

THE LORAX STATE: PARENS PATRIAE AND THE PROVISION OF PUBLIC GOODS

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This Note defends the majority's standing analysis in Massachusetts v. EPA as a matter of both jurisprudence and public policy. First, this Note recounts the Court's state standing cases, tracing the development of the parens patriae doctrine that permits states to litigate in defense of interests related to their status as sovereigns. Massachusetts sits at the intersection of this jurisprudence and the Court's recent debate over the purposes of standing. Massachusetts built upon cases that held the assurance of concrete adversarialism—rather than upholding the separation of powers—as the primary purpose of standing. In Massachusetts, Justice Stevens focused on both a traditional injury to Massachusetts's property and plaintiff's status as a sovereign state to find that the parties were truly adverse. Contrary to Chief Justice Roberts's dissent and early criticism, Justice Stevens did not use Massachusetts's statehood to obfuscate the traditional standing requirements. The majority advanced cumulative, but doctrinally distinct, routes to standing. Understanding parens patriae as separate from the traditional constitutional standing inquiry necessitates the development of a rationale justifying different standards for state plaintiffs. This Note seeks to do that by providing a unifying principle for state standing drawn from economics. Economists would label as "public goods" the precise set of interests that the Court has found to support claims of parens patriae standing. This Note concludes by exploring some analytical wrinkles and beneficent consequences of linking state standing to the provision of public goods within the context of our system of dual sovereignty.

INTRODUCTION

In 1971, amidst America's environmental awakening, one small furry creature boldly declared: "I am the Lorax . . . I speak for the trees, for the trees have no tongues."¹ In 2007, amidst America's awakening to the threat of global climate change, one Supreme Court opinion relieved the Lorax of that duty and recognized the place of sovereign states in defending that without voice: the global commons.

The seeds of *Massachusetts v. EPA* were sown in 1999, when a group of nongovernmental organizations filed a petition for rulemaking with the Environmental Protection Agency (EPA), requesting that it regulate the emission of greenhouse gases (GHGs) from new motor vehicles.² After an active comment period, the EPA denied the petition.³ The petitioning organizations, joined by several states and local governments,

1. Dr. Seuss, *The Lorax* (1971).

2. 127 S. Ct. 1438, 1440 (2007). The petitioners asserted that such regulation was mandated by the Clean Air Act, § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000).

3. See *Massachusetts*, 127 S. Ct. at 1449–50 (noting that EPA received more than 50,000 comments over five-month period).

sought judicial review of that denial in the Court of Appeals for the District of Columbia, as prescribed by the Clean Air Act (CAA).⁴ A divided panel dismissed the petition, with each judge writing separately.⁵ Eight years after the petition was filed, the Supreme Court handed down its decision, finding the EPA's refusal to initiate rulemaking arbitrary and capricious.⁶

As an initial matter, the Court declared that the Commonwealth of Massachusetts deserved "special solicitude" in evaluating whether it had standing to challenge the administrative execution of the CAA.⁷ After noting that a state was "no ordinary litigant,"⁸ the Court proceeded to examine Massachusetts's asserted injury in the ordinary framework.⁹ The resulting standing analysis has been described as tangled and unclear;¹⁰ the implications of the decision are equally muddy.¹¹

The *Massachusetts* majority found standing through cumulative, but independent, inquiries into Massachusetts's proprietary and quasi-sovereign interests, each of which was discretely injured by EPA inaction. As evinced in *Massachusetts*, *parens patriae*¹² standing serves to permit the state-led litigation of injuries to what judges label "sovereign" or "quasi-sovereign" interests and what economists would term "public goods."

4. *Id.* at 1451.

5. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

6. *Massachusetts*, 127 S. Ct. at 1463.

7. *Id.* at 1455.

8. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring) ("More significantly, a State is no ordinary litigant.").

9. *Massachusetts*, 127 S. Ct. at 1455–58.

10. See, e.g., Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 *Wm. & Mary L. Rev.* 1701, 1707 (2008) [hereinafter Mank, *Should States*] ("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."); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 *Nw. U. L. Rev. Colloquy* 1029, 1030 (2007), at http://colloquy.law.northwestern.edu/main/2007/06/massachusetts_v_1.html (on file with the *Columbia Law Review*) ("The Court's approach to standing . . . was somewhat unusual.").

11. See, e.g., Mank, *Should States*, *supra* note 10, at 1704 ("[T]he 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."); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 *Penn St. L. Rev.* 1, 4–5 (2007) ("[T]he most far-reaching implications . . . are for . . . the question of standing for challenging inaction by an administrative agency."); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 *J. Land, Resources & Envtl. L.* 273, 274 (2007) ("[T]he legal significance of the opinion remains open to debate.").

12. Historically, the term "*parens patriae*" has described actions brought by states on behalf of their citizens in their quasi-sovereign capacity. See Watts & Wildermuth, *supra* note 10, at 1034 (describing quasi-sovereign interests as "derivative . . . based on preventing harm to [a state's] citizens"). Translated, it means "parent of the country," *Black's Law Dictionary* 1114 (6th ed. 1990), and its shifting understanding leaves it "uninhibited by a strict conceptual or precedential definition." George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 *DePaul L. Rev.* 895, 895 (1976).

These public goods are different in kind from proprietary interests that a state possesses like an individual, and thus it is analytically appropriate to view sovereign and quasi-sovereign interests outside of the traditional standing inquiry. This Note will offer an interpretation of the standing analysis in *Massachusetts v. EPA* that is harmonious with recent standing jurisprudence and employs the idea of public goods to situate *Massachusetts* as the consistent culmination of state standing jurisprudence.

Part I of this Note explicates the historical development of state standing in federal courts, outlining the evolution in the Court's treatment of state-as-party claims toward permitting the litigation of sovereign and quasi-sovereign state interests. This Part concludes with a brief exploration of the broad tension in recent Supreme Court standing jurisprudence outside the context of state-as-party litigation.¹³ Part II dissects the competing standing arguments in *Massachusetts* and argues that Justice Stevens's opinion presents discrete and cumulative routes to a finding of standing. In concluding, Part II demonstrates the irrelevance—in the wake of *Massachusetts*—of any doctrinal distinction between sovereign and quasi-sovereign rights for purposes of state standing analysis. Finally, Part III defends this interpretation of the standing argument in *Massachusetts* by using the economic idea of “public goods” as a unifying definition of states' sovereign and quasi-sovereign interests and exploring the theoretical implications of state standing to sue the federal government for injuries to public goods.

I. STATES, SOVEREIGNTY, STANDING, AND THE SUPREMES

Part I of this Note sets forth the Court's jurisprudence on state standing and situates *Massachusetts* as the latest installment of an ongoing doctrinal evolution. The cases discussed in Part I—similarly to *Massachusetts*—defer to a state's sovereign assessment of its own interests and demonstrate a unique and persistent role for states in the litigation of public goods. Part I.A reviews the Court's evolution away from its early nineteenth century requirement that states seeking to litigate issues implicating sovereignty must do so within the framework of a distinct common law claim. Where Part I.A asks whether the Court will hear sovereignty claims, Part I.B asks what sort of interests will provide a basis for *parens patriae* standing. Part I.B looks at early twentieth century examples of sovereign or quasi-sovereign interests that garnered access to the Court, including the Court's most recent substantive foray into state standing: *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.¹⁴ Part I.C concludes with a brief outline of trends in recent standing jurisprudence

13. The most pertinent and pronounced trend discussed in Part I.C is the Court's varying treatment of the separation of powers function of standing advanced by Justice Scalia. See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881 (1983).

14. 458 U.S. 592 (1982).

regarding the purpose of Article III standing, focusing on the injury-in-fact requirement, to provide context beyond the narrow arena of state standing.

A. *Nineteenth Century State Standing*

In our nation's infancy, the Court only adjudicated issues of sovereignty when it was necessary to decide a common law cause of action.¹⁵ Over the course of the nineteenth century, the Court gradually moved to embrace a sovereignty-vindicating basis for jurisdiction.¹⁶ The transboundary nuisance suit—the original template for *parens patriae* actions¹⁷—was pivotal in this development. Transboundary nuisance actions and conventional boundary disputes directly implicate both traditional common law property rights and concerns of sovereignty.¹⁸

Article III grants the Supreme Court original jurisdiction over “controversies” “in which a State shall be Party,”¹⁹ seemingly declaring state-as-party cases within the proper purview of the Court. The Court inter-

15. These cases are characterized by state plaintiffs raising sovereignty interests alongside traditional common law claims based on the law of property, contracts, or the like. For example, the Court was willing to decide the geographic scope of a state's police power in the context of a boundary dispute. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 659 (1838) (ruling on bill for “the settlement of the boundary between the two states”). In such cases the sovereign interest (the legitimate exercise of police power over the entire geographic dominion of the state) is vindicated as a result of the resolution of a traditional property law claim (the determination of proper boundaries).

16. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 416 (1995) (discussing boundary cases as example of early Court's willingness “to allow states to vindicate sovereignty interests”). Common law debt actions provide an apt example of the earliest state-as-party cases: The Court heard disputes centering upon Revolutionary War debts with states as both plaintiffs and defendants. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793) (determining if Georgia may be party-defendant to suit); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792) (“If the State has a right to the debt in question, it may be enforced at common law . . .”); Woolhandler & Collins, *supra*, at 406–07 (discussing Revolutionary War debt cases).

17. See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 305 (2005) (noting Supreme Court's original jurisdiction cases that adjudicated transboundary nuisance disputes were “the paradigm for the modern *parens patriae* action”).

18. Woolhandler & Collins, *supra* note 16, at 415–16 (noting that Court “entertained these cases in part because they resembled traditional property claims that the Court could decide according to ordinary principles of law and equity, even though the cases also implicated sovereignty issues” (footnote omitted)).

19. U.S. Const. art. III, § 2, cls. 1–2. Article III also extends Supreme Court original jurisdiction “to controversies between two or more states.” *Id.* cl. 1. These grants provide for the Court to hear cases in which a state is a party; however, Article III does not resolve what types of controversies are justiciable as such. These clauses can be read as granting the Court personal jurisdiction over states, with the question of a properly justiciable dispute serving as a judicial question of subject matter jurisdiction. See *Louisiana v. Texas*, 176 U.S. 1, 15–16 (1900) (explaining Art. III, § 2, cl. 2 confers a “jurisdiction [that] is of so delicate and grave a character that it was not contemplated that it would be exercised save when the . . . matter [was] in itself properly justiciable,” and that “original jurisdiction depends solely on the character of the parties”).

preted Article III to preclude federal adjudication of state criminal enforcement actions²⁰ when prosecuting either a state's own citizens²¹ or those of another state.²² Outside the context of federal statutory claims, which were relatively uncommon at that point, states could only allege common law injuries in federal courts.²³

Common law claims are based on traditionally justiciable injuries, so state plaintiffs were effectively subject to an injury requirement akin to the injury-in-fact requirement in contemporary standing jurisprudence.²⁴ Interests related to sovereignty, in contrast, are not concrete or particularized as is required of injuries in fact under modern standing jurisprudence.²⁵ States exclusively seeking vindication of sovereignty interests, including those public interests that encompassed the general interests of a

20. Woolhandler & Collins, *supra* note 16, at 400–01 (concluding that Article III grant of original jurisdiction was bounded by general Article III grant of federal power, thus precluding federal cases to enforce state laws).

21. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821) (asserting original “jurisdiction depends entirely on the character of the parties. In this are comprehended . . . ‘controversies between a State and citizens of another State,’ ‘and between a State and foreign States, citizens or subjects,’” thus excluding criminal enforcement actions against state’s own citizen).

22. *Id.* at 399 (determining federal court jurisdiction could only be appellate in “every case between a State and its citizens, and perhaps, every case in which a State is enforcing its penal laws”). Though *Cohens* does not absolutely bar state prosecutions of noncitizens originating in federal court as a matter of constitutional interpretation, the 1789 Judiciary Act restricts federal jurisdiction to civil state-as-party cases. Contemporary principles of federalism and the invocation of “controversies”—as opposed to “cases”—also arguably support the bar against state enforcement actions originating in federal courts. See Woolhandler & Collins, *supra* note 16, at 402–04 (discussing support for argument that grant of state-as-party jurisdiction is only for civil actions). Of course, state prosecutions could still be removed to federal courts when federal questions were implicated. See, e.g., *Tennessee v. Davis*, 100 U.S. 257, 260–62 (1879) (allowing for removal by defendant, who was officer of United States as deputy collector of internal revenue, because cases against such officers have “a basis for the assumption of Federal jurisdiction”).

23. See, e.g. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 559–64 (1851) (holding original jurisdiction appropriate for state plaintiff bringing public nuisance claim against diverse party for obstruction of navigable water due to bridge construction and location); Woolhandler & Collins, *supra* note 16, at 405 (describing types of state-as-party suits in federal court). Notably, Supreme Court precedent recognized that the Framers would have been especially familiar with boundary disputes as rooted in the common law of property and that such controversies would be the natural target of Article III’s state-party clause. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723–24 (1838) (“It is a part of the public history of the United States, of which we cannot be judicially ignorant, that at the adoption of the constitution, there were existing controversies between eleven states respecting their boundaries . . .”).

24. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 559–60 (“In this case the State of Pennsylvania is not a party in virtue of its sovereignty . . . [I]n the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual.”); see also *infra* notes 151–152 and accompanying text.

25. See *infra* Part I.C.

state's populace, were rebuffed and labeled as political by nineteenth century federal courts.²⁶

The categorical rule against the adjudication of sovereign interests became untenable as the Court was faced with more and more state-party litigation. Boundary disputes and public nuisance actions demonstrated that the Court's prohibition against litigating sovereignty interests was necessarily permeable, if not entirely displaced by a willingness to evaluate the claims of competing sovereigns. Boundary cases implicate sovereignty—they resolve which state controls a given tract. However, they are also analogous to traditional property conflicts.²⁷ Thus they provide an analytic bridge from the era of requisite common law claims to the age of adjudicated sovereignty.²⁸

The *Massachusetts* majority, in quipping about Massachusetts's invading its diminutive neighbor Rhode Island, paid homage to the Court's state boundary dispute jurisprudence.²⁹ In *Rhode Island v. Massachusetts*, Justice Baldwin framed state ratification of the Constitution as one sovereign ceding dispute-resolving power to another.³⁰ However, Baldwin himself,³¹ later Courts,³² and legal scholars³³ minimized questions of sov-

26. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (dismissing case as "political" because petitioner sought to vindicate sovereign interest in precluding respondent's enforcement of respondent's law in petitioner's territory); see also *Woolhandler & Collins*, *supra* note 16, at 411–12 (describing state attempts to vindicate sovereignty interests in federal courts).

27. See, e.g., *Rhode Island*, 37 U.S. (12 Pet.) 657 (adjudicating boundary dispute between Rhode Island and Massachusetts); see also *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 68–69 (1867) (interpreting *Rhode Island* decision about sovereignty as incidental to decision about property rights).

28. A relatively recent Supreme Court decision involving a Maryland challenge to a Louisiana state tax suggests that original jurisdiction was *only* appropriate for state-versus-state disputes that implicated sovereignty concerns. *Maryland v. Louisiana*, 451 U.S. 725, 736–37 (1981) (rejecting respondent's contention that lack of important federalism and sovereignty concerns, necessary for the exercise of original jurisdiction, precluded state standing in Supreme Court).

29. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . ."). For an extensive discussion of Justice Stevens's word choice, potential motives therein, and the degree to which he may or may not have been drawing upon older and less-discussed Supreme Court precedent or various commentators, see *Stevenson*, *supra* note 11, at 26–40.

30. 37 U.S. (12 Pet.) at 720 ("[T]his Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."). *Rhode Island* involved a simple boundary dispute and the interpretation of various colonial grants and documents. *Id.* at 711.

31. *Id.* at 733 (describing jurisdiction and sovereignty as tied to territory).

32. See *Stanton*, 73 U.S. (6 Wall.) at 73 (describing Baldwin's opinion as centering upon "question . . . of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case").

33. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 303 (1985) (discussing *Stanton* Court's treatment of *Rhode Island*); see

ereignty and emphasized the decision's basis in traditional property law. *Rhode Island* demonstrates the Court's waning commitment to the necessity of common law claims in state-as-party litigation because the Court explicitly decided a question of sovereignty, though it only did so incident to deciding a conventional property claim.

State-as-plaintiff public nuisance law demonstrates a similar trend toward adjudicating sovereignty when presented in the context of controversies closely resembling traditional common law claims.³⁴ *Missouri v. Illinois* involved an interstate nuisance claim in which the state-plaintiff did not allege a specific injury and sought expressly to vindicate its citizenry's public interest.³⁵ Other state-as-party public nuisance cases of the era similarly involved a state's suit on behalf of its populace to obtain injunctive relief against environmental harms.³⁶ The *Missouri* Court invoked the sovereignty-ceding rationale of Justice Baldwin:

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 remedy³⁷

also Woolhandler & Collins, *supra* note 16, at 415 (“[T]hat sovereignty was at issue in the boundary cases was never seen . . . as weighing in favor of the Court’s jurisdiction Rather it entertained these cases in part because they resembled traditional property claims”).

34. See *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 99 (1838) (“[A]s in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, [a state must] have averred and proved . . . that they thereby had suffered a special damage.”).

35. 180 U.S. 208, 241 (1901) (“[I]t 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.”); Woolhandler & Collins, *supra* note 16, at 446–47. In *Missouri*, the Court explicitly noted that no actual property rights need be implicated, unlike in *Massachusetts*, where the Court noted as persuasive the presence of significant state-owned property at risk. Compare *Missouri*, 180 U.S. at 240–41 (“[J]urisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise”), with *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) (“That 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.”).

36. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution emanating from Tennessee factory); *Kansas v. Colorado*, 185 U.S. 125 (1902) (diversion of water).

37. *Missouri*, 180 U.S. at 241; see also Mank, *Should States*, *supra* note 10, at 1760 (describing “*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”).

The Court, then, had become comfortable adjudicating clear questions of sovereignty that related to a state's power to govern their citizens.

Around the turn of the twentieth century, however, states began to seek federal judicial respite from threats beyond their own police powers as the vindication of their citizenries' collective interests. Faced with such claims, the Court began to develop the content of quasi-sovereign interests in *Louisiana v. Texas*.³⁸ Louisiana sought to enjoin a Texas health official's imposition of quarantine in Galveston, Texas, which amounted to an embargo of Texan goods flowing into New Orleans.³⁹ While the Court dismissed the original jurisdiction claim for want of a "controversy" between the two states,⁴⁰ it found the injury cognizable, holding that a "State is entitled to seek relief in this way because the matters complained of affect her citizens at large."⁴¹

In the context of another public nuisance case, *Georgia v. Tennessee Copper*, the Court further developed the meaning of quasi-sovereign interests.⁴² A state's quasi-sovereign interests are derivative,⁴³ or as Justice Holmes put it, based upon "interest[s] independent of and behind [the interests] of its citizens."⁴⁴ The stewardship of quasi-sovereign interests is the responsibility of the state, which "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."⁴⁵

The recognition that sovereign and quasi-sovereign interests were of a fundamentally different ilk than those individual interests at the core of common law claims led Justice Holmes to treat them in a distinct manner. In effect, *Tennessee Copper* "reformulated" the public interest in clean air "into a litigable claim of right similar to individual claims of right."⁴⁶

38. 176 U.S. 1, 19 (1900) ("[T]he cause of action must be regarded not as involving any infringement of the powers of the state of Louisiana, or . . . injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.").

39. *Id.* at 22.

40. See *id.* at 18 ("[T]here must be a direct issue between them, and the subject-matter must be susceptible of judicial solution[, a]nd it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made . . .").

41. *Id.* at 19.

42. 206 U.S. 230, 237 (1907).

43. Watts & Wildermuth, *supra* note 10, at 1037 ("[T]he 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.").

44. *Tennessee Copper*, 206 U.S. at 237. Justice Holmes's elucidation in *Tennessee Copper* received attention in both Justice Stevens's majority opinion, *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007), and Chief Justice Roberts's dissent, *id.* at 1465 (Roberts, C.J., dissenting).

45. *Tennessee Copper*, 206 U.S. at 237, quoted in *Massachusetts*, 127 S. Ct. at 1454 (majority opinion).

46. Woolhandler & Collins, *supra* note 16, at 444–45. Concurrent to this "reformulation," the Court was also permitting the federal executive to vindicate the national public interest in nonstatutory actions. These dual developments represented the

Permitting a state to litigate its citizens' shared interest in the same forum as the litigation of traditional claims that could be pursued by an individual did not render sovereign and quasi-sovereign interests identical to proprietary or common law interests. Rather, *Tennessee Copper* acknowledged the function of federal courts in adjudicating this alternative type of controversy. By the early twentieth century the Court was actively and openly engaged in litigating sovereignty-based claims of states.

B. *Parens Patriae* in the Modern Court

Through a hundred-year common law process, the Court had come to "conceive[] of state-as-party suits as substitutes for the use of force or diplomacy—as an alternative avenue for the exercise of state power."⁴⁷ The Court adjudicated sovereignty and quasi-sovereignty issues independently from the traditional proprietary and common law interests that states might also bring into court. Thus, the next major question confronting the Court was what sort of interests should be recognized as implicating a state's sovereignty or quasi-sovereignty.

For example, in *Missouri v. Holland*, Missouri sued to prevent federal enforcement of the Migratory Bird Treaty Act and thus vindicate its sovereign interest in regulating the hunting and sale of birds within its territory.⁴⁸ Justice Holmes moved quickly through the "slender reed" of Missouri's pecuniary ownership interest in migratory birds; it was not a sovereign interest, but merely proprietary and insignificant next to the "national interest of very nearly the first magnitude" expressed in the Migratory Bird Treaty Act.⁴⁹ The Court dismissed this proprietary interest and engaged in direct adjudication of the competing regulatory interests of the state and federal governments.⁵⁰

Given the sovereignty trade-off justification for state standing in the nineteenth and early twentieth centuries, it is somewhat ironic that the modern Court's most complete explication of the *parens patriae* doctrine

Court's declaration that the protection of the public interest was not the exclusive province of the legislature, but rather the very function of government more broadly. *Id.* at 447–50; see also *infra* notes 199–201 and accompanying text (making this point in terms of public goods literature).

47. *Woolhandler & Collins*, *supra* note 16, at 450–51; see, e.g., *North Dakota v. Minnesota*, 263 U.S. 365, 372–73 (1923) (holding original jurisdiction "limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment"); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (presenting identical argument).

48. 252 U.S. 416, 424 (1920) (arguing on behalf of Missouri that federal government's regulation was unconstitutional exercise of power over "the common property of [the State's] citizens").

49. See *id.* at 434–35 ("As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim.").

50. Ultimately, the Court found that Missouri's sovereign regulatory interest was superseded by the Migratory Bird Treaty as supreme law of the land under the Supremacy Clause. See *id.* at 435.

was delivered in a case brought by a territory: Puerto Rico.⁵¹ In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, Puerto Rico sought a declaration that certain employment practices of Virginia apple growers violated federal law by failing to extend benefits statutorily due to residents of Puerto Rico as domestic workers.⁵² The Court characterized this interest as “quasi-sovereign,” and though it admitted that it could not precisely define “quasi-sovereign” interests,⁵³ it concluded that the term did not include other bases for state-as-party litigation, namely, “sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.”⁵⁴

The Court, then, was able to lay out categories of interest that were *not* quasi-sovereign. Sovereign interests, at their most basic, consist of “the power to . . . enforce a legal code, both civil and criminal.”⁵⁵ Proprietary interests, such as ownership of real estate or stock,⁵⁶ would anchor a state’s traditional common law claim in property—the very sort entertained by the nineteenth century Court with regularity.⁵⁷ A state could also potentially serve as a “nominal party” litigating to advance the interests of an individual.⁵⁸ In either of the latter two circumstances *parens patriae* standing is inappropriate.⁵⁹

Quasi-sovereign interests “consist of a set of interests that the State has in the well-being of its populace[, but] . . . must be sufficiently con-

51. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1983) (holding that Puerto Rico had *parens patriae* standing to sue). Puerto Rico, unlike a state, did not voluntarily enter into the Union. The typical argument—that entering states cede the power to conduct foreign relations to the federal government and thus must be remunerated with recourse to federal courtrooms for the resolution of interstate disputes—is then sapped of much of its persuasive effect. That the Court found this distinction so unproblematic supports the conclusion that the litigation of sovereignty-related interests is analytically distinct from the litigation of traditional injuries because of categorical differences in the interest itself more than the identity of the party as a state. However, the *Alfred L. Snapp* Court functionally treated Puerto Rico as a state in its analysis. *Id.* at 608 n.15 (“Although we have spoken throughout of a ‘State’s’ standing as *parens patriae* . . . the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.”).

52. *Id.* at 597–98.

53. *Id.* at 601.

54. *Id.* at 602.

55. *Id.* at 601.

56. *Id.*

57. See *supra* Part I.A.

58. *Alfred L. Snapp*, 458 U.S. at 600 (“[*Parens patriae*] does not involve the State’s stepping in to represent the interests of particular citizens who . . . cannot represent themselves [I]f the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine.”).

59. See *id.* at 601 (“[T]o have [*parens patriae*] standing the State must assert an injury to what has been characterized as a ‘quasi-sovereign’ interest”); see also Mank, *Should States*, *supra* note 10, at 1767 (“[C]ourts 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.”).

crete to create an actual controversy between the State and the defendant.”⁶⁰ *Alfred L. Snapp* outlined two general types of quasi-sovereign claims recognized in earlier case law: “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”⁶¹ The majority reviewed the transboundary public nuisance cases as examples of the judicial vindication of such interests, and paid particular heed to Justice Holmes’s sovereignty trade-off rationale in *Tennessee Copper*.⁶² Justice White was explicit, though, that “*parens patriae* interests extend well beyond the prevention of such traditional public nuisances,”⁶³ pointing to *Pennsylvania v. West Virginia*⁶⁴ in support of the proposition that issues of “grave public concern” may also be the basis for *parens patriae* standing.⁶⁵

Second, “a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”⁶⁶ Puerto Rico alleged a deprivation of “its right to effectively participate in the benefits of the Federal Employment Service System.”⁶⁷ Its citizens were discriminated against in favor of foreign workers and “denied the benefits of access to domestic work opportunities that the [statutes at issue] were designed to secure.”⁶⁸ The Court agreed, and found that the statutes’ administration injured Puerto Rico’s quasi-sovereign interests.⁶⁹

Justice Brennan filed an important concurrence that was joined by Justice Stevens, the author of the *Massachusetts* majority opinion. Brennan argued for deference to a state’s assessment of its own sovereign

60. *Alfred L. Snapp*, 458 U.S. at 602; see also Mank, *Should States*, *supra* note 10, at 1757–59 (reviewing *Alfred L. Snapp* analysis of state interests); Watts & Wildermuth, *supra* note 10, at 4 (“[I]n order for a state to have *parens patriae* standing today, ‘the State must assert an injury to . . . a “quasi-sovereign” interest,’ that is, an interest related to the well-being of its residents.” (quoting *Alfred L. Snapp*, 458 U.S. at 601)). This reference to sufficient concreteness speaks to the primary function of standing generally, see *infra* Part I.C, and is at the heart of Justice Stevens’s *Massachusetts* reasoning, see *infra* Part II.A.1.

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

62. See *id.* at 602–06.

63. *Id.* at 605.

64. 262 U.S. 553, 592 (1923) (holding Pennsylvania proper party to bring suit to maintain access to natural gas produced in West Virginia because the “health, comfort and welfare [of its citizens were] seriously jeopardized . . . [and it was] a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected”).

65. *Alfred L. Snapp*, 458 U.S. at 605 (quoting *Pennsylvania*, 262 U.S. at 592). As discussed by Justice White, the “grave public concern” basis for *parens patriae* standing was also invoked in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 450–51 (1945) (“These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.”).

66. *Alfred L. Snapp*, 458 U.S. at 607; see also Watts & Wildermuth, *supra* note 10, at 1034 (describing quasi-sovereign interests as “derivative . . . based on preventing harm to [a state’s] citizens”).

67. *Alfred L. Snapp*, 458 U.S. at 598 (internal citation omitted).

68. *Id.* at 608.

69. *Id.*

or quasi-sovereign interests: “[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.”⁷⁰ Justice Brennan succinctly captured the twin principles of *parens patriae* standing: respect for the sovereignty and autonomy of states and the assurance of adversarial, concrete litigation.⁷¹

Once the Court was willing to consider questions of sovereignty tangentially in boundary and transboundary public nuisance actions, an analytic avenue was opened to the adjudication of controversies implicating only state sovereignty or quasi-sovereignty. This is the nature of the controversy in *Massachusetts v. EPA*.

C. *The Ebb and Flow of Justice Scalia’s Influence upon Standing Doctrine*

In order to fully understand *Massachusetts*, it must be viewed against the backdrop of broader standing jurisprudence. One of the most daunting hurdles to finding standing in any climate change litigation is the injury-in-fact requirement, especially in the form propounded—in both case law and commentary—by Justice Scalia.⁷² For Justice Scalia, particularity is paramount; if a plaintiff’s injury is not different in kind from that of others, the plaintiff must pursue redress through organization and the political process.⁷³ Generally, climate change injuries shared by many others, like that of Massachusetts’s loss of shoreline due to rising sea

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

71. The import placed upon a demonstration of concreteness and true adversarialism by Justice Brennan is echoed by the majority; a quasi-sovereign interest may or may not be many things, but it “must be sufficiently concrete to create an actual controversy between the State and the defendant.” *Id.* at 602 (majority opinion).

72. See 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, 435–46 (describing difficulty of proving that injury is actual, imminent, concrete and particularized). But see Merrill, *supra* note 17, at 299 (arguing that generalized grievance or particularity bar would be less formidable than redressibility prong of standing).

73. See, e.g., *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment) (“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.”); see also Edward Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 *Tex. L. Rev.* 907, 911 (1997) (explaining that, to Justice Scalia, “the point of the personal harm requirement is to make sure that generalized injuries to the body politic are resolved through the democratic political process rather than through litigation”); Scalia, *supra* note 13, at 894–97 (arguing that without harm to minority’s interest, “there is no reason to remove the matter from the political process and place it in the courts”).

levels,⁷⁴ would fail a strict particularity test.⁷⁵ Professor David Hodas describes Justice Scalia's influence over the Court's standing jurisprudence as tidal,⁷⁶ surging in *Lujan v. Defenders of Wildlife*,⁷⁷ and then ebbing in *Federal Election Committee v. Akins*⁷⁸ to a persisting low tide.⁷⁹

1. *Lujan v. Defenders of Wildlife*. — Justice Scalia penned the plurality opinion in *Lujan v. Defenders of Wildlife*,⁸⁰ which represented the most complete judicial adoption of the ideas presented in his seminal *Suffolk University Law Review* piece.⁸¹ *Lujan* turned upon whether an environmental organization had standing to challenge a regulation issued by the Department of the Interior under the Endangered Species Act for failure to account for extraterritorial impacts of federal actions.⁸² In rejecting petitioners' various theories on standing, Justice Scalia began by dismissing the alleged injury—depletion of threatened species due to U.S.-financed dam projects in Sri Lanka and Egypt—for lack of concreteness and imminence because plaintiffs did not make reference to any “concrete plans” to benefit from the species in question.⁸³ This conclu-

74. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007) (describing petitioners' affidavits averring “rising seas have already begun to swallow Massachusetts'[s] coastal land”).

75. See Bertagna, *supra* note 72, at 436–38 (concluding that D.C. Circuit rejected plaintiffs' standing argument because they failed to state particularized injury).

76. See generally David R. Hodas, Standing and Climate Change: Can Anyone Complain About the Weather? 15 *J. Land Use & Envtl. L.* 451, 9 *J. Transnat'l L. & Pol'y* 451 (2000) (Joint Issue) (tracing rise and fall of Justice Scalia's influence over the Court's standing jurisprudence in environmental law cases). It is important to note that the foundational connection between standing and separation of powers narrowly predates Justice Scalia's ascendance to the Court. In *Allen v. Wright*, the Court noted that the “idea of separation of powers . . . underlies standing doctrine.” 468 U.S. 737, 759 (1984). Notably, the Court rendered this decision after the publication of Scalia's *Suffolk University Law Review* article, see Scalia, *supra* note 13, though it did not make reference to it. Professor Cass Sunstein has denigrated this use of standing in defense of the separation of powers as “causation requirements . . . being used to do work that has little to do with causation.” Cass R. Sunstein, Standing and the Privatization of Public Law, 88 *Colum. L. Rev.* 1432, 1459 (1988).

77. 504 U.S. 555 (1992).

78. 524 U.S. 11 (1998).

79. Comically and coincidentally, Chief Justice Roberts also invokes this tidal motif to describe standing jurisprudence. In maligning the *Massachusetts* majority, Roberts likens the decision to the now-infamous *SCRAP* case: “Today's decision recalls the previous high-water mark of diluted standing requirements.” *Massachusetts*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting) (referring to *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)).

80. *Lujan*, 504 U.S. 555 (Scalia, J., plurality opinion).

81. See Scalia, *supra* note 13.

82. *Lujan*, 504 U.S. at 557–58; see also Bradford C. Mank, Standing and Global Warming: Is Injury to All Injury to None?, 35 *Envtl. L.* 1, 30 (2005) [hereinafter Mank, *Injury to All*].

83. *Lujan*, 504 U.S. at 564. Justice Scalia wrote for three other Justices, and Justice Kennedy concurred, noting that while this requirement of a purchased airline ticket may seem “trivial,” it was necessary to show an actual injury when regular use could not be inferred from the factual situation. *Id.* at 579 (Kennedy, J., concurring). The second

sion stemmed from the separation of powers. Justice Scalia declared that the “separation of powers significance” of the injury-in-fact requirement compelled the conclusion that Congress could not convert an “undifferentiated public interest” in the enforcement of a statute “into an ‘individual right’ vindicable in the courts.”⁸⁴ “Vindicating the public interest . . . is the function of Congress and the Chief Executive,” and thus courts cannot provide redress when such an interest is injured.⁸⁵

Only Justices White, Rehnquist, and Thomas agreed with Justice Scalia’s entire opinion and signed onto his rationales relating to redressibility and the separation of powers.⁸⁶ Justices Kennedy and Souter concurred in the result, but rejected Justice Scalia’s assertion that the redress of broadly-shared injuries should be the exclusive province of the political branches.⁸⁷ Justice Kennedy exhibited a different focus in his concurrence, positing that regardless of how many individuals shared an injury, it was necessary only that the plaintiff was injured “in a concrete and personal way.”⁸⁸ Justice Kennedy’s disagreement rendered the implications of *Lujan* unclear as to injury in fact, and lower courts largely interpreted it as a broad instruction to view environmental standing with greater skepticism.⁸⁹

grounds for rejecting petitioners’ standing involved Justice Scalia’s surgical dismissal of the petitioners’ proffered “nexus” theories of standing. *Id.* at 565–67 (plurality opinion); see also Hodas, *supra* note 76, at 465–66 (outlining Justice Scalia’s opinion); Mank, *Injury to All*, *supra* note 82, at 31–32 (same).

84. *Lujan*, 504 U.S. at 577; see also Hodas, *supra* note 76, at 466; Mank, *Injury to All*, *supra* note 82, at 33–35. Contrast this with *supra* note 46 and accompanying text (discussing reformulation of public interest into quasi-sovereign interest vested in state plaintiff in *Tennessee Copper*).

85. *Lujan*, 504 U.S. at 576. Justice Scalia substantiated this point with reference to the Take Care Clause of Article II as evidence that the separation of powers precludes the judiciary from spurring the execution of statutes. *Id.* at 577 (denying Congress’s ability to transfer to courts “the Chief Executive’s most important duty, to ‘take Care that the Laws be faithfully executed’”). This interpretation uses constitutional text beyond Article III to limit judicial power.

86. Hodas, *supra* note 76, at 466–68 (laying out “scorecard analysis” of *Lujan* opinions). The redressibility analysis dealt with the effective ability of the Secretary of the Interior to control the granting agencies. See *Lujan*, 504 U.S. at 568–71 (finding “respondents failed on ‘fairly traceable’ element of standing”).

87. See Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law’s Growing Shadow*, 2007 *Sup. Ct. Rev.* 111, 130–31 (discussing memo from Justice Souter to Justice Scalia that expressed unease with implications of Scalia’s “repeated references to a particularity requirement,” and Justice Kennedy’s discomfort with Scalia’s restriction of environmental plaintiffs’ standing expressed at conference).

88. *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

89. See, e.g., *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (finding standing failed on “‘fairly traceable’ element of standing” (quoting *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996))); *Broadened Horizons Riverkeepers v. U.S. Army Corps of Eng’rs*, 8 F. Supp. 2d 730, 733 (E.D. Tenn. 1998) (finding injuries untraceable to government action); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 868–70 (E.D. Pa. 1996) (finding *Lujan* compelled dismissal because plaintiff failed to assert injury with sufficient

2. *Federal Election Commission v. Akins*. — The relationship between particularity and concreteness, unresolved by the multiple opinions in *Lujan*, was revisited in *Federal Election Commission v. Akins* when a group of voters challenged the Federal Election Commission's refusal to categorize the American Israel Public Affairs Committee as a "political committee" and subsequent refusal to regulate the disclosure of its fundraising and expenditures.⁹⁰ Justice Breyer's majority opinion severed concreteness from particularity, and reaffirmed the position that a widespread injury is litigable.⁹¹ Breyer concluded that concreteness was both necessary and sufficient to establish injury in fact: "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"⁹² The Court accepted the plaintiffs' hampered ability to evaluate candidates without the contested information as a concrete injury.⁹³ *Akins*, then, witnessed

specificity); see also Hodas, *supra* note 76, at 468 (noting that many lower courts read Scalia's opinion as sign to more rigorously evaluate standing in environmental cases); Mank, *Should States*, *supra* note 10, at 1710–13 (describing pre-*Akins* confusion as to whether generalized grievance bar was prudential and Court's failure to set clear standard for particularity).

90. 524 U.S. 11, 14–16 (1998).

91. See Hodas, *supra* note 76, at 471–73 (discussing Justice Breyer's finding in *Akins* that plaintiffs suffered "constitutionally genuine injury in fact" (internal quotation marks omitted)); Mank, *Injury to All*, *supra* note 82, at 37–38 (same).

92. *Akins*, 524 U.S. at 24 (citing *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449–50 (1989)); see also *Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("It appears to be abstractness, not wide dispersal, of an injury that may prevent the injury from being sufficient to confer standing."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) (summarizing *Akins* as holding that "so long as the plaintiff . . . has a concrete and particularized injury, it does not matter that legions of other persons have the same injury"); Mank, *Should States*, *supra* note 10, at 1713–14 (forwarding same reading of *Akins*). Through his treatment of *United States v. Richardson*, 418 U.S. 166 (1974), Justice Breyer effectively linked the prudential "generalized grievance" bar to his consideration of particularity. *Akins*, 524 U.S. at 21–23. Breyer distinguished the instant case, brought under a statutory citizen-suit provision, from taxpayer standing cases like *Richardson* and *Flast v. Cohen*, 392 U.S. 83 (1968), based on the Accounts Clause, U.S. Const. art. I, § 9, cl. 7. *Akins*, 524 U.S. at 21–23. Justice Breyer noted that in the generalized grievance cases, "the harm at issue [wa]s not only widely shared, but . . . also of an abstract and indefinite nature." *Id.* at 23. There is still significant uncertainty as to the relationship between the particularity requirement of injury in fact and the prudential generalized grievance bar to standing. See Merrill, *supra* note 17, at 298. Professor Mank reads *Akins* as declaring the generalized grievance bar as prudential, while preserving the possibility that Article III precludes the adjudication of some widely shared injuries, such as the "common concern for obedience to law." Mank, *Should States*, *supra* note 10, at 1713–14. For purposes of this Note, the two may be safely equated as representative of the same proposition: Abstract grievances that are widely shared are non-litigable.

93. *Akins*, 524 U.S. at 21 ("[T]his Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.").

the Court distancing itself from Justice Scalia's position espoused in *Lujan*.⁹⁴

Justice Scalia's dissent argued that the "weighty governmental purpose underlying the 'generalized grievance' prohibition" prevented the judiciary from deciding political propositions.⁹⁵ In responding to the majority's reference to mass torts as instances in which widespread injuries are judicially cognizable,⁹⁶ Justice Scalia drew a simplistic distinction that ultimately unravels his argument. "One tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are different arms," Justice Scalia explains.⁹⁷ However, as the majority rejoined, even if every voter was deprived alike of information pertinent to electoral decisions, each plaintiff was deprived of the ability to make a fully-informed electoral decision.⁹⁸ Thus, if discrete electoral decisions are to be treated differently than discrete limbs when considered by courts, it must be on the basis of concreteness rather than that of particularity.⁹⁹

Akins repudiates Justice Scalia's theory of standing developed in the *Suffolk University Law Review* and endorsed by the *Lujan* plurality.¹⁰⁰ Thus, the injury-in-fact jurisprudence into which the *Massachusetts* plaintiffs plunged was circling the conclusion announced by Justice Kennedy in *Lujan*: "While it does not matter how many persons have been injured by the challenged action . . . the vitality of the adversarial process" de-

94. Interestingly, legal education may, to an extent, remain captured by Justice Scalia's perspective. At least one first-year constitutional law casebook instructs that "limitations on standing . . . have taken up the role of policing the boundary between political and legal decisions." Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 39 (15th ed. 2004).

95. *Akins*, 524 U.S. at 33 (Scalia, J., dissenting).

96. *Id.* at 24 (majority opinion).

97. *Id.* at 35 (Scalia, J., dissenting).

98. *Id.* at 21 (majority opinion).

99. A distinction based on concreteness would be simple to administer and describe: Arms are tangible and thus concrete, while votes are intangible and thus inherently not concrete. However, the law recognizes all sorts of intangible interests and this is not the distinction Scalia or any others attempted to draw. Attempting to distinguish along lines of particularity is impossible because both an arm and a vote may be injured en masse but are possessed by individuals.

100. See *Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("*Akins* can be seen to shift the focus from the widespread (or generalized) nature of an injury, the focus of prior precedent, and to turn the focus upon the concreteness of the injury, however widespread."); *id.* at 652 ("After *Akins*, the superordinate question about the injury requirement here is whether the injury suffered . . . is concrete rather than 'abstract and indefinite.'"); see also Daniel A. Farber, *A Place-Based Theory of Standing*, 55 *UCLA L. Rev.* 1505, 1536 (2008) (describing *Akins* as a "decisive blow to Justice Scalia's theory of standing," and declaring that "[t]he Supreme Court clearly does not accept Scalia's theory of standing . . . that what otherwise would constitute injury in fact ceases to be so when it is broadly shared"); Mank, *Injury to All*, *supra* note 82, at 38 ("Justice Breyer's majority opinion was fundamentally inconsistent with Justice Scalia's 1983 separation-of-powers and standing article, as well as the spirit of Justice Scalia's separation-of-powers arguments in [*Lujan*].").

mands that “the party bringing suit . . . show that the action injures him in a concrete and personal way.”¹⁰¹ With this standing jurisprudence in mind, this Note turns to the arguments in *Massachusetts v. EPA*.

II. MASTERING MASSACHUSETTS: WHY DOES THE STATE HAVE STANDING?

Massachusetts sits at the nexus of recent developments in standing jurisprudence and the Court’s approach to state-as-party litigation. The Rehnquist Court’s standing decisions exhibited an increasing focus on robust adversarialism rather than the separation of powers.¹⁰² The somewhat dusty Supreme Court state standing jurisprudence, meanwhile, had developed to embrace the litigation of interests that did not comfortably fit within the common law injury-in-fact framework. Intra-court dynamics and the immense political and environmental significance of *Massachusetts* further complicated this doctrinal confluence. Justice Stevens navigated these competing concerns; thus, his route was necessarily circuitous.

Part II of this Note examines Justice Stevens’s standing analysis, which has left scholars befuddled and lower courts without instruction.¹⁰³ This Part engages the reasoning in *Massachusetts* and finds that the case treats state standing as an independent route to standing. Part II.A lays

101. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring), quoted in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). Justice Stevens’s use of that particular language, as a sequel to *Akins*’s finding of standing for an informational injury—injuries that are inherently shared by all—“eliminated any possible remaining doubts about the demise of Justice Scalia’s standing theory.” Farber, *supra* note 100, at 1536.

102. See *supra* Part I.C.

103. Courts have already begun to disentangle and apply the standing analysis in *Massachusetts*, coming to varying conclusions. Primarily, these decisions quote *Massachusetts* for the proposition that the purpose of standing is to assure adversarialism, rather than protect the separation of powers. See, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2543 (2008) (noting *Massachusetts*’s emphasis on adversity in litigation); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044 (9th Cir. 2008) (quoting *Massachusetts* to emphasize necessity of personal stake in litigation). Other courts have looked to *Massachusetts* to analyze and adjudicate clearly quasi-sovereign interests. See, e.g., *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241–42 (10th Cir. 2008) (finding Wyoming’s claim that its ability to enforce its legal code was abridged was sufficient sovereign interest to substantiate standing under *Alfred L. Snapp* and *Massachusetts*). Still other courts have adopted the dominant scholarly response, discussed *infra* Part II.B, and used the pleading of a quasi-sovereign interest as a trigger for a more forging analysis under the traditional three-prong inquiry. See, e.g., *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1322–23 (D.C. Cir. 2008) (“[T]he states’ quasi-sovereign interests entitles them to ‘special solicitude’ in [traditional] standing analysis.”); *Coal. for a Sustainable Delta v. Carlson*, No. 1:08-CV-00397, 2008 WL 2899725, at *6 (E.D. Cal. July 24, 2008) (dismissing private plaintiff’s climate change litigation on reasoning that *Massachusetts* only permitted diminished redressibility and causation standards for state plaintiffs). Another district court distinguished a state’s *parens patriae* argument from *Massachusetts* because the statute in question did not contain a comparable citizen suit provision that would give rise to a procedural injury. See *Colorado ex rel. Suthers v. Gonzales*, 558 F. Supp. 2d 1158, 1163–64 (D. Colo. 2007).

out the important facets of the majority opinion, pausing to compare it with both Chief Justice Roberts's dissent and academic commentary preceding it. Part II.B then synthesizes the dominant scholarly interpretation of and responses to Justice Stevens's opinion, which reveals the absence of any serious consideration that state standing is analytically distinct from the traditional standing inquiry. These sections provide the grist for Part II.C, which offers an overlooked reading of the opinion as being principally driven by the unique status of state plaintiffs and a concern for rough assurances of adversarialism. After recognizing *parens patriae* standing as an alternative to traditional standing, Part II.D explores the continued relevance of the oft-ignored distinction between a state's sovereign and quasi-sovereign interests.

A. *The Components of the Reasoning in the Massachusetts Majority*

To describe the reasoning set forth in the *Massachusetts* majority opinion as surprising is to dabble in hyperbolic understatement. Some scholars did not expect the Court to even hear the case.¹⁰⁴ Many expected the Court to uphold the D.C. Circuit's decision¹⁰⁵ on either traditional standing¹⁰⁶ or political ques-

104. See, e.g., Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 Va. L. Rev. In Brief 53, 54 (2007), at <http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/05/21/cannon> (on file with the *Columbia Law Review*) ("And then, somewhat surprisingly, as there was no conflict among the circuits and the case presented a serious question of whether petitioners had standing, the Supreme Court granted review."); Wildermuth, *supra* note 11, at 282–83 ("Because the decision implicated no circuit split, involved a political hot potato, and had thorny standing issues to boot, it was a surprise to many that the Court granted certiorari in the case in the closing days of the October 2005 term.")

105. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

106. See, e.g., Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 Va. L. Rev. In Brief 63, 64 (2007), at <http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/05/21/adler> (on file with the *Columbia Law Review*) ("[M]any 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."); Bertagna, *supra* note 72, at 429–33 (outlining potential injuries averred as caused by climate change and rejecting each as sufficient for Article III standing); Stevenson, *supra* note 11, at 12 ("[E]veryone knew that the 'injury-in-fact' requirement for standing under Article III would be the lynchpin of the case."); see also Caroline Patton, *An Environmentalist's Unlikely Foe: The Use of Hypothetical Jurisdiction in Massachusetts v. EPA*, 30 *Environ. Envtl. L. & Pol'y J.* 173, 195–96 (2006) (arguing that traditionally stringent causation requirements for injuries under Article III standing should be relaxed in context of "virtual consensus" as to threat of global warming). But see Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 43A *Stan. J. Int'l L.* 77, 26A *Stan. Envt'l L.J.* 77, 97 (2007) (Joint Issue) (arguing that inactivity by executive and legislature justifies "substantial role" for federal courts in combating climate change); Hodas, *supra* note 77, at 486 ("In the context of climate change, *Laidlaw*, [a standing and mootness decision rendered by the Court in 2000,] will open up the courts to citizens.")

tion¹⁰⁷ grounds.¹⁰⁸ And, while the Court's focus upon special solicitude for state standing was also unforeseen by most, *Tennessee Copper* itself had been "argued largely as if it were [a dispute] between two private parties."¹⁰⁹ The subsections below address the major concepts at play in Justice Stevens's majority opinion. Part II.A.1 discusses the opinions' differing conceptions of the purpose of standing doctrine and how each authoring Justice treated the plaintiffs' status as sovereign states. Part II.A.2 reviews the competing applications of the *Lujan* framework. The careful exposition of these ideas facilitate the analysis in Part II.C, which traces the connections between each of these concepts in Justice Stevens's majority.

1. *The Purposes of Standing as Applied to Sovereign States.* — In what was perhaps the most straightforward sentence of his opinion, Justice Stevens declared his view as to the fundamental purpose of standing: "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'"¹¹⁰ Moreover, per Justice

107. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (dismissing public nuisance suit against greenhouse gas emitters by state attorneys general on political question grounds); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 Va. L. Rev. In Brief 75, 75 (2007), at <http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/05/21/cass> (on file with the *Columbia Law Review*) (characterizing Justice Stevens's opinion as effort to "avoid the inconvenient truth that this is not a matter on which judges have any real role to play"); Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. Environmental Protection Agency*, 2007 *Cato Sup. Ct. Rev.* 193, 212 (arguing that regulation of "emissions of greenhouse gases is fundamentally a political question").

Unlike standing, the political question doctrine is unquestionably and explicitly aimed at preserving the separation of powers. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' . . . The nonjusticiability of a political question is primarily a function of the separation of powers.").

108. In fact, Judge Sentelle's concurrence to the D.C. Circuit decision forwarded arguments that both traditional standing analysis and the political question doctrine precluded judicial review. See *Massachusetts*, 415 F.3d at 59–60 (Sentelle, J., dissenting in part and concurring in the judgment) (finding petitioners' injuries not "particularized to themselves," and legislative or executive branch better suited to address global warming). The key insight of the political question doctrine in the context of *Massachusetts* is two-fold. First, the Court *could* have avoided deciding the issues presented altogether, but did not. Second, the separation of powers is, and may be, upheld through doctrinal means other than standing. See Sunstein, *supra* note 76, at 1472 (arguing that "political" rather than "legal" disputes are, and should be, resolved through judicial doctrines other than standing, or that plaintiffs raising such issues ultimately fail on merits).

109. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), quoted in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007).

110. *Massachusetts*, 127 S. Ct. at 1453 (quoting *Baker*, 369 U.S. at 204).

Kennedy's *Lujan* concurrence,¹¹¹ Stevens described standing as "'preserv[ing] the vitality of the adversarial process,'" and was mute as to the separation of powers.¹¹² In contrast, Chief Justice Roberts opened his dissent by declaring "that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."¹¹³ So from the outset, the two standing opinions adopt the competing positions described in Part I.C.

Echoing language in antecedent cases,¹¹⁴ Stevens "imbued the case with federalism implications . . . by emphasizing Massachusetts's status as a sovereign state," and portraying the courts as the constitutional mechanism for vindicating a state's sovereign interests.¹¹⁵ After all, as Justice Stevens noted, Massachusetts can neither invade nor negotiate with other states or foreign nations so as to vindicate its quasi-sovereign interests implicated here.¹¹⁶ While he labeled the state interest at stake as "quasi-sovereign," in discussing it, Stevens also referenced sovereign and proprietary interests.¹¹⁷ He did not, however, evaluate the sincerity or severity of the interest asserted. Stevens's failure to scrutinize the quasi-sovereign interest is consistent with Justice Brennan's call for deference to a state's assessment of its sovereignty-related interests.¹¹⁸ That Stevens accepts the asserted quasi-sovereign interest, and then applies the traditional standing inquiry to the proprietary interest, compels the conclusion that these inquiries are independent.

111. See Cass, *supra* note 107, at 79 (describing Justice Stevens's opinion as "quoting consistently from [Justice Kennedy's] concurring opinion in *Lujan* rather than from the majority").

112. *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

113. *Id.* at 1464 (Roberts, C.J., dissenting) (quoting *Lujan*, 504 U.S. at 576 (Scalia, J., plurality opinion)). Also compare *id.* at 1471 ("The 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.'" (internal citation omitted)), with *Lujan*, 504 U.S. at 560 ("One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'—is the doctrine of standing." (internal citation omitted)).

114. See *supra* Part I.

115. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *Duke L.J.* 2023, 2036 (2008). The rationale invoked by Stevens may be synthesized as follows: "When a State enters the Union, it surrenders certain sovereign prerogatives These sovereign prerogatives are now lodged in the Federal Government," and thus states retain a special and definite interest in their proper exercise. *Massachusetts*, 127 S. Ct. at 1454.

116. See discussion of *Massachusetts v. Rhode Island*, *supra* notes 29–33 and accompanying text.

117. See discussion *infra* Part II.D.

118. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring) ("As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.").

The Chief Justice dismissed Stevens's "special solicitude" as a confusion of the requirements for *parens patriae* standing.¹¹⁹ Chief Justice Roberts correctly stated the law, but was mistakenly pejorative: "The 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."¹²⁰

The state standing cases discussed above in Part I, however, belie this description. In those cases, the Court deferred to states' assessments of their interests and gradually divorced the evaluation of those interests from any analysis of common law injuries.¹²¹ Given this historical acceptance of a sovereignty-vindicating function for the Court, when these sorts of state interests are allegedly impaired, it is clear that the federal courts are the proper venue for redress.¹²² Thus, when a state comes to federal court for the redress of injuries to its quasi-sovereign interests, a federal court must respect that state's assessment of its interest and presume adversarialism.

2. *The Traditional Framework.* — Justice Stevens examined Massachusetts's proprietary interest in coastal property through *Lujan's* outline as informed by *Akins*. Injury in fact was satisfied because the "widely[-]shared" nature of climate change injuries "d[id] not minimize Massachusetts'[s] interest in the outcome of th[e] litigation," nor did it render the state's injury any less concrete or personal.¹²³ After *Akins*, this understanding of the injury-in-fact requirement is conventional, and was

119. *Massachusetts*, 127 S. Ct. at 1464–65 (Roberts, C.J., dissenting).

120. *Id.* at 1465–66.

121. See Mank, *Should States*, *supra* note 10, at 1768 ("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 [not] . . . requiring them to prove the specific injuries required in suits by individual litigants . . ."). It is important to recall that the state standing cases, discussed *supra* Part I, were decided in the nineteenth and early twentieth centuries before the Court began speaking explicitly of standing. See Scalia, *supra* note 13, at 883–84 (describing development of Supreme Court's standing jurisprudence). Thus, it is absurd to expect those cases to have dealt expressly in the terms utilized in the "traditional" standing framework. This point reduces the persuasiveness of Chief Justice Roberts's argument that *Tennessee Copper* accepted an expanded set of remedies for states rather than enhanced access to the federal courts because the Court of that era did not question the legitimacy of Georgia's litigating interests incidental to its sovereignty. *Massachusetts*, 127 S. Ct. at 1465–66 (Roberts, C.J., dissenting). Again, that *Tennessee Copper* "had nothing to do with Article III standing," is a natural consequence of that decision predating the judicial divination of Article III standing by almost thirty years. *Id.*

122. See *infra* notes 178–179 and accompanying text.

123. *Massachusetts*, 127 S. Ct. at 1456 (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)). The reference to *Akins* is critical in that it endorses the jurisprudential narrative, forwarded in Part I.C *supra*, of a shift away from using standing to uphold the separation of powers toward conceptualizing standing as an assurance of adversarialism. See Mank, *Should States*, *supra* note 10, at 1774 ("The *Massachusetts* decision concluded that the injuries to Massachusetts'[s] coastline from global warming were sufficiently concrete to meet the *Akins* test.").

advanced by Judge Tatel of the D.C. Circuit below.¹²⁴ Stevens quickly established the other elements under *Lujan*, accepting both incremental redress¹²⁵ and imminent injury as sufficient.¹²⁶

Chief Justice Roberts's central critique was that Stevens failed to "ground the rest of the standing analysis in th[e] specific injury," of coastal property loss.¹²⁷ With respect to the other prongs of standing, the majority treated the relevant injury as global warming generally, rather than the specific injury of coastal property loss.¹²⁸ "Redressability," for Roberts, is "problematic," because if a court is only capable of partial redress, the controversy must be outside of judicial cognizance.¹²⁹

In their application of the *Lujan* framework, Justice Stevens and Chief Justice Roberts arrived at opposite conclusions because they began with different assumptions about the role of standing. This foundational difference has been absent from scholarly efforts to interpret the decision. The Chief Justice's focus on the separation of powers ignores the singularity of state plaintiffs and leads to a rigid, formulaic conception of standing. Because Justice Stevens was more concerned with assuring a "gist" of adversarialism, his opinion confronted each type of state interest independently. This interpretation of Justice Stevens's opinion is explicated in Part II.C, and demands that the content of each interest be uncovered.

124. Judge Tatel seized upon Justice Scalia's "different arms" argument, see *supra* note 97 and accompanying text (discussing Justice Scalia's *Akins* dissent), to satisfy particularity, noting "Maine may suffer [the] loss of Maine coastal land" due to "the same global warming." *Massachusetts v. EPA*, 415 F.3d 50, 65 (D.C. Cir. 2005) (Tatel, J., dissenting).

125. See *Massachusetts*, 127 S. Ct. at 1457–58 (noting that to "accept[] that [incremental causes are not judicially cognizable] would doom most challenges to regulatory action," and the fact that judicial remedy may "not by itself reverse global warming" does not preclude determination of "whether EPA has a duty to take steps to *slow* or *reduce* it").

126. See *id.* at 1456 (citing plaintiffs' affidavits which alleged that "rising seas have already begun to swallow Massachusetts'[s] coastal land").

127. *Id.* at 1467 (Roberts, C.J., dissenting).

128. *Id.* at 1469.

129. *Id.* The small proportion of GHGs emitted by new U.S. mobile sources limits the efficacy of any action the Court could demand of the EPA. The Court's power to redress is confined by the statutory text it construed. *Massachusetts v. EPA*, it is easy to forget, began as a petition requesting that the EPA regulate carbon dioxide emissions from U.S. mobile sources under section 202 of the Clean Air Act, 42 U.S.C. § 7521 (2000). For background to the lawsuit, see Cannon, *supra* note 104, at 53–54; Mank, *Should States*, *supra* note 10, at 1721–22. Furthermore, the petitioner's argument that EPA regulation will spur other nations into action failed both because the Court could not depend upon such actions by other sovereigns and because the petitioners failed to demonstrate that such redress is the "likely" result of a favorable judicial outcome. It is beyond the power of the Court to compel foreign emitters' reductions or conduct international climate negotiations, which would be required to fully redress the injury averred. *Massachusetts*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting).

B. *Quasi-Sovereign, Quasi-Standing: Interpreting Justice Stevens*

The *Massachusetts* decision has already been subjected to a great deal of scholarly analysis, much of which aims to untangle Justice Stevens's explication of standing.¹³⁰ This Part sets forth several of the dominant interpretations of *Massachusetts*.

There are two realist explanations: the magnitude of global warming,¹³¹ and the influence of Justice Kennedy.¹³² There are also two doctrinal approaches: that Stevens innovatively employed "special solicitude" to relax the Article III standing requirements,¹³³ or that "states are no ordinary litigants" and that the adjudication of quasi-sovereign rights does not depend upon the typical hallmarks of Article III standing.¹³⁴ Part II.C of this Note advances this final interpretation, and Part III presents a theory of sovereign and quasi-sovereign interests that operationalizes it, but first Part II.B presents the alternatives.

1. *The Realists' Reactions.* — The popular response to *Massachusetts* was simplistic: "This was a case about global warming, the newspapers said, and the immediate symbolism of the case was that the Court had nudged the federal government into action."¹³⁵ The political context of *Massachusetts* is undeniable, and its effect on the majority's holding has been much debated.¹³⁶ The magnitude of the problem was clearly at the

130. See, e.g., Cannon, *supra* note 104; *supra* notes 10–11.

131. See *Massachusetts*, 127 S. Ct. at 1446 (describing issue as "the most pressing environmental challenge of our time" (internal quotation marks omitted) (quoting Petition for Writ of Certiorari, *Massachusetts*, 127 S. Ct. 1438 (No: 05-1120))); *infra* Part II.B.1.

132. See Michael L. Wells et al., 2008 Supplement to Cases and Materials on Federal Courts 37 (2008) ("It is only realistic to acknowledge that Justice Kennedy's position was key to the result."); *infra* Part II.B.1. It could also be argued that the green hue of Justice Stevens played a role in the formation of the majority and certainly the drafting of the opinion. See generally Kenneth A. Manaster, Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation, 74 *Fordham L. Rev.* 1963 (2006) (describing Justice Stevens's history of arguing for independent judicial role in protecting environment).

133. See *infra* Part II.B.2.

134. Crucially, both of these interpretations of Justice Stevens's standing argument recognize that the opinion rests upon the premise that standing's principle function is *not* to preserve the separation of powers, but rather to ensure that the judiciary decides only concrete and adversarial disputes. *Massachusetts* may ultimately alter many legal doctrines—those of state standing and judicial review of agency inaction principally—but the opinion may be best remembered as the demise in influence of Justice Scalia's separation of powers standing jurisprudence.

135. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise* 1 (Aug. 2007) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=1008906>.

136. One commentator, clearly dissatisfied with the Court, went so far as to allege that "political inclinations insinuate[d] themselves into the Justices' thinking in a way that color[ed] their approach and tilt[ed] toward one outcome." Cass, *supra* note 107, at 75. A notable amicus curiae, Robert Bork, asserted that the case was purely a political ploy, pointing to the petition submitted in 1999, in which the plaintiffs refer to their own use of the courts as a tool in a broader campaign to combat global warming. Stevenson, *supra* note 11, at 4 n.14 (citing to Brief of Amici Curiae Robert H. Bork et al. in Support of

fore of Justice Stevens's mind.¹³⁷ The Court opened by embracing petitioners' characterization of climate change as "the most pressing environmental challenge of our time," and went on to detail predicted afflictions stemming from the release of greenhouse gasses.¹³⁸ Some observers suggest that *Massachusetts* represents a reinvigoration of an environmental ethic among the Justices and that the Court has internalized "environmentalists' views on climate change" and "show[n] its colors [as] green."¹³⁹

Respondent United States Environmental Protection Agency, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120)).

While this section discusses potential political *causes* of *Massachusetts*, much ink has already been spilled addressing its political *effects* as well. See, e.g., Adler, *supra* note 106, at 74 ("At this point, if not before, Congress will be compelled to act."); Cannon, *supra* note 104, at 61–62 ("The decision provides a rallying point for climate change advocates and a touchstone for the public on climate change."); Cass, *supra* note 107, at 84 ("With luck, the Court's decision will not be the opening salvo in a wholesale rewriting of administrative law doctrine but, instead, will remain an isolated relic of the heady days after Al Gore's Academy Award, when anything seemed possible and global warming was simply a category of its own."); Richard Lazarus, A Breathtaking Result for Greens, *Envtl. F.*, May–June 2007, at 12, 12 (describing *Massachusetts* as "stunning" victory and galvanizing force).

137. See Cannon, *supra* note 104, at 56 (analyzing Justice Stevens's opening paragraphs to conclude that "the most important thing in this case is that anthropogenic climate change is real and very serious"); see also Freeman & Vermeule, *supra* note 135, at 29 ("The simplest approach to *MA v. EPA* is to say that it is really just a global warming case, produced by a confluence of political and regulatory circumstances that may or may not generalize to other areas.").

138. *Massachusetts*, 127 S. Ct. at 1447–49 (describing development of scientific and political understanding and predicted consequences of climate change); see also Cass *supra* note 107, at 76 ("By the end of the first paragraph, readers understand that . . . this decision is going to command the Bush Administration's environmental decisionmakers to do what a Gore Administration's more eco-friendly administrators surely would have done . . .").

139. Cannon, *supra* note 104, at 61, 62; see also *id.* at 58 ("*[M] ass. v. EPA* represents the Court's fresh embrace of the environmentalist worldview in its Article III jurisprudence."). Cannon, former General Counsel of the EPA, heralds the opinion generally as "an enormous, if narrow, victory for environmentalists," an unsurprising position given its vindication of his own stated position while at the EPA. *Id.* at 53 (disclosing his "dog in this fight"). Justice Scalia, in dissent, decries the *Massachusetts* majority's capture by the environmentalist ethic he has complained of since 1983. *Massachusetts*, 127 S. Ct. at 1477–78 (Scalia, J., dissenting) ("The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation."); accord Scalia, *supra* note 13, at 884 (criticizing "the judiciary's long love affair with environmental litigation"). For a discussion of the influence of ideology on the Supreme Court's review of agency decisions, see generally Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 825–26 (2006) (concluding that conservative Justices are significantly more likely to validate agency interpretations whose ideological content is conservative, and liberal Justices are significantly more likely to validate interpretations with liberal ideological content).

Justice Stevens's majority opinion has also been characterized as the product of "intra-Court coalition building"¹⁴⁰ targeted at winning over Justice Kennedy.¹⁴¹ As one biting observer noted, "Justice Stevens's opinion shows special solicitude for Justice Anthony Kennedy, the Court's new swing-man, quoting consistently from his concurring opinion in *Lujan*"¹⁴² Because the invocation of state status in the standing analysis appears aimed at garnering Justice Kennedy's vote, the extent to which state status is doctrinally significant is somewhat unclear.¹⁴³ Justice Kennedy asked about *Tennessee Copper* during oral arguments,¹⁴⁴ is associated with a strong federalist position, and has supported states' rights over separation of powers arguments in the context of standing.¹⁴⁵

2. *The Dominant Interpretation: A Little from Column A* — The prevailing scholarly response¹⁴⁶ to the standing analysis in *Massachusetts* has interpreted it as diluting the *Lujan* standing requirements when state plaintiffs assert injuries to sovereign or quasi-sovereign rights alongside proprietary interests in the context of a statutory cause of

140. Freeman & Vermeule, supra note 135, at 12.

141. Many in the media discussed the importance of Justice Kennedy's vote in the case. See, e.g., Lyle Denniston, Analysis: Kennedy Key to Global Warming Challenge, SCOTUSblog, Nov. 29, 2006, at <http://www.scotusblog.com/movabletype/archives/2006/11/26-week/> (on file with the *Columbia Law Review*) ("[T]he deciding vote on that question probably lies with the Court's key centrist Justice, Anthony M. Kennedy."); Tony Mauro, Eyes on Kennedy as Supreme Court Debates Global Warming Case, Legal Times, Nov. 30, 2006, at <http://www.law.com/jsp/article.jsp?id=1164810399422&rss=newswire> (on file with the *Columbia Law Review*) ("Supreme Court Justice Anthony Kennedy appears to hold the key to the outcome of the Court's first case assessing the environmental impact of global warming."); Tony Mauro, Wooing Kennedy on Warming, The BLT: The Blog of Legal Times, Apr. 4, 2007, at http://legaltimes.typepad.com/blt/2007/04/wooin_kennedy_.html (on file with the *Columbia Law Review*) (positing that both majority and dissent oriented their standing arguments toward Justice Kennedy).

142. Cass, supra note 107, at 79. The most illuminating such quote to Justice Kennedy's *Lujan* concurrence is excerpted above, see supra note 101 and accompanying text, and focuses the injury-in-fact inquiry upon concreteness rather than the number of individuals injured as such.

143. See Metzger, supra note 115, at 2039 (noting that Court's emphasis on state standing could be doctrinally significant or merely attempt to reach out to Justice Kennedy). Professor Mank agrees, finding it "most likely that Justice Kennedy suggested that the majority rely on *Tennessee Copper*," and the states' standing logic reviewed in Part I of this Note. Mank, *Should States*, supra note 10, at 1738.

144. See Transcript of Oral Argument at 15, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120) (recounting Justice Kennedy's suggestion to plaintiffs' counsel that *Tennessee Copper* "seems to me your best case").

145. See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616-18 (1989) (Kennedy, J.) (finding Arizona Supreme Court's interpretation of federal New Mexico-Arizona Enabling Act binding when plaintiffs met state standing requirements but would have failed to establish standing under federal standard).

146. District courts, already beginning to confront *Massachusetts* in briefs, have also largely treated the case as a unique blend of state sovereignty and procedural injury justifying a flexible *Lujan* analysis. See cases discussed supra note 103.

action.¹⁴⁷ The principle source of criticism echoes Chief Justice Roberts: The injury seems inconsistently related to the *Lujan* analysis, and does not clearly qualify as sovereign or quasi-sovereign.¹⁴⁸

Prior to *Massachusetts*, the standard for state standing to defend a quasi-sovereign interest was unclear.¹⁴⁹ Professor Thomas Merrill, in his analysis of public nuisance actions addressing global warming, concluded that a state “suing in the court of another sovereign . . . to vindicate a quasi-sovereign interest . . . ‘should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens.’”¹⁵⁰ Professor Merrill buttressed his conclusion by noting that states forwarding quasi-sovereign interests would likely be able to meet the *Lujan* requirements in any event.¹⁵¹ Other scholars have noted that states alleging injuries to sovereign interests would also easily meet the injury-in-fact requirements.¹⁵² Before *Massachusetts*, scholars believed that sovereign and quasi-sovereign injuries were still subject to the *Lujan* test.

147. See, e.g., Freeman & Vermeule, *supra* note 135, at 11 (casting standing decision in *Massachusetts* as merely continuation of return to “more liberalized standing” prior to Justice Scalia’s *Lujan* decision); Metzger, *supra* note 115, at 2039 (describing potential interpretation of *Massachusetts* as exemplifying “forgiving application of the standard *Lujan v. Defenders of Wildlife* standing analysis”); Watts & Wildermuth, *supra* note 10, at 1030–31 (“[Justice Stevens] blended the conventional *Lujan* analysis . . . with an argument . . . that the Court should base the standing analysis on the state’s sovereign interest at stake in the litigation.”).

148. See *Massachusetts*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) (“[T]he Court overlooks the fact that our cases cast significant doubt on a State’s standing to assert a quasi-sovereign interest—as opposed to a direct injury . . .”).

149. See Wildermuth, *supra* note 11, at 306 (“[W]hen a state brings suit based on a quasi-sovereign interest in the courts of *another* sovereign . . . it is not clear whether that state must satisfy *Lujan*-type requirements.”).

150. *Id.* (quoting Merrill, *supra* note 17, at 305). Professor Merrill believes that a state need not show standing when vindicating quasi-sovereign interests in its own courts, and does admit that the fact that much of the state standing jurisprudence predates the Court’s modern formulation of Article III standing “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.” Merrill, *supra* note 17, at 306. Against the backdrop of Justice Scalia’s recent standing jurisprudence and the fact that injury in fact likely would have been met in the older state standing cases, Professor Wildermuth concluded that, prior to *Massachusetts*, “Professor Merrill’s approach . . . was likely [to] be adopted.” Wildermuth, *supra* note 11, at 307.

151. Merrill, *supra* note 17, at 306 (attempting to reconcile standing requirements for states suing as *parents patriae*).

152. See Wildermuth, *supra* note 11, at 313–14 (noting sovereign interest cases rarely discuss three-part *Lujan* analysis, and when they do, “[t]hose discussions . . . make it hard to imagine a situation in which . . . the *Lujan* requirements would *not* be satisfied”).

The *Massachusetts* state plaintiffs were positioned to assert injuries to sovereign,¹⁵³ quasi-sovereign,¹⁵⁴ and proprietary interests.¹⁵⁵ Added to the mix was the principle of relaxed standing in statutory procedural rights cases rooted in the famed “footnote seven” of Justice Scalia’s *Lujan* opinion.¹⁵⁶ According to the leading interpretation, Justice Stevens loosely weighed these factors with a wan invocation of the *Lujan* standards to find standing for the Commonwealth of Massachusetts.¹⁵⁷ This “blended”¹⁵⁸ standing analysis has been received with both cheers and jeers. Some have endorsed the Court’s opinion as an incorporation of Professor Merrill’s conclusion.¹⁵⁹ Others, picking up on the dissent of

153. See *Massachusetts*, 127 S. Ct. at 1454 (“[I]n some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”); Metzger, *supra* note 115, at 2038 (noting other state plaintiffs in *Massachusetts* could claim that protecting efficacy of statutes regulating GHGs from preemption by ineffectively implemented federal statute constituted sovereign interest); Wildermuth, *supra* note 11, at 318–20 (same).

154. See *Massachusetts*, 127 S. Ct. at 1454 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) for discussion of injury to quasi-sovereign interest). The preservation of a state’s coastline, while superficially a proprietary interest, has been classified as a quasi-sovereign interest by many lower courts and commentators. See Mank, *Should States*, *supra* note 10, at 1758 (“Massachusetts’[s] interest in protecting its coastline affects the welfare of a large number of its citizens and, therefore, is an appropriate quasi-sovereign interest.”); *id.* at 1762 n.348 (listing lower court cases declaring proposition that coastal property constitutes natural resource and thus quasi-sovereign interest of state). These cases considering coastal property a natural resource seem to mitigate the criticism of Justice Stevens advanced by some that a focus on the coastal property loss should have precluded any special consideration of the state’s sovereignty in the standing analysis. See, e.g., Cass, *supra* note 107, at 78 (advancing criticism that loss of coastal property is injury to pure proprietary interest).

155. See *Massachusetts*, 127 S. Ct. at 1454 (“Massachusetts does in fact own a great deal of the ‘territory to be affected . . .’”).

156. *Id.* at 1453; Mank, *Should States*, *supra* note 10, at 1719 (“[T]he *Massachusetts* Court treated footnote seven as binding precedent.”). For discussion of the possible extent of footnote seven’s reduction of the immediacy and redressibility requirements, see generally *id.* at 1716–18.

157. *Massachusetts*, 127 S. Ct. at 1454–55 (“Given that procedural right [of the Clean Air Act’s citizen suit provision] and Massachusetts’[s] stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our [traditional *Lujan*] standing analysis.”). This depiction of the standing analysis as rough-hewn is fortified by Justice Stevens’s choice of quotation from *Baker* as to the “gist” of standing. *Id.* at 1453 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

158. Watts & Wildermuth, *supra* note 10, at 2.

159. See *id.* at 11 (“[E]ven though the Court’s approach to standing came with the unexpected creation of a *Lujan*-lite standard, we agree with the Court’s adoption of Professor Merrill’s suggestion with respect to the assertion of quasi-sovereign interests by states in federal courts.”); see also Mank, *Should States*, *supra* note 10, at 1708 (“[T]he *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.”); Stevenson, *supra* note 11, at 73–74 (“The Supreme Court created a new standing rule in *Massachusetts v. EPA*. This ‘special solicitude’ rule gives states a favored status when bringing suits against federal administrative agencies.”).

the Chief Justice, have been critical of the opinion, decrying it as an unjustified weakening of standing doctrine.¹⁶⁰

Under this reading, the lesson for future plaintiffs concerned with establishing standing appears quite limited. State plaintiffs seeking to vindicate quasi-sovereign interests must still satisfy the *Lujan* analysis; however they may anticipate forgiving treatment as to the probabilities and thresholds involved.¹⁶¹ Alternatively, if Justice Stevens's concern for the sovereignty of state plaintiffs is taken more seriously, then this explanation is deficient. Moreover, if we decline the easy explanations founded on Justice Kennedy's role or politics, then we must consider Justice Stevens's invocation of special solicitude for states in its proper context alongside the Court's state standing jurisprudence. Part II.C supplies this explanation.

160. See, e.g., *Massachusetts*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting) (stating “*parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a ‘quasi-sovereign interest’ ‘*apart* from the interests of particular parties,’” and do not replace traditional requirements (emphasis added) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982))). Thus, the Chief Justice appears to endorse the strong version of Professor Merrill’s position. It has been noted that such a standard would effectively eliminate any incentive for states to litigate their quasi-sovereign rights however. See Wildermuth, *supra* note 11, at 307 (questioning why state would pursue quasi-sovereign interest if it would be forced to demonstrate injury in fact based on concrete interests of itself or its citizens). Professor Wildermuth goes on to note, however, that “one benefit of [relaxed Article III inquiry spurred by special solicitude] is that it gives a state an incentive to assert a quasi-sovereign interest,” showing that this interpretation of *Massachusetts* would not suffer the practical incentive problem she attaches to the strong version of Merrill’s theory. *Id.* at 316; see also Adler, *supra* note 106, at 66 (“The *Mass. v. EPA* court [sic] was not simply ‘solicitous’ of states. It weakened the traditional requirements for Article III standing as well.”).

161. See Wells et al., *supra* note 132, at 39 (“Justice Stevens applied the usual [*Lujan*] tests in this case. It appears, then, that he meant to say only that a state may establish injury, causation, and redressibility more easily than can private litigants.”); Adler, *supra* note 106, at 64 (“It may herald in a new era of state-sponsored litigation, environmental standing, and statutory interpretation—and yet still do little to cool down a warming planet.”); Stevenson, *supra* note 11, at 73–74 (“This ‘special solicitude’ rule gives states a favored status when bringing suits against federal administrative agencies.”); Watts & Wildermuth, *supra* note 10, at 17 (“States are left in a relatively powerful position vis-à-vis federal agencies in terms of their ability . . . to file suits against agencies . . .”). At the same time, *Massachusetts* could be easily distinguished on various grounds. See, e.g., Cass, *supra* note 107, at 84 (“While the appearance of doing something out of keeping with the broad fabric of the law for one case and one set of interests only is never a good thing, that is the best possible legacy for *Mass. v. EPA*.”); Stevenson, *supra* note 11, at 32 (offering distinction for cases outside CAA’s cooperative federalism structure); Wildermuth, *supra* note 11, at 317 (“[T]he decision might be chalked up to confusion about the interest at stake and therefore will be of limited applicability.”).

For a discussion of the opinion’s effects on litigation led by interest groups, see generally Stevenson, *supra* note 11, at 50–51 (“Activist groups . . . may find that they have a diminished role for litigation against federal agencies in light of the special solicitude rule.”). But see Morriss, *supra* note 107, at 214 (“[B]y making it easier for states and interest groups to push the regulatory state to expand through the relaxation of the requirements for standing[], *Massachusetts v. EPA* is a major step away from limited government.” (emphasis added)).

C. *States' Standing: Obfuscated but Obvious*

Driven by an emphasis on adversarialism, Justice Stevens did not amalgamate or confuse the analysis of the multiple types of interests forwarded by the state plaintiffs. Instead, he examined them independently and cumulatively. Each portion of his opinion analyzed the same injury, but focused, in turn, on distinct capacities of the state.¹⁶² Taken together, the quasi-sovereign and proprietary interests provided Massachusetts with a sufficient “‘stake in the outcome of the controversy as to assure . . . concrete adverseness’”¹⁶³ Part II.C of this Note advances this interpretation of *Massachusetts* by closely focusing on the language and structure of Justice Stevens’s opinion.

Justice Stevens explicitly stated that the proprietary and quasi-sovereign interests point separately but harmoniously to a finding of standing:¹⁶⁴ “That 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.”¹⁶⁵ *Massachusetts*, much like *Tennessee Copper*, treated damage to state-owned property as surplus to a *parens patriae* action, unnecessary to gain entrance to the federal courtroom.¹⁶⁶ The

162. This approach—to discern separate standing analyses for Massachusetts’s quasi-sovereign and proprietary interests at stake—is not wholly novel. See Wells et al., *supra* note 132, at 38 (querying of students: “Wouldn’t it make more sense to say that a state’s quasi-sovereign interests . . . substitute for the personal interests that individuals would need to obtain standing on their own? Isn’t that why quasi-sovereign interests are required for a *parens patriae* suit—because ordinary Article III requirements for private suits are not?”). Professor Cannon also implies this doctrinal discreteness in his analysis. See Cannon, *supra* note 104, at 57 (“There are several things going on in Justice Stevens’s standing analysis, including special solicitude for Massachusetts’[s] standing as a sovereign State, but I want to focus here on the Court’s assessment of Massachusetts’[s] standing under the standard three-part test.”).

163. *Massachusetts*, 127 S. Ct. at 1453 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

164. For a critical reading of the Court’s cumulative approach, see Mank, *Should States*, *supra* note 10, at 1747 (“The majority appears to have it both ways: The Court argued that the petitioners met the three-part standing test, but also suggested that . . . Massachusetts as a state will receive the benefit of [any] doubt[s].”). But see Watts & Wildermuth, *supra* note 10, at 7 (“[O]ne might suggest that once Massachusetts asserted a quasi-sovereign interest, it did not need to demonstrate that it satisfied the *Lujan* requirements. The fact that the Court turned to the *Lujan* analysis after its discussion of the interest at stake, however, seems to foreclose that option.”). This “foreclosure” argument is not compelling, however, if it is recognized that Stevens does not view the standing inquiry to be about a clear-cut test, but rather as turning on the “gist” of adversarialism.

165. *Massachusetts*, 127 S. Ct. at 1454 (emphasis added) (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

166. Compare *Massachusetts*, 127 S. Ct. at 1454 (“That 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.”), with *Tennessee Copper*, 206 U.S. at 237 (“The alleged damage to the State as a private owner is merely a makeweight”).

Court has long interpreted *Tennessee Copper* as rendering mere “make-weight,” any “injury to the State as proprietor” when considering justiciability in *parens patriae* actions.¹⁶⁷ Moreover, the Court in *Tennessee Copper* also recognized that proprietary interests could be examined for purposes of evaluating justiciability alongside interests related to sovereignty, though Justice Holmes found the quasi-sovereign interest sufficient for purposes of invoking federal jurisdiction.¹⁶⁸

The structure of Justice Stevens’s opinion reveals the doctrinal separation between *parens patriae* and *Lujan* standing.¹⁶⁹ Stevens anchored his execution of the *Lujan* test in standing case law and quarantined that analysis from his state standing rationale.¹⁷⁰ Notably, the first citation in his *Lujan* analysis was to *Akins*, firmly placing *Massachusetts* alongside the repudiation of the particularity requirement announced by the *Lujan* plurality.¹⁷¹ None of the cases Stevens relied upon in this section involved state plaintiffs, suggesting that statehood did not color the traditional analysis. If Stevens believed that statehood altered the *Lujan* analysis, he would have had reason to include precedent applying the traditional analysis to states; he did not. Finally, in summarizing his application of the traditional framework, Stevens did not mention statehood—he merely reiterated the satisfaction of the *Lujan* elements and noted other cases dealing with potentially catastrophic but probabilistic injuries.¹⁷²

In his express terms, choice of authority, and structure, Stevens offered complementary and independent routes to standing for the Commonwealth of Massachusetts. Since it is clear that state standing is more than a lens through which a traditional standing analysis is performed, attention must turn back to the project undertaken by the Court

167. *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450 (1945).

168. *Tennessee Copper*, 206 U.S. at 237 (“[W]e may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads.”). In addition, Professor Wildermuth admits that in sovereign interest cases, courts often perform *Lujan* analyses that are “easily satisfied,” rendering such analyses unnecessary. Wildermuth, *supra* note 11, at 314.

169. Before moving into separate sections addressing each element of standing as identified in *Lujan*, Stevens paused to note that state standing arguments alone indicated that “petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process.” *Massachusetts*, 127 S. Ct. at 1455.

170. “In sum . . . the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. . . . That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing” *Id.* at 1458. Justice Stevens did not mention “special solicitude” or state standing in summarizing his *Lujan* analysis.

171. *Massachusetts*, 127 S. Ct. at 1456 (“That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’[s] interest in the outcome of this litigation.” (citing *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998))).

172. See, e.g., *id.* at 1458 n.23 (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996), for proposition that “[t]he more drastic the injury that government action makes more likely, the lesser the increment in probability to establish standing”).

at the turn of the twentieth century: determining what exactly qualifies as a sovereign or quasi-sovereign interest. First, Part II.D pauses to consider if, after *Massachusetts*, there is any meaningful difference for a federal court evaluating sovereign versus quasi-sovereign interests.

D. *Six or One-Half-Dozen: Sovereignty, Quasi-Sovereignty, and Getting into Court*

If standing requires a “gist” of adversarialism, and different types of interests may contribute separately but distinctly to the satisfaction of that standard, how meaningful is the distinction between categories of state interest? This Section shows that there is no doctrinal difference between sovereign and quasi-sovereign interests, and thus paves the way for a unified theory of *parens patriae* standing in Part III.

Recognizing that both sovereign and quasi-sovereign interests inhere in the notion of statehood, should the Court treat a state’s assertion of sovereign interests differently from quasi-sovereign interests? Justice Stevens, like many,¹⁷³ confused the two concepts throughout his opinion. He discussed the surrender of a state’s “sovereign prerogatives” when entering the Union, and “Massachusetts’[s] well-founded desire to preserve its sovereign territory today.”¹⁷⁴

It seems that the Justices’ converged conceptualization of the two began during oral arguments. Justice Ginsberg asked the plaintiffs’ advocate if it “make[s] a difference that [it is] States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn’t exercising it?”¹⁷⁵ Unpacking this question reveals reference to many of the themes discussed in this Note. Being “disarmed from regulating” represents a sovereign interest, whereas the latter half of the question describes a regulatory benefit of the federal system being withheld from the states’ citizens. Potential preemption of state regulation as a sovereign interest and the quasi-sovereign interest in assuring rightful benefits of the federal system are two sides of the same coin: When the federal government decides to regulate an issue, states have an interest—call it sovereign or quasi-sovereign—in the faithful execution thereof. Moreover, the phrase “regulatory responsibility [as] given to the Federal Government” invokes the argument that when states cede a degree of autonomy to the federal union, the federal government bears that power as a responsibility rather than a right.

173. Professor Metzger describes the interests vindicated as “sovereign” rather than quasi-sovereign, though she goes on to disclaim the interests averred as definitively *not* sovereign because they were not based on the state’s regulatory interest. Metzger, *supra* note 115, at 2037 (“Massachusetts was not claiming that its own regulatory efforts were unduly preempted by the EPA or that the federal government was exceeding its constitutional powers . . .”).

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

175. Transcript of Oral Argument at 16, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

Professors Watts and Wildermuth, reading *Alfred L. Snapp*, have remarked that the Court should “make the line between quasi-sovereign and sovereign interests more clear.”¹⁷⁶ However, under the reading of *Massachusetts* advanced in this Note, such clarification is functionally unnecessary. When either a sovereign or a quasi-sovereign interest is asserted, standing would be satisfied so long as the interests asserted are legitimate.¹⁷⁷

That a reasonable assertion of injury to a state’s sovereign *or* quasi-sovereign interest is sufficient for federal court jurisdiction is supported in the Court’s state standing jurisprudence. Justice Holmes was explicit in *Missouri v. Holland*, declaring that while a “State [may] also allege[] a pecuniary interest . . . it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State.”¹⁷⁸ Justice Brennan, concurring in *Alfred L. Snapp*, also acknowledged the point: “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.”¹⁷⁹

Both Justice Stevens’s opinion and the work of various legal scholars indicate that Massachusetts could have established a claim based upon either sovereign or quasi-sovereign interests.¹⁸⁰ Stevens suggested that Massachusetts’s sovereign regulatory power was implicated: “[I]n some

176. Watts & Wildermuth, *supra* note 10, at 1039.

177. This is consistent with ongoing lower court practice. See Wildermuth, *supra* note 11, at 313 (“In several post-*Lujan* cases, courts have noted the existence of a sovereign interest but did not cite to *Lujan* or its three factors when deciding that the state could bring the suit.”); see also *supra* note 166 and accompanying text. But see Mank, *Should States*, *supra* note 10, at 1779 (“The *Massachusetts* decision implicitly assumed that states must meet some standing requirements. 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.” (footnote omitted)). What Professor Mank overlooks, however, is that the *Massachusetts* Court was not confronted with a state’s asserting only sovereign or quasi-sovereign interests. Thus, it was not forced to decide whether such a claim was tenable.

178. 252 U.S. 416, 431 (1920).

179. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring). Again, though *Alfred L. Snapp* found standing to defend a quasi-sovereign right, Brennan speaks of “sovereign interest[s],” demonstrating the absence of a functional distinction between the two.

180. See Wildermuth, *supra* note 11, at 298–99 (explaining quasi-sovereign interests as discussed in *Alfred L. Snapp* as applied to *Massachusetts* as either “(1) a sovereign’s interest in protecting the health and well-being—‘both physical and economic’—of its citizens . . . [or] (2) a sovereign’s interest in seeing that its ‘residents are not excluded from the benefits that flow from participation in the federal [Clean Air Act] system’” (quoting *Alfred L. Snapp*, 458 U.S. at 607–08)). As a general matter, any injury to the health, welfare, safety, or environment of a state’s citizenry involves a sovereign or quasi-sovereign interest and provides proper grounds for a *parens patriae* suit. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tul. L. Rev. 859, 863 (2000) (“A state’s quasi-sovereign interests include its interest in its citizens’ health, safety, and welfare as well as in a healthful environment.”).

circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”¹⁸¹ In characterizing the quasi-sovereign interest at stake, Justice Stevens equated “Massachusetts’[s] well founded desire to preserve its sovereign territory today” with “Georgia’s ‘independent interest . . . in all the earth and air within its domain,’” as the basis for federal jurisdiction.¹⁸² Many lower courts have treated publicly owned coastal property as a natural resource, the protection of which constitutes a sovereign interest, suggesting that the seemingly proprietary interest in preserving a state’s real property can implicate both sovereign and quasi-sovereign interests.¹⁸³

The interchangeable use of the terms “sovereign” and “quasi-sovereign” and the conceivable application to identical injuries in fact strongly supports the conclusion that the two sets of interests should be treated identically in standing analyses. While this may merely exhibit linguistic confusion, and thus beg for clarification, the simplest reading is that interests implicating sovereignty at all are outside the ambit of *Lujan*.

If sovereign and quasi-sovereign interests are outside the *Lujan* requirements, but a state must still satisfy that test for proprietary interests, it is evident that it is not statehood itself, but rather the inherently collective nature of those interests protected by states that affords them “special solicitude” and excepts them from the traditional test. Economists and political scientists have also contemplated that which the courts describe as sovereign or quasi-sovereign, however they label such things “public goods.”

III. INTERESTS, INDIVIDUALS, AND LITIGATING THE PUBLIC GOOD(S)

This Part demonstrates that the Court has found states to have sovereign and quasi-sovereign rights when public goods are threatened. Finding sovereignty-based interests in the protection of public goods harmonizes the doctrinal lines discussed in Part I of this Note, the historical acceptance of litigable sovereignty claims, and the waning authority of Justice Scalia’s interpretation of standing to permit the litigation of widely shared grievances by state plaintiffs. Recognizing such a right provides a consistent reading of the Supreme Court’s state standing jurisprudence

181. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007). For a discussion of potential sovereign interest claims, see Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281, 299–303 (2005) (discussing potential Clean Air Act preemption of California’s regulatory efforts toward addressing greenhouse gas emissions); Yvonne Gross, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO₂ Cap-and-Trade Programs*, 28 T. Jefferson L. Rev. 205, 233 (2005) (“[T]hrough field preemption, such state-implemented cap-and-trade programs are unconstitutional as violative of the Supremacy Clause.”); Watts & Wildermuth, *supra* note 10, at 1037–39 (discussing California’s potential claim as to their special statutory status in terms of auto emission standards).

182. *Massachusetts*, 127 S. Ct. at 1454 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

183. See *supra* note 154.

culminating in *Massachusetts*,¹⁸⁴ ensures the federal government's faithful implementation of congressional purposes, and enhances the democratic accountability of our federal system.¹⁸⁵

Part III.A explicates the economic idea of public goods and argues that their provision is a fundamental purpose of government. Part III.B shows that the types of injuries litigated as sovereign or quasi-sovereign are public goods and that the Court has permitted this litigation despite the fact that these injuries would likely fail the injury-in-fact requirement applied to individual or associational plaintiffs. Part III.C addresses the Court's decision in *Massachusetts v. Mellon*,¹⁸⁶ and attempts to define the "public" enjoying a particular good to identify the legal interest at stake in the context of litigation between two sovereigns—the state and federal governments—that are each charged with the protection of the same citizens. Part III aims to show that a rule permitting states to litigate sovereign or quasi-sovereign interests is theoretically justified by their sovereign role as protectors of public goods.

A. *Public Goods and Private Incentives*

A public good is nonrivalrous and nonexcludable. "Nonrivalrous" consumption indicates that one person's use of a resource does not preclude or reduce the use of that resource by others. "Nonexcludability" refers to the idea that the costs of preventing someone from using or consuming the resource effectively preclude such exclusion.¹⁸⁷ One example of a public good is national defense;¹⁸⁸ police and lighthouse services are other examples.¹⁸⁹

184. As understood in this Note, *supra* Part II.C.

185. See Stevenson, *supra* note 11, at 12 ("[O]ne could see [*Massachusetts's* special solicitude] as another democratic outlet, a new source of democratic accountability for unelected officials in federal agencies.").

186. 262 U.S. 447 (1923).

187. Charles D. Kolstad, *Environmental Economics* 78–81 (2000); see also Geoffrey Heal, *New Strategies for the Provision of Global Public Goods*, in *Global Public Goods* 220, 220–21 (Inge Kaul et al. eds., 1999) (listing "law and order, defense, protection from extreme weather, essential social and economic infrastructure" as examples of public goods).

188. Karl E. Case & Ray C. Fair, *Principles of Economics* 329 (6th ed. 2003).

189. Not everything provided by the government is a public good. Health services and education, though publicly provided (at least to some arguable extent) in the United States, are, by definition, *not* public goods. See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 16 (1971) ("There is no suggestion . . . that states . . . provide only public or collective goods."). Under the approach recommended by this Note, states would not be able to assert quasi-sovereign interests when statutes in these policy areas are unsatisfactorily executed. When healthcare or education is maladministered, individuals have immediate and effective incentives to defend their own interests, and as such do not need the paternalism of *parens patriae*.

Relevant to *Massachusetts*, many economists have described a stable climate as a public good,¹⁹⁰ and it is intuitive to understand the enjoyment of a stable climate as nonrival and nonexcludable.¹⁹¹ Economists also classify an operable system of law—which the Court considers a sovereign interest—as a public good.¹⁹² It is not rational for individuals to make personal expenditures to defend or further public goods due to the nonexcludability of their benefits; one bears the entire cost of their defense, but must share the resulting benefit.¹⁹³ Succinctly put, public

190. See, e.g., Kolstad, *supra* note 187, at 82 (“Greenhouse gases, leading to climate change, are shown as nonrival and nonexcludable. No one can easily be prevented from being subject to the global climate and any one person’s consumption of the global climate imposes no costs on others.”); Heal, *supra* note 187, at 222 (“[T]he concentration of carbon dioxide in the atmosphere is rather uniform around the world, and its atmospheric concentration is a global public good.”).

For an argument that the public good status of a stable climate counsels against the regulation of GHGs under the CAA, see Adler, *supra* note 106, at 75 (“[I]n the absence of cooperative efforts by the other users of the atmosphere, which is the world’s greatest common pool resource—applying the CAA’s specific requirements to greenhouse gases makes little sense.”); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Change Policies*, 155 U. Pa. L. Rev. 1961, 1966–67 (2007) (arguing that since no single State Implementation Plan under CAA could effectively achieve local standard for atmospheric concentration of carbon dioxide, regulation under CAA is legally inappropriate).

191. Some would argue that climate change does not affect us all equally and in the same manner, suggesting that it is not an injury to a public good. See Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report 9* (Robert T. Watson et al. eds., 2001), available at <http://www.ipcc.ch/pdf/climate-changes-2001/synthesis-spm/synthesis-spm-en.pdf> (on file with the *Columbia Law Review*) (noting that climate change will disproportionately harm lower income populations, particularly in tropical nations); Thomas C. Schelling, *What Makes Greenhouse Sense?*, 38 Ind. L. Rev. 581, 586 (2005) (“[M]ost, nearly all, of the adverse effects of likely climate change will accrue to the descendants of those living today in what we call ‘developing countries’ . . .”). While this argument is superficially attractive, it fails when simply inverted. The enjoyment of a stable climate is the freedom from uncertain and potentially catastrophic events, which we all share alike and in kind. The fact that the injury to a public good will harm individuals in a distinct manner does not alter its nature as a public good. Consider for a moment that individuals appreciate public goods—like a local park—to different degrees and so the deprivation of such goods would naturally affect different people in different ways. The variegated individual effects of an injury to a public good do not alter its definition as such.

192. Compare Olson, *supra* note 189, at 14 (identifying “the system of law and order generally” as public good), with *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1981) (identifying “easily . . . the power to create and enforce a legal code, both civil and criminal” as sovereign interest).

193. Olson, *supra* note 189, at 11–12 (discussing incentives and disincentives of individual industry actors to spend in furtherance of industry-wide necessities or benefits such as subsidies). This is tied into the “free rider” problem associated with public goods that describes how individuals may benefit from public goods without contributing to their provision, and thus have no economic incentive to contribute. *Id.* at 15 (“[T]hose who do not purchase or pay for any of the public or collective good cannot be excluded or kept from sharing in the consumption of the good . . .”). This incentive effect is also true when applied to associational groups often found as plaintiffs in environmental suits. Groups like the Sierra Club or the Natural Resources Defense Council may demonstrate their interest in such public goods through litigation and other expenditures, but it is not,

goods “must be available to everyone if they are available to anyone.”¹⁹⁴ A “public good,” then, refers to precisely the sorts of interests tagged as “sovereign” or “quasi-sovereign” by the Court in *Alfred L. Snapp*,¹⁹⁵ and as a discrete state interest in the advancement of the public interest in *Tennessee Cooper*.¹⁹⁶

This is the analytical rub: *Parens patriae* suits require a connection to the states’ residents’ interests; however, the doctrine does not permit a state to merely adopt the interests of some subset of its citizens.¹⁹⁷ The theoretical relationship between public goods and the purpose of government provides a neat answer. As Professor Mancur Olson put it, “[a] state¹⁹⁸ is first of all an organization that provides public goods for its members, the citizens.”¹⁹⁹ His canonical work, *The Logic of Collective*

as per Olson’s theory or Garret Hardin’s notion of a tragedy of the commons, economically rational for them to do so because they cannot prevent free-riding nor ensure cooperation from others who enjoy or threaten the particular public good in question.

194. *Id.* at 14.

195. See *supra* notes 55, 60–66 and accompanying text.

196. See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (finding that, in its capacity as quasi-sovereign, state “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain”); *supra* note 46 and accompanying text.

197. See Wildermuth, *supra* note 11, at 302 (“It is therefore doubtful that the Court would embrace a test that permits a state to sue because it is unlikely that individuals would bring suit. Instead, the Court will probably continue to view this as a factor to consider”); see also Mank, *Should States*, *supra* note 10, at 1757 (“A state that is ‘only a nominal party without a real interest of its own’ does ‘not have standing under the *parens patriae* doctrine.’”). The problem is put nicely by Professor Wildermuth: “[B]ecause the state’s interest must be tied to an injury to its residents, one might rightly wonder whether this category is necessary. One assumes that individual residents could pursue these claims on their own. It therefore seems redundant to permit a state to bring these claims on their behalf.” Wildermuth, *supra* note 11, at 299. However, the incentive-related characteristics of public goods, discussed *supra* note 193 and accompanying text, suggest that individuals would not bring such suits on their own behalf. Moreover, “[a]rguably, the very point of *parens patriae* litigation is that states can (and must) proceed on the basis of ‘generalized grievances’—the very kinds of interests that typically are insufficient to warrant suits by private individuals.” Wells et al., *supra* note 132, at 39.

It has also been noted that class action suits share this incentive-aggregating quality. See generally Wildermuth, *supra* note 11, at 307 (discussing state standing where residents are unlikely to bring suit individually and alternative use of class actions in such instances); Comment, *State Standing to Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine*, 125 U. Pa. L. Rev. 1069, 1103–09 (1977) (comparing *parens patriae* standing with class action suits). However, the process of class formation in such suits and the potential for there to be truly public goods—i.e., those shared by the entire citizenry—would preclude the use of a class action in certain circumstances, such as climate change injuries.

198. Although Olson invokes the term “state” outside the U.S. legal context to refer to any sovereign government, this does not diminish this proposition as applied to federal states. Olson, *supra* note 189, at 13.

199. *Id.* at 15; see also Case & Fair, *supra* note 188, at 330 (“When members of society get together to form a government, they do so to provide themselves with goods and services that will not be provided if they act separately.”); Heal, *supra* note 187, at 220–21 (noting that “[t]raditionally it has been assumed that public goods . . . should be provided

Action, forwards the thesis that social organizations—exemplified by political sovereigns—provide public goods because they are formed to advance interests shared by their constituents.²⁰⁰ Public goods, such as an operable system of law or clean environment, can only be provided by a government with coercive power and the capacity to force cooperation when individual interests would direct actors otherwise.²⁰¹

Massachusetts, viewed through this understanding of state standing as a method to enforce the delivery of a public good, could be used by state litigants to sue in furtherance of other public goods provided by federal statutory or constitutional mandate. For example, though taxpayer suits to challenge the dispersal of federal funding have been roundly and repeatedly rejected based on particularity of injury,²⁰² a state could allege that the improper execution of the tax code denies its citizens the benefit of the federal system. Without pausing to consider separation of powers rebuttals, it is also conceivable that state suits questioning executive compliance with national security statutes may harness this theory. Executive implementation of other environmental statutes, such as the Clean Water Act, or the management of public lands, could also be more susceptible to state-sponsored litigation under this theory.

The public goods explanation of state standing presented in this Note could be employed by courts in evaluating these potential cases. When a state sues a federal agency alleging a failure to properly administer a statute, scrutiny of some tangential traditional interest would be unnecessary. Rather, the state would plead an injury to a quasi-sovereign interest, based on the individual interests of its citizens. Using the *parens patriae* case law and the theoretic lens offered by this Note, a court would accept such a pleading as satisfying standing when, as in the precedents

by the public sector for the public as a whole,” but problematizing this notion in context of public goods threatened or produced by private decision makers).

200. Olson, *supra* note 189, at 7 (describing one central purpose of all organizations as furtherance of their constituents’ *common* interests); *id.* at 15 (“The very fact that a goal or purpose is *common* to a group means that no one in the group is excluded from the benefit or satisfaction brought about by its achievement.”). Importantly, Olson does not assume that the interests advanced are shared *only* by the group’s members.

201. Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1245 (1968) (“[T]he air and waters surrounding us cannot readily be fenced, and so the tragedy of the commons as a cesspool must be prevented by different means, by coercive laws or taxing devices that make it cheaper for the polluter to treat his pollutants than to discharge them untreated.”). Professor Olson notes that states must resort to coercion, in the form of taxes, to finance the provision of such goods, because rational individuals have no incentive to make expenditures toward public goods in the absence of social organizations. Olson, *supra* note 189, at 13.

202. See, e.g., *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (denying standing because plaintiff had failed to allege that “as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute”); *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968) (outlining requirement of “nexus” between statute attacked and particular injury to taxpayer); *supra* note 92 and accompanying text (discussing particularized injury requirement and examining occasions on which courts have found standing in spite of diffuse harm).

discussed, the individual citizens' enjoyment of that which is protected under the statute is nonrivalrous and nonexcludable.

Recent scholarship advances the idea that climate change threatens a "global public good," which functions as a public good with respect to political sovereigns rather than individual consumers.²⁰³ Global public goods can only be preserved through collective action undertaken by political entities, which serve to aggregate individual interests.²⁰⁴ If an interest is concrete, but only creates incentives for its protection when aggregated, a social aggregate is the logical entity for its defense.²⁰⁵ Voluntary issue-advocacy organizations such as the Sierra Club or Friends of the Earth remain fundamentally tied to the interests of their members, a point reflected in the doctrine of associational standing.²⁰⁶ States, conversely, represent the entire set of inhabitants in a geographic area, and as such do not suffer from the problems of self-selection that might limit the perspective of advocacy organizations. Furthermore, democratically accountable officials are responsible for state litigation decisions,²⁰⁷ and these officials are responsive to the full range of interests present in the state's electorate.²⁰⁸ This democratic accountability goes a long way to

203. The idea of "global public goods," in the term's strongest form, refers to goods which "benefit[] all countries, people and generations," and do so discretely; that is, each country, apart from each citizenry, benefits. Inge Kaul et al., *Defining Global Public Goods*, in *Global Public Goods* 2, 9–13 (Inge Kaul et al. eds., 1999). For further explication of climate change as a global public good, see, e.g., Heal, *supra* note 187, at 235 (discussing need to make climate change treaty regime in interests of countries rather than in interests of individuals); William D. Nordhaus, *Global Public Goods and the Problem of Global Warming*, Annual Lecture to the Institut d'Economie Industrielle (IDEI) (June 14, 1999) (noting lack of political or economic mechanism to cope with threats to global public goods such as global warming and terrorism and need for collective action by political aggregates).

204. The *Massachusetts* standing decision may spur this sort of cooperative effort by fueling the recent trend of state attorneys general forming consortiums to advance issue litigation. Interestingly, such efforts may be subject to constitutional attacks based on the "Compact Clause." See Stevenson, *supra* note 11, at 47–50 (noting coordinated activity by attorneys general may violate Compact Clause prohibition on states making compacts with one another absent congressional consent).

205. Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 *Mich. L. Rev.* 733, 749 (1988) (arguing that when public good is threatened, social organization that aggregates interest in that good suffers distinct injury from that afflicting its members).

206. To establish associational standing, an organization must demonstrate that an individual member could meet the traditional Article III standing requirements. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1465 (2007) (Roberts, C.J., dissenting) ("[A]n association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements . . ."). Roberts would extend this rule to states suing *parens patriae*. *Id.*

207. State attorneys general are popularly elected in forty-three states. Stevenson, *supra* note 11, at 10.

208. For a superb exploration of the effects of *Massachusetts* upon state attorneys general, see generally Stevenson, *supra* note 11. See also Mank, *Should States*, *supra* note 10, at 1781–82 (noting additional efficiency benefit of having state attorney general file single lawsuit as opposed to myriad of suits filed by nongovernmental organizations). But

ward assuaging the concern that liberalized standing permits the use of the judiciary by private parties to hijack the democratic process when those parties are dissatisfied with its output.²⁰⁹

As a result, under this theory of public goods, the generalized grievance bar is inapposite to state plaintiffs,²¹⁰ because the widespread nature of such injuries is the precise characteristic that legitimizes state action aimed at their redress.²¹¹ Our federalist system of dual sovereigns thus provides a significant institutional boon. States, as social aggregates, experience the proper incentives to watchdog the provision of public goods by the federal government.²¹²

Understanding sovereign and quasi-sovereign interests as interests in public goods, it is appropriate to examine the tension between the injury-in-fact requirement of traditional standing and litigation in defense of those interests. It is important to recognize this tension because it demonstrates, in theory, that the application of the traditional standing inquiry to *parens patriae* claims is inapposite, just as Part II demonstrated this analysis is unnecessary as a matter of the Court's jurisprudence.

B. *Public Goods and Injury in Fact*

Professor Mank, in exploring the possibilities for standing to sue regarding climate change, inquired: "Since global warming potentially affects everyone in the world, does any *individual* have standing to sue the . . . [EPA] to force them to address climate change issues?"²¹³ Such framing led to a pre-*Massachusetts* conclusion that a particularized injury in fact, necessary to establish standing, would be prohibitively difficult to demonstrate.²¹⁴ However, this question is misdirected as applied to a

see *id.* at 1783 ("There is a danger that state attorneys general will file lawsuits for political reasons."); Comment, *supra* note 197, at 1099 ("The state's role as plaintiff not only lends its powerful legal arsenal and investigative resources to the pursuit of an adequate remedy but also renders an intangible 'respectability' to the lawsuit.").

209. See generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251, 1259–60 (1992) (linking broadening in standing doctrine to judicial intrusion into political decisionmaking in "surrogate political role" in cases in which it was "easy to assume political failure").

210. Evan Caminker, Note, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 386 n.225 (1989) (pointing to "political science literature" ignored by argument that generalized grievances are exclusive domain of political branches).

211. See Mank, *Should States*, *supra* note 10, at 1767 ("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.").

212. See Herman E. Daly & Joshua Farley, *Ecological Economics: Principles and Applications* 175 (2004) (demonstrating that political decisionmakers at varying levels of government experience differing incentives to act to protect public goods).

213. Mank, *Injury to All*, *supra* note 82, at 6 (emphasis added).

214. See *supra* note 106. But see Farber, *supra* note 100, at 1536 ("Information by its nature is a public good, equally accessible and usable by all once it has been made public. Nevertheless . . . a desire for the information is enough to create standing.").

public good. No *individual* is the appropriate plaintiff to litigate injuries to public goods.²¹⁵ Though public goods are enjoyed by individuals, tools to remedy injuries to public goods, such as criminal enforcement,²¹⁶ are lodged in political sovereigns because such injuries can only be effectively addressed with collective action and are at their most concrete in the aggregate.²¹⁷

Two further points are relevant to the concreteness of injuries to public goods. The first is jurisprudential. The Court has refused to permit state standing simply because individuals may have insufficient financial incentive to pursue redress in the courts themselves.²¹⁸ Some lower

215. Standing for voluntary association is precluded on the same basis because, according to associational standing jurisprudence, a litigating membership organization may only have standing if one of its members can demonstrate standing and it satisfies other additional requirements. See *supra* note 206 and accompanying text.

216. For the proposition that the enforcement of criminal codes is uncontroversially within the ambit of Article III justiciability, and therefore discrete injury in fact could not possibly be an unconditional requirement thereof, see generally Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 *Mich. L. Rev.* 2239 (1999); Merrill, *supra* note 17 at 300 (“In what sense can it be said that the government, in prosecuting a crime, is seeking to vindicate some injury in fact, or that a conviction will redress that injury, or that a crime (some crime at least, like victimless crime) is not a generalized grievance . . . ?”). But see Scalia, *supra* note 13, at 895 (“‘[C]oncrete injury’—an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action—is the indispensable prerequisite of standing.”). In the context of suits to preserve public goods, states do not allege a “mere breach of the social contract,” but rather a divergence from the constantly negotiated federalism with the national government. As President Woodrow Wilson once noted, “The question of the relation of the States to the federal government . . . cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive state of our political and economic development gives it a new aspect, makes it a new question.” Woodrow Wilson, *Constitutional Government in the United States* 173 (1908).

217. Interests in public goods are “concrete” only in the aggregate in the sense that though individuals perceive their diminution, they cannot effectively act upon them unilaterally, and the incentive to defend them is produced by and through cooperation. This is consonant with the Court’s requirement that “[a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). *Alfred L. Snapp* discussed quasi-sovereign interests in a state ensuring that its citizens enjoy the benefits flowing from their participation in the federal system. *Id.* at 611 (Brennan, J., concurring). The CAA, implemented in accordance with the letter of the law, could be viewed as just such a benefit. See Mank, *Should States*, *supra* note 10, at 1773 (asserting both enumerated quasi-sovereign interests in *Alfred L. Snapp* as basis for state suit against federal government for failure to properly enforce statute in *Massachusetts*); Metzger, *supra* note 115, at 2039 (noting “role that states can play in overseeing federal program administration” as potentially underlying Court’s finding of legitimate state interest in proper administration of regulatory statutes); Comment, *supra* note 197, at 1087 (“To say that the state has no interest in the proper functioning of [administrative agencies] is to ignore the role of the state itself in their creation and administration.”).

218. See *supra* note 197 and accompanying text; see also *Alfred L. Snapp*, 458 U.S. at 607 (“[M]ore must be alleged than injury to an identifiable group of individual residents . . .”).

courts, in applying *Alfred L. Snapp* to state consumer fraud suits, have found standing based on injury to quasi-sovereign interests when the state plaintiff demonstrates offense to state policy in addition to the economic loss caused by frauds against individual consumers.²¹⁹ In cases involving only residents' physical well-being, however, states have successfully claimed injuries to quasi-sovereign interests.²²⁰ The *Alfred L. Snapp* Court justified state standing to protect its residents' physical well-being in two instructive ways. Such injuries are often "indirect" and within the regulatory powers of the state.²²¹ By instructing courts to pay attention to the "indirect effects" of threats to the citizenry's physical health, the Court acknowledged the practical reality that threats to health are often difficult to observe and establish as damaging in court for individual litigants. So the Court has implicitly agreed that injuries of unclear concreteness on the individual level may achieve sufficient concreteness when advanced in the aggregate.

Second, Professor Sunstein describes the application of traditional standing requirements to regulatory programs as inherently imbalanced. Because regulated industries will always be able to point to direct economic costs incurred in response to regulation, they will expeditiously be able to assert injury in fact.²²² The intended benefit of regulation, though, is likely to be less monetizable and less immediately apparent, which poses difficulties to arguments that such injuries are concrete. Moreover, particularity may also be onerous to establish because the intended beneficiary is often the entire public. The interplay between the requirements of standing and the structure of regulatory statutes creates "[a] system in which regulatory harms [a]re not judicially cognizable[,] . . . imposing a perverse set of incentives on administrative actors by inclining them against regulatory implementation when it is legally required."²²³ So bureaucrats may hesitate to aggressively regulate for fear of readily available industry challenges, while reciprocal lawsuits brought by those seeking more robust regulation are prevented from balancing the incentives of agency policymakers. Further, regulated entities typically have serious resource advantages over those who would represent

219. See Wildermuth, *supra* note 11, at 303–04 (canvassing lower court decisions applying *Alfred L. Snapp*).

220. See *id.* at 299–304 (discussing suits aimed at "protecting the health and well-being of [states'] residents"). In finding state standing in one economic well-being case, *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981), the Court recognized the unlikelihood of individuals' challenging a tax because its minimal effect on each citizen would be a negligible incentive as compared to the expense of litigation. *Maryland* suggests that de minimis generalized economic harms may also be accepted as the basis for *parens patriae* suits. See Wildermuth, *supra* note 11, at 300 (citing "relatively small" claims as reason for allowing states to sue as *parens patriae* (quoting *Maryland*, 451 U.S. at 739) (internal quotation marks omitted)).

221. *Alfred L. Snapp*, 458 U.S. at 607.

222. Sunstein, *supra* note 76, at 1463.

223. *Id.*

the often unorganized general public in these matters, which further exacerbates this imbalance. This asymmetry undermines Congress's purposes in passing regulatory statutes because it leads to underenforcement or nonenforcement of enacted statutes.²²⁴ States, however, may draw upon greater financial and political resources than individuals or public interest organizations.²²⁵ *Parens patriae* suits provide a useful and appropriate doctrinal adjustment to permit the legal defense of public interests in the supply of statutorily protected public goods.

C. Defining the "Public" that Enjoys a "Public Good"

How do you define the "public" that collectively enjoys a certain "public good"? This goes to the heart of the purpose of the doctrine of standing as explicated by Justice Stevens. If standing is about assuring adversarialism, then the scope of the "public" related to a given "good" tells us something about the aggregating sovereign's interest in defending it.

Before the rise of the modern administrative state, *Massachusetts v. Mellon* announced that, with regard to issues of citizens' "relations with the Federal Government . . . it is the United States, and not the State, which represents them as *parens patriae*."²²⁶ *Mellon* as an absolute bar to *parens patriae* suits against the federal government has long been

224. See *id.* One could argue that Congress, as a political matter, might appreciate underenforcement of regulatory statutes based on public choice theory. In such a system, congresspeople are able to score political points through passing broadly popular expressions of certain values without actually restricting the activities of the regulated industries that may provide campaign contributions or other political capital. That this cynical depiction may be accurate does not argue for judicial facilitation thereof through the structure of standing doctrine.

225. See Stevenson, *supra* note 11, at 50–51 (discussing various ways in which increased activity of states as public interest plaintiffs will change public interest litigation strategies and objectives).

226. 262 U.S. 447, 485–86 (1923). Professors Watts and Wildermuth have summarized the reasoning in *Mellon* usefully: A State should not be able to invoke *parens patriae* against the federal government "because the federal government is not only charged with the same obligation to protect those residents, but it typically stands in a superior position to that of the states to do so." Watts & Wildermuth, *supra* note 10, at 5; see also Gary Igal Strausberg, *The Standing of a State as Parens Patriae to Sue the Federal Government*, 35 Fed. B.J. 1, 14 (1976) ("The underlying assumption appears to be that since the right was created by federal law, the Federal Government will enforce it and to permit a state to maintain a *parens patriae* suit would bring into conflict state power in relation to federal power."). Professor Mank argues that

[i]n theory, the *Mellon* decision is correct[,] the federal government ought to act as *parens patriae* on behalf of each state's citizens to secure their rights under federal laws . . . [Thus,] 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.

Mank, *Should States*, *supra* note 10, at 1771–72.

disputed among academics²²⁷ and received some attention in the *Massachusetts* opinions.²²⁸ However, after *Massachusetts*, it seems that *Mellon* does not bar *parens patriae* suits based upon the improper implementation of federal statutes.²²⁹ The *Mellon* Court expressly declared that it was “called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] *not quasi-sovereign rights actually invaded or threatened.*”²³⁰ Thus, the *Massachusetts* majority read *Mellon* as a prohibition against the Court’s adjudication of the sort of declarative and abstract suit exemplified by a state facial challenge of the constitutionality of a federal law.²³¹

The *Mellon* bar suggests an important question for this public goods theory of state standing: Is *parens patriae* standing affected when the public good affects a population broader than that of the state?

227. See, e.g., Comment, *supra* note 197, at 1084–93 (attacking broad reading of *Mellon* bar as “inconsistent with the present scope of the federal-state relationship” and outlining “decline in the importance of the *Mellon* doctrine as an obstacle to state standing to challenge federal agency action”). But see Wildermuth, *supra* note 11, at 308–09 (describing “consistent approach” in lower courts, where “*Mellon* was understood to bar states from suing the federal government when they asserted a quasi-sovereign interest unless the bar was waived by Congress in legislation”). *Alfred L. Snapp* seemed to embrace an inclusive reading of the *Mellon* bar, prohibiting any *parens patriae* suit against the federal government. See *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.”). A narrow reading of *Mellon* would not reach suits seeking to compel proper executive enforcement of congressional statutes, because in those cases “the Federal Government is not acting as the ultimate protector of the citizens. It is the one causing the harm.” Strausberg, *supra* note 226, at 15.

228. Chief Justice Roberts pointed to *Mellon* in exasperation, and without much explanation, for the proposition that a state cannot sue the federal government to protect its citizens from the effect of federal law. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting). Justice Stevens was untroubled by *Mellon* because “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).” *Id.* at 1455 n.17 (majority opinion) (internal quotation marks omitted). Note that Justice Stevens believed that a state *has*—not *may have*—standing to assert this type of sovereignty-based right under federal law in federal courts, which is another linguistic clue favoring the interpretation advanced by this Note.

229. See *Massachusetts*, 127 S. Ct. at 1455 n.17 (“*Mellon* itself disavowed any such broad reading when it noted that the Court had been ‘called upon to adjudicate . . . *not quasi sovereign rights actually invaded or threatened.*’” (quoting *Mellon*, 262 U.S. at 484–85)); see also Mank, *Should States*, *supra* note 10, at 1759 (“[T]he second type of *parens patriae* [presented in *Alfred L. Snapp*] 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 [itself] did not allow such suits.”). But see Wildermuth, *supra* note 11, at 320–21 (concluding that litigation of quasi-sovereign interests “might be subject to a *Mellon*-type bar in some circumstances but *Massachusetts* left this unclear”).

230. *Mellon*, 262 U.S. at 484–85 (emphasis added), quoted in *Massachusetts*, 127 S. Ct. at 1455 n.17.

231. But see Watts & Wildermuth, *supra* note 10, at 1033–34 (arguing that Court had “leaned” toward prohibiting *parens patriae* suits against federal government based upon injuries to quasi-sovereign interests in *Mellon*).

Massachusetts was not motivated by the protection of the entire set of individuals who constitute the “public” for which a stable climate is a “good.”²³² For that matter, neither is the federal government, because global warming is a *global* problem. However, this does not stop the federal government or the states from attempting to address this and other global public goods through any tool at their disposal: statutes, regulations, treaties, or lawsuits. Because the standing inquiry is focused on a plaintiff’s capacity for robust adversarial representation of the interests at stake, the fact that other sovereigns share that interest is immaterial. EPA’s refusal to regulate mobile sources of GHGs also threatens the health and well-being of Maine’s residents,²³³ but that does not make the threat any less concrete to the citizens of Massachusetts. This reformulates Justice Scalia’s self-defeating burnt-arms argument in *Akins* but now on an aggregate level: Though the citizens of two states may enjoy the same public good, each group—as a group²³⁴—perceives an injury upon its depletion.²³⁵ *Massachusetts*, then, synthesizes the *Akins* focus on concreteness of injury in fact and the interest-aggregating function of *parens patriae* standing.

In contrast, it could be argued that when a public good relates to a population broader than that of a particular state, the state is not an appropriate advocate because it does not aggregate the entire set of interests of affected individuals. In the context of evaluating state and even national policy approaches to global warming, several legal scholars have argued that—because the costs of regulating GHG emissions are fully internalized within the regulatory jurisdiction but benefits are not—unilateral regulation of GHGs is economically irrational and inefficient.²³⁶ Admitting that “local abatement actions pose local costs, yet deliver essentially no local climate benefits,”²³⁷ does not dilute a locality’s capac-

232. This point was recognized by the Court: “Congress has ordered EPA to protect Massachusetts (among others)” *Massachusetts*, 127 S. Ct. at 1454.

233. Alternatively, it could be cast as denying them the benefit of the federal CAA system.

234. For a discussion of a stable climate as a global public good, presenting itself to individual political entities as a public good, see *supra* notes 203–205 and accompanying text.

235. This draws directly upon the reading of *Tennessee Copper* as reformulating a public concern, say in clean air, into a concrete, litigable quasi-sovereign interest. See *supra* note 46 and accompanying text.

236. There is robust legal scholarship on the “Matching Principle,” which posits that the optimal jurisdiction for environmental regulation is that which fully encompasses all negative externalities at issue. See generally, Henry N. Butler & Jonathan R. Macey, Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority, 14 *Yale L. & Pol’y Rev.* 23, 25, 14 *Yale J. on Reg.* 23, 25 (1996) (Joint Symposium Issue) (“The Matching Principle suggests that, in general, the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.”). In the case of a global public good such as climate change, the Matching Principle would require global regulation.

237. Weiner, *supra* note 190, at 1965; see also Daniel C. Esty, Toward Optimal Environmental Governance, 74 *N.Y.U. L. Rev.* 1495, 1555 (1999) (“Falling back to

ity to serve as a representative and zealous advocate. That capacity is created by its denizens suffering local harms and not its relative ability to affect redress. The redressibility prong of the standing inquiry, it must be remembered, is concerned with the *court's* ability to remedy the injury, not with the plaintiff's ability to do so.

Although a political aggregate may not capture the entire population affected by a public good, the common injury—the loss of our enjoyment of a stable climate—has similar effects across the set of individuals enjoying it, rendering representative any aggregate with sufficient incentive to advance those interests. Some have argued that state regulation is theoretically unattractive because costs are localized while benefits are diffuse. However, that does not necessarily mean that state litigation to affect subglobal, i.e., national, regulation is inefficient from the state's perspective. Prosecution of one lawsuit, no matter how massive, is less costly than drastic regulation of GHGs, and it may outweigh even the modest share of any marginal increase in the protection of a stable climate affected by federal regulation under the CAA. This may be true even leaving aside potential domino benefits from such litigation, public choice incentives driving state attorneys general to file suit, or even the potential efficacy of unilateral domestic regulation.²³⁸ Thus, a state may make a perfectly logical decision that the costs of prosecuting litigation like *Massachusetts* have sufficient expected returns to assure robust advocacy.

The formal distinction between sovereign and quasi-sovereign interests may be momentarily resurrected in this context. The enforcement of legal codes and integrity of boundaries are definitively sovereign interests. These are public goods enjoyed exclusively by the state's citizenry by definition. Quasi-sovereign interests—whether they be the sort asserted in *Tennessee Copper*, *Alfred L. Snapp*, or *Massachusetts*—implicate not only a state's residents, but other individuals as well. Nothing in those cases declares that the *benefits* of the suit must be restricted to the state's citizens. Georgia and Tennessee residents alike could expect cleaner air in the wake of *Tennessee Copper*. Thus, while the two types of interests may be

national-scale intervention . . . invites free riding, holdouts, and inefficient spending of limited resources—and thus structural regulatory failure. At least from a theoretical viewpoint, inherently global problems demand concerted worldwide action.”); Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, 1997 U. Chi. Legal F. 293, 323 (“On the domestic level, even the most cost-effective greenhouse policy instrument will be desirable only if the national target it seeks to achieve is part of an accepted set of international mandates.”). But see Kristen H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 *Ecology L.Q.* 183, 189, 209 (2005) (describing authors' goal “to prevent the current lack of a truly comprehensive international climate treaty from being used as a rationale for chilling the efforts of subglobal governments to fill the void,” and arguing that interim subregional regulation is rational and efficient).

238. See generally Engel & Saleska, *supra* note 237, for an explication of these arguments as suggesting that domestic regulation of GHGs is both efficient and rational.

treated similarly by the Court, their formal distinction, demonstrated by this discussion of public goods, shows why standing to litigate quasi-sovereign interests is so difficult to analyze.

CONCLUSION

This Note sought to demonstrate that the standing decision in *Massachusetts v. EPA* was neither revolutionary nor cut from whole cloth, but rather a natural application of the Court's state standing jurisprudence to a modern statutory framework designed to secure public goods. *Massachusetts* demonstrates that sovereign and quasi-sovereign rights are not evaluated using the traditional Article III test, but may be viewed in concert with the application of that test to proprietary interests in order to assure adversarial representation.

Professor Joseph Sax, writing at the dawn of the modern American environmental movement, called for a "theory and mechanism for implementing enforceable *public* rights."²³⁹ The modern form of *parens patriae* standing does just that. It was the aim of this Note to explicate that doctrine and provide a theory in support of it. The economic idea of "public goods" demonstrates that there are some interests, shared by all, that only a social aggregate is capable of protecting. The Court has been explicating the same concept, though labeling it as "sovereign" or "quasi-sovereign" interests. Understanding the underlying truth—that under some circumstances injury to the aggregate is more concrete than the sum of injuries to its parts—is analytically useful and confers significant benefits upon our regulatory and federal nation.

It is appropriate to conclude with the Court's own words, almost 120 years old, which recapitulate well: "This prerogative of *parens patriae* is inherent in the supreme power of every State . . . [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity"²⁴⁰

239. Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* 135 (1971) (emphasis added).

240. *Mormon Church v. United States*, 136 U.S. 1, 57 (1890).