of the standing test); Mank, *supra* note 9, at 45 (discussing the split among circuits about how to apply the footnote seven standing test in NEPA cases); Sakas, *supra* note 50, at 192 (noting that in procedural injury challenges to programmatic rules, "[t]he Ninth and Seventh Circuits have held that a plaintiff need not have a claim that is site-specific, while the D.C., Eighth, and Eleventh Circuits have created a stricter standing doctrine where a site-specific injury is necessary").

92. See *infra* notes 129-33 and accompanying text.

93. See *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002) (defining a procedural right as "the right to have the Executive observe procedures mandated by law"); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 931 (9th Cir. 1988) (defining procedural injury as applying to situations where the plaintiff alleges that a statute requires certain procedures be followed "to ensure that the environmental consequences of a project are adequately evaluated" and where the responsible agency fails to comply with those procedures); Bertagna, *supra* note 10, at 456 n.216.

## II. THE COURT OF APPEALS' DIVIDED OPINION IN *MASSACHUSETTS*

In 1999, a group of nineteen private organizations petitioned the EPA “to regulate ‘greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.’”<sup>94</sup> After providing for public comment, on September 8, 2003, the EPA entered an order denying the rule-making petition.<sup>95</sup> The EPA provided two grounds for its denial of the petition: “(1) that contrary to the opinions of its former general counsels” issued in 1998 and 1999, “the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.”<sup>96</sup> A month later, in October 2003, the petitioners were joined by twelve intervenor states, with Massachusetts as lead petitioner, in filing suit in the federal D.C. Circuit Court of Appeals to seek review of the denial.<sup>97</sup>

The court of appeals, in a divided opinion, denied the petition for review. Although each of the three judges on the court of appeals panel wrote a separate opinion, two judges agreed “that the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rule making.”<sup>98</sup> This Article will focus on the standing portion of the decision.

To prove that they met standing requirements, the petitioners filed several affidavits from scientists and property owners that generally alleged that rising levels of GHGs were causing global warming that was likely to result in significant damage to state and private property.<sup>99</sup> To specifically address the causation and redressability prongs of the standing test, the petitioners relied on two affidavits from a climatologist and an engineer alleging that reducing vehicle emissions would reduce the harms to the

---

94. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1449 (2007) (majority opinion); *see* 42 U.S.C. § 7521(a)(1) (2000) (quoting the original petition).

95. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (notice of denial Sept. 8, 2003).

96. *Massachusetts*, 127 S. Ct. at 1450 (summarizing 68 Fed. Reg. 52,922, 52,925-31) (citations omitted).

97. *See id.* at 1451; Mank, *supra* note 9, at 8-9 nn.41-44 (citing petitions).

98. *Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

99. *See id.* at 54.

petitioners from GHGs.<sup>100</sup> Conversely, the EPA argued that the petitioners had “not ‘adequately demonstrated’ two elements of standing: that their alleged injuries were ‘caused by EPA’s decision not to regulate emissions of greenhouse gases from mobile sources’; and that their injuries ‘can be redressed by a decision in their favor’ by this court.”<sup>101</sup>

### *A. Judge Randolph*

In his opinion announcing the court’s judgment, Judge Randolph avoided deciding whether the petitioners had standing even though courts must usually determine whether a plaintiff has standing before considering the merits of its claims.<sup>102</sup> Judge Randolph reasoned that the court could first decide the merits of the case because the merits of the case and the issue of standing overlapped.<sup>103</sup> Although the petitioners’ affidavits and declarations sufficiently supported each element of standing to withstand a motion for summary judgment, he concluded that the petitioner faced a higher burden to meet standing requirements because some of the EPA’s evidence controverted the petitioners’ claims that GHGs from new vehicles would significantly increase global warming.<sup>104</sup> Because of conflicting evidence about causation and redressability, Judge Randolph proceeded to decide the case on the merits.<sup>105</sup>

On the merits, Judge Randolph did not directly decide whether the EPA Administrator has the authority under Section 202 of the CAA to regulate GHGs that “‘in his judgment’ ‘may reasonably be anticipated to endanger public health or welfare.’”<sup>106</sup> Instead, he concluded that, even assuming that the EPA Administrator has the authority to regulate GHGs pursuant to Section 202, the EPA has the discretion not to regulate GHG emissions from motor vehicles

---

100. See *id.* at 54-55; *id.* at 65-66 (Tatel, J., dissenting); Mank, *supra* note 9, at 26-28 (summarizing the causation and redressability prongs).

101. *Massachusetts*, 415 F.3d at 54 (quoting Brief for Respondent at 16).

102. *Id.*; see *Massachusetts*, 127 S. Ct. at 1451 (majority opinion).

103. *Massachusetts*, 415 F.3d at 56; see *Massachusetts*, 127 S. Ct. at 1451.

104. See *Massachusetts*, 415 F.3d at 55-57.

105. See *id.*

106. *Id.* at 57-58 (discussing EPA’s authority to regulate GHGs under 42 U.S.C. § 7521(a)(1) (2000) and quoting the regulation).

because the EPA's denial of the rulemaking petition did not have to be based solely on the scientific evidence, which includes the EPA's concern about scientific uncertainties about global warming. Rather, the denial could also be based on "policy" considerations such as the agency's "concern that unilateral regulation of U.S. motor vehicle emissions could weaken efforts to persuade developing countries to reduce the intensity of greenhouse gases" and the Bush Administration's preference for "voluntary emission reduction programs and initiatives with private entities to develop new technology ...."<sup>107</sup> Judge Randolph determined that the court should give deference to the EPA's discretionary policy judgment in this case because the agency was addressing complex and uncertain issues at the frontiers of scientific knowledge.<sup>108</sup> Accordingly, he held as the judgment of the divided court of appeals that "the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking."<sup>109</sup>

#### *B. Judge Sentelle*

Judge Sentelle dissented in part and concurred in the judgment because he argued that courts are required to decide standing questions before reaching the merits and thus he disagreed with Judge Randolph's approach of deciding the merits without resolving the issue of standing.<sup>110</sup> Judge Sentelle concluded that the EPA was correct to dismiss the petition because the petitioners had "not demonstrated the element of injury necessary to establish standing under Article III."<sup>111</sup> He argued that the Article III standing test in *Lujan* requires a plaintiff to demonstrate that he has suffered a "particularized" injury and not just a generalized injury common to the public at large.<sup>112</sup> Judge Sentelle argued that, pursuant to the Constitution's separation of powers, generalized public injuries should be addressed by the politically elected Executive Branch and Congress rather than the courts:

---

107. *Id.* at 58.

108. *See id.*

109. *Id.*

110. *See id.* at 59 (Sentelle, J., dissenting in part and concurring in judgment).

111. *Id.*

112. *Id.*

A case such as this, in which plaintiffs lack particularized injury is particularly recommended to the Executive Branch and the Congress. Because plaintiffs' claimed injury is common to all members of the public, the decision whether or not to regulate is a policy call requiring a weighing of costs against the likelihood of success, best made by the democratic branches taking into account the interests of the public at large. There are two other branches of government. It is to those other branches that the petitioners should repair.<sup>113</sup>

Because global warming is "harmful to humanity at large," Judge Sentelle concluded that the plaintiffs failed to demonstrate that they were sufficiently injured by global warming to have standing in the federal courts because "the alleged harm is not particularized, not specific, and in my view, not justiciable."<sup>114</sup> Although he dissented on standing and jurisdiction, Judge Sentelle accepted the contrary view as the law of the case and joined Judge Randolph's judgment on the merits dismissing the petition as the result closest to that which he preferred.<sup>115</sup>

### *C. Judge Tatel*

In his dissenting opinion, Judge Tatel concluded that Massachusetts had at least "satisfied each element of Article III standing—*injury, causation, and redressability*."<sup>116</sup> He argued that Massachusetts made particularized allegations demonstrating a "substantial probability"<sup>117</sup> that projected rises in sea level would lead to serious losses to its coastal property and that these specific allegations of injury were a "far cry" from the type of generalized harm that Judge Sentelle contended was insufficient to establish Article III jurisdiction.<sup>118</sup> As to causation, Judge Tatel determined that the petitioners' affidavits provided strong evidence that GHGs, including U.S. vehicle emissions, contributed to the sea level

---

113. *Id.* at 60; *see also* Breedon, *supra* note 43.

114. *Massachusetts*, 415 F.3d at 60.

115. *See id.* at 60-61.

116. *Id.* at 64 (Tatel, J., dissenting).

117. *Id.* (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)).

118. *Id.* at 65.



changes that threatened Massachusetts' coastal property.<sup>119</sup> As to redressability, he concluded that there was evidence from one of the petitioners' experts, a former EPA climatologist, that a favorable judicial decision requiring the EPA to regulate GHGs and vehicle emissions would delay and reduce the harm to Massachusetts' coastline.<sup>120</sup> In response to the EPA's argument that the United States' regulation of vehicle emissions would be ineffective unless other nations joined the effort, Judge Tatel observed that the petitioner submitted an affidavit from the one-time director of the EPA's motor-vehicle pollution control efforts, which concluded that the EPA's requirement of enforceable emission standards would lead to the development of new emission control technologies by other nations.<sup>121</sup> On the merits, Judge Tatel concluded that the Clean Air Act granted the EPA the authority to regulate GHGs, and that the agency's policy concerns about the impact of mandatory regulation on the president's ability to negotiate GHG agreements with other nations did not justify its refusal to make an endangerment finding about the harms of GHGs required by the statute.<sup>122</sup>

### III. THE SUPREME COURT'S NEW STANDING TEST FOR STATES

#### A. *Justice Stevens' Majority Opinion on Standing*

##### 1. *Congress May Broadly Define What Constitutes an Injury*

In addressing whether the petitioners had standing, the *Massachusetts* majority opinion began by emphasizing that Congress specifically authorized citizen suits in the CAA, and relied heavily upon Justice Kennedy's concurring opinion in *Lujan*.<sup>123</sup> Citing Justice Kennedy's concurring opinion in *Lujan*, Justice Stevens observed "[t]hat [congressional] authorization is of critical

---

119. *See id.*

120. *See id.* at 65-66.

121. *See id.*

122. *See id.* at 73, 80-81.

123. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (citing 42 U.S.C. § 7607(b)(1) (2000)).

importance to the standing inquiry.”<sup>124</sup> Justice Stevens, in *Massachusetts*, quoted Justice Kennedy’s concurring opinion in *Lujan* for the principle that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before” provided that Congress “identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit.”<sup>125</sup> To qualify the broad view of congressional authority to confer standing, Justice Stevens, again quoting Justice Kennedy’s concurring opinion, stated that the Court would not “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”<sup>126</sup> Because Justice Kennedy’s concurring opinion in *Lujan*, which was joined by Justice Souter, provided the crucial votes for a majority in that case, a number of commentators have argued that his concurrence—rather than Justice Scalia’s nominal majority opinion, which was fully joined by only Chief Justice Rehnquist, Justice White, and Justice Thomas—practically constituted the defining law in that case.<sup>127</sup> Furthermore, in the five-to-four *Massachusetts* decision, Justice Stevens likely had to secure Justice Kennedy’s vote by assuring him that the majority opinion was consistent with Justice Kennedy’s prior opinions on standing.<sup>128</sup>

---

124. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

125. *Id.*

126. *Id.*

127. See, e.g., Buzbee, *supra* note 73, at 279; Mank, *supra* note 9, at 63-64 (arguing that the *Akins* decision followed Justice Kennedy’s concurring opinion in *Lujan*).

128. See, e.g., *Wooing Kennedy on Warming*, Posting of Tony Mauro to BLT: The Blog of Legal Times, [http://legaltimes.typepad.com/blt/2007/04/wooing\\_kennedy\\_.html](http://legaltimes.typepad.com/blt/2007/04/wooing_kennedy_.html) (Apr. 4, 2007, 10:11 EST) (arguing that Justice Kennedy’s vote was crucial in the *Massachusetts* decision and that Justice Stevens and Chief Justice Roberts each tried to win Justice Kennedy’s vote on the standing issue); Posting of Aaron M. Streett to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2007/week14/index.html> (Apr. 4, 2007, 16:43 EST) (“Although this opinion has been touted for its discussion of standing principles, less attention has been paid to the important legal principle for which it stands: that it is always prudent to curry favor with [Justice Kennedy] to hold his critical fifth vote.”). Many commentators believe that Justice Kennedy is the key swing vote on the Supreme Court since Sandra Day O’Connor’s retirement in 2006. See, e.g., Michael C. Blumm & Sherry Bosse, *Justice Kennedy and the Environment: Property, States’ Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667 (2007); Tony Mauro, *Eyes on Kennedy as Supreme Court Debates Global Warming Case*, LEGAL TIMES, Nov. 30, 2006, <http://www.law.com/jsp/article.jsp?id=1164810399422>; Analysis: Kennedy Key to Global Warming Challenge, Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/commentary-and-analysis/analysis-kennedy-key-to-global-warming->

The majority opinion acknowledged that a plaintiff must demonstrate that the “[challenged] action injures him in a concrete and personal way,”<sup>129</sup> but applied a more relaxed analysis of what constitutes a concrete injury because the petitioners were asserting a procedural right.<sup>130</sup> The Court applied the relaxed standards for redressability and immediacy applicable to procedural rights cases following footnote seven in *Lujan* because the *Massachusetts* case involved “the right to challenge agency action unlawfully withheld, § 7607(b)(1).”<sup>131</sup> Following *Lujan*, Justice Stevens observed that, where Congress grants a procedural right to a plaintiff, as in a citizen suit provision, “that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”<sup>132</sup> Professor Adler has argued that *Massachusetts* is not a procedural rights case and that therefore the Court erred in applying footnote seven standing in this case.<sup>133</sup>

## 2. *The Special Standing Rights of States*

In addition to applying the lenient standing analysis for procedural rights plaintiffs under footnote seven, the Court also applied a more generous standing analysis because Massachusetts is a state.<sup>134</sup> Because “[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review,” Justice Stevens, like Judge Tatel, focused on “the special position and interest of Massachusetts.”<sup>135</sup> Justice Stevens stated that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”<sup>136</sup> Relying on Justice Holmes’ 1907 opinion in *Tennessee Copper*, which

---

challenge/ (Nov. 29, 2006, 11:34 EST).

129. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (majority opinion) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment)).

130. *See id.*

131. *Id.* (citing *Lujan*, 504 U.S. at 572 n.7 (majority opinion)); *see Mank*, *supra* note 9, at 35-36 (discussing relaxed standing requirements for procedural injuries).

132. *Massachusetts*, 127 S. Ct. at 1453 (citing *Lujan*, 504 U.S. at 572 n.7).

133. *See infra* Part III.C.2.

134. *See Massachusetts*, 127 S. Ct. at 1454; Stevenson, *supra* note 3, at 2 n.3.

135. *Massachusetts*, 127 S. Ct. at 1453-54.

136. *Id.* at 1454.

authorized Georgia to protect its citizens from air pollution from outside its borders because of the state's quasi-sovereign interest in its natural resources and the health of its citizens, the majority opinion emphasized that the Court long ago "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."<sup>137</sup> Justice Stevens concluded, "[j]ust as Georgia's 'independent interest ... in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today."<sup>138</sup> Justice Stevens also cited and quoted, as suggestive authority, Justice Kennedy's majority opinion in *Alden v. Maine*, which "observ[ed] that in the federal system, the States 'are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.'"<sup>139</sup> Additionally, the Court stated, "[t]hat Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."<sup>140</sup>

Justice Stevens explained that states have standing to protect their quasi-sovereign interest in the health and welfare of their citizens because they have surrendered three crucial sovereign powers to the federal government: (1) states may no longer use military force; (2) the Constitution prohibits states from negotiating treaties with foreign governments; and (3) federal laws may, in some circumstances, preempt states laws.<sup>141</sup> The federal government now enjoys those sovereign prerogatives.<sup>142</sup> In recognition of all the powers that states have surrendered to the federal government, the Court instead has recognized that states can file suit in federal court to protect their quasi-sovereign interest in the

---

137. *Id.*

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

139. *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)); *see also* Streett, *supra* note 128.

140. *Id.* (quoting *Tenn. Copper*, 206 U.S. at 237).

141. *See id.* ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted."); *see also* Stevenson, *supra* note 3, at 5-8.

142. *Massachusetts*, 127 S. Ct. at 1454.

health, welfare, and natural resources of their citizens.<sup>143</sup> Although *Tennessee Copper* was not explicitly a standing case, Justice Stevens rejected Chief Justice Roberts' argument that the majority misread that 1907 case by observing that

no less an authority than Hart & Wechsler's *The Federal Courts and the Federal System* understands *Tennessee Copper* as a standing decision. Indeed, it devotes an entire section to chronicling the long development of cases permitting States "to litigate as *parens patriae* to protect quasi-sovereign interests—*i.e.*, public or governmental interests that concern the state as a whole."<sup>144</sup>

The Court additionally stated that Congress required the EPA to use the federal government's sovereign powers to protect states, among others, from vehicle emissions "which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>145</sup> Furthermore, Congress has "recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious."<sup>146</sup> Justice Stevens concluded that "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."<sup>147</sup> He implied that the federal government owes states greater standing rights because states have surrendered sovereign powers to the federal government.<sup>148</sup>

---

143. *Id.* at 1454-55; see *infra* notes 147-48 and accompanying text.

144. *Massachusetts*, 127 S. Ct. at 1455 n.17 (citing and quoting RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 289-90 (5th ed. 2003) (citation omitted)). In a footnote, Chief Justice Roberts responded in his dissenting opinion:

The Court seems to think we do not recognize that *Tennessee Copper* is a case about *parens patriae* standing, but we have no doubt about that. The point is that nothing in our cases (or Hart & Wechsler) suggests that the prudential requirements for *parens patriae* standing can somehow substitute for, or alter the content of, the "irreducible constitutional minimum" requirements of injury in fact, causation, and redressability under Article III.

*Id.* at 1466 n.1 (Roberts, C.J., dissenting) (citations omitted).

145. *Id.* at 1454 (majority opinion) (quoting 42 U.S.C. § 7521(a)(1) (2000)).

146. *Id.* (citing 42 U.S.C. § 7607(b)(1) (2000)).

147. *Id.* at 1454-55.

148. *Id.*

*3. Massachusetts Meets the Tests for Injury, Causation, and Redressability*

The Court was ambiguous about whether Massachusetts satisfied normal standing requirements<sup>149</sup> or met those requirements only because it was a state. In the paragraph after it declared that “the Commonwealth is entitled to special solicitude in our standing analysis,”<sup>150</sup> the Court stated that “[w]ith that in mind, it is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process.”<sup>151</sup> The Court’s use of the term “[w]ith that in mind” suggests that it was applying a special standing test for states. The D.C. Circuit Court of Appeals has interpreted *Massachusetts* as holding “that states receive ‘special solicitude’ in standing analysis, including analysis of imminence.”<sup>152</sup> Conversely, the majority’s statement that the “petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process” arguably implies that Massachusetts could have met ordinary standing requirements.<sup>153</sup>

The Court declared that Massachusetts satisfied all three prongs of the standing test. Regarding the injury prong of standing, Justice Stevens determined that the “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”<sup>154</sup> As to redressability, he concluded that there is “a ‘substantial likelihood that the judicial relief requested’ will prompt the EPA to take steps to reduce that risk.”<sup>155</sup>

---

149. See Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. IN BRIEF 53, 57 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cannon.pdf> (arguing that Justice Stevens’ majority opinion in *Massachusetts* satisfied all three elements of the standing test because the Court was willing to consider systemic injury as a legitimate basis for standing).

150. *Massachusetts*, 127 S. Ct. at 1454-55.

151. *Id.* at 1455.

152. Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin., 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007).

153. See Cannon, *supra* note 149.

154. *Massachusetts*, 127 S. Ct. at 1455 (majority opinion) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

155. *Id.* (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79 (1978)).

As to the injury prong of the standing test, the majority opinion reviewed the petitioners' evidence and found that "[t]he harms associated with climate change are serious and well recognized."<sup>156</sup> In contrast to Judge Sentelle's conclusion that global warming involves a generalized grievance that is better addressed by the political branches,<sup>157</sup> Justice Stevens stated, "[t]hat these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."<sup>158</sup> He found compelling the evidence in "petitioners' unchallenged affidavits" that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming" and that "[t]hese rising seas have already begun to swallow Massachusetts' coastal land."<sup>159</sup> Because Massachusetts "owns a substantial portion of the state's coastal property," the majority opinion found that "it has alleged a particularized injury in its capacity as a landowner."<sup>160</sup> Furthermore, the Court found that "[t]he severity of that injury will only increase over the course of the next century" as sea levels continue to rise and that "[r]emediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."<sup>161</sup>

As to the causation prong of the standing test, the Court found that the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming."<sup>162</sup> Accordingly, the majority opinion concluded that "[a]t a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."<sup>163</sup> Addressing the overlapping issues of causation and redressability, Justice Stevens rejected the EPA's arguments that "its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them" and that no "realistic

---

156. *Id.*

157. *See supra* Part II.B.

158. *Massachusetts*, 127 S. Ct. at 1456 (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'")).

159. *Id.*

160. *Id.* (quoting the Declaration of Karst R. Hoogeboom, ¶ 4).

161. *Id.*

162. *Id.* at 1457.

163. *Id.*

possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries.”<sup>164</sup>

The EPA next argued that federal courts could not redress the alleged harms to the petitioners from GHGs “because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease” that might result if the agency regulated GHGs from new vehicles.<sup>165</sup> The Court rejected the EPA’s argument because it “rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.”<sup>166</sup> Justice Stevens observed that agencies and legislatures “do not generally resolve massive problems in one fell regulatory swoop.”<sup>167</sup> He concluded, “[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.”<sup>168</sup>

Rejecting the EPA’s pessimistic assessment, the majority determined that “reducing domestic automobile emissions is hardly a tentative step” toward reducing GHG emissions.<sup>169</sup> Because the United States transportation sector “accounts for more than 6% of worldwide carbon dioxide emissions,” the Court concluded that “U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.”<sup>170</sup> For these reasons, the majority found that the petitioners had met the causation portion of the standing test.<sup>171</sup>

In finding that the petitioners had satisfied the redressability part of the standing test, the Court observed that “[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.”<sup>172</sup> Rejecting the argument that the EPA’s regulation of

---

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1457-58.

171. *See id.*

172. *Id.* at 1458.



GHG emissions from new vehicles would have little impact because it would not affect emissions from existing vehicles, the majority stated that “[b]ecause of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant.”<sup>173</sup> Additionally, Justice Stevens rebuffed the argument that growing emissions from developing nations would eclipse any reductions from the EPA’s regulation of vehicles, stating that “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>174</sup> The Court observed that the EPA and President Bush agreed that the United States should address the issue of global climate change and that the EPA gave “ardent support for various voluntary emission-reduction programs.”<sup>175</sup> The majority agreed with Judge Tatel’s dissenting opinion that the “EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming.”<sup>176</sup>

The Court concluded its discussion of the standing issue as follows:

In sum—at least according to petitioners’ uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.<sup>177</sup>

The Court’s opinion is somewhat contradictory because it emphasized that the petitioners were entitled to the more lenient standing requirements for footnote seven procedural rights plaintiffs and that

---

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (quoting *Massachusetts v. EPA*, 415 F.3d 50, 66 (D.C. Cir. 2005) (Tatel, J., dissenting)).

177. *Id.*

Massachusetts was entitled to preferential standing as a state, while it simultaneously implied that Massachusetts had met normal standing requirements.<sup>178</sup> The problem with the Court's dual approach is that it is not clear to what extent the Court altered its standing analysis because Massachusetts is a state rather than a private individual or because the Court applied a footnote seven analysis. For instance, it is uncertain whether an individual that owns large tracts of coastline property would have standing if he or she alleged the same facts because the Court never explains to what degree or how the standing analysis is different for states as opposed to individuals. The Court left many questions about standing unanswered for future courts.

*B. Chief Justice Roberts' Dissenting Opinion*

*1. Massachusetts Lacks Standing Because Global Warming Is a Generalized Grievance*

Even assuming that global warming is a serious problem, Chief Justice Roberts, in his dissenting opinion, argued that it was a nonjusticiable general grievance that should be decided by the political branches rather than by the federal courts.<sup>179</sup> He argued that it is inappropriate for the Court to apply a more generous standing test for states because there was no basis in the statute, precedent, or logic for a different standing test for states.<sup>180</sup> He emphasized that the CAA does not provide states with greater rights to sue than ordinary citizens.<sup>181</sup> Chief Justice Roberts argued: "Nor does the case law cited by the Court provide any support for the notion that Article III somehow implicitly treats public and private litigants differently."<sup>182</sup>

---

178. See Cannon, *supra* note 149.

179. See *Massachusetts*, 127 S. Ct. at 1463-64 (Roberts, C.J., dissenting).

180. See *id.* at 1464-66.

181. See *id.* at 1464-65.

182. *Id.* at 1465.

*2. States Do Not Have Greater Standing Rights Under the Parens Patriae Doctrine*

Chief Justice Roberts acknowledged that *Tennessee Copper* “did indeed draw a distinction between a State and private litigants, but solely with respect to available remedies,” giving Georgia the right to equitable relief when private litigants could obtain only a legal remedy.<sup>183</sup> He argued that “[t]he case had nothing to do with Article III standing.”<sup>184</sup> He contended that “[i]n contrast to the present case, there was no question in *Tennessee Copper* about Article III injury.”<sup>185</sup>

Chief Justice Roberts argued that “*Tennessee Copper* has since stood for nothing more than a State’s right, in an original jurisdiction action, to sue in a representative capacity as *parens patriae*”<sup>186</sup> and that the *parens patriae* doctrine does not support giving states greater standing rights than individuals.<sup>187</sup> He contended that “[n]othing about a State’s ability to sue in that capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III.”<sup>188</sup> He explained that “[a] claim of *parens patriae* standing is distinct from an allegation of direct injury” and “[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a ‘quasi-sovereign interest’ ‘*apart from the interests of particular private parties.*’”<sup>189</sup> Chief Justice Roberts argued that “a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.”<sup>190</sup> Accordingly, he maintained that “[f]ocusing on

---

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* at 1466.

188. *Id.* at 1465.

189. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)); *cf. Snapp*, 458 U.S. at 611 (Brennan, J., concurring) (“At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.”). *But see* MICHAEL L. WELLS ET AL., 2007 SUPPLEMENT TO CASES AND MATERIALS ON FEDERAL COURTS 38 (2007) (questioning Chief Justice Roberts’ assertion that states in *parens patriae* suits have to meet additional requirements for standing and suggesting that a state’s quasi-sovereign interest alone is sufficient for standing).

190. *Massachusetts*, 127 S. Ct. at 1465.

Massachusetts' interests as quasi-sovereign makes the required showing here harder, not easier."<sup>191</sup>

More broadly, Chief Justice Roberts complained that "[t]he Court, in effect, takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III."<sup>192</sup> His charge has some truth if one looks at the narrow holdings of various *parens patriae* decisions. As Part IV of this Article will show, if one looks at the broader theoretical rationale for protecting the quasi-sovereign interests of states, however, the majority's use of the quasi-sovereign doctrine to broaden the standing rights of states makes sense.<sup>193</sup>

Chief Justice Roberts did point out a potential flaw in the Court's use of the quasi-sovereign *parens patriae* standing doctrine. He observed that "[t]he Court asserts that Massachusetts is entitled to 'special solicitude' due to its 'quasi-sovereign interests,' ... but then applies our Article III standing test to the asserted injury of the State's loss of coastal property ... '*in its capacity as a landowner*.'"<sup>194</sup> Chief Justice Roberts correctly observed that "[i]n the context of *parens patriae* standing, however, we have characterized state ownership of land as a 'nonsovereign interes[t]' because a State 'is likely to have the same interests as other similarly situated proprietors.'"<sup>195</sup>

Chief Justice Roberts was correct that the majority confuses the distinction between quasi-sovereign interests and property interests. Some of Massachusetts' coast, however, is *not* owned by the State, and the Commonwealth would have a quasi-sovereign interest in that property. Additionally, Massachusetts has a more general quasi-sovereign interest in protecting the health and welfare of its citizens from harms to its coastline caused by global warming.<sup>196</sup> Thus, the Court was correct in holding that Massachusetts has both a quasi-sovereign interest and a property

---

191. *Id.*

192. *Id.* at 1465-66.

193. *See infra* Part IV.

194. *Massachusetts*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) (quoting *id.* at 1455-56 (majority opinion)).

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

196. Watts & Wildermuth, *supra* note 4 (manuscript at 7).

interest in its coastline, but the majority opinion did not explain that clearly.

Citing the Court's 1923 *Massachusetts v. Mellon*<sup>197</sup> decision and a footnote in the 1982 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*<sup>198</sup> decision, Chief Justice Roberts also argued that a state generally may not assert a quasi-sovereign interest against the federal government.<sup>199</sup> He observed that neither the petitioners nor the numerous amici supporting the petitioners had ever "cited *Tennessee Copper* in their briefs before this Court or the D.C. Circuit" and speculated that that was because of the *Mellon* limitation on parens patriae standing.<sup>200</sup> Professor Adler argues that "[t]he simplest explanation for *Georgia*'s conspicuous absence from the briefing is that the decision does not support the proposition for which it was cited."<sup>201</sup>

In a footnote, the majority opinion defended its reliance on *Tennessee Copper* and distinguished *Mellon*. Quoting its 1945 decision in *Georgia v. Pennsylvania Railroad Co.*, the *Massachusetts* Court stated that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)."<sup>202</sup> The Court's 1945 *Georgia* decision allowed a state to bring a parens patriae action against a private party for alleged violations of federal antitrust laws and arguably limited *Mellon* to prohibiting states from filing parens patriae suits that challenge the constitutionality of a federal statute.<sup>203</sup> The Court concluded that

---

197. 262 U.S. 447 (1923).

198. 458 U.S. 592 (1982).

199. *Massachusetts*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) (citing *Mellon*, 262 U.S. at 485-86; *Snapp*, 458 U.S. at 610 n.16).

200. *Id.*

201. Adler, *supra* note 3, at 65.

202. *Massachusetts*, 127 S. Ct. at 1455 n.17 (majority opinion) (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)).

203. See *Georgia*, 324 U.S. at 445-47; see also *Connecticut ex rel. Blumenthal v. U.S. Dep't of Commerce*, 369 F. Supp. 2d 237, 245 n.8 (D. Conn. 2005); *P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159-60 (S.D.N.Y. 1984); Comment, *State Standing To Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1089-93 (1977) ("Even assuming *Mellon*'s continued validity as a bar to state *parens patriae* suits which allege the

Massachusetts was properly asserting its quasi-sovereign interest to require the federal government to enforce the CAA.<sup>204</sup> In a footnote, Chief Justice Roberts argued, in turn, that a state could “assert rights under a federal statute as *parens patriae*” against private parties, but not against the federal government.<sup>205</sup> He also relied on *Alfred L. Snapp & Son*’s “clear ruling that ‘[a] State does not have standing as *parens patriae* to bring an action against the Federal Government.’”<sup>206</sup> The majority opinion, however, cited a subsequent *parens patriae* case in which the Court allowed a cross-claim against the United States.<sup>207</sup> Although they are not discussed in the Supreme Court’s decision, Part IV will address some lower court decisions that have allowed states to file *parens patriae* suits against the federal government.<sup>208</sup>

It seems most likely that Justice Kennedy suggested that the majority rely on *Tennessee Copper*. The petitioners did not cite *Tennessee Copper* in their briefs.<sup>209</sup> Arizona and four other states filed an amicus brief in which they argued that states should have standing to sue when the decision of a federal agency, including the EPA’s decision in that case, may preempt their state laws regulating GHGs.<sup>210</sup> The preemption argument is based on the state’s sovereign

---

unconstitutionality of a statute, many courts have begun to distinguish such suits from state *parens patriae* suits that seek review of federal agency action allegedly inconsistent with a federal statute.”).

204. See *Massachusetts*, 127 S. Ct. at 1455 n.17.

205. *Id.* at 1466 n.1 (Roberts, C.J., dissenting).

206. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982)).

207. See *id.* at 1455 n.17 (majority opinion) (citing *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (holding that Wyoming had standing to bring a cross-claim against the United States to vindicate its “‘quasi-sovereign’ interests which are ‘independent of and behind the titles of its citizens, in all the earth and air within its domain.’”)).

208. See *infra* note 386 and accompanying text.

209. See Adler, *supra* note 3, at 65.

210. See Brief of the States of Arizona, Iowa, Maryland, Minnesota and Wisconsin as Amici Curiae in Support of Petitioners at \*\*20-25, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380 [hereinafter *Arizona Amicus Brief*]; see also Stevenson, *supra* note 3, at 32-36 (agreeing with *Arizona Amicus Brief* that states should have standing to sue when the decision of a federal agency, including EPA’s decision in that case, may preempt their state laws regulating GHGs); Watts & Wildermuth, *supra* note 4 (manuscript at 2, 6-7, 9-11). The *Arizona Amicus Brief* relied on four lower court decisions, but no Supreme Court precedent for the principle that a state has standing to challenge a federal statute or regulation that potentially preempts a state law. See *Arizona Amicus Brief*, *supra*, at \*\*22-23; see also *Alaska v. U.S. Dep’t of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989); *Ohio ex rel.*

interest in enacting its own laws rather than the quasi-sovereign interest relied on in *Tennessee Copper*.<sup>211</sup> Massachusetts and the other petitioners cited the Arizona brief in their brief.<sup>212</sup> During the oral argument before the Supreme Court, James R. Milkey, an assistant attorney general for Massachusetts and the petitioners' only oral advocate before the Court, made a standing argument based on preemption by claiming that states have "special standing" to challenge federal laws or regulations that potentially preempt state laws.<sup>213</sup> During the oral argument, Justice Ginsburg explicitly agreed with the standing argument in the Arizona brief,<sup>214</sup> but the preemption standing line of reasoning was not mentioned in the Court's decision.<sup>215</sup>

Instead, during the oral argument in the case, Justice Kennedy stated that *Tennessee Copper* was the petitioners' "best case" supporting their standing, although he also remarked that the decision was "pre-Massachusetts versus Mellon."<sup>216</sup> Justice Kennedy has strongly supported federalism and state rights since he was

---

*Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985); *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 880 n.3 (D.C. Cir. 1983); *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974); *Stevenson*, *supra* note 3, at 32-36; *Watts & Wildermuth*, *supra* note 4 (manuscript at 7 n.43).

211. See *Watts & Wildermuth*, *supra* note 4 (manuscript at 9-11).

212. See *Arizona Amicus Brief*, *supra* note 210, at 6 n.5.

213. Transcript of Oral Argument at \*\*14-17, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3431932 [hereinafter *Oral Argument*] (statement of James R. Milkey, Assistant Attorney General for Massachusetts, for Petitioners, citing the Arizona brief and a case from the court of appeals); see also *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *Stevenson*, *supra* note 3, at 29-31.

214. See *Oral Argument*, *supra* note 213, at \*\*16-17.

215. See *Stevenson*, *supra* note 3, at 35 (stating that the *Massachusetts* decision did not cite any cases in the Arizona brief); *Watts & Wildermuth*, *supra* note 4 (manuscript at 11) ("Because the CAA allows California to create its own laws with respect to motor vehicle emissions and other states to adopt those standards, we think the Court should have examined whether California and the piggy-backing states had a sovereign interest at stake in this case. If the Court concluded that there was a sovereign interest at stake, as we believe there is, there would have been no need for any state to satisfy the *Lujan* requirements and thus no need to create a *Lujan*-lite analysis for states.").

216. *Oral Argument*, *supra* note 213, at \*15 (statement of Justice Kennedy); Thomas J. Donlon, *Supreme Court Boldly Steps into Global Warming Debate*, ABA News & Developments: E-Flash for April 2007, [http://www.abanet.org/litigation/committees/appellate/news\\_0407.html](http://www.abanet.org/litigation/committees/appellate/news_0407.html) ("Apparently, the [*Tennessee Copper*] case was first raised by Justice Kennedy at oral argument."); Douglas T. Kendall & Jennifer Bradley, *How Environmentalists Can Win Over the Supreme Court*, NEW REPUBLIC ONLINE, Dec. 1, 2006, at 1, <http://www.communityrights.org/PDFs/TheNewRep.12.01.06.pdf>; Mauro, *supra* note 128.

appointed to the Court by President Reagan in 1988.<sup>217</sup> He likely was attracted to *Tennessee Copper* as a justification for standing because that case strongly supports the rights of states.<sup>218</sup>

Although Chief Justice Roberts' discussion of *Tennessee Copper* is technically accurate, the implications of that decision are broader than he concedes. *Tennessee Copper* was decided thirty-seven years before the Court first explicitly used a standing test in *Stark v. Wickard*,<sup>219</sup> so it is not surprising that Justice Holmes did not even mention the issue of standing.<sup>220</sup> As is discussed in Part IV, *Tennessee Copper* gave states broader remedies than private litigants based on the principle that states have broader rights when they protect quasi-sovereign interests than private litigants have in suing for private interests.<sup>221</sup>

### *3. Massachusetts Failed To Prove Injury, Causation, or Redressability*

Chief Justice Roberts argued that the Court did not explain how its "special solicitude" for Massachusetts affected its standing

---

217. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that states retain residual sovereignty under a federalist system and therefore Congress may not subject non-consenting states to private suits for damages in state courts); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (interpreting the Commerce Clause in light of federalist concerns); Blumm & Bosse, *supra* note 128, at 672-73, 703-04, 715-18, 722 (arguing that federalism and states' rights are a central theme in Justice Kennedy's jurisprudence); Kendall & Bradley, *supra* note 216, at 2 ("To Justice Kennedy, the [*Massachusetts*] case seems to turn instead on the political theory of James Madison."); Dawn Reeves & Lara Beaven, *Justice Kennedy Fulfills Role as Key but Elusive Environmental Vote*, INSIDE EPA, June 29, 2007, <http://www.insideepa.com> (subscription required) (reporting unidentified "high court expert" as stating that Justice Kennedy generally supports the position of states in environmental cases before the Court during the 2006-07 term). Some argue that Justice Kennedy takes a "pragmatic" approach to federalist concerns. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 801-04 (1996); Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 238-42 (1996).

218. See Kendall & Bradley, *supra* note 216, at 1-2 (arguing that Justice Kennedy stated that *Tennessee Copper* was the "best" standing precedent in the *Massachusetts* case because the former case is based on the principle that states have greater rights than individual citizens in our federalist system of government).

219. 321 U.S. 288, 310 (1944).

220. See Mank, *supra* note 9, at 22 (discussing the history of the Court's use of standing criteria).

221. See *infra* Part IV.G.



analysis, “except as an implicit concession that petitioners cannot establish standing on traditional terms.”<sup>222</sup> He asserted that “the status of Massachusetts as a State cannot compensate for petitioners’ failure to demonstrate injury in fact, causation, and redressability.”<sup>223</sup> Chief Justice Roberts first asserted that the petitioners’ injuries from global warming failed to meet *Lujan*’s requirement that the alleged injury be “particularized” because they were common to the public at large.<sup>224</sup> He also argued that the petitioners’ evidence that rising sea levels was insufficient to establish that the injury is “actual or imminent, not conjectural or hypothetical”<sup>225</sup> because the computer modeling program relied upon by the plaintiffs had a significant range of uncertainty.<sup>226</sup> In a footnote, the majority responded that the petitioners did not have to prove the amount of loss with exactitude, but merely had to demonstrate that it was likely that rising sea levels would result in the loss of some of Massachusetts’ coastline.<sup>227</sup> Additionally, Chief Justice Roberts argued that, even if the models were correct about the loss of coastline, the injury was not immediate if its full effects would not be felt until 2100.<sup>228</sup> He stated: “[A]ccepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.”<sup>229</sup>

Additionally, Chief Justice Roberts argued that the petitioners failed to prove that a causal connection existed between the alleged injury of loss of coastal land in Massachusetts and “the lack of new motor vehicle greenhouse gas emission standards.”<sup>230</sup> Because GHGs persist in the atmosphere “for anywhere from 50 to 200 years” and “domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global greenhouse gas

---

222. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting).

223. *Id.* at 1466-67.

224. *See id.* at 1467.

225. *Id.*

226. *See id.* at 1467-68 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); accord Bertagna, *supra* note 10, at 444-46 (“Global warming plaintiffs cannot take their imminent injury claims out of the speculative category, because their claims are based entirely on conjectural, complex systems of climate modeling.”).

227. *See Massachusetts*, 127 S. Ct. at 1456 n.21 (majority opinion).

228. *See id.* at 1468 (Roberts, C.J., dissenting); Adler, *supra* note 3, at 68.

229. *Massachusetts*, 127 S. Ct. at 1468 (Roberts, C.J., dissenting); *see* Adler, *supra* note 3, at 67-68.

230. *Massachusetts*, 127 S. Ct. at 1468-69.

emissions,” the petitioners’ request that the EPA regulate emissions from “*new* motor vehicles and *new* motor vehicle engines” would have only a tiny impact on total global GHGs.<sup>231</sup> He concluded:

In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners’ alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.<sup>232</sup>

By contrast, the majority rejected similar arguments by the EPA and concluded instead that the petitioners had established causation because “U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.”<sup>233</sup>

Finally, Chief Justice Roberts argued that “[r]edressability is even more problematic” because of the “tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue here” and the additional problem that the “petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States.”<sup>234</sup> He criticized the petitioners’ claim that other countries would follow the lead of the United States if it reduced its motor vehicle emissions because that assertion ignored the impact of cost on other nations’ decisions and that U.S. courts would have no authority to force other countries to reduce their emissions.<sup>235</sup> Chief Justice Roberts rejected the majority’s conclusion that “*any* decrease in domestic emissions will ‘slow the pace of global emissions increases, no matter what happens elsewhere.’”<sup>236</sup>

The Chief Justice argued that the Court’s reasoning failed to satisfy the three-part standing test’s requirement that a court find that it is “likely” that a remedy will redress the “particular injury in

---

231. *Id.*

232. *Id.* at 1469.

233. *Id.* at 1457-58 (majority opinion); see *supra* text accompanying notes 165-71.

234. *Massachusetts*, 127 S. Ct. at 1469 (Roberts, C.J., dissenting).

235. See *id.* at 1469-70.

236. *Id.* at 1470 (quoting *id.* at 1458 (majority opinion)).

fact” at issue.<sup>237</sup> He complained that “even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed.”<sup>238</sup> By contrast, the Court concluded that the petitioners met the redressability and other standing requirements because reducing domestic emissions would reduce the loss of land and the risk of catastrophic harm to some extent.<sup>239</sup> Implicitly, Chief Justice Roberts appeared to demand that the petitioners quantify, at least to some extent, how much land might be saved by the EPA’s regulation of emissions from new vehicles and new engines to establish standing. The majority, however, was satisfied that the petitioners had shown that such regulation would reduce the risk to the Massachusetts coastline from rising sea levels resulting from GHGs and higher temperatures, despite the uncertainties about how much land the EPA’s regulation of new vehicles would save. The disagreement between the majority and Chief Justice Roberts’ minority opinion demonstrates that the Court’s standing test is far from precise and can be applied in different ways by different judges.

*4. Chief Justice Roberts Accuses the Majority of Intruding upon the Role of the Political Branches*

Chief Justice Roberts acknowledged that different judges could sometimes reasonably “debate” the application of imprecise standing standards, such as what is “‘fairly’ traceable or ‘likely’ to be redressed.”<sup>240</sup> He contended, however, that the Court’s loose application of standing principles in this case failed to consider separation of powers principles limiting the judiciary to “concrete cases.”<sup>241</sup> He argued that the majority’s recognition of standing in a case involving broad policy issues results in the Court intruding upon policy decisions appropriately within the purview of the

---

237. *Id.*

238. *Id.*

239. *See id.* at 1458 (majority opinion). *See supra* Part III.A.3.

240. *Massachusetts*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting).

241. *Id.*

political branches of government.<sup>242</sup> Chief Justice Roberts implied that the right of citizens to elect representatives to Congress and a President is an adequate answer to any sovereign rights that states surrender without expanding the rights of states to have standing in the federal courts.<sup>243</sup>

Chief Justice Roberts argued that “[t]oday’s decision recalls the previous high-water mark of diluted standing requirements, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.”<sup>244</sup> He summarized *SCRAP* as follows:

In *SCRAP*, the Court based an environmental group’s standing to challenge a railroad freight rate surcharge on the group’s allegation that increases in railroad rates would cause an increase in the use of nonrecyclable goods, resulting in the increased need for natural resources to produce such goods. According to the group, some of these resources might be taken from the Washington area, resulting in increased refuse that might find its way into area parks, harming the group’s members.<sup>245</sup>

The Court has never expressly overruled *SCRAP*, but in its 1990 decision *Whitmore v. Arkansas*,<sup>246</sup> the Court strongly questioned its rationale, stating that *SCRAP* involved “[p]robably the most attenuated injury conferring Art. III standing” and “surely went to the very outer limit of the law.”<sup>247</sup> Chief Justice Roberts agreed that “[t]he difficulty with *SCRAP*, and the reason it has not been followed ... is the *attenuated* nature of the injury there.”<sup>248</sup> He argued that “*SCRAP* became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint.”<sup>249</sup> He continued, “*SCRAP* made standing seem a lawyer’s

---

242. *See id.* at 1470-71.

243. *See id.* at 1463-64 (arguing that the majority had usurped the authority of political branches by unduly expanding standing rights of states).

244. *Id.* at 1470 (citing 412 U.S. 669 (1973)).

245. *Id.* at 1471.

246. 495 U.S. 149 (1990).

247. *Id.* at 158-59; *see Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990) (stating that *SCRAP* “has never since been emulated by this Court”).

248. *Massachusetts*, 127 S. Ct. at 1471 n.2 (Roberts, C.J., dissenting).

249. *Id.* at 1471.

game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches.”<sup>250</sup> He concluded, “Today’s decision is *SCRAP* for a new generation.”<sup>251</sup>

In a footnote, the majority responded to Chief Justice Roberts’ comparison of the case to *SCRAP*. First, the Court observed that he did not “disavow this portion of Justice Stewart’s opinion for the Court” in which the *SCRAP* Court had stated “that standing is not to be denied simply because many people suffer the same injury .... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.”<sup>252</sup> In a footnote, Chief Justice Roberts agreed that the portion of the *SCRAP* decision quoted by the Court was not problematic, but “[r]ather it is the *attenuated* nature of the injury there.”<sup>253</sup> The majority also challenged Chief Justice Roberts’ claim that the Court had followed *SCRAP* in making standing a “lawyer’s game.”<sup>254</sup> The majority responded: “It is moreover quite wrong to analogize the legal claim advanced by Massachusetts and the other public and private entities who challenge EPA’s parsimonious construction of the Clean Air Act to a mere ‘lawyer’s game.’”<sup>255</sup> Chief Justice Roberts responded in turn that “[o]f course it is not the legal challenge that is merely ‘an ingenious academic exercise in the conceivable,’ but the assertions made in support of standing.”<sup>256</sup>

In the concluding paragraph of his dissent, Chief Justice Roberts argued that the Court implicitly recognized that the petitioners could not meet normal standing criteria when the majority “devise[d] a new doctrine of state standing to support its result.”<sup>257</sup> He saw a small silver lining in an otherwise bad standing decision, stating: “The good news is that the Court’s ‘special solicitude’ for

---

250. *Id.*

251. *Id.*

252. *Id.* at 1458 n.24 (majority opinion) (quoting *United States v. SCRAP*, 412 U.S. 669 687-88 (1973)).

253. *Id.* at 1471 n.2 (Roberts, C.J., dissenting).

254. *Id.* at 1471.

255. *Id.* at 1459 n.24 (majority opinion) (quoting *id.* at 1471 n.2 (Roberts, C.J., dissenting)).

256. *Id.* at 1471 n.2 (Roberts, C.J., dissenting) (quoting *SCRAP*, 412 U.S. at 688 (citation omitted)).

257. *Id.* at 1471.

Massachusetts limits the future applicability of the diluted standing requirements applied in this case.”<sup>258</sup> Conversely, he concluded, “[t]he bad news is that the Court’s self-professed relaxation of those Article III requirements has caused us to transgress ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>259</sup>

### *C. Analysis*

A major weakness in the Court’s opinion is that it never explained to what extent it had relaxed standing requirements for states. It provided little or no guidance to lower courts about the degree to which they should give “special solicitude” to states in deciding standing issues.<sup>260</sup> The majority opinion is murky about how much extra deference states should receive with regard to standing, because the Court was unwilling to acknowledge that the petitioners failed to meet any part of the three-prong standing test. Additionally, the Court invoked the more relaxed immediacy and redressability requirements for procedural rights cases under footnote seven of *Lujan*, but did not explain how much more relaxed those requirements are compared to substantive cases.<sup>261</sup> Furthermore, because the case involved both procedural and substantive issues, it is at least questionable whether the case is a procedural rights action entitled to the relaxed footnote seven analysis.

#### *1. The Court Does Not Provide a Clear Test for State Standing*

The Court never clearly explained whether the petitioners could have met the three-part standing test without the benefit of the special standing position of states. Chief Justice Roberts’ argument that the majority’s approach of giving states special standing rights was an implicit admission that the petitioners could not meet

---

258. *Id.* (quoting *id.* at 1455 (majority opinion)).

259. *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

260. *See id.* at 1454-55 (majority opinion).

261. *See id.* at 1453.

ordinary standing principles has some truth,<sup>262</sup> but the Court's opinion is more complicated. The majority appears to have it both ways: The Court argued that the petitioners met the three-part standing test, but also suggested that if there are any doubts about whether they have met any facet of the test, then Massachusetts as a state will receive the benefit of the doubt.<sup>263</sup>

The majority opinion is also somewhat unclear about which kind of state interests are entitled to special standing analysis. The Court made a strong argument that states deserve special protection of quasi-sovereign interests because they have surrendered aspects of their sovereignty to the United States, and, therefore, can no longer defend the interests in the health and welfare of their citizens through war or diplomacy.<sup>264</sup> Yet the Court also observed that the fact that Massachusetts owned a great deal of the coastline strengthened the argument that it had a concrete stake in the case.<sup>265</sup> On the whole, the Court's opinion most strongly supports the view that states deserve special protection of quasi-sovereign interests in *parens patriae* cases. However the opinion does not necessarily establish that states are entitled to special standing rights in cases in which they are a mere property owner comparable to an ordinary citizen.

*2. It Is Questionable Whether Massachusetts Is a Procedural Rights Plaintiff, but the Court Has Never Provided a Good Definition of When Footnote Seven Applies*

Commentators have predicted that it would be easier for plaintiffs asserting global warming claims to prove standing in a procedural rights case, such as a NEPA action, than in a substantive case, including tort or nuisance actions, because of the relaxed immediacy and redressability requirements for procedural rights plaintiffs under *Lujan's* footnote seven.<sup>266</sup> For example, one commentator

---

262. *Id.* at 1466 (Roberts, C.J., dissenting).

263. *See id.* at 1454-55 (majority opinion).

264. *See id.* at 1454.

265. *Id.*

266. *See* Bertagna, *supra* note 10, at 456-58 (arguing that substantive global warming claims are unlikely to meet standing requirements, but that procedural rights cases under NEPA have a better chance of meeting standing requirements); Bradford C. Mank, *Civil Remedies*, in *GLOBAL CLIMATE CHANGE & U.S. LAW* 183, 184-99, 215-19, 237-38 (Michael B.

argued that “[t]he principal way in which the relaxed standards of procedural standing assist global warming plaintiffs is by allowing them to allege an injury that will occur in the future.”<sup>267</sup> In footnote seven, the *Lujan* Court stated that a NEPA plaintiff could challenge a dam that might not be completed “for many years.”<sup>268</sup> In *Massachusetts*, the petitioners presented estimates of damage to Massachusetts’ coastline through 2100;<sup>269</sup> such information would only meet the relaxed immediacy requirements under footnote seven for procedural rights plaintiffs and not for normal standing requirements.<sup>270</sup> Additionally, according to some lower court decisions and commentators, the standard for redressability is relaxed for procedural rights plaintiffs; this view holds that these plaintiffs do not have to prove that a favorable decision from the court will “fully remedy” their injuries.<sup>271</sup> Thus, it is not surprising that the majority in *Massachusetts* characterized the petitioners’ action as procedural in nature on the grounds that the petitioners were challenging the EPA’s refusal to act on their petition under 42 U.S.C. § 7607(b)(1), which provides “the right to challenge agency action unlawfully withheld.”<sup>272</sup>

Professor Adler, however, argues that the majority inappropriately applied the relaxed standing analysis because “Massachusetts claimed substantive injury, for which it sought

---

Gerrard ed., 2007) (arguing that the Ninth Circuit, and probably the Eighth and Tenth Circuits, would accept NEPA suits raising global warming issues, but that the District of Columbia Circuit applied stricter standing approach even in procedural rights cases).

267. Bertagna, *supra* note 10, at 460.

268. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *see also* Bertagna, *supra* note 10, at 461.

269. *See Massachusetts*, 127 S. Ct. at 1456 n.20; *id.* at 1467-68 (Roberts, C.J., dissenting) (criticizing Massachusetts’ use of estimates of sea level rise through 2100); *see also* Adler, *supra* note 3, at 67-68.

270. *See Massachusetts*, 127 S. Ct. at 1467-68 (Roberts, C.J., dissenting) (arguing that Massachusetts’ evidence of estimated sea level rise did not satisfy the immediacy test for standing); Adler, *supra* note 3, at 67-68.

271. *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1240 (10th Cir. 2004) (applying relaxed standing analysis for redressability in a procedural rights case); *Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001); *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (stating that a procedural rights plaintiff meets redressability requirement if the challenged project “could be influenced” by the court’s decision); Bertagna, *supra* note 10, at 463-64.

272. *Massachusetts*, 127 S. Ct. at 1453 (majority opinion) (citing 42 U.S.C. § 7607(b)(1) (2000)); *see also id.* at 1454 (stating that “Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious” (citing 42 U.S.C. § 7607(b)(1) (2000))).



substantive relief.”<sup>273</sup> Professor Adler apparently would limit the relaxed standing analysis in footnote seven of *Lujan* to solely procedural actions such as those under NEPA.<sup>274</sup> Whether the Court was right to apply footnote seven analysis, or whether Professor Adler is right, is complicated because the Court has never clearly defined under what circumstances the relaxed immediacy and redressability requirements for procedural rights plaintiffs apply.

In applying *Lujan*’s standing test, Professor Buzbee has argued that “[t]he line between substantive and procedural agency errors is unclear.”<sup>275</sup> He observes that “[e]xactly what a ‘procedural rights’ injury or harm is remains foggy.”<sup>276</sup> In his *Lujan* dissent, Justice Blackmun, who was joined by Justice O’Connor, criticized the majority’s procedural rights distinction by stating that “[m]ost governmental conduct can be classified as ‘procedural.’”<sup>277</sup> Additionally, he observed that “[i]n complex regulatory areas ... Congress often legislates ... in procedural shades of gray.... [I]t sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.”<sup>278</sup>

Professor Buzbee maintains that many cases in which administrative agencies are defendants “occur[] in the context of intermediate government actions.”<sup>279</sup> He explains, “I mean actions short of the final step in the decision-making process created by a relevant enabling act. Part of a statutory sequence of steps may be complete, but other decisions and actions must occur before final choices are made and tangible results impacting a plaintiff follow.”<sup>280</sup> In *Bennett v. Spear*,<sup>281</sup> the Court treated the government’s intermediate steps in deciding whether certain habitat was “critical

---

273. Adler, *supra* note 3, at 68.

274. *See id.*

275. Buzbee, *supra* note 73, at 255 n.33.

276. Buzbee, *supra* note 83, at 793 n.148.

277. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601 (1992) (Blackmun, J., dissenting); *see also* Buzbee, *supra* note 83, at 793 n.148; Buzbee, *supra* note 73, at 255 n.33.

278. *Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting); *see also* Buzbee, *supra* note 83, at 793 n.148; Buzbee, *supra* note 73, at 255 n.33.

279. Buzbee, *supra* note 73, at 255 n.33.

280. *Id.*

281. 520 U.S. 154 (1997).

habitat” used by endangered species as procedural omissions even though the statute ultimately required the Secretary of Interior to make a substantive decision.<sup>282</sup> The *Bennett* Court stated: “It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.... Since it is the omission of these required procedures that petitioners complain of, their [16 U.S.C.] § 1533 claim is reviewable under § 1540(g)(1)(C).”<sup>283</sup> Although Professor Buzbee is critical of the *Bennett* Court’s approach of dividing procedural and substantive steps that are ultimately substantive in nature,<sup>284</sup> *Bennett* is arguably precedent for applying the *Lujan* footnote seven standing test by treating a case with intermediate procedural steps as a procedural rights case even though the agency must ultimately decide a substantive issue.<sup>285</sup>

In *Massachusetts*, the petitioners of the Act sought, under Section 202, both procedural action by the EPA in determining whether CO<sub>2</sub> is “reasonably ... anticipated to endanger public health or welfare,” and substantive action in regulating emissions from new vehicles.<sup>286</sup> The procedural and substantive aspects of Section 202 are intertwined because, as the majority stated, “[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles.”<sup>287</sup> Yet in the conclusion of the opinion, the Court simply required the EPA to fulfill its procedural duty to explain its reasons for not taking action, and did not require the agency to take substantive action. “In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore ‘arbitrary, capricious, ... or otherwise not in accordance with law.’”<sup>288</sup> The Court effectively stated that the EPA must fulfill its procedural duties

---

282. See *id.* at 172; Buzbee, *supra* note 83, at 793 n.148.

283. *Bennett*, 520 U.S. at 172 (internal citations omitted); see also Buzbee, *supra* note 83, at 793 n.148.

284. See Buzbee, *supra* note 83, at 793 n.148. See generally *id.* at 793-98, 800-09, 811-23 (discussing procedural and substantive aspects of *Bennett*).

285. See *Bennett*, 520 U.S. at 172; Buzbee, *supra* note 83, at 793 n.148.

286. 42 U.S.C. § 7521(a)(1) (2000).

287. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007) (majority opinion).

288. *Id.* at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A) (2000)).

under Section 202, but did not address to what extent the Court would require the agency to make any substantive determinations. However, the majority went on to note:

We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.... We hold only that EPA must ground its reasons for action or inaction in the statute.<sup>289</sup>

Following *Bennett* and Professor Buzbee's intermediate step analysis, the *Massachusetts* Court's order could be construed as simply requiring the EPA to take an intermediate procedural action in explaining its reasoning for denying the petition. Arguably, footnote seven standing could apply in *Massachusetts* because of the intermediate procedural steps in the case even though the EPA may eventually need to make a substantive decision.<sup>290</sup>

Because the *Massachusetts* decision only required the EPA to take an "intermediate procedural" step in explaining its reasoning for denying the petition,<sup>291</sup> the Court's characterization of the case as procedural in nature is arguably correct. Nevertheless, Professor Adler is right to question the majority's assertion that the case is a procedural rights challenge that neatly fits under footnote seven of the *Lujan* decision. The Court needs to develop a better analysis for whether *Lujan* footnote seven standing applies to a case that involves intermediate procedural steps and an ultimate substantive decision.

The Court might have decided the case in favor of the petitioners without invoking footnote seven's relaxed standing requirements for procedural rights plaintiffs. It is worth noting that Judge Tatel concluded that *Massachusetts* met all of the standing requirements

---

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

290. Professor Adler acknowledges that the Court's decision technically only requires the EPA to reconsider its decision, but then argues that "the adoption of new vehicle emission standards is only a matter of time" because the Bush Administration and EPA have already conceded that GHGs pose serious risks of climate change. Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript at 8-13, available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/20/LRColl2007n20Adler.pdf>).

291. See *supra* notes 279-90 and accompanying text.

without invoking the relaxed standards in footnote seven of *Lujan*.<sup>292</sup> The Supreme Court in *Massachusetts* suggested that the plaintiffs had met normal standing requirements, but also invoked the relaxed analysis of footnote seven.<sup>293</sup> If the majority was confident that the plaintiffs had met the normal three-part standing test, the Court could have clearly stated so and then it would not have needed to invoke the footnote seven standing doctrine in a case that did not squarely fit within a procedural rights framework.

As is addressed in Part V, this Article's proposed standing test would eliminate any dispute about whether a case is procedural, because states filing *parens patriae* actions would be entitled to the same relaxed immediacy and redressability requirements as procedural rights plaintiffs even if the state's case is substantive in nature.<sup>294</sup> The proposed test would address the Court's failure to define how states are treated differently from other plaintiffs in determining standing.

### *3. Did Massachusetts Meet the Traditional Three-part Standing Test?*

Even if one accepts Professor Adler's argument that the Court should not have applied footnote seven procedural rights standing in the case, the majority arguably could have followed Judge Tatel's analysis and concluded that Massachusetts met standing requirements. If the Court's three-part standing test is applied liberally, on the whole, the Court's opinion is persuasive that Massachusetts' allegations about the loss of its coastline from rising sea levels caused by global warming, which, in turn, are caused by growing concentrations of GHGs, is sufficient to meet standing requirements. The Court correctly rejected the EPA's argument "that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional

---

292. *Massachusetts v. EPA*, 415 F.3d 50, 64 (D.C. Cir. 2005) (Tatel, J., dissenting), *rev'd*, 127 S. Ct. 1438 (2007).

293. *See Massachusetts*, 127 S. Ct. at 1453 (characterizing the case as involving procedural rights); *id.* at 1455-58 (stating that plaintiffs had met the three-part standing test); Cannon, *supra* note 149, at 57 (arguing that Justice Stevens' majority opinion in *Massachusetts* satisfied all three elements of the standing test because the Court was willing to consider systemic injury as a legitimate basis for standing); *see also supra* Part III.A.3.

294. *See infra* Part V.

obstacle.”<sup>295</sup> Chief Justice Roberts did not challenge the majority’s favorable discussion of the *SCRAP* Court’s conclusion that standing is not to be denied simply because many people are injured.<sup>296</sup>

Regarding the injury portion of the standing test, the Court found that Massachusetts had established that global warming caused a ten to twenty centimeter increase in global sea levels over the course of the twentieth century and that those increases have probably already caused harm to its coastline.<sup>297</sup> The current injuries to Massachusetts’ coastline are concrete and immediate, and it is probable that growing levels of GHGs during the twenty-first century will cause even greater harms to its coastline in the future.<sup>298</sup> Although Chief Justice Roberts is correct that computer models projecting the relationship between GHG levels and sea levels are far from precise, the majority opinion makes the stronger argument that Massachusetts showed injury in fact even if the exact magnitude of any future injuries was uncertain.<sup>299</sup>

Concerning the causation part of the standing test, the Court and Chief Justice Roberts disagreed about to what extent the petitioners had to establish that GHGs from new domestic motor vehicles were a significant factor in causing Massachusetts to lose coastal land. Because the U.S. transportation sector represents 6 percent of worldwide carbon dioxide emissions, the Court determined that “U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.”<sup>300</sup> By contrast, Chief Justice Roberts argued that the petitioners failed to establish that the EPA’s regulation of GHGs from new domestic motor vehicles would prevent the loss of Massachusetts’ coastal land when regulation of new vehicles would reduce only a fraction of the 4 percent of GHGs produced by the U.S. transportation sector.<sup>301</sup> He argued that such emissions play only a “bit-part” in the impact of the “150-year global

---

295. *Massachusetts*, 127 S. Ct. at 1453.

296. *See id.* at 1458 n.24 (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88 (1973)); *id.* at 1471 n.2 (Roberts, C.J., dissenting).

297. *See id.* at 1456 (majority opinion).

298. *See id.*

299. *Compare id.* at 1456 n.21 (majority opinion), *with id.* at 1467-68 (Roberts, C.J., dissenting).

300. *Id.* at 1457-58 (majority opinion).

301. *Id.* at 1468-69 (Roberts, C.J., dissenting).

phenomenon” of global warming and, therefore, it was speculative that the lack of EPA regulation had an impact on the alleged injury of Massachusetts losing coastal land.<sup>302</sup>

The “fairly traceable” standard for causation does not provide an exact test for what percentage of harm an alleged cause must contribute to a plaintiff’s alleged injuries.<sup>303</sup> If a defendant’s activities have only a trivial impact on a plaintiff, then a court should deny standing. Deciding whether the U.S. transportation sector is a meaningful factor in increasing global warming depends on whether one emphasizes the more than 1.7 billion metric tons of carbon dioxide it released in 1999 alone, which the Court cited as evidence of its enormous impact, or whether one emphasizes, as in Chief Justice Roberts’ dissenting opinion, the small percentage that figure represents of worldwide emissions.<sup>304</sup> Although Chief Justice Roberts is correct that the EPA’s regulation would apply only to new vehicles, over time an increasing percentage of all domestic vehicles would be subject to regulation as old vehicles are eventually replaced by new ones. Because the U.S. transportation sector contributes 4 percent of worldwide GHGs, the Court properly decided that the regulation of these emissions was more than a trivial factor in affecting global warming and therefore was a sufficiently meaningful factor to warrant standing under the fairly traceable standard.

The EPA argued that the plaintiffs could not meet the redressability portion of the standing test because federal courts could not control the rapidly growing emissions of developing nations, including China and India.<sup>305</sup> According to the EPA, a favorable court decision for the plaintiffs ordering the agency to control domestic new vehicle emissions might be fruitless if foreign emissions grew more rapidly than domestic reductions.<sup>306</sup> The Court was correct to reject the EPA’s argument because a remedy that reduced the harm to the petitioners by limiting domestic emissions was enough to warrant standing even if the remedy could not

---

302. *Id.* at 1469.

303. *See id.* at 1464; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

304. *Compare Massachusetts*, 127 S. Ct. at 1457-58 (majority opinion), *with id.* at 1468-69 (Roberts, C.J., dissenting).

305. *See id.* at 1457-58 (majority opinion).

306. *See id.*

prevent greater harms from GHGs emitted by foreign countries.<sup>307</sup> Although Chief Justice Roberts is correct that the petitioners must establish that it is “likely” that the proposed relief will remedy their alleged injuries, he demands too much in essentially demanding that the petitioners quantify, at least to some extent, how the EPA’s regulation of GHGs will reduce erosion of its coastline despite an increase in GHGs from other nations.<sup>308</sup> The majority is correct that regulating GHGs is likely to reduce the impacts of GHGs from what they would have been with no regulation. As discussed in the preceding paragraph, the U.S. transportation sector’s 4 percent contribution to worldwide GHGs is more than a trivial factor in affecting global warming. Chief Justice Roberts demands a certainty in predicting the impact of the remedy that is not required.

There is a more than plausible argument that Massachusetts met the normal three-part standing test, as Judge Tatel concluded and the majority of the Supreme Court suggested.<sup>309</sup> Nevertheless, one must acknowledge that without the relaxed immediacy and redressability standards of footnote seven or the special solicitude that the majority gave to states, the issue of whether Massachusetts met normal standing requirements is debatable. Chief Justice Roberts and Judge Sentelle present a plausible case that Massachusetts failed to meet the normal standing test.<sup>310</sup> Accordingly, it is not surprising that the majority sought to characterize the case as both a footnote seven case and a special state standing case so that more lenient standing requirements would apply.

The main difficulty with the Court’s standing analysis is that it is never clear to what extent the majority applied reduced standing requirements under footnote seven or a special solicitude for states standard. It is possible that some members of the majority believed, like Judge Tatel, that Massachusetts had met normal standing requirements and that other members of the majority did not. As a result, the Court suggested simultaneously that Massachusetts

---

307. *See id.* at 1458.

308. *See id.* at 1469-70 (Roberts, C.J., dissenting).

309. *Id.* at 1455-58 (majority opinion) (explaining that plaintiffs had met the three-part standing test); *Massachusetts v. EPA*, 415 F.3d 50, 64 (D.C. Cir. 2005) (Tatel, J., dissenting), *rev’d*, 127 S. Ct. 1438 (2007); Cannon, *supra* note 149, at 57; *see supra* Parts II.C, III.A.3.

310. *See supra* Parts II.C, III.B.

made a strong showing under normal standing requirements and that the Court was applying relaxed footnote seven and special state solicitude standards as well.<sup>311</sup> The decision provides little or no guidance to lower courts when they face a case in which it is unclear whether a state has met normal standing requirements. It remains to be seen whether the Court in the future will limit *Massachusetts* to its facts, or perhaps to cases involving the CAA only, or if it will apply a rule of special solicitude for state standing in many cases.<sup>312</sup>

#### IV. DOES THE PARENS PATRIAE STANDING DOCTRINE SUPPORT BROADER STANDING RIGHTS FOR STATES?

In *Massachusetts*, the majority relied heavily upon the right of states to litigate as parens patriae to protect quasi-sovereign interests, set out in *Tennessee Copper*, to justify greater standing rights for states under the modern three-part constitutional standing test.<sup>313</sup> Chief Justice Roberts, however, argued that states seeking to litigate as parens patriae have to meet additional standing requirements and not lower standing requirements.<sup>314</sup> In light of this disagreement, it will be helpful to carefully examine the history and development of the parens patriae doctrine. Although Chief Justice Roberts is correct that courts have sometimes limited the doctrine, the broad principles underlying the right of states to protect quasi-sovereign interests support the Court's giving greater standing rights to states.

##### A. *The Historical Development of Parens Patriae*

In its 1982 *Snapp* decision, the Supreme Court reviewed the history and development of the parens patriae doctrine.<sup>315</sup> In the

---

311. See *Massachusetts*, 127 S. Ct. at 1453 (majority opinion) (characterizing the case as involving procedural rights); *id.* at 1454-55 (concluding that states in some circumstances are entitled to special consideration when courts make standing decisions); *id.* at 1455-58 (arguing that plaintiffs had met three-part standing test); Cannon, *supra* note 149, at 57.

312. See Stevenson, *supra* note 3, at 8 (discussing the possibility that the Supreme Court in the future could limit *Massachusetts* to cases involving the Clean Air Act).

313. See *Massachusetts*, 127 S. Ct. at 1454-55 (majority opinion); *supra* Part III.A.2.

314. *Id.* at 1465 (Roberts, C.J., dissenting); *supra* Part III.B.2.

315. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-08 (1982).



English common law, the king had the “royal prerogative” as parent or father of the country, *parens patriae*, to act as guardian for those who lacked the legal capacity to act for themselves, including minors and the mentally disabled.<sup>316</sup> After America became independent of England and its king, American courts recognized that state legislatures or Congress had the prerogative to act as *parens patriae* for individuals unable to care for themselves.<sup>317</sup>

### *B. Parens Patriae and Quasi-sovereign Interests*

Beginning in the early 1900s, the doctrine of *parens patriae* evolved from the common law approach of protecting individuals who lacked legal capacity to the quite different principle that a state has standing to defend its quasi-sovereign interest in the “well-being of its populace.”<sup>318</sup> It is easiest to begin with what is *not* a quasi-sovereign interest. The *Snapp* Court explained that “[q]uasi-sovereign interests ... are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.”<sup>319</sup> A state has a sovereign interest in the enforcement of its laws or the recognition of its borders.<sup>320</sup> A state has a proprietary interest in the land or businesses it owns, much like “other similarly situated proprietors.”<sup>321</sup> A state that is “only a nominal party without a real interest of its own” does “not have standing under the *parens patriae* doctrine.”<sup>322</sup> None of these three types of interests can be a quasi-sovereign interest.

Next, the *Snapp* Court tried to provide a definition of a quasi-sovereign interest. The Court stated, “[Quasi-sovereign interests] consist of a set of interests that the State has in the well-being of its populace.”<sup>323</sup> The Court declared that standing principles limit the

---

316. *Id.* at 600; *see also* *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 n.4 (1st Cir. 2000).

317. *E.g.*, *Snapp*, 458 U.S. at 600; *Mormon Church v. United States*, 136 U.S. 1, 57 (1890); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854); *Estados Unidos Mexicanos*, 229 F.3d at 335 n.4; Comment, *supra* note 203, at 1072.

318. *Snapp*, 458 U.S. at 602; *see also* Watts & Wildermuth, *supra* note 4 (manuscript at 4).

319. *Snapp*, 458 U.S. at 602; *see also* Watts & Wildermuth, *supra* note 4 (manuscript at 3).

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

321. *Id.* at 601-02; *see also* Watts & Wildermuth, *supra* note 4 (manuscript at 3).

322. *Snapp*, 458 U.S. at 600.

323. *Id.* at 602.

scope of which quasi-sovereign interests are actionable in federal courts. The Court stated, “Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”<sup>324</sup> The Court acknowledged that this limitation was far from clear, stating, “The vagueness of this concept can only be filled in by turning to individual cases.”<sup>325</sup>

Quasi-sovereign interests include two different categories. According to the *Snapp* Court, “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”<sup>326</sup> As to the first category, the Court has never established any specific requirements as to “the proportion of the population of the State that must be adversely affected by the challenged behavior.”<sup>327</sup> The Court explained, “Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.”<sup>328</sup> Furthermore,

One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers<sup>329</sup>

rather than through “private bills” designed to assist “particular individuals.”<sup>330</sup> Massachusetts’ interest in protecting its coastline affects the welfare of a large number of its citizens and, therefore, is an appropriate quasi-sovereign interest.

According to the *Snapp* Court, the second type of *parens patriae* suit involves a state’s “quasi-sovereign interest in not being

---

324. *Id.*

325. *Id.*

326. *Id.* at 607.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 607 n.14.

discriminatorily denied its rightful status within the federal system.”<sup>331</sup> The Court explained, “Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system.”<sup>332</sup> For example, a state can sue another state that imposes barriers to trade in violation of the Commerce Clause.<sup>333</sup> A state can sue another state or private firm for violating a federal statute that provides benefits to the state’s citizens as long as the state is “more than a nominal party.”<sup>334</sup> The *Snapp* Court concluded that “a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population.”<sup>335</sup> As discussed below, the second type of *parens patriae* is arguably justification for *parens patriae* suits by states against the federal government if the executive branch is failing to enforce a federal law, although the *Snapp* decision did not allow such suits.<sup>336</sup>

### *C. Parens Patriae and Suits To Enjoin Public Nuisances*

The earliest successful *parens patriae* cases involved suits to enjoin public nuisances.<sup>337</sup> Public nuisance cases are the most analogous *parens patriae* cases compared to the global warming suit in *Massachusetts*.<sup>338</sup> In its 1901 decision, *Missouri v. Illinois*, the

---

331. *Id.* at 607.

332. *Id.* at 607-08.

333. *Id.* at 608 (citing *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)).

334. *Id.* (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945) (federal antitrust laws); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Natural Gas Act)).

335. *Id.*

336. *See infra* Part IV.H.

337. *See Snapp*, 458 U.S. at 603-05 (listing and discussing *parens patriae* cases involving suits to enjoin public nuisances); *see also* *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (diversion of water); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of water); *Kansas v. Colorado*, 185 U.S. 125 (1902) (diversion of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (water pollution).

338. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 3-5 (2003); Mank, *supra* note 266, at 197-98; Merrill, *supra* note 5, at 328-33. *But see* *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265, 268, 274 (S.D.N.Y. 2005) (dismissing a public nuisance suit by eight state attorneys general

Court considered Missouri's request for an injunction to enjoin Illinois from discharging sewage that polluted the Mississippi River in Missouri.<sup>339</sup> The *Missouri* Court declared that a state could sue to protect the health of its citizens:

It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.<sup>340</sup>

The *Missouri* Court "relied upon an analogy to independent countries in order to delineate those interests that a State could pursue in federal court as *parens patriae*, apart from its sovereign and proprietary interests."<sup>341</sup> The Court stated:

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.<sup>342</sup>

The *Tennessee Copper* Court followed *Missouri's* approach of justifying state *parens patriae* suits for quasi-sovereign interests as a substitute for the sovereign interests that states surrender when they join the United States.<sup>343</sup> Additionally, *Tennessee Copper* expanded the scope of quasi-sovereign interests protected by *parens patriae* suits from protecting the health of their citizens from public

---

against five large public utilities as violating the political question doctrine).

339. 180 U.S. 208 (1901). In a subsequent case, the Court denied Missouri's request for an injunction without prejudice because it was unclear whether the typhoid bacillus in the sewage survived the journey from Illinois to Missouri and there was evidence of other possible infection in other sewage sources, including towns in Missouri, but the Court left it open to Missouri to submit additional evidence addressing whether Illinois was the source of the alleged disease. *Missouri v. Illinois (Missouri II)*, 200 U.S. 496, 521-26 (1906).

340. *Missouri*, 180 U.S. at 241.

341. *Snapp*, 458 U.S. at 603.

342. *Missouri*, 180 U.S. at 241.

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

nuisances to safeguarding their land, air, and natural resources.<sup>344</sup> The *Tennessee Copper* Court stated:

This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.... When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.<sup>345</sup>

Thus, even though Georgia owned very little of the affected land, it still had a quasi-sovereign interest in protecting the land and natural resources within its borders, as well as the health of its citizens.<sup>346</sup> The Court stated that the evidence of harm to the state's natural resources alone was sufficient to require injunctive relief to protect the state's quasi-sovereign interests: "[W]e are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri*."<sup>347</sup> Because *Tennessee Copper* recognized that a state has a quasi-sovereign

---

344. See *id.*; Ricard Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1867 (2000) ("In *Georgia ex rel. Hart v. Tennessee Copper Co.*, a state's quasi-sovereign interest was extended beyond the general concepts of the health and comfort of its citizens to specifically include interests in the land on which they reside and in the air that they breathe."); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 107 (2005) ("The Supreme Court, observing that the state owned very little of the property alleged to be damaged, recast the state's claim as a suit for injury to resources owned by Georgia in its capacity of 'quasi-sovereign.'").

345. *Tenn. Copper*, 206 U.S. at 237 (citing *Missouri*, 180 U.S. at 241).

346. See *id.* at 238-39; Kanner, *supra* note 344.

347. *Tenn. Copper*, 206 U.S. at 238-39; see also Kanner, *supra* note 344.

interest in protecting its natural resources, Massachusetts has a similar quasi-sovereign interest in protecting its coastline.<sup>348</sup>

Chief Justice Roberts is technically correct that the *Tennessee Copper* decision only gave states greater remedies than private individuals and did not address the issue of standing.<sup>349</sup> The absence of standing language in *Tennessee Copper* is not surprising because the Court did not create a standing doctrine until 1944.<sup>350</sup> The *Tennessee Copper* Court's underlying reasoning, however, was based on the broader principle that states are entitled to broader rights than individuals because of the quasi-sovereign rights they retain as a limited substitute for their former full sovereign rights.<sup>351</sup> These broader principles are consistent with the *Massachusetts* Court's decision to grant states broader standing rights than individuals.<sup>352</sup>

#### *D. Parens Patriae Actions Other than Public Nuisances*

Although the first parens patriae cases involved public nuisances, the *Snapp* Court observed that "*parens patriae* interests extend well beyond the prevention of such traditional public nuisances."<sup>353</sup> The Court in *Pennsylvania v. West Virginia* in 1923 allowed Pennsylvania to represent the quasi-sovereign interests of its residents in maintaining access to natural gas produced in West Virginia.<sup>354</sup> The *Pennsylvania* Court stated:

---

348. See *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973) (holding that a state has a quasi-sovereign interest in coastal resources); *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1065-67 (D. Md. 1972) (allowing a state to file a parens patriae suit to recover damages to coastal waters from an oil spill); *State v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 758 (N.J. Super. Ct. App. Div. 1975) (allowing a state to file a parens patriae suit to recover damages for fish kill), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976); Ieyoub & Eisenberg, *supra* note 344, at 1869-70 & n.56 (discussing the state quasi-sovereign interest in natural resources, including coastal resources); Kanner, *supra* note 344, at 107-09 (discussing the state quasi-sovereign interest in natural resources).

349. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1465 (2007) (Roberts, C.J., dissenting); *supra* notes 183-85 and accompanying text.

350. See *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (becoming the first Supreme Court case to explicitly state the Article III standing requirements); *supra* note 9 and accompanying text.

351. See *Tenn. Copper*, 206 U.S. at 237.

352. See *Massachusetts*, 127 S. Ct. at 1454-55 (majority opinion); *infra* Part IV.G.

353. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 605 (1982).

354. 262 U.S. 553, 581, 591 (1923).

The private consumers in each State ... constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.<sup>355</sup>

In its 1945 decision, *Georgia v. Pennsylvania Railroad Co.*, the Court held that Georgia could bring a parens patriae suit to protect state residents from alleged antitrust violations because the economic harms at issue were as important as the issues in public nuisance cases like *Tennessee Copper* or *Missouri*.<sup>356</sup> The Court stated:

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy.... [Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams.... These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.<sup>357</sup>

In the economic injury parens patriae cases, the state's suit was not based on its own injuries, but instead as the representative of its citizens for their injuries.<sup>358</sup>

---

355. *Id.* at 592.

356. 324 U.S. 439, 443-44, 450-51 (1945).

357. *Id.* at 450-51.

358. States can sue if they suffer individual injuries, but parens patriae actions are based solely on states acting in a representative capacity for their citizens' interests. *See Maryland v. Louisiana*, 451 U.S. 725, 737-39 (1981) (authorizing parens patriae suit for states to challenge "first use" tax imposed by Louisiana on certain uses of natural gas where "a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year"). A state can sue both in its individual capacity and as parens patriae, but the Supreme Court has treated such suits as analytically separate. *See id.*

*E. Justice Brennan's Broader Concurring Opinion in Snapp*

In his concurring opinion in *Snapp*, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, stated: "At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations."<sup>359</sup> He then implied that states should have greater rights than individuals:

More significantly, a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.<sup>360</sup>

Although he does not explicitly declare that states have greater standing rights than individuals, his argument that federal courts should normally defer to a state's "assertion of sovereign interests" would effectively give states greater standing rights than individuals, although not automatic standing. Presumably, Justice Brennan meant to include quasi-sovereign interests along with sovereign interests because the *Snapp* decision was primarily concerned with quasi-sovereign interests and not purely sovereign interests.

*F. Standing in Public Nuisance Cases*

The traditional rule in public nuisance cases is that the state has automatic standing as a sovereign.<sup>361</sup> Courts viewed public nuisance

---

359. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring). Four justices did not join his concurrence: Chief Justice Burger and Justices White, who wrote the majority opinion, Rehnquist, and O'Connor. *Id.* at 594 (majority opinion). Justice Powell did not participate in the case. *Id.* at 610.

360. *Id.* at 612 (Brennan, J., concurring).

361. See, e.g., *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 162 (Ill. 1982) ("Equitable jurisdiction to abate public nuisances is said to be of 'ancient origin,' and it exists even where not conferred by statute ...."); see also Grossman, *supra* note 338, at 55; David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1177 n.9 (2000); Matthew F. Pawa & Benjamin A.



cases as quasi-criminal in nature, and states have always had automatic standing in criminal cases.<sup>362</sup> Thus, a court might presume that a state in a public nuisance case has standing. Perhaps that presumption explains why early Supreme Court cases like *Missouri* and *Tennessee Copper* do not question the right of states to bring suit.

Professor Merrill argues that the issue of whether states deserve automatic standing in public nuisance cases is more complicated when a state brings an action in the courts of another sovereign, the federal courts.<sup>363</sup> As a matter of theory, based on the principle that states can only bring criminal actions in their own courts, he would prefer that states should only bring public nuisance actions in their own courts because they are quasi-criminal in nature,<sup>364</sup> but he concedes that “it is almost certainly too late in the day to advance any general rule that public nuisance actions, like criminal actions, must always be brought in the courts of the sovereign that institutes the action.”<sup>365</sup> As an alternative, he proposes a rule whereby states would have automatic standing when they bring *parens patriae* suits in their own courts, but would apply “the same Article III and prudential standing limitations that apply to suits by aggrieved

---

Krass, *Behind the Curve: The National Media's Reporting on Global Warming*, 33 B.C. ENVTL. AFF. L. REV. 485, 489-90 (2006). However, Professors Woolhandler and Collins argue that during the nineteenth century, federal courts would not have granted automatic standing to states filing nuisance suits in a federal court, but would have required the state to demonstrate “‘particularized’ or special injury,” the same as any private individual. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 432-33 (1995) (discussing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 559 (1851)). They acknowledge that federal courts by the early 1900s did grant automatic standing to states filing suit in federal courts under a *parens patriae* theory. *Id.* at 446-47 (citing *Missouri v. Illinois*, 180 U.S. 208, 241, 244 (1901)).

362. See Grossman, *supra* note 338, at 55; Pawa & Krass, *supra* note 361, at 489-90; Merrill, *supra* note 5, at 300-01, 304.

363. Merrill, *supra* note 5, at 302-04; Watts & Wildermuth, *supra* note 4 (manuscript at 4-5) (discussing Professor Merrill's proposal that states should not have automatic standing when they file public nuisance suits in federal courts).

364. See Merrill, *supra* note 5, at 301-03.

365. *Id.* at 303.

citizens” to states when they bring such actions in federal courts.<sup>366</sup> Yet he acknowledges:

There is no suggestion from the Supreme Court’s original jurisdiction cases adjudicating transboundary nuisance disputes—the paradigm for the modern *parens patriae* action—that the States bringing these suits were required to meet any particular standing burden in order to maintain the action. One could attempt to distinguish these cases on the grounds that today’s elaborate standing doctrine, requiring injury in fact, causation, redressability and so forth, is a relatively recent development that postdates the decisions in these transboundary cases. Moreover, it is quite likely that if in fact one were to apply modern standing requirements to these transboundary suits, the States would have been able to establish standing in each of these cases. Still, the absence of any discussion in these cases that even sounds like the Court was considering a standing requirement makes it substantially more difficult to maintain that traditional standing notions should be turned on or off depending on whether public officers are suing in the courts of their own sovereign.<sup>367</sup>

Although he personally disagrees with automatic standing in *parens patriae* cases, Professor Merrill concedes that the *Missouri* and *Tennessee Copper* decisions appear to have granted states standing by right in *parens patriae* actions.<sup>368</sup> His analysis strongly suggests that the *Massachusetts* Court was closer to the spirit of those two decisions than Chief Justice Roberts’ dissenting opinion.

---

366. *Id.* at 304-05; Watts & Wildermuth, *supra* note 4 (manuscript at 4-5) (agreeing with Merrill that states should not have automatic standing when they file public nuisance suits in federal courts). Federal courts followed Merrill’s approach of not giving states automatic standing in nuisance suits in the federal courts during the nineteenth century; but by the early 1900s they were granting states automatic standing under the *parens patriae* doctrine. See Woolhandler & Collins, *supra* note 361, at 432-33 (citing *Wheeling & Belmont Bridge*, 54 U.S. (13 How.) at 561; *id.* at 446-47 (citing *Missouri*, 180 U.S. at 240-41, 244).

367. Merrill, *supra* note 5, at 305-06 (footnotes omitted).

368. See *id.* at 302-06.

*G. States Are Entitled to Greater Standing Rights in Parens Patriae Cases Involving Quasi-sovereign Interests*

Because the parens patriae doctrine gives states the right to protect a broad range of interests that affect the health, safety, welfare, and economics of their citizens, it is reasonable to give states broader latitude in obtaining standing for generalized injuries that affect many of their citizens. Courts have recognized parens patriae standing for mass torts and consumer fraud.<sup>369</sup> Indeed, courts may properly deny parens patriae standing if a suit involves only a few injured individuals because those individuals could bring their own lawsuit and thus the state is only a nominal party.<sup>370</sup> States are the ideal party to bring a suit challenging global warming because such generalized harms affect the welfare of many of their citizens and the state is in a better position to represent their common interests than any group of individuals. Professor Merrill argues “that the State’s interest in protecting the health and wellbeing of its citizens from transboundary nuisances is the paradigm case of a quasi-sovereign interest that will support *parens patriae* standing.”<sup>371</sup>

Following Justice Holmes’ broad reasoning in *Tennessee Copper*, the *Massachusetts* Court made a strong argument that states are entitled to greater latitude concerning standing to protect their quasi-sovereign interests.<sup>372</sup> The Supreme Court has long recognized that states have a quasi-sovereign interest in protecting their water resources.<sup>373</sup> Lower court decisions have specifically concluded that

---

369. See *Maryland v. Louisiana*, 451 U.S. 725, 737-39 (1981) (authorizing parens patriae suit for states to challenge “First Use Tax” imposed by Louisiana on certain uses of natural gas where “a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year”); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907) (allowing Georgia to bring public nuisance suit on behalf of numerous citizens affected by air pollution); *Ieyoub & Eisenberg*, *supra* note 344, at 1870; Kenneth Juan Figueroa, Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 436 n.146 (2002).

370. See *supra* notes 319-22, 334 and accompanying text.

371. Merrill, *supra* note 5, at 304.

372. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-55 (2007) (majority opinion).

373. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (diversion of water); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of water); *Kansas*

states have a quasi-sovereign interest in their coastal waters and the biological and natural resources associated with them.<sup>374</sup> Massachusetts has a quasi-sovereign interest in protecting its coastline from global warming and should have standing to protect it in the federal courts.

Although neither the *Missouri* nor *Tennessee Copper* decisions directly involved standing, the Court in those *parens patriae* decisions implicitly gave states broader standing rights by allowing a state to obtain broad remedies for a public nuisance without requiring them to prove the specific injuries required in suits by individual litigants, who must prove direct and particularized harm to themselves. In *Tennessee Copper*, Justice Holmes acknowledged that the Court granted equitable relief to Georgia that it might well not have given to private litigants. He stated:

If any such demand [for equitable relief] is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.<sup>375</sup>

According to the First Circuit, the *parens patriae* doctrine “creates an exception to the normal rules of standing applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests in the ‘well-being of its populace.’”<sup>376</sup>

---

v. Colorado, 185 U.S. 125 (1902) (diversion of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (water pollution).

374. See *supra* note 348.

375. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907).

376. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982)). The First Circuit qualified this statement by stating that “[i]t is a judicially created exception that has been narrowly construed.” *Id.*

*H. Can States File Parens Patriae Suits Against the Federal Government?*

Following *Massachusetts v. Mellon*,<sup>377</sup> Chief Justice Roberts argued that a state may not assert a quasi-sovereign interest against the federal government.<sup>378</sup> The *Mellon* decision held that states may not sue the federal government in a parens patriae capacity because the federal government is in the position of parens patriae, for those same citizens are both federal and state citizens.<sup>379</sup>

[T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.<sup>380</sup>

A footnote in the 1982 *Alfred L. Snapp & Son* decision expressed agreement with the *Mellon* decision that states cannot file parens patriae suits against the federal government.<sup>381</sup> Professors Watts and Wildermuth also agree with *Mellon*'s reasoning and argue that

[b]ecause a state's quasi-sovereign interests are based on protecting "the well-being of its populace," it seems to follow that a state would not be permitted to bring suit as *parens patriae* against the federal government because the federal government is not only charged with the same obligation to protect those

---

377. 262 U.S. 447 (1923).

378. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting) (citing *Mellon*, 262 U.S. at 485-86).

379. See *Mellon*, 262 U.S. at 485-86.

380. *Id.* (internal citation omitted).

381. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government." (citing *Mellon*, 262 U.S. at 485-86 (1923))).

residents, but it typically stands in a superior position to that of the states to do so.<sup>382</sup>

The majority opinion distinguished *Mellon* by limiting it to its facts involving a suit to prevent the application of federal tax laws in Massachusetts. Justice Stevens stated that “there is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).”<sup>383</sup> Accordingly, the Court concluded that Massachusetts properly asserted its quasi-sovereign interest to require the federal government to enforce the CAA.<sup>384</sup> The majority opinion cited a 1995 *parens patriae* case in which the Court allowed a cross-claim against the United States as evidence that it did not prohibit *parens patriae* suits by states against the federal government in all circumstances; however, that case did not discuss or distinguish *Mellon* or *Snapp*.<sup>385</sup>

Although not discussed by the *Massachusetts* majority, several lower court decisions have treated the *Snapp* footnote as dicta and allowed states to file *parens patriae* suits against the federal government to require the government to enforce rights in a federal statute on behalf of their citizens, which is consistent with the reasoning of the majority in *Massachusetts*.<sup>386</sup> While serving on the D.C. Circuit Court of Appeals, then-Judge Scalia authored an

---

382. Watts & Wildermuth, *supra* note 4 (manuscript at 5-6).

383. *Massachusetts*, 127 S. Ct. at 1455 n.17 (majority opinion).

384. *See id.*

385. *See id.* (citing *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (holding that Wyoming had standing to bring a cross-claim against the United States “to vindicate its ‘quasi-sovereign’ interests which are ‘independent of and behind the titles of its citizens, in all the earth and air within its domain’”)).

386. *See, e.g., Connecticut ex rel. Blumenthal v. U.S. Dep’t of Commerce*, 369 F. Supp. 2d 237, 245 n.8 (D. Conn. 2005) (treating the *Snapp* footnote as dicta and allowing a state to bring *parens patriae* suit against the federal government); *P.R. Pub. Hous. Admin. v. U.S. Dep’t of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990) (allowing a state to bring *parens patriae* suit against the federal government); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159-60 (S.D.N.Y. 1984) (treating the *Snapp* footnote as dicta and allowing a state to bring *parens patriae* suit against the federal government); Comment, *supra* note 203, at 1089-93. *But see State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (interpreting *Snapp* to bar all *parens patriae* suits by state against federal government); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *Iowa v. Block*, 771 F.2d 347, 354-55 (8th Cir. 1985).

opinion allowing a Maryland commission to file suit as *parens patriae* against the Federal Energy Regulatory Commission because he concluded that *Mellon's* limitation of *parens patriae* suits against the federal government was only a prudential limitation on standing subject to congressional override rather than a constitutional prohibition against standing. He determined that the statute implicitly authorized *parens patriae* suits when it authorized suits by states or their commissions even though it was unlikely that a state would have an interest in natural gas as a purchaser.<sup>387</sup> Judge Scalia stated that, at least in some circumstances, Congress can override *Mellon's* limitation of *parens patriae* suits against the federal government, including "where the subject of challenge is Executive compliance with statutory requirements in a field where the federal government and the states have long shared regulatory responsibility; we have no doubt that congressional elimination of the rule of *Massachusetts v. Mellon* is effective."<sup>388</sup> Because, following Justice Scalia's reasoning, the Clean Air Act is premised upon shared responsibility between states and the federal government,<sup>389</sup> it was reasonable for the *Massachusetts* majority to conclude that Congress implicitly allowed states to bring *parens patriae* suits against the EPA for allegedly failing to comply with the Act. The dissenting justices in *Massachusetts* might respond that the Clean Air Act does not contain any language clearly overriding *Mellon's* limitation of *parens patriae* suits against the federal government, but the purpose of the Act in enhancing air quality for the public would be enhanced if states can file *parens patriae* suits against the executive branch for any alleged failures to comply with the statute.

This Article agrees with the *Massachusetts* majority that states should be able to file *parens patriae* suits on behalf of its citizens against the federal government if the federal government has allegedly failed to perform a statutory or constitutional duty. In theory, the *Mellon* decision is correct that the federal government

---

387. *Md. People's Counsel v. Fed. Energy Regulatory Comm'n*, 760 F.2d 318, 320-22 (D.C. Cir. 1985).

388. *Id.* at 322.

389. *See, e.g.*, 42 U.S.C. §§ 7407-10 (2000) (giving the U.S. EPA responsibility for establishing national ambient air quality standards (NAAQS) and states primary responsibility for implementation of NAAQS).

ought to act as *parens patriae* on behalf of each state's citizens to secure their rights under federal laws and that, if that is the case, there is no need for state suits against the federal government. The reality is, however, that the executive branch does not always appropriately enforce federal laws. The *Snapp* decision authorizes states to sue on behalf of their citizens if they are denied federal rights, observing that

the State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.<sup>390</sup>

Although a footnote in *Snapp* declared that states cannot file *parens patriae* suits against the federal government,<sup>391</sup> the broader reasoning of *Snapp* suggests that states should be able to file such suits if the federal government fails to protect the rights of the state's citizens.<sup>392</sup>

Professors Watts and Wildermuth observe that the *Massachusetts* Court provides a confusing explanation of why states can file *parens patriae* suits against the federal government by stating that Massachusetts was protecting its own rights rather than those of its citizens:

Instead of explaining its result by, for example, reasoning that sovereigns need to be able to protect their residents from the federal government in the complicated modern federal administrative system, the Court insists that the difference in this case is that a state may not sue the federal government based on its interest in protecting its citizens but it may sue the federal government "when it assert[s] its [own] rights under federal law." That sounds like the assertion of a *sovereign* interest, i.e., where the federal legislation directly operates on

---

390. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982).

391. *Id.* at 610 n.16.

392. *See id.* at 607-08; Watts & Wildermuth, *supra* note 4 (manuscript at 7) ("[G]iven the Court's observation that the federal government has an obligation to protect Massachusetts under the CAA, the state's interest could be in protecting its residents by 'securing observance of the terms under which it participates in the federal system.'" (footnote omitted)).



a state and the state asserts its own legally protected interest in response. As we noted above, there is no bar to suing the federal government when a state asserts a sovereign interest. But the Court specifically identified Massachusetts's relevant interest as a quasi-sovereign interest, *not* a sovereign interest.<sup>393</sup>

Professors Watts and Wildermuth convincingly argue that the confusion likely arises from the statement in *Snapp* that “[a] State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”<sup>394</sup> This language is misleading because it is clear that the Court’s cases on quasi-sovereign interests always refer to an interest related to a state’s residents rather than simply the state’s own interest. They observe that all of the cases cited by *Snapp* involve the protection of state residents and not the state itself.<sup>395</sup> Furthermore, the *Snapp* decision then accurately characterizes the quasi-sovereign interest as “assuring that the benefits of the federal system are not denied to its general population” rather than to the state’s interests.<sup>396</sup> Accordingly, they conclude that “it is clear that quasi-sovereign interests must always relate back to a state’s residents.”<sup>397</sup> The *Massachusetts* decision should have stated more clearly that Massachusetts has a right to file *parens patriae* suits against the federal government because of the interests of its residents in protecting its coastline from the impacts of global warming, rather than because of the proprietary interest of the Commonwealth in those portions of its coastline that it owns—which is a proprietary interest similar to a private owner or possibly a sovereign interest in its borders, but is not a quasi-sovereign interest.<sup>398</sup> The *Massachusetts* conclusion that states ought to have greater standing rights to defend their quasi-sovereign interest in the health, welfare, and natural resources of their citizens is correct even if the Court’s reliance in part on the Commonwealth’s ownership of some

---

393. Watts & Wildermuth, *supra* note 4 (manuscript at 8) (quoting *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 n.17 (2007) (footnote omitted)).

394. *Id.* at 8 (quoting *Snapp*, 458 U.S. at 607).

395. *Id.* at 9.

396. *Id.* (quoting *Snapp*, 458 U.S. at 608).

397. *Id.* at 9.

398. See *Snapp*, 458 U.S. at 600-02 (defining proprietary, sovereign, and quasi-sovereign interests); Watts & Wildermuth, *supra* note 4 (manuscript at 3-7); *supra* Part III.C.1.

of the property is contrary to the rationale for allowing states greater rights in *parens patriae* suits.

### *I. Limits on Parens Patriae Suits*

A weakness of the *Massachusetts* decision is that it does not provide any guidelines on the limits of special standing for states.<sup>399</sup> The *Snapp* Court broadly defined quasi-sovereign interests to include any issue that affects the “well-being of [a state’s] populace,” but warned that because this definition was “[f]ormulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III.”<sup>400</sup> The *Akins* decision provides limits on Article III suits by requiring a concrete injury if a plaintiff asserts an injury that affects the population at large.<sup>401</sup> The *Massachusetts* decision concluded that the injuries to Massachusetts’ coastline from global warming were sufficiently concrete to meet the *Akins* test.<sup>402</sup> In the future, courts should not give special standing to states if the alleged injuries are trivial, only affect a few individuals who could sue themselves, or are non-concrete generalized injuries that fail the *Akins* test. In all other cases, courts should give special standing to states.

One issue not addressed by the Court is whether relaxed standing for states will result in states filing more suits within the Supreme Court’s original jurisdiction.<sup>403</sup> For many years, the Court has sought to restrict the number of cases it hears within its original jurisdiction to those involving two or more states and has exercised

---

399. See *supra* Part III.C.1.

400. *Snapp*, 458 U.S. at 602.

401. See *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24-25 (1998).

402. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007) (majority opinion).

403. See U.S. CONST. art. III, § 2, cl. 2 (stating Supreme Court shall have “original Jurisdiction” in cases “in which a State shall be a Party”); 28 U.S.C. § 1251 (2000) (“(A) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. (B) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.”); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 292-93 & n.6 (5th ed. 2003) (asking whether the Supreme Court might want to restrict state standing to avoid too many suits within its original jurisdiction).

its discretion not to hear cases involving states and non-state parties.<sup>404</sup> One solution would be to apply relaxed standing only when a state files suit in district court and to deny relaxed standing if a state seeks to sue within the Supreme Court's original jurisdiction.<sup>405</sup>

#### V. A PROPOSED STANDING TEST: RELAXING THE IMMEDIACY AND REDRESSABILITY REQUIREMENTS FOR STATES

The *Massachusetts* Court failed to explain when or to what extent courts should relax standing requirements for states. Using the Court's footnote seven procedural rights standing test as a model, this Article proposes to relax the immediacy and redressability requirements of the standing test when states file *parens patriae* suits to protect the health, welfare, or natural resources of their citizens. The Court's historic decisions in *Missouri* and *Tennessee Copper* support this test.

The *Missouri* decision supports relaxing the immediacy requirement for states. In granting injunctive relief, the *Missouri* Court considered not just the actual harms from the sewage, but also the potential risks:

The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi [R]iver are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi [R]iver, including its

---

404. See, e.g., *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497-99 (1971) (denying a state's motion for leave to file suit within the Court's original jurisdiction and stating as a matter of policy that the Court should exercise discretion to limit original jurisdiction suits because of "the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court"); FALLON ET AL., *supra* note 403, at 280, 294-304 (discussing cases in which the Court exercised discretion to decline original jurisdiction in favor of another forum).

405. See FALLON ET AL., *supra* note 403 (asking whether the Supreme Court should allow broader standing if a state chooses to file *parens patriae* suit in district court rather than within the Court's original jurisdiction).

commercial metropolis, would injuriously affect the entire state.<sup>406</sup>

The *Missouri* Court's consideration of potential harms supports the *Massachusetts* Court's consideration of the future harms of global warming.<sup>407</sup> Although Chief Justice Roberts could try to argue that the potential harms in *Missouri* were more likely to occur than those asserted in *Massachusetts*, the *Massachusetts* petitioners presented far more scientific evidence in the computer models supporting their assertions than was possible for plaintiffs to present in 1901.<sup>408</sup>

The *Tennessee Copper* decision supports relaxing the redressability portion of the standing test for states. Chief Justice Roberts acknowledges that the *Tennessee Copper* decision gave states greater remedies than private individuals.<sup>409</sup> In *Tennessee Copper*, Justice Holmes stated that Georgia could not meet the normal requirements for equitable relief. He stated:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small.<sup>410</sup>

The *Tennessee Copper* Court granted equitable relief nonetheless to allow Georgia to protect its quasi-sovereign interests in its air and its natural resources. Justice Holmes stated that states are entitled to special deference in defending their quasi-sovereign interests:

If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi*-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if

---

406. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

407. *See supra* Part III.A.3.

408. *See supra* Part III.A.3.

409. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1465 (2007) (Roberts, C.J., dissenting); *supra* note 183 and accompanying text.

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

that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power.<sup>411</sup>

The *Tennessee Copper* Court concluded that a state as a quasi-sovereign could demand equitable relief from pollution that affected many of its citizens even if individuals could not sue:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.<sup>412</sup>

Because remedies and redressability are intertwined concepts, the *Tennessee Copper* decision's preferential treatment of remedies for states strongly supports relaxing the normal redressability requirements for states.

Justice Holmes' broad language supports the approach taken in *Massachusetts* that states are entitled to greater redress in federal court than individuals when they are protecting quasi-sovereign interests, and broadly supports the principle that states need greater standing rights to protect such quasi-sovereign interests. A weakness of Justice Holmes' opinion is that he never defines how much extra deference should be given to states compared to private individuals. Probably the *Tennessee Copper* Court believed that it would have to assess on a case-by-case basis how much additional

---

411. *Id.* at 237-38.

412. *Id.* at 238.

deference to give to states regarding judicial remedies. The inexactitude of the *Tennessee Copper* decision about how much additional deference states deserve compared to individuals leads to the same problem in *Massachusetts*, where the modern Court relies on *Tennessee Copper* but never provides any additional guidance on how much extra deference states deserve when courts determine standing rights.

Read together, the *Missouri* and *Tennessee Copper* decisions support relaxing the immediacy and redressability portions of the modern standing test. These are the same two parts of the standing test that footnote seven in *Lujan* recognized should be relaxed for procedural rights plaintiffs.<sup>413</sup> Accordingly, it makes sense to define *Massachusetts*' special solicitude for state plaintiffs test in light of footnote seven's more established jurisprudence. A significant difference is that states would enjoy relaxed standing even when they bring substantive claims. Many of the Court's *parens patriae* cases were substantive claims, including the public nuisance issues in *Missouri* and *Tennessee Copper*.

A more radical approach would be to abolish standing requirements for states whenever they assert quasi-sovereign interests in a *parens patriae* suit.<sup>414</sup> Although he believes that states should have to meet Article III standing in federal courts, Professor Merrill concedes: "There is no suggestion from the Supreme Court's original jurisdiction cases adjudicating transboundary nuisance disputes—the paradigm for the modern *parens patriae* action—that the States bringing these suits were required to meet any particular standing burden in order to maintain the action."<sup>415</sup> Professors Woolhandler and Collins, however, believe that at least some of the Court's early *parens patriae* decisions required states to demonstrate "an interest independent of [their] citizens," although they concede "that independent interest often seems attenuated."<sup>416</sup> The *Snapp* decision implied that Article III limits the concept of quasi-sovereign interests, but also provided a very broad definition of those

---

413. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

414. WELLS ET AL., *supra* note 189, at 38-39 (suggesting that a state's quasi-sovereign interest alone is sufficient for standing).

415. Merrill, *supra* note 5, at 305.

416. Woolhandler & Collins, *supra* note 361, at 511.

interests.<sup>417</sup> Abolishing standing requirements for states in *parens patriae* suits would simplify such cases by eliminating the need to address difficult standing issues such as injury, causation, and redressability. The *Massachusetts* decision implicitly assumed that states must meet some standing requirements.<sup>418</sup> It is unlikely that the Court meant to abolish standing for states even if eliminating all standing requirements would simplify the task left to lower courts.

The *Massachusetts* decision implied that states in *parens patriae* suits are entitled to more lenient standing requirements.<sup>419</sup> Footnote seven standing is the only existing example in which the Court has adopted more lenient standing requirements, and therefore would appear to be a logical starting point for inferring what the *Massachusetts* majority had in mind when it concluded that states are entitled to lower standing requirements.<sup>420</sup> One problem with using footnote seven standing as an analogy for state standing is that the Court has never fully defined the contours of the former standing test. In light of the special solicitude that *Massachusetts* gave to state standing in *parens patriae* cases, courts should generally follow those lower court decisions that have liberally interpreted footnote seven standing. For example, in state *parens patriae* standing cases, courts should follow the Ninth Circuit's rule that footnote seven plaintiffs "need only establish 'the reasonable probability of the challenged action's threat to [their] concrete interest'" rather than the D.C. Circuit's more restrictive four-part test requiring a procedural rights plaintiff to demonstrate that it is "substantially probable" that the agency action will cause a demonstrable injury to a particularized interest of the plaintiff.<sup>421</sup> Judge Sentelle concluded that the petitioners in *Massachusetts* could not meet the standing requirements even under the relaxed standing test for procedural rights plaintiffs because he followed

---

417. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) ("Formulated so broadly, the concept [of a quasi-sovereign interest] risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant."); Merrill, *supra* note 5, at 304.

418. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-55 (2007) (majority opinion).

419. *See id.*

420. *See supra* Part III.A.2.

421. *See supra* note 91.

the D.C. Circuit's more restrictive test.<sup>422</sup> In light of the Supreme Court's rejection of Judge Sentelle's approach to standing in *Massachusetts*, it is more likely that the majority of the Court would have followed the Ninth Circuit's more liberal approach to standing.

## VI. POLICY IMPLICATIONS

The relaxed standing rule for states in *Massachusetts* will make it easier for states and state attorneys general (AGs) to file suit in federal courts.<sup>423</sup> State AGs generally possess a "monopoly, or a near monopoly, on the state executive branch's access to the courtroom," although the governor or state legislature may have some influence through legal, budgetary, or political intervention.<sup>424</sup> Decisions that recognize that states have broad authority to file *parens patriae* suits generally expand the power of state AGs to file lawsuits.<sup>425</sup> The *Massachusetts* decision will encourage states and state AGs to file suits against the federal government in particular, although several lower court decisions had already allowed such suits.<sup>426</sup> Additionally, states and state AGs may file more *parens patriae* suits in general, including mass tort claims, consumer protection suits, or natural resource damages claims.<sup>427</sup>

---

422. See *Massachusetts v. EPA*, 415 F.3d 50, 59-60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment) (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996)), *rev'd*, 127 S. Ct. 1438 (2007).

423. See Stevenson, *supra* note 3, at 38; Watts & Wildermuth, *supra* note 4 (manuscript at 8) ("The more lenient *Lujan*-lite analysis that courts apparently are now to apply when states assert a quasi-sovereign interest may well give states a strategic incentive to assert quasi-sovereign interests, even though the analysis will still turn on their proprietary interests."). See generally Richard Blumenthal, *The Role of State Attorneys General*, 33 CONN. L. REV. 1207 (2001); *Roundtable: State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 617 (2001) [hereinafter *Roundtable*]; Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335 (2005).

424. Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 890-95 (2007).

425. See Ieyoub & Eisenberg, *supra* note 344, at 1875-76 (arguing broad *parens patriae* doctrine leads to more suits by state AGs); Kanner, *supra* note 344, at 112-15.

426. See *supra* note 386 and accompanying text.

427. See Ieyoub & Eisenberg, *supra* note 344, at 1875-83 (arguing broad *parens patriae* doctrine leads to more mass tort and consumer protection suits by state AGs, including suits against the tobacco industry); Kanner, *supra* note 344, at 107-15 (arguing broad *parens patriae* doctrine leads to more natural resource damages suits by state AGs).



A *parens patriae* suit by a state AG is often a more effective way to protect the public interest of state residents than individual suits by private individuals, including suits against the federal government.<sup>428</sup> A state in a *parens patriae* suit may be able to secure broader relief and represent a broader range of interests than a suit by individuals, even if those individuals file a class action.<sup>429</sup> Traditionally, public nuisance suits by government officials were accorded presumptive validity by courts and therefore were subject to lesser standing-like requirements than private nuisance suits, in which individual plaintiffs had to prove special injury.<sup>430</sup> In *Tennessee Copper*, Justice Holmes provided broad equitable relief to Georgia that was unavailable to private litigants, and stated that the Court weighed the equities in granting injunctive relief to a state to protect its quasi-sovereign interest in its natural resources differently than if two private individuals were involved in a suit.<sup>431</sup> In *Massachusetts*, it is unclear whether the Court would have been willing to allow private individuals to secure the same relief against the EPA that the Court granted to Massachusetts.

Additionally, it is generally less costly for the state AG to file one lawsuit than for dozens of private individuals to file suit, although the cost of private suits may be reduced if they are filed as a class action under Federal Rule of Civil Procedure 23 or by an organization representing a large number of members.<sup>432</sup> In some cases,

---

428. See Comment, *supra* note 203, at 1101 (“A state could thereby mobilize its powerful legal resources, including ample funding and staffing, on behalf of its citizens when they are harmed by federal agency action, rather than let the burden fall upon individual injured parties whose resources may be inadequate for the task.”).

429. See *id.* at 1103-09 (comparing *parens patriae* suits with class action suits and arguing that *parens patriae* suits have several advantages).

430. See David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGICAL L.Q.* 883, 883-84 (1989); Merrill, *supra* note 5, at 301 & n.35.

431. *Georgia v. Tenn. Copper*, 206 U.S. 230, 237-38 (1907); *supra* text accompanying notes 15, 21.

432. See generally Kanner, *supra* note 344, at 112-15 (stressing the efficiency of suits by state AGs); Comment, *supra* note 203, at 1103-09 (comparing *parens patriae* suits with class action suits and arguing that *parens patriae* suits have several advantages). *But see* FALLON ET AL., *supra* note 403, at 292 (“Is the state a better or worse representative of others than, for example, a class representative under Fed. R. Civ. Proc. 23, or an organizational plaintiff suing on behalf of its members?”). One potential disadvantage of *parens patriae* suits is that they will ordinarily preclude separate claims by citizens who were represented by the state. *Id.*

state AGs have controversially contracted with private attorneys on either an hourly fee or contingent fee basis to file suit if the state AG lacks the resources or expertise to file a particular type of suit.<sup>433</sup> There was controversy in litigation involving the tobacco industry about the size of the contingency fees and the secrecy in some states about the size of the fees and how the AG selected the private attorneys.<sup>434</sup> For example, Minnesota Attorney General Humphrey stated that his office lacked sufficient attorneys and expertise in civil litigation to sue the tobacco industry without the assistance of private attorneys that his office hired.<sup>435</sup>

A state AG can also ally with her colleagues in other states to reduce costs or to increase the level of legal or technical expertise for the plaintiffs, as in the *Massachusetts* litigation, where twelve state AGs joined as petitioners.<sup>436</sup> For instance, Connecticut Attorney General Richard Blumenthal has observed that it is helpful to have California and New York as allies in global warming cases because they are large states with “huge resources.”<sup>437</sup> There can be conflicts among states about which states will take the lead role in the case, but sometimes those issues can be resolved by choosing the state that has the strongest factual case. In *Massachusetts*, the Commonwealth of Massachusetts took the lead role in the case because its long coastline presented the best factual case for showing harm from global warming.<sup>438</sup>

---

433. See Kanner, *supra* note 344, at 113-14 (encouraging state AGs to hire private attorneys on a contingency fee basis to reduce costs to the public).

434. See *Roundtable*, *supra* note 423, at 621-22 (remarks of Alabama Attorney General William H. Pryor, Jr.) (discussing controversy about size of attorneys' fees and secrecy by some state AGs in negotiating fees and hiring private attorneys in litigation challenging marketing practices of the tobacco industry); see also Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, PROD. SAFETY & LIAB. REP., Oct. 2, 2000, at 915. Some states have enacted legislation to regulate the fees that the state attorney general may negotiate with private lawyers. See, e.g., Kan. H.B. 2627 (2000); N.D. CENT. CODE. § 54-12-08.1 (1999); TEX. GOV'T CODE ANN. § 404.097 (Vernon 1999); *Roundtable*, *supra* note 423, at 622 n.10.

435. See *Roundtable*, *supra* note 423, at 622-23 (remarks of Minnesota Attorney General Humphrey).

436. See Stevenson, *supra* note 3, at 12, 37-50 (discussing the trend since the 1980s for state AGs to cooperate and collaborate in lawsuits); Meyer, *supra* note 424, at 903-07 (discussing cooperation of state AGs in tobacco litigation and other cases).

437. Symposium, *supra* note 423, at 346 (remarks of Connecticut Attorney General Richard Blumenthal).

438. See Stevenson, *supra* note 3, at 12-13.

There could be negative political or policy consequences from *parens patriae* suits if state AGs abuse their authority by filing frivolous or burdensome suits, although Rule 11 sanctions should limit inappropriate actions.<sup>439</sup> Of course, private parties sometimes also file frivolous or burdensome suits, and thus state AGs are not the only lawyers who might file questionable lawsuits. There is a danger that state AGs will file lawsuits for political reasons because state AGs are elected positions in forty-three states.<sup>440</sup> Accordingly, state AGs “are political figures with political agendas and political aspirations [and] [t]heir litigation decisions often reflect their political interests ....”<sup>441</sup> Professor Cass observes, “It should come as no surprise that eleven of the twelve attorneys general suing in *Mass. v. EPA* were Democrats while the administration whose policies they challenged was Republican.”<sup>442</sup> By increasing the importance of the state AGs, the easy availability of *parens patriae* suits might lead to more political competition to become the state AG and might make the office more partisan.<sup>443</sup> Such political competition might have positive impacts by improving the quality of candidates, but also could have negative effects if sitting state AGs file suits for political reasons, or if candidates pander for votes by promising to file questionable suits if they are elected.<sup>444</sup> Industries that are potential or actual defendants might get involved in AG elections to defeat candidates who might sue them or to elect candidates who may be more favorable to their interests.<sup>445</sup> Because special interests often have more incentive to lobby the

---

439. See FED. R. CIV. P. 11(c) (authorizing courts to impose sanctions against parties or attorneys filing frivolous law suits). See generally HANS BADER, COMPARATIVE ENTERPRISE INST., THE NATION'S TOP TEN WORST STATE ATTORNEYS GENERAL 22 (Jan. 24, 2007), available at <http://www.cei.org/pdf/5719.pdf> (criticizing ten state attorneys general for using “lawsuits as a weapon by which to impose new regulations on the public”); *infra* note 452 and accompanying text.

440. Stevenson, *supra* note 3, at 10; Meyer, *supra* note 424, at 895-96 (arguing that state AGs may alter decisions to increase opportunities for higher office).

441. Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75, 78-79 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf>.

442. *Id.* at 79.

443. See Stevenson, *supra* note 3, at 10-12.

444. See *id.* at 10-12, 40-41, 46 n.233.

445. See Kanner, *supra* note 344, at 114 (observing that a new AG may drop a lawsuit it disagrees with); Stevenson, *supra* note 3, at 42 (predicting more “lobbyist efforts focused on these national policy issues ... at the state AG’s office”).

government than average citizens, there is a possibility that states or state AGs will file suits that serve those interests more than the interests of the state's citizens.<sup>446</sup> Additionally, in some circumstances, a group of some state AGs may be able to reach a national settlement with a particular industry or set of defendants that does not reflect the will of citizens in other states.<sup>447</sup>

Conversely, there are reasons to believe that state AGs will generally use their authority to file *parens patriae* suits in a responsible way. State AGs must respond to a broad range of constituents and therefore have an incentive to serve the public interest.<sup>448</sup> There could be some public benefits from increased public discussion of important national policy issues if candidates for the AG position address potential areas of litigation that they plan to bring if they are elected.<sup>449</sup> The increased importance of the state AG position could bring stronger candidates for that office.<sup>450</sup> Because lawsuits often last for many years and outlast the term of a particular state AG, career civil servants, including attorneys in the AG's office, might be able, in some circumstances, to influence their politically elected superior to maintain suits that a new AG might not have filed in the first instance.<sup>451</sup> Finally, the federal courts can dismiss frivolous suits and even impose sanctions under Rule 11 of the Federal Rules of Civil Procedure if a state AG files an

---

446. See generally Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (discussing four competing theories of whether government bureaucracies act on behalf of public interest, special interests, or government employees' self-interests, and concluding, "regulatory outcomes ameliorate market failures and vindicate the citizenry's interests ... more commonly than other scholars of regulation acknowledge ...."); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (discussing "public choice" theory that postulates that special interest groups will have greater incentive to lobby and influence legislative actions, and arguing that legislatures act on behalf of public interest more often than public choice theory would predict); Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J.L. ECON. & ORG. 536, 537 (2002) (discussing the problem of bureaucracies acting contrary to legislative intent); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990) (discussing theory that special interests can "capture" regulatory agencies).

447. Meyer, *supra* note 424, at 886-87, 909-14.

448. See Stevenson, *supra* note 3, at 14.

449. *Id.* at 12.

450. *Id.* at 41-43.

451. Kanner, *supra* note 344, at 114.

abusive parens patriae action.<sup>452</sup> Thus, most parens patriae suits should serve the public interest.

### CONCLUSION

The *Massachusetts* decision announced a new rule of law that gives states preferential standing when they sue to protect their quasi-sovereign interest in the health and welfare of their citizens or the state's natural resources.<sup>453</sup> Yet this new rule has a sound basis in the Court's parens patriae decisions, even though those cases generally do not explicitly address standing issues.<sup>454</sup> Because quasi-sovereign interests normally involve generalized grievances applicable to large numbers of people or to extensive natural resources, courts should not require states to demonstrate the type of particularized injuries that private plaintiffs are required to demonstrate for standing.<sup>455</sup> For example, both the *Missouri* and *Tennessee Copper* cases were public nuisance suits addressing generalized injuries to large numbers of people or territories, but the Court in those cases did not require the plaintiff state to show that it had an individual injury because quasi-sovereign interests are different in kind from individual rights.<sup>456</sup> Accordingly, *Massachusetts* appropriately relied on the Court's parens patriae decisions as the grounds for giving states greater standing rights when they sue on behalf of quasi-sovereign interests, although none

---

452. See FED. R. CIV. P. 11(c) (authorizing courts to impose sanctions against parties or attorneys filing frivolous law suits); *Derechin v. State Univ. of N.Y.*, 963 F.2d 513, 519-20 (2d Cir. 1992) (affirming district court's imposition of Rule 11 sanctions against New York State Assistant Attorney General and order prohibiting the lawyer from receiving indemnification available under New York law); *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296-97 (5th Cir. 1990) (affirming district court's imposition of Rule 11 sanctions against Louisiana State Assistant Attorney General). But see *Connecticut v. Borjorquez*, 967 F.2d 1418, 1421 (9th Cir. 1992) (vacating district court's order reprimanding Arizona State Assistant Attorney General under Rule 11 for filing a frivolous motion because the district court abused its discretion, and because appellant's motion was soundly based in fact and law, and was not filed for the purpose of delay); *Gilmore v. Finn*, 259 Va. 448, 527 S.E.2d 426 (2000) (reversing as abuse of discretion the trial court's award of attorney's fees and sanctions against the Governor of Virginia for filing suit in a right-to-die case because the Governor's suit was not baseless or frivolous—rejecting trial court's findings to that effect).

453. See *supra* Part III.A.2.

454. See *supra* Part IV.G.

455. See *supra* Part I.B.

456. See *supra* Part IV.B.

of those earlier cases had explicitly applied a different standing test for states.<sup>457</sup>

A serious weakness of the *Massachusetts* decision is that it fails to define to what extent and under what circumstances federal courts should apply more relaxed standing requirements for states.<sup>458</sup> The *Missouri* and *Tennessee Copper* decisions provide helpful insights about how modern courts should address standing issues in parens patriae cases, even though neither case was about standing. The *Missouri* decision considered the future health impacts of the water pollution in that case and, by analogy, supports relaxing the immediacy requirement of standing so that, for example, Massachusetts should be able to include projections from computer models about the effects of global warming on its coastline through 2100.<sup>459</sup> The *Tennessee Copper* decision gave states equitable remedies that were unavailable to private litigants and did not require Georgia to explain the precise impacts of injunctive relief.<sup>460</sup> By analogy, *Tennessee Copper* supports relaxing the redressability requirements for states so that, for example, Massachusetts does not have to prove how much the EPA's regulation of new vehicle emissions would reduce future harms to its coastline, as long as it is likely that such regulation would reduce the harm to the state.<sup>461</sup>

Similar to procedural rights cases, the Supreme Court should apply more lenient immediacy and redressability requirements when states sue to protect quasi-sovereign interests.<sup>462</sup> Thus, even if Professor Adler is correct that the *Massachusetts* Court was wrong when it applied the footnote seven analysis to a case that ultimately required a substantive decision by the EPA, the Court was right to apply more relaxed immediacy and redressability requirements because Massachusetts was protecting its quasi-sovereign interest

---

457. See *supra* note 313 and accompanying text.

458. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.").

459. See *supra* notes 405-06 and accompanying text.

460. See *supra* notes 409-12 and accompanying text.

461. See *supra* notes 343-47 and accompanying text.

462. See *supra* Part I.C.

in its coastline.<sup>463</sup> The *Akins* decision suggests an appropriate outer limit to *parens patriae* cases and special solicitude for state standing by requiring proof of some type of concrete injury when a plaintiff seeks relief for generalized injuries that apply to the public at large.<sup>464</sup> Because the loss of Massachusetts' coastline is far from trivial and the proposed remedy of limiting emissions from new U.S. vehicles would reduce the amount of harm, the Court appropriately granted standing to Massachusetts.<sup>465</sup>

---

463. See *supra* Part III.C.2.

464. See *supra* Part I.B.

465. See *supra* Part III.C.3.