COMMENTS

SOVEREIGN EPHEMERA: STATE STANDING AGAINST THE FEDERAL GOVERNMENT FOR INJURIES TO QUASI-SOVEREIGN INTERESTS*

"The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."[1]

I. INTRODUCTION

Within weeks of the 2016 presidential election, Democratic attorneys general from several states signaled their intention to use the federal courts to litigate the deregulatory agenda at the center of the President-elect's campaign platform.[2] Such brash pronouncements would have been unthinkable a decade ago. If a state attempted to sue a federal agency for the enforcement or nonenforcement of its statutory duties, the case was not likely to have been heard on the merits.[3] Federal courts would deny subject matter jurisdiction on the grounds that states lacked standing, a doctrine jurists use to apply the courts' fundamental jurisdiction over "cases and controversies."[4] But in 2007, the Supreme Court issued an opinion in *Massachusetts v. EPA*[5] that broke new ground for state standing against the federal government, and made the threats of the state attorneys general real.[6] Only two weeks into President Trump's

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1. FTC v. Ruberoid Co., 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting).

2. Lawrence Hurley, *'First line of defense': Democratic States Vow to Fight Trump in Court*, REUTERS (Nov. 18, 2016, 6:09 AM), http://www.reuters.com/article/us-usa-trump-democratic-states-idUSKBN13D17M [http://perma.cc/KLC6-3BN4].

3. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 480 (1923); Pennsylvania v. Kleppe, 533 F.2d 668, 670–71 (D.C. Cir. 1976).

4. *See infra* Part II.B.

5. 549 U.S. 497 (2007).

6. *See infra* Part III.B.2.a.

tenure, attorneys general from the States of Washington and Minnesota successfully moved for a temporary restraining order to enjoin enforcement of a controversial executive order limiting immigration from seven Muslim-majority countries.[7] This well-publicized litigation stands at the vanguard of state actions against the federal government in a diversity of realms including education,[8] energy,[9] emissions,[10] and emoluments.[11]

The federal courts' constitutional Article III jurisdiction over cases and controversies initiated by states has traditionally been defined in the context of state actions against private actors or against other states.[12] With a few notable exceptions,[13] the question of state standing against the federal government effectively arose with the growth of public law and the expansion of federal administrative agencies.[14] In broad strokes, to be further elaborated below, the prevailing presumption has been against recognizing states' standing to sue the

7. *See* Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017); *see also* Aziz v. Trump, 231 F. Supp. 3d 23, 29, 33 (E.D. Va. 2017) (granting standing to Virginia to intervene in a similar suit against the executive order originally brought by a private plaintiff). Following the Ninth Circuit's decision in *Washington*, the Trump administration issued a revised executive order, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), that inspired a similar state-plaintiff action seeking a temporary restraining order on the revised executive order. *See* Hawaii v. Trump, 859 F.3d 741, 760 (9th Cir.), *cert. granted, stay granted in part sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017).

8. Complaint at 1–2, Massachusetts v. DeVos, No. 1:17-cv-01331 (D.D.C. July 6, 2017) (setting forth eighteen states' challenge to the Department of Education's rescission of final agency regulation known as "Borrower Defense Rule"); *see also* Stacy Cowley, *18 States Sue Betsy DeVos over Student Loan Protections*, N.Y. TIMES (July 6, 2017), http://www.nytimes.com/2017/07/06/business/dealbook/massachusetts-betsy-devos-lawsuit.html [http://perma.cc/FW4A-BZZG].

9. Complaint at 1, California v. Perry, No. 4:17-cv-03406 (N.D. Cal. June 13, 2017) (setting forth eleven states' challenge to Department of Energy's failure to publish final energy-efficiency standards for certain appliances); s*ee also* Claire Sasko, *Pa. Attorney General Sues Trump Admin over Lack of Energy Regulations*, PHILA. MAG. (June 16, 2017, 2:04 PM), http://www.phillymag.com/news/2017/06/16/pa-attorney-general-sues-trump-admin [http://perma.cc/FVF7-AYLG].

10. Letter from State Atty's Gen., to Adm'r E. Scott Pruitt, Envtl. Prot. Agency, Re: Midterm Evaluation of Emission Standards for Passenger Cars and Light Duty Trucks for Model Years 2022-25 (June 8, 2017) (describing the threat of attorneys general from twelve states to challenge mooted Environmental Protection Agency action to roll back emissions standards); *see also* Scott Dance, *Frosh, 12 Attorneys General Threaten to Sue EPA if Vehicle Emissions Standards Weakened*, BALT. SUN (June 9, 2017, 7:35 PM), http://www.baltimoresun.com/news/maryland/environment/bs-md-frosh-vehicle-emissions-20170609-story.html [http://perma.cc/VQN4-EGAX].

11. Complaint at 1–2, District of Columbia v. Trump, No. 8:17-cv-01596 (D. Md. June 12, 2017) (setting forth Maryland and the District of Columbia's suit against President Trump for violating the Emoluments Clause); *see also* Sharon LaFraniere, *Maryland and District of Columbia Sue Trump over His Businesses*, N.Y. TIMES (June 12, 2017), http://www.nytimes.com/2017/06/12/us/trump-lawsuit-private-businesses.html [http://perma.cc/LYL6-JS8L].

12. *See infra* Part II.D.

13. See *infra* Part II.D.3.a for a discussion of the Supreme Court's jurisdictional holdings in nineteenth-century cases regarding the sovereignty of the Indian nations and the sovereignty of states following the Civil War.

14. *See infra* notes 249–50 and accompanying text.

federal government,[15] either on the basis of federal supremacy[16] or on the basis of the political question doctrine.[17] Yet over the past century, a theory of state standing against the federal government has evolved around the nebulous doctrine of injuries to states' "quasi-sovereign" interests.[18] This quasi-sovereign interest doctrine culminates in the *Massachusetts* Court's opinion, where the State's quasi-sovereign interest is held to give rise to a "special solicitude" in standing analysis for the State's action against a federal agency.[19]

As noted by Justice Jackson in the epigraph, the prefix "quasi" often implies the failure of a classificatory scheme.[20] This failure spurs confusion, and this confusion spurs competing interpretations of, in this case, the constitutional authority of the federal judiciary to articulate divisions of power between the dual sovereignties that undergird our system of government. Scholars have settled upon three predominant theories to understand what the Court means by quasi-sovereign interests and how they impact an Article III standing analysis: a common law theory,[21] a theory based on the doctrine of parens patriae,[22] and a theory of constitutionally derived sovereignty interests.[23] This Comment sorts through these arguments and their legal histories in order to propose an interpretation that maintains legal consistency and precedent while basing the judiciary's Article III jurisdiction over state suits on sovereignty interests implicit in the Constitution.[24] Contrary to other scholars who favor a sovereignty argument related to a state's ability to make and enforce laws,[25] this Comment will limit justiciable quasi-sovereign interests to a state's sovereign interest in its territorial and jurisdictional integrity.[26] This interpretation, as argued below, provides a narrow enough reading of *Massachusetts* to stymie a vast expansion of state recourse to the federal courts to litigate policy differences with the federal administration, yet it still allows states the necessary opportunity to protect their interests in territorial integrity. As a foil upon which to apply this legal theory, this Comment turns to the Court's most recent encounter with the question, resulting in a split decision over the Fifth Circuit's holding in *Texas v. United States*.[27]

15. *See infra* Section II.
16. *See infra* Part II.C.2.
17. *See infra* Part II.D.3.a.
18. *See infra* Part II.D.4.
19. Massachusetts v. EPA, 549 U.S. 497, 520 (2007).
20. *See supra* note 1 and accompanying text.
21. *See infra* Part III.A.
22. *See infra* Part III.B.
23. *See infra* Part III.C.
24. *See infra* Part III.C.
25. *See infra* Part III.C.2.
26. *See infra* Part III.C.4.
27. 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

II. OVERVIEW

In Part II.A, this Overview will introduce the landmark decision in contemporary state standing, *Massachusetts v. EPA*.[28] In Part II.B, it will examine the establishment of the injury-in-fact test for Article III standing,[29] and the prudential limits established by the courts to limit standing in certain cases.[30] In Part II.C, it will frame the constitutional structure of dual sovereignty as it relates to Article III standing.[31] In Part II.D, it will address the legal and conceptual forms of state standing that, prior to *Massachusetts*, had been recognized by the courts, including common law interests,[32] parens patriae interests,[33] sovereignty interests,[34] and quasi-sovereign interests.[35] In Part II.E, it will consider the structural imperatives of both vertical and horizontal federalism in order to better frame the warp and woof that guide these arguments.[36] Finally, Part II.F will end with a brief review of *Texas v. United States*, which represents the Supreme Court's most recent encounter with this issue.[37]

A. Massachusetts v. EPA

Massachusetts v. EPA[38] is the most prominent recent Supreme Court decision that invokes quasi-sovereign interests as judiciable as asserted against the federal government.[39] At issue in *Massachusetts* was a question of administrative law addressing whether the Environmental Protection Agency (EPA) was within the scope of its delegated authority when it denied "a rulemaking petition [from nineteen private organizations] asking EPA to regulate 'greenhouse gas emissions from new motor vehicles under §202 of the Clean Air Act.'"[40] The EPA denied the petition on two grounds.[41] First, the EPA claimed that it lacked statutory authority under the Clean Air Act (CAA) "to issue mandatory regulations to address global climate change."[42] It based this argument on the fact that Congress did not pass any legislation directly addressing climate change, which the agency read as a signal to exercise restraint.[43] This argument was made in light of the Court's decision in *FDA v.*

28. *See infra* Part II.A.
29. *See infra* Part II.B.1.
30. *See infra* Part II.B.2.
31. *See infra* Part II.C.
32. *See infra* Part II.D.1.
33. *See infra* Part II.D.2.
34. *See infra* Part II.D.3.
35. *See infra* Part II.D.4.
36. *See infra* Part II.E.
37. *See infra* Part II.F.
38. 549 U.S. 497 (2007).
39. *See Massachusetts*, 549 U.S. at 520.
40. *Id.* at 510 (quoting Joint Appendix at 5, *Massachusetts*, 549 U.S. 497 (No. 05-1120)).
41. *Id.* at 511.
42. *Id.*
43. *Id.* at 511–13.

Brown & Williamson Tobacco Corp.,[44] where Justice O'Connor wrote for the majority that administrative agencies should exercise discretion in reading broad grants of statutory authority over politically sensitive and widely impactful matters, even if these matters are within their traditional scope of regulatory jurisdiction.[45] Second, even with such authority, the EPA felt that "it would be unwise to [issue such regulations] at this time."[46] The EPA felt it unwise because there was no unequivocal scientific link between increased greenhouse gases and climate change and the "piecemeal approach" of any "such regulation would conflict with the President's 'comprehensive approach' to the problem."[47] Under the procedural right granted by 42 U.S.C. § 7607(b)(1), Massachusetts petitioned for review of the agency decision, which the Court of Appeals for the District of Columbia Circuit denied.[48] The Supreme Court granted certiorari, reversing the lower court and ruled against the EPA's denial of the rulemaking petition.[49] In order to rule on the merits, the Court first had to find that Massachusetts's complaint came under its jurisdiction through Article III's delegation to hear "Cases" and "Controversies."[50] That is, the Court had to find that Massachusetts had standing to sue the federal government.[51] As will be explored further below, the Court's decision appeared to license a potentially broad expansion of Article III standing.[52] Justice Stevens's opinion holds that Massachusetts was entitled to "special solicitude" in the Court's standing analysis due to its "quasi-sovereign" interest at stake.[53] This Comment addresses itself to the continuing conversation over what this novel construction of standing analysis entails.

B. General Requirements of Standing

1. The Injury-in-Fact Test for Standing

In order to determine whether Massachusetts had standing, the Court had recourse to well-developed, if interpretatively contested, precedents in standing doctrine.[54] Standing provides the key heuristic for applying the Constitution's

44. 529 U.S. 120 (2000).

45. *See Brown & Williamson*, 529 U.S. at 126, 159 (holding that the FDA did not have regulatory authority over tobacco, despite its general authority to regulate drugs), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111–30, 123 Stat. 1776.

46. *Massachusetts*, 549 U.S. at 511.

47. *Id.* at 513–14 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003) (notice of denial of petition for rulemaking)).

48. *Id.* at 514 & n.16.

49. *Id.* at 506, 534–35.

50. *Id.* at 516; *see also* U.S. CONST. art. III, § 2, cl. 1.

51. *Massachusetts*, 549 U.S. at 516.

52. *See infra* Section III.

53. *Massachusetts*, 549 U.S. at 520. For an explanation of the Court's choice of the phrase "special solicitude," see Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN ST. L. REV. 1, 19–29 (2007).

54. *Massachusetts*, 549 U.S. at 516–21.

grant of federal judicial jurisdiction over certain "cases" and "controversies."[55] While standing initially derived from self-evident injuries at common law, the development of the regulatory state and the rise of public rights and interests spurred the articulation of a formal doctrine.[56] In determining whether parties have a judicially remediable case, the Court in *Lujan v. Defenders of Wildlife*[57] settled on an "injury-in-fact" inquiry to establish standing.[58] This inquiry requires (1) "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent'"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a favorable judicial decision must be likely to offer redress to the injury.[59] While this test has been effective for litigants asserting private rights, the injury-in-fact component of the test has proven difficult to implement in public law contexts.[60]

2. Prudential Restrictions on Standing

Limitations on the judiciary's capacity to hear and decide a case are generally divided between constitutional restrictions that flow through Article III and judicially imposed restrictions that fall under the doctrine of "prudential standing."[61] For the purposes of this Comment, prudential limits on jurisdiction can be imposed if the harm takes the form of a "generalized grievance."[62] As the Court recently clarified in *Lexmark International, Inc. v. Static Control Components, Inc.*,[63] prudential standing is not a separate test for ascertaining justiciability, but rather it is a means of assessing whether a claim meets the requirements of a legal cause of action.[64] Congress can create legal causes of action, beyond any judicially imposed prudential limits, up to and until Article III's hard injury-in-fact requirements.[65] A party that wishes to sue for a violation

55. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (noting that standing is concerned with adverse litigants, "directly concerned" litigants, ensuring that concrete cases inform consequential decisions, and protecting against policymaking by the unelected judiciary).

56. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 116–17 (7th ed. 2015); *see also* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55–56 (1978); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–25 (1988).

57. 504 U.S. 555 (1992).

58. *Lujan*, 504 U.S. at 560–61.

59. *Id.* (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

60. Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 226 (2008).

61. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1, at 42–43 (6th ed. 2012) ("The Court determines whether a particular restriction is constitutional or prudential in its explanation of whether the rule derives from Article III or from its views of prudent judicial administration.").

62. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (noting that generalized grievances are harms "shared in substantially equal measure by all or a large class of citizens").

63. 134 S. Ct. 1377 (2014).

64. *See Lexmark*, 134 S. Ct. at 1387.

65. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of*

under that cause of action must still meet the injury-in-fact requirements of *Lujan*.[66] However, as discussed in a footnote in *Lujan*, a suit brought under a statutorily created procedural right can lower the bar for the elements of the injury-in-fact test.[67] In *Massachusetts*, Justice Stevens rendered any prudential concerns moot by noting that the State brought suit under a procedural right created by the CAA.[68] That is, the CAA requires the judiciary to recognize injuries derived from agency action in implementing the Act up to the limits allowed by the Article III injury-in-fact standing test.[69]

C. The Constitutional Structure of Dual Sovereignty

1. State Standing Under Article III

As public, corporate entities with a constitutionally defined role in federal government, state litigants have long been treated differently by the federal judiciary than private litigants when asserting injuries to their common, statutory, or constitutional rights.[70] Section two of Article III enshrines this distinction by granting jurisdiction to the federal judiciary over cases and controversies "between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[71] The Constitution also grants the Supreme Court original jurisdiction to all cases "in which a State shall be Party."[72] Yet the specific instances in which a state has legally remediable injuries have proven to be a complicated inquiry. There is no doubt a state has the right to sue in its capacity as a sovereign entity in its own

Powers, 17 SUFFOLK U. L. REV. 881, 886 (1983) (arguing that prudential standing should be understood as Congress's power to create legal rights cognizable under the cases and controversies requirement of Article III, and not a grant of authority to the courts to go beyond this). Of note, Justice Scalia wrote the unanimous opinion in *Lexmark* that transformed his law review argument into Supreme Court precedent. *See Lexmark*, 134 S. Ct. at 1383, 1387–88 ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." (citation omitted)).

66. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992))).

67. *Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

68. *See* Massachusetts v. EPA, 549 U.S. 497, 517, 519–20 (2007).

69. *See id.*

70. *Cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (analyzing whether states should be treated similarly to private litigants in contract disputes), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

71. U.S. CONST. art. III, § 2, cl. 1.

72. *Id.* § 2, cl. 2.

courts in order to enforce its own laws against criminals[73] or to regulate property interests under its police powers.[74] But because such enforcement is, generally speaking, by a state against its own citizens, it was not envisioned as part of the federal judiciary's jurisdiction.[75] When states began asserting their rights against other states and the federal government, the federal judiciary had to consider any claims for standing in light of fundamental constitutional concerns regarding the separation of powers.[76]

2. Federal Supremacy and State Integrity

Regarding the vertical separation of power between the federal and state governments, the question of state standing must be addressed in the context of the Constitution's structure of dual sovereignty.[77] Sovereignty is a foundational political idea referring to the autonomy of a supreme authority.[78] The modern conception of political sovereignty is founded in terms of territorial exclusivity.[79] Dual sovereignty therefore effects a structural tension, insofar as bodies that, as a function of sovereignty, historically assume territorial exclusivity and genuine autonomy are set within a system of overlapping territorial boundaries and interlocking legal systems.[80] In *McCulloch v. Maryland*,[81] Chief Justice Marshall

73. *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 411–12 (1995); *see also* Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 213 (2014).

74. *See* Woolhandler & Collins, *supra* note 73, at 450–55.

75. *See id.* at 436–38.

76. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Raines v. Byrd, 521 U.S. 811, 820 (1997) (noting that the standing doctrine represents an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere"); Allen v. Wright, 468 U.S. 737, 752 (1984) (noting that the law of Article III standing is based on "the idea of separation of powers"); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461–63 (2008) (explaining that there are three different aspects of separations of powers referred to in standing doctrine: (1) the Court adjudicating traditional adversarial contests, (2) the Court deferring political questions and generalized grievances to the political branches, and (3) limiting the Court's role as a means for Congress to check the executive branch); M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 736 (2015) (noting that the Court does not permit public interest standing in order to ensure separation of powers).

77. *See* THE FEDERALIST NO. 10, at 45 (James Madison) (Terence Ball ed., 2003) ("The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures.").

78. *Sovereignty*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430–32 (1987) (discussing the determinative historical debate in Britain as to whether sovereignty resided in the Crown or the people before settling on a synthesis of the "King-in-Parliament").

79. *See, e.g.*, HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS OF CHANGE 3 (1994) ("[T]he concept of sovereignty . . . altered the structure of the international system [of the late Middle Ages] by basing political authority on the principle of territorial exclusivity. The modern state is based on these two key elements, internal hierarchy and external autonomy . . . ." (footnote omitted)).

80. *See generally* JOHN AUSTIN, *Lecture VI*, *in* THE PROVINCE OF JURISPRUDENCE

explained this tension away with a sleight of hand that found the ultimate source of sovereignty in the American people.[82] The Constitution provides a framework by which this sovereignty is channeled in two directions: between the federal government with its enumerated powers and the state governments with whatever powers remain.[83] Where the two conflict, the federal government's sovereignty is presumed to prevail.[84]

What federal supremacy means in practice presents a more checkered story. For the purposes of this Comment, there is a distinctive line of Supreme Court decisions that highlights a recognized constitutional policy interest in the sovereign integrity of the states.[85] "[T]o 'secure[] to citizens the liberties that derive from the diffusion of sovereign power,' the Constitution recognizes 'rights' that belong to states as 'beneficiaries of federalism.'"[86] A state's sovereign integrity and autonomy are most often related to the state's police powers.[87] The source of this sovereign power to regulate internal affairs is found in the Tenth Amendment's reservation of powers to the states.[88] However, Article IV of the Constitution more explicitly structures the relation of the power of the states to the federal government and to each other.[89] While it grants no specific powers to the states, Article IV suggests certain protections for

DETERMINED *AND* THE USES OF THE STUDY OF JURISPRUDENCE 191 (Weidenfeld & Nicholson ed., Hackett Publ'g Co. 1998) (1954) (examining the nature of sovereign states and the relation between sovereign and subject states).

81. 17 U.S. (4 Wheat.) 316 (1819).

82. *See McCulloch*, 17 U.S. (4 Wheat) at 403–04.

83. *Id.* at 404–05.

84. *Id.* at 405–06 (quoting U.S. CONST. art. VI, cl. 2).

85. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) ("The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. . . . Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy."), *superseded by statute*, Fair Labor Standards Amendments of 1986, Pub. L. No. 99–150, 99 Stat. 787 (1985); Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) ("Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

86. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 73 (2014) (second alteration in original) (quoting Bond v. United States, 564 U.S. 211, 221–22 (2011)).

87. *See* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869); *see also* THE FEDERALIST NO. 45, *supra* note 77, at 227 (James Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.").

88. U.S. CONST. amend. X; *see also* Kansas v. Colorado, 206 U.S. 46, 89–90 (1907).

89. *See* U.S. CONST. art. IV.

their territorial and jurisdictional integrity. The territorial integrity of the states is protected through limits on the ability to form new states out of the territory of the old states[90] and the federal government's guarantee to defend them against invasion.[91] Similarly, the jurisdictional integrity of the states, specifically among one another, is protected through the mutual recognition of binding legal authority over a state's own citizens and the citizens of other states granted through the Full Faith and Credit Clause,[92] the Privileges and Immunities Clause,[93] the Extradition Clause,[94] and the (thankfully moot) Fugitive Slave Clause.[95] These latter protections speak to the recognition of a state's exercise of its internal sovereign authority across state borders.

D. State Interests for Article III Standing

This structure of dual sovereignty informs the three types of state interests that the federal judiciary traditionally recognizes: (1) a state's common law interests,[96] (2) a state's interests as a parens patriae representative of its citizens,[97] and (3) a state's sovereign interests.[98] Historically, analysis of these interests has often been wrapped up in the Court's concomitant analysis of whether the Court's original jurisdiction over "those [cases] in which a State shall be Party" applies.[99]

In addition to these identifiable forms of state interest, courts over the past century have recognized a fourth category known as quasi-sovereign interests.[100] What began as a doctrine to assert states' interests in their territory and natural resources therein[101] has been variously confused with their interests in (1) the economic well-being of their citizens,[102] (2) the well-being of their citizens vis-à-vis federal administrative schemes,[103] and (3) being able to legislate and enforce

90. *Id.* § 3, cl. 1.

91. *Id.* § 4.

92. *Id.* § 1.

93. *Id.* § 2, cl. 1.

94. *Id.* § 2, cl. 2.

95. *Id.* § 2, cl. 3, *rendered moot by* U.S. CONST. amend. XIII.

96. Woolhandler & Collins, *supra* note 73, at 406–07.

97. Woolhandler, *supra* note 73, at 213; *see also* Woolhandler & Collins, *supra* note 73, at 411 (explaining that states assert their sovereignty for the purpose of protecting the wellbeing of their citizens).

98. Woolhandler & Collins, *supra* note 73, at 410–12; Woolhandler, *supra* note 73, at 214.

99. *See* U.S. CONST. art. III, § 2, cl. 2; *see also infra* Part III.C.1.

100. *See* Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 640, 662–73 (2016).

101. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 430–31 (1920); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

102. *See* Georgia v. Pa. R.R. Co., 324 U.S. 439, 446–47 (1945) (granting Georgia standing to sue railroad companies for conspiracy as a parens patriae representative of sovereign interests in the well-being of its economy), *superseded by statute*, Reed-Bulwinkle Act, Pub. L. No. 80–662, 62 Stat. 472 (1938).

103. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609–10 (1982); Kansas *ex rel.* Hayden v. United States, 748 F. Supp. 797, 802 (D. Kan. 1990) (finding parens patriae

a legal code.[104] The thrust of this Comment is to recommend a restored understanding of quasi-sovereign interests, stripped of these confusing precedents, to the residual constitutional interests of state sovereignty.

1. Proprietary Interests

Common law interests have rarely been at stake in actions against the federal government,[105] even as they are implicated in more general sovereignty interests such as those related to a state's territory as "property."[106] However, the federal courts have long afforded states standing equal to that of private litigants in enforcing contract and property rights in cases against sister states and private actors.[107] A significant balance of scholarship regards the standing decision in *Massachusetts* as based on injuries to the State in its capacity as an owner of flooded coastal property.[108]

2. Parens Patriae Interests

a. Massachusetts v. Mellon*: Limits on Parens Patriae*

Parens patriae, on the other hand, while recognized in actions against sister states and private actors,[109] is limited in actions directed against the federal government where the nation's interest in representing the interest of its citizens

standing supported by both a quasi-sovereign interest for the state as a specific legal beneficiary of a law and ensuring full benefit of federal laws to the general population of the state); Abrams v. Heckler, 582 F. Supp. 1155, 1159–61 (S.D.N.Y. 1984) (finding parens patriae standing to sue administrative agency for violating the law).

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

105. Notably, the Ninth Circuit found standing in the recent travel ban cases based on injuries to the States' ownership interests in their public universities. Washington v. Trump, 847 F.3d 1151, 1158–61 (9th Cir.) (per curiam), *reconsideration en banc denied*, 858 F.3d 1168, 1168 (9th Cir. 2017) (first travel ban); Hawaii v. Trump, 859 F.3d 741, 763–65 (9th Cir.), *cert. granted, stay granted in part sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (second travel ban). This allowed the courts to avoid the difficulty posed by the quasi-sovereign interest doctrine, advanced by the States in their briefs, *e.g.*, States' Response to Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 13–14, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), as it plays out in immigration. *See infra* Section IV.

106. *See, e.g.*, Alaska v. United States, 545 U.S. 75, 78, 81–82 (2005) (disputing federal claims to submerged lands along state coastline). Most court cases between federal and state governments over territorial claims are initiated by the federal government. Even Alaska's action followed a long line of cases where the federal government asserted territorial claims to similarly submerged lands under the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301–15 (2012)). *See, e.g.*, United States v. Maine, 420 U.S. 515, 517 (1975); United States v. California, 381 U.S. 139, 142 (1965); United States v. Louisiana, 363 U.S. 1, 5–6 (1960).

107. *See, e.g.*, New York v. New Jersey, 256 U.S. 296, 298 (1921) (pollution suit between states); Kansas v. Colorado, 185 U.S. 125, 135–37 (1902) (water rights suit between states).

108. *See infra* Part III.A.1.

109. *See, e.g.*, Georgia v. Pa. R.R. Co., 324 U.S. 439, 445 (1945); Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923) (granting Pennsylvania and Ohio standing to sue West Virginia as "representative[s] of the consuming public").

preempts any concurrent state interest.[110] *Massachusetts v. Mellon*[111] has long stood as the leading case regarding parens patriae state standing in actions against the federal government.[112] The case involved legislation passed under the tax and spend power of the U.S. Constitution, which created a program to administer funds to states to combat maternal and infant mortality.[113] Massachusetts sued under the theory that the act violated the Tenth Amendment by disproportionately taxing wealthier, industrial states to spend for the benefit of poorer states.[114] Moreover, Massachusetts claimed that the act forced it to yield its lawmaking rights to the federal government or lose its share of contributed taxes.[115] The Supreme Court ruled that Massachusetts did not possess standing to challenge the act, and dismissed the complaint for want of jurisdiction.[116] The Court considered two theories of state standing. First, the Court addressed whether a state has standing where, as alleged, "the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States."[117] In essence, the Court viewed Massachusetts's argument as based on an injury to its sovereign, internal lawmaking power. The Court rejected this argument as a political question that was "not a matter which admits of the exercise of the judicial power."[118] In the paradigm of the more recent standing test from *Lujan*, the *Mellon* Court did not recognize a "legally protected interest"[119] in the State's capacity to legislate locally, even when preempted by potentially ultra vires federal actions.[120] Second, the Court considered "whether the suit may be maintained by the State as the representative of its citizens"—that is, standing as parens patriae.[121] This doctrine derives historically from the intersection of sovereignty with the common law such that the king could act as the "father of the country" and represent the interests of "persons under legal disabilities to act for themselves."[122] In the United States, this concept expanded to allow the states to maintain lawsuits on behalf of the entire citizenry.[123] Justice Sutherland forcefully rejected that parens patriae might apply to the states when

110. *See* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

111. 262 U.S. 447 (1923).

112. Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 851 (2012).

113. *See Mellon*, 262 U.S. at 479 (citing Promotion of Welfare and Hygiene of Maternity and Infancy Act, ch. 135, 42 Stat. 224 (1921)).

114. *Id.* at 479–80.

115. *Id.*

116. *Id.* at 480.

117. *Id.* at 482.

118. *Id.* at 483.

119. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

120. *See Mellon*, 262 U.S. at 483.

121. *Id.* at 485.

122. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972) (footnote omitted) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *47), *superseded by statute*, Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96–349, 94 Stat. 1154.

123. *Id.* at 257–60.

suing the federal government, stating:

> [I]t is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.[124]

b. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez*: The Court Revisits Parens Patriae*

Before *Massachusetts v. EPA* was decided, the Supreme Court provided an opening to expand state standing under parens patriae theory in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.[125] In *Puerto Rico*, the territory of Puerto Rico brought suit against Virginia apple growers for employment discrimination against Puerto Rican citizens in violation of federal law that required preference for hiring domestic workers over foreign workers.[126] The Court resolved the question of Puerto Rico's standing parens patriae as derivate of whether Puerto Rico could assert a quasi-sovereign interest and not a mere nominal interest in the case.[127] A quasi-sovereign interest could be found in one of two ways: "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."[128] Although the case featured neither a state plaintiff (rather a territory) nor a federal defendant (rather private businesses), *Puerto Rico* pressed against the holding of *Mellon*. Lower federal courts began recognizing state standing for injuries derived from their place in federal administrative schemes.[129] The Supreme Court did not address the issue again until *Massachusetts v. EPA*.

3. Sovereignty Interests

Sovereignty interests rest on appeals to rights preserved to the states in the

124. *Mellon*, 262 U.S. at 485–86.

125. 458 U.S. 592 (1982).

126. *Puerto Rico*, 458 U.S. at 594–96.

127. *Id.* at 607.

128. *Id.*

129. *See, e.g.*, Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 443–45 (D.C. Cir. 1989) (granting states standing to challenge Department of Transportation rule on advertising that interfered with state consumer protection codes because "Congress has expressly contemplated that States may be heard to complain of injury" in the relevant act and not on the basis of sovereignty interests); P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev., 59 F. Supp. 2d 310, 325–26 (D.P.R. 1999) (granting Puerto Rico parens patriae standing against a federal agency due to "impossibility for private citizens to bring suit themselves . . . within the present circumstances"); Holden v. Heckler, 584 F. Supp. 463, 485–86 (N.D. Ohio 1984) (allowing state parens patriae standing to join an action of its citizens seeking federal government to enforce federal statutes), *stay vacated*, 615 F. Supp. 682 (N.D. Ohio 1985).

Constitution.[130] The scope of sovereignty interests that are or ought to be recognized by the federal courts varies widely with the judge or author.[131] Sovereignty claims related to a state's ability to govern itself internally, for instance, have long been barred.[132] Conversely, sovereignty claims related to federal legislation that either acts upon the states or unduly coerces state officials to act have found recognition by the courts.[133]

a. Limits on Sovereignty Interests Related to Governance

The political question doctrine under which the *Mellon* Court denied Massachusetts standing to challenge the federal government on the basis of injury to the State's internal lawmaking power had, at that point, been well established.[134] The Court had ruled on states' sovereignty interests related to internal governance in a series of high-profile cases that presented unique historical circumstances.[135] The first was *Cherokee Nation v. Georgia*,[136] where the Court refrained from ruling on Georgia's infringement on Cherokee territorial sovereignty ostensibly for two reasons: (1) the Cherokee Nation was not technically a foreign state, and (2) questions over the power to make and apply law were nonjusticiable political questions.[137] However, the decision may have been impacted by the knowledge that President Jackson had no intention of enforcing any ruling against Georgia, leaving Chief Justice Marshall hesitant to extend the Court's jurisdiction to a functionally unenforceable holding.[138] Following this were the Reconstruction cases led by *Georgia v. Stanton*,[139] where certain States questioned Congress's authority to supplant state governments through federal legislation.[140] The Court again exercised discretion on the

130. *See, e.g.*, New York v. United States, 505 U.S. 144, 157 (1992) (Tenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 307–08 (1966) (Fifteenth Amendment).

131. *See infra* Part III.C.

132. *See infra* Part II.D.3.a.

133. *See infra* Part II.D.3.b.

134. *See supra* notes 117–20 and accompanying text.

135. *See* Roesler, *supra* note 100, at 645–46.

136. 30 U.S. (5 Pet.) 1 (1831).

137. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20; *see also* Woolhandler & Collins, *supra* note 73, at 413–14 ("[T]he case presented a *political* question rather than a *justiciable* question because the Cherokees sought to vindicate an interest in their sovereignty. When a party sought to vindicate directly its power to make and apply law in a particular territory, rather than to present a traditional claim of injury to person or property, the Court treated the case as nonjusticiable." (footnote omitted)).

138. The Court found jurisdiction to rule on a case related to the sovereignty of the Cherokee Nation the following year in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)—the decision which prompted President Jackson's infamous retort: "John Marshall has made his decision, now let him enforce it." *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 524–25 (1969).

139. 73 U.S. (6 Wall.) 50 (1868) (discussing the appointment of federal officials to administer voting rolls and elections for new state governments).

140. *Stanton*, 73 U.S. (6 Wall.) at 77; *see also* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867) (addressing the imposition of military tribunals in defeated Confederate states).

grounds that political questions regarding the states' sovereignty and their constitutions vis-à-vis the federal government were outside its jurisdictional limits.[141]

b. Coercive Violations of Sovereignty

The courts do, however, recognize state standing for injuries related to federal laws that act directly upon the institutions and officials of the state.[142] The Supreme Court has granted standing for states to sue the federal government over legislation that directly regulates the states,[143] compels state officials or state legislatures to act,[144] or exercises undue coercion upon state legislatures to pass laws according to federal dictates.[145] The interests contested in these cases are constitutionally granted reservations of rights that protect the states from becoming mere agencies of the federal government.[146] They are sovereignty interests wherein the state is being affirmatively forced to act by federal legislation.[147] This is opposed to more general sovereignty interests imposed by federal preemption in which a state is enjoined from legislating in spheres claimed for the federal government.[148] Preemption alone is not sufficient to grant standing to a state against the federal government.[149]

4. Quasi-Sovereign Interests

Historically, the quasi-sovereign interest theory of standing arose out of two specific intersections of common law causes of action with the powers and rights associated with sovereignty: (1) the common law assumes certain assignments of

141. *See Stanton*, 73 U.S. (6 Wall.) at 77 ("That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges.").

142. *See* Woolhandler & Collins, *supra* note 73, at 508–09.

143. *See, e.g.*, South Carolina v. Baker, 485 U.S. 505, 507–08 (1988) (granting standing to South Carolina to challenge federal legislation that regulated state-issued bonds); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985) (granting Texas standing to challenge federal legislation that regulated employment standards for state and municipal employers), *superseded by statute*, Fair Labor Standards Amendments of 1986, Pub. L. No. 99–150, 99 Stat. 787. Following Professors Shannon Roesler and Ann Woolhandler on a point where they agree, this category of interests is more analogous to private party litigation where states are asserting injuries based on their role as regulated entities. As such, and because they do not arise in the context of *Massachusetts*, this Comment will not address them further. *See* Roesler, *supra* note 100, at 657 n.106; Woolhandler, *supra* note 73, at 213.

144. *See, e.g.*, New York v. United States, 505 U.S. 144, 149 (1992); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 759–69 (1982).

145. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

146. *See, e.g.*, *New York*, 505 U.S. at 155–57.

147. *See, e.g.*, *id.* at 164–66.

148. *See Preemption*, BLACK'S LAW DICTIONARY, *supra* note 78 ("The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

149. *See* Woolhandler, *supra* note 73, at 222.

property within the sovereign's territory to the sovereign,[150] and (2) the federal courts have recognized common law injuries to a sovereign's territorial possessions.[151] Justice Holmes authored two early twentieth-century opinions based upon these respective arguments.

In *Missouri v. Holland*,[152] the Court found a quasi-sovereign interest related to a state's regulation of *ferae naturae* migratory birds.[153] The State of Missouri sued in equity to prevent the federal regulation of migratory birds.[154] Prior federal case law, with analysis based on classic legal treatises and texts, recognized that animals *ferae naturae* belong to the local sovereign.[155] This ownership interest, unlike private ownership interests, was more akin to a trust, where ownership rests in "the people in their collective sovereign capacity."[156] Justice Holmes opined that the interest at stake is not a pecuniary interest related to loss of property rights over migratory birds but rather a Tenth Amendment quasi-sovereign interest in the right to regulate these territorial possessions.[157] As will be discussed in more detail below, this Tenth Amendment interest derives from a constitutional reservation of sovereign jurisdiction, rather than a more general Tenth Amendment interest in the legislation of police powers.[158]

Where *Holland* addressed a type of sovereign interest found in common law, the second line of cases examined common law injuries suffered by the states and recognized in federal courts. The common law figured into these cases

150. *See, e.g.*, Geer v. Connecticut, 161 U.S. 519, 527–29 (1896); United States v. Shauver, 214 F. 154, 157 (E.D. Ark. 1914), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

151. *See, e.g.*, New York v. New Jersey, 256 U.S. 296, 298 (1921); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237–38 (1907).

152. 252 U.S. 416 (1920).

153. *Holland*, 252 U.S. at 431, 434–35.

154. *Id.* at 430. The authority the federal government claimed for the regulation came from a treaty entered into with Great Britain, which was then sovereign of Canada. *Id.* at 431.

155. *See, e.g.*, *Geer*, 161 U.S. at 527–29 ("[T]his attribute of government to control the taking of animals *ferae naturae* . . . . passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution. . . . [F]or the purpose of exercising this power, the State . . . represents its people, and the ownership is that of the people in their united sovereignty." (citation omitted)); *Shauver*, 214 F. at 157 ("But the rule of law which all the American courts have recognized is that animals ferae naturae, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common.").

156. *See Geer*, 161 U.S. at 529 (quoting *Ex parte* Maier, 37 P. 402, 404 (Cal. 1894)).

157. *See Holland*, 252 U.S. at 431 ("The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State.").

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

at the point of injury, either in nuisance suits arising from interstate pollution[159] or in suits asserting the common law water rights of the states.[160] Although based in the common law, these suits related less to real property and more to states' territorial interests.[161] The first case to use the analytic language of quasi-sovereignty, emphatically quoted in *Massachusetts v. EPA*, was the interstate pollution case *Georgia v. Tennessee Copper Co.*[162] Justice Holmes drew out the distinction between a state suing in its quasi-sovereign capacity over injuries inflicted on its territorial and jurisdictional domain and a tort of nuisance as afflicts private parties:

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.[163]

Much of the standing analysis in *Tennessee Copper Co.* is based on a previous Holmes decision in the early twentieth-century case of *Missouri v. Illinois*,[164] where Missouri sued Illinois for polluting the Mississippi River.[165] There, however, after noting the difference in justiciable rights and duties between states and private individuals,[166] the Court punted on deciding whether the states could sue one another over pollution claims.[167] Instead, the Court found that there was not enough scientific evidence to support a claim for the injuries attested.[168]

159. *See, e.g.*, New York v. New Jersey, 256 U.S. 296, 298 (1921); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237–38 (1907).

160. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125, 143–44 (1902).

161. *See, e.g.*, *Tenn. Copper Co.*, 206 U.S. at 237.

162. 206 U.S. 230 (1907).

163. *Tenn. Copper Co.*, 206 U.S. at 237; *see also* Robert V. Percival, Massachusetts v EPA*: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 131–34. *But see* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 865–66 (2016) (arguing that "Justice Holmes was using the term 'quasi-sovereign' in a very different sense—to refer to the State's sovereign interest in the continued enforceability of state law" (quoting *Tenn. Copper Co.*, 206 U.S. at 237)).

164. 200 U.S. 496 (1906); *see also Tenn. Copper Co.*, 206 U.S. at 237.

165. *Illinois*, 200 U.S. at 517.

166. *Id.* at 520–21.

167. *Id.* at 526.

168. *Id.* at 525–26.

Holmes's emphasis on the rights possessed by states over territorial concerns is further clarified in the Court's decisions in early water rights cases. In *Kansas v. Colorado*,[169] Kansas brought suit to enjoin Colorado from diverting the flow of the Arkansas River, and the Court recognized the common law rights of Kansas and its citizens to the continual flow of the river.[170] Then, in *Marshall Dental Manufacturing Co. v. Iowa*,[171] another Holmes opinion, the Court recognized Iowa's interest in preserving a body of water within its territorial limits independent of its proprietary interests.[172] This precedent for interstate suits over water rights has been expanded by federal courts in recent years to suits against the federal government. For example, in 2005 the Court of Appeals for the Eleventh Circuit granted Alabama the right to sue the U.S. Army Corps of Engineers over asserted mismanagement of upstream water resources.[173]

E. Standing and the Balance of Federalism

At issue across all these decisions on standing and the scholarship they have seeded are two axes related to the constitutional separation of powers: (1) the horizontal separation of powers by which the judiciary acknowledges the license of Congress and the executive to operate over "political questions";[174] and (2) the vertical separation of powers by which states exercise their sovereign rights vis-à-vis federal supremacy—that is, federalism.[175] While political questions and prudential limitations derive from separation of powers doctrine, advocates for limiting state access to the federal judiciary make a functional argument as well.[176] To wit, unbridled access to the federal courts whenever states feel aggrieved in their capacity as sovereigns risks both flooding the federal courts with frivolous litigation against national legislation that local officials dislike and hampering the effectiveness of federal legislative and administrative bodies to pass and enforce laws without awaiting the languorous process of litigation to unfold.[177] These functional concerns seem especially pertinent in light of recent incidents of state litigants' forum shopping for favorable decisions that are

169. 185 U.S. 125 (1902).

170. *Kansas*, 185 U.S. at 145–46.

171. 226 U.S. 460 (1913).

172. *Marshall Dental*, 226 U.S. at 462 ("It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not.").

173. *See* Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1130 (11th Cir. 2005).

174. *See supra* Part II.D.3.a.

175. *See* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 778–81 (1999) (noting that when decisions shift from Congress to the federal courts, structural concerns about the political powers of state and local actors in the federal system are raised); *see also* Timothy Sandefur, *State Standing to Challenge* Ultra Vires *Federal Action: The Health Care Cases and Beyond*, 23 U. FLA. J.L. & PUB. POL'Y 311, 317–22 (2012) (noting the structural role of the states in checking the powers of the federal government).

176. *See infra* Part III.B.2.

177. *See infra* Part III.B.2.

remedied through national injunctions.[178]

Professor Bickel perhaps put it the most eloquently in his article commenting on the, by and large, passed over question of state standing in the *South Carolina v. Katzenbach* Voting Rights Act case[179]:

> To allow the states to litigate in this fashion . . . would be a fundamental denial of perhaps the most innovating principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting . . . directly upon the citizenry, which is its own as well as theirs. The states are built into the political structure of the federation, and play their part in the formation of its institutions. But they are not to contest, as if between one sovereign and another in some quasi-international forum, the actions of the national institutions. For the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries.[180]

Professor Bickel's argument presumes that when state governments litigate in their capacity as sovereign entities, they implicitly claim to do so as privileged representatives of their citizens.[181] However, as in *Mellon*, the United States' claim to represent the same citizens takes precedence by virtue of federal supremacy: "[I]t is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate."[182] By recognizing that a state might have an equal or greater claim to represent citizens' rights than the federal government, the judiciary would tacitly undermine the structure of the federal, constitutional separation of powers between the states and the federal government, which is better resolved through recourse to the legislative and executive branches.[183]

However, since *Massachusetts v. EPA* was decided, courts and scholars have turned from the presumption of limited state standing towards more practical interpretations of Justice Stevens's "special solicitude" doctrine. These interpretations can be roughly grouped into three understandings of what the dispositive holding of *Massachusetts* was or should have been: (1) expanding the prudential limits of state standing in topic-specific subject matters, in particular

178. *See* Texas v. United States, 809 F.3d 134, 149 (5th Cir. 2015) (filing suit in Texas where the Fifth Circuit Court of Appeals would be more favorable to appeals against administrative agency actions than the D.C. Circuit Court of Appeals which has expertise in administrative law), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (filing challenge to a transgender bathroom bill in a sympathetic district, which has led to a national injunction against administrative agency action despite contrary rulings in other circuits); Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (issuing a national injunction on an administrative rule), *vacated and remanded*, 414 F.3d 1207 (10th Cir. 2005).

179. 383 U.S. 301 (1966) (question of standing noted but not explored in dissent, *id.* at 357 (Black, J., dissenting)).

180. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89.

181. *See id.*

182. Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

183. *See* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1054–55 (2009) (suggesting that the federal courts should exercise prudence in recognizing standing, with congressional will as one factor to consider).

generalized grievances about environmental injuries, on the basis of common law property interests;[184] (2) relaxing the cause and redressability requirements of standing on the basis of parens patriae injuries that state litigants claim vis-à-vis federal administrative programs;[185] or (3) recognizing injuries to sovereign governing interests as a basis for standing parallel to *Lujan*.[186] Since the Fifth Circuit's decision in *Texas v. United States*, scholars have attempted to sharpen these interpretations in light of special solicitude to injuries related to the state fisc and governing interests implicated in the federal administration of immigration law. For example, one scholar argues that this category of sovereignty interests should be extended to governance interests exercised by the state in order to secure the advantages of federal administrative law.[187] She argues that such a rule would have provided a stronger position for the Court to stand on in *Massachusetts*, rather than the quasi-sovereign interest theory on which the majority ultimately relied.[188] Other scholars have likewise focused on expanding this Tenth Amendment standing exception to include when states and the federal government have concurrent interests in protecting individual rights[189] or, even more broadly, whenever federal legislation or enforcement preempts an enacted state law.[190]

F. Texas v. United States

In the 2015 Term, the Court responded to one of the most politically contentious cases on the docket with a terse split decision.[191] An equally divided

184. *See infra* Part III.A; *see also* Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1068 (2011); Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 295–98 (2007) (discussing instances where states asserting proprietary rights needed to meet full *Lujan* standards).

185. *See infra* Part III.B; *see also* 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, 1785–86 (2008) [hereinafter Mank, *Greater Standing*] (arguing for parens patriae as a means to litigate generalized grievances); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1077–78 (2010) (arguing for special solicitude to challenge agency's failure to regulate when a state law is preempted); Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799–800 (2009) (arguing for state standing on the basis of "public goods"); Sara Zdeb, Note, *From* Georgia v. Tennessee Copper *to* Massachusetts v. EPA*:* Parens Patriae *Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1061–62 (2008) (arguing for state standing for federal failure to enforce law).

186. *See infra* Part III.C; *see also* Grove, *supra* note 163, at 868–69 (arguing for state standing to protect federal impairment of state law); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 262 (2009) (arguing for state standing for sovereign injuries that implicate the "structural design of dual sovereignty"); Roesler, *supra* note 100, at 641 (arguing for state standing when states have a role in implementing federal scheme); Vladeck, *supra* note 112, at 848 (arguing for state standing when federal laws operate directly on the states).

187. *See* Roesler, *supra* note 100, at 675.

188. *Id.* at 675–76.

189. *See* Sandefur, *supra* note 175, at 313.

190. *See* Grove, *supra* note 163, at 855.

191. *See* United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam), *aff'g by an equally*

Court affirmed the Fifth Circuit's judgment in *Texas* without opinion.[192] A central holding of the original decision was the extent to which *Massachusetts* expanded federal court jurisdiction to hear state challenges to federal agency actions.[193] At issue was a Department of Homeland Security (DHS) order that expanded the class of persons eligible for and rights granted to them by an established DHS program.[194] The Deferred Action for Childhood Arrivals program (DACA), ordered through a memorandum issued by Secretary Napolitano in 2012, enjoined DHS officials to exercise prosecutorial discretion in immigration actions against individuals who (1) arrived in the United States under the age of sixteen, (2) continuously resided in the United States for at least five years, (3) pursued educational opportunities or joined the military, (4) had a clean record, and (5) were not above the age of thirty.[195] In 2014, Secretary Johnson issued a subsequent memorandum ordering the implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA).[196] This memorandum extended the class of individuals eligible for prosecutorial discretion to include parents of children who were U.S. citizens or lawful permanent residents.[197] More contentiously, the memorandum directed that individuals covered under DACA and DAPA for deferred action be treated as "lawfully present" in the United States.[198] The lawfully present status does not merely protect an alien from immigration action, but further removes a bar to eligibility to a considerable number of federal benefits including "social security retirement benefits, social security disability benefits, or health insurance under Part A of the Medicare program."[199] Moreover, any states that draw a distinction between "lawfully present" and "unlawfully present" aliens in the conferral of state benefits would be obliged to extend such

divided court 809 F.3d 134 (5th Cir. 2015).

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

193. *Id.* at 151–52.

194. *Id.* at 147–48.

195. *See* Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1–exercising–prosecutorial–discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/8DRL-3UVU]. The Directive was implemented and given its name through U.S. DEP'T OF HOMELAND SECURITY, NATIONAL STANDARD OPERATING PROCEDURES (SOP): DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (FORM I-821D AND FORM I-765): VERSION 1.0 (Aug. 30, 2012), http://www.judicialwatch.org/wp.../02/2013-HQFO-00304-First-Interim-Release-Package.pdf [perma: http://perma.cc/8L2F-BSFW].

196. *See* Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immig. Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [http://perma.cc/S2HU-K4PQ]; *Texas*, 809 F. 3d at 147 (referring to the memorandum as "what is termed the 'DAPA Memo'").

197. *Id.* at 4.

198. *Id.* at 2.

199. *See* Brief for the Appellants at 48–49, Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238).

benefits to the newly lawful class of persons.[200] Texas was just such a state.[201] And so Texas, as one of twenty-six states, brought suit against the federal government in a Texas federal district court for a preliminary injunction to forbid implementation of the DAPA program on the grounds that the memorandum violated the Administrative Procedure Act (APA) by not going through the required rulemaking process.[202] The injunction was granted by the district court,[203] affirmed by the Fifth Circuit,[204] and affirmed by an equally divided Supreme Court.[205] Briefed along each step of the way was the procedural concern: Do the States have standing to challenge DAPA?

The Fifth Circuit based its recognition of standing to the state litigants expressly on the decision in *Massachusetts*.[206] It approached special solicitude as separate from the injury, cause, and redressability requirements of the injury-in-fact standing test in general.[207] The two-part inquiry for special solicitude first looked for a procedural right granted to the states[208] and second for a quasi-sovereign interest that is affected by the administrative decision.[209] The court found a procedural right provided by the APA, which authorizes judicial review of "final agency action for which there is no other adequate remedy in a court."[210] Of note, the court felt the need to explain that the procedural right granted by the APA, though broader than the far more specific right granted by the CAA, was still adequate for special solicitude because Texas was challenging an agency action rather than an agency inaction.[211] The Fifth Circuit then identified two quasi-sovereign interests implicated in the case.[212] First, the court noted a governing interest insofar as the change in federal law exerts economic pressure on the State to change its laws.[213] Second, the court called attention to the preemption of immigration by the federal authorities as a quasi-sovereign interest insofar as, similar to environmental concerns, the State now relies on the federal government to protect its interests in the ceded arena.[214] In establishing

200. *See Texas*, 809 F.3d at 149.

201. *Id.* (noting that Texas provides state-subsidized driver's licenses to lawfully present but not unlawfully present aliens).

202. *See* Texas v. United States, 86 F. Supp. 3d 591, 607–08 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). The constitutionality of the memorandum was also called into question under the Take Care Clause of the Constitution, but the district court found it unnecessary to address this claim having granted the injunction on the grounds of the APA violation. *See id.* at 607, 677.

203. *Id.* at 677.

204. *Texas*, 809 F.3d at 188.

205. United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).

206. *Texas*, 809 F.3d at 151–55, 159.

207. *Id.* at 151–55.

208. *Id.* at 151.

209. *Id.* at 151–52.

210. *Id.* at 152 (quoting Administrative Procedure Act § 704, 5 U.S.C. § 704 (2012)).

211. *Id.*

212. *Id.* at 153–54.

213. *Id.* at 153.

214. *Id.* at 153–54.

injury, the Fifth Circuit focused on the economic costs that would accrue to Texas's fisc as a result of being required, under Texas law, to provide driver's licenses to all "lawfully present" aliens.[215] Importantly, the court noted that Texas would either have to bear increased costs from the license law, or change the license law to exclude DAPA beneficiaries and in so doing risk violating the Equal Protection Clause of the Fourteenth Amendment or the Preemption Clause.[216]

III. ARGUMENT

The structure Justice Stevens used to address standing in *Massachusetts* bears an intriguing relationship to the injury-in-fact test for standing enjoined by *Lujan*. Notably, while the second half of the holding on standing was devoted to a subsectional breakdown of the *Lujan* elements of injury,[217] causation,[218] and redressability,[219] the first half was devoted to a penumbral comment on the importance of Massachusetts's status as a sovereign state as it relates to standing,[220] culminating in the infamous grant of "special solicitude in our standing analysis."[221] This shifted the "legally protected interest" buried in *Lujan*'s injury prong[222] to a certain asymmetric equivalence with the enumerated *Lujan* elements. Any determination on the "interest" side might impact the analysis on the elements side. Tracing the judicial implications of this wrinkle in the *Lujan* standing doctrine, scholars as well as judges in the lower federal courts have understood Justice Stevens's analysis to provide an expanded scope of state standing along three prospective theories: (1) a subject matter argument centered on common law environmental protections,[223] (2) a functional argument on the value of granting parens patriae standing to states in adjudicating administrative law,[224] and (3) a constitutional argument implicating states' assertions of sovereignty.[225]

This Section will consider these respective arguments in turn to see how well they hold up when applied to *Texas*. In Part III.A, this Comment will reject a theory of standing based on common law interests as insufficient for the actual stakes of the cases at hand; however, it will find that the quasi-sovereign interests implicated as the basis for these claims, in *Massachusetts* the physical territory

215. *Id.* at 155.

216. *Id.* at 153, 155. Notably, at oral argument before the Supreme Court, Justice Sotomayor suggested that a private lawsuit arising from a denial of such benefits would have been the appropriately ripe situation for Texas to assert a defense that DAPA itself violated the APA. *See* Transcript of Oral Argument at 36–38, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674).

217. Massachusetts v. EPA, 549 U.S. 497, 521–23 (2007).

218. *Id.* at 523–25.

219. *Id.* at 525–26.

220. *Id.* at 516–21.

221. *Id.* at 520.

222. *See supra* notes 58–59 and accompanying text.

223. *See infra* Part III.A.1.

224. *See infra* Part III.B.

225. *See infra* Part III.C.

and in *Texas* the jurisdictional territory, suggest a class of quasi-sovereign interests based in the territorial integrity of the sovereign states.[226] In Part III.B, this Comment will reject a theory of standing based on the parens patriae interests of states asserting their rights to the benefits and protections of administrative federalism as unprecedented and functionally dangerous; however, it will find that as unique actors in a federal system, the states—relative to private actors—should be granted some leniency in the rigid requirements of the *Lujan* standing test.[227] And finally in Part III.C, this Comment will propose a variant of the third approach, such that injuries inflicted upon a state's properly defined quasi-sovereign interests represent an issue of residual sovereignty that the Court should recognize as justiciable.[228]

A. Topic-Specific Standing

To a layperson's eyes, *Massachusetts* is a case about the environment and *Texas* is a case about immigration. And there is something valuable to be gained from trying to understand quasi-sovereign standing doctrine in these cases as related to such field-specific concerns. However, this tack can also confuse matters if one is not careful, as the different spin that environmental law and immigration law put on standing doctrine can lead to starkly inconsistent legal conclusions. For instance, in *Massachusetts*, the environmentally focused approach reads out of the precedential cases a foundation for standing in the common law of pollution and nuisance. In *Texas*, however, focus on immigration law quickly descends into questions about federal preemption and, as discussed further below, parens patriae injuries to the state fisc. This Part aims to draw out the actual stakes in the relation between quasi-sovereignty and these topic-specific focuses as an interest in the territorial integrity of the states—the sovereign residuum of which stands as an implied constitutional right.

1. States' Interests in Environmental Law

The Court's decision in *Massachusetts* was understood by many scholars as an expansion of the justiciability of environmental interests.[229] This understanding rests on the most straightforward interpretation of Justice Stevens's special solicitude analysis: the procedural cause of action in the CAA removed any prudential bar to standing, damage to a state's environment can satisfy the injury-in-fact test, and this damage is to a proprietary interest that a state has in its territory.[230] Once injury in fact has been met, Justice Stevens's

226. *See infra* Part III.A.

227. *See infra* Part III.B.

228. *See infra* Part III.C.

229. *See, e.g.*, Bradford, *supra* note 184, at 1065–66 (arguing that state litigants in the aftermath of *Massachusetts* should "invoke their sovereign interests in regulating environmentally harmful activities as the basis for standing in future climate litigation").

230. *See* Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 70–74 (2009) [hereinafter Mank, *Standing and Future Generations*].

special solicitude doctrine lessens the state's burden of proof for the causation and redressability requirements of the test.[231] However, this analysis begs the question as to what the state's quasi-sovereign interest is, circularly treating it as a proprietary interest in another guise, which shifts special solicitude to simply derive from a state litigant asserting a procedural cause of action. This confusion of quasi-sovereign interests with common law property interests derives from the earliest line of cases that recognize quasi-sovereign interests as federally justiciable.[232] *Massachusetts* heightens this confusion by suggesting that while the interest is quasi-sovereign, the injury is actually to Massachusetts as an owner of coastal property that will be flooded.[233]

Two major arguments cut against the idea that Massachusetts was granted standing primarily on the basis of injuries to its common law proprietary interests in coastal land. First, if a proprietary interest were really in question, the full *Lujan* analysis should have been applied.[234] As discussed below, the causation and redressability requirements of the *Lujan* analysis do not appear as rigorous as regular application of the *Lujan* test would imply.[235] Second, Justice Stevens's extensive quotation of Justice Holmes's opinion in *Tennessee Copper Co.* suggests an analogous relationship in *Massachusetts* between the state property interest and the state quasi-sovereign interest in its territorial integrity.[236] Namely, that "[t]he alleged damage to the State as a private owner *is merely a makeweight*, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads."[237] That is, the property interest is a mere token of damages that provides a formal clearance for a state to bring an action; but, this cognizable token should not be taken as the

231. *See infra* Part III.B.3; *see also* Massey, *supra* note 186, at 261 (noting that the causation and redressability elements of the *Lujan* test appeared more relaxed for Massachusetts than they would have been for a private citizen who was suffering equal injury to his coastal land).

232. *See supra* Part II.D.4; *see also* Mank, *Standing and Future Generations*, *supra* note 230, at 78–81 (noting that early cases demonstrate that the states have "a quasi-sovereign interest in protecting the land and natural resources within [their] borders").

233. *See* Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007) ("Because the Commonwealth 'owns a substantial portion of the state's coastal property,' it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be 'either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.' Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars." (footnotes omitted) (citations omitted)); *see also* Massey, *supra* note 186, at 265 ("In [*Massachusetts v.*]*EPA*, . . . Massachusetts had a sovereign interest in its territorial integrity. Ironically, that sovereign interest was also a proprietary interest. The Court was remiss in not noting this complete overlap, which the Court could have used to clarify the extent to which a state may assert its sovereign interests against the federal government in federal court." (footnote omitted)).

234. *See* Wildermuth, *supra* note 184, at 295–98 (discussing instances where states asserting proprietary rights needed to meet full *Lujan* standards).

235. *See infra* Part III.B.3.

236. *See Massachusetts*, 549 U.S. at 518–19.

237. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (emphasis added).

dispositive interest for Article III standing.[238]

This confusion has led to inconsistent applications of state standing doctrine, even in cases of environmental harm and its concomitant damages to property. For example, lower federal courts have been inconsistent as to whether a territory's air quality can constitute a sufficiently injurable quasi-sovereign interest to bring suit against the EPA. So that in *North Carolina v. EPA*,[239] the Court of Appeals for the D.C. Circuit found that certain pollutant emissions met the injury prong of the *Lujan* test, but the court refused to weaken the redressability prong simply on this basis.[240] Yet when Delaware sued on the grounds that an EPA rule permitting certain pollution-producing emergency generators was impermissibly broad, the same D.C. Circuit found that injuries to the general welfare of Delaware's population, combined with the costs to the state in meeting National Ambient Air Quality Standards required by the CAA, provided sufficient cause for standing.[241]

2. States' Interests in Immigration Law

Like environmental law in *Massachusetts*, immigration law is a field where legislation can easily define and impact a state's territorial integrity, here through its relation to sovereign jurisdiction.[242] In *Texas*, the Fifth Circuit identified immigration, as a form of control over one's sovereign borders, to be an aspect of sovereignty that states surrendered to the federal government upon ratification of the Constitution.[243] Secretary Johnson's memorandum expanded the category of "lawfully present" persons and thus expanded the number of persons who were eligible for benefits under Texas law.[244] Texas's ability to lawfully discriminate against a class of aliens in the distribution of state resources was directly affected.[245] But the connection to draw here between *Massachusetts* and *Texas* is not that state laws were preempted in a general field of

238. *See* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 107–08 (2005) ("The Supreme Court, observing [in *Tennessee Copper Co.*] that the state owned very little of the property alleged to be damaged, recast the state's claim as a suit for injury to resources owned by Georgia in its capacity of 'quasi-sovereign.'").

239. 587 F.3d 422 (D.C. Cir. 2009).

240. *North Carolina*, 587 F.3d at 425–28.

241. Del. Dep't of Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 8–10 (D.C. Cir. 2015) (finding "self-evident" standing for Delaware related to public utilities and the impact of neighboring states' emissions on its air quality).

242. *See* Arizona v. United States, 567 U.S. 389, 417 (2012) (Scalia, J., concurring in part and dissenting in part) ("As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty."); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *354–58 (tracing the jurisdictional power of a sovereign to subjects naturally born in the sovereign's territory or to resident aliens).

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

244. Memorandum from Jeh Charles Johnson, *supra* note 196, at 2, 4.

245. *See supra* notes 198–202 and accompanying text.

governmental regulation and action.[246] Rather, the specific field preempted is one essential to the territorial and jurisdictional integrity of the state, and, by virtue of the constitutional structure of dual sovereignties, the state has no other forum in which to pursue an adequate remedy.[247] The relationship of these state cessions of power to the supremacy of the federal government becomes problematic when the federal government acts in breach of its implied constitutional duty to protect the sovereign territory of the states.[248] Yet in a clear functional sense, only the states are well positioned to put forth claims for injuries to this implied constitutional right. Only Massachusetts is self-interested in ensuring its sovereign territory is not submerged by the impacts of climate change; only Texas is self-interested in ensuring its sovereign territory is not filled with more persons than it can economically support. It is on this basis, of an implied constitutional right combined with the need for a functional path for interested (state) parties to pursue remedies to injuries thereto, that the concept of "quasi-sovereignty" becomes so valuable to understanding "special solicitude" for state standing.

B. Parens Patriae, Administrative Federalism, and the Lujan *Triptych*

The decision in *Massachusetts*, while obviously important to the relatively narrow fields of environmental law and federal court jurisdiction, implicates a broader field in legal scholarship concerned with the intersection of administrative law and the doctrine of federalism. Over the past century and a half, in the face of proliferating new technologies, aggregating capital, and globalized economies, a federal administrative state has developed to enable regulatory oversight of this novel form of political economy in accordance with our national values.[249] The Framers, in their drafting of the Constitution and its

246. See *infra* Part III.C.2 for the argument against granting state standing against the federal government on the basis of federal preemption claims that impact a state's sovereign interest to make and enforce laws both generally and in specific fields.

247. *See Texas*, 809 F.3d at 153 ("Moreover, these plaintiff states' interests are like Massachusetts's in ways that implicate the same sovereignty concerns. When the states joined the union, they surrendered some of their sovereign prerogatives over immigration. They cannot establish their own classifications of aliens, just as 'Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] cannot negotiate an emissions treaty with China or India.'" (footnotes omitted) (quoting Massachusetts v. EPA, 549 U.S. 497, 519 (2007))); *see also Arizona*, 567 U.S. at 431 (Scalia, J., concurring in part and dissenting in part) ("What I do fear—and what Arizona and the States that support it fear—is that 'federal policies' of nonenforcement will leave the States helpless before those evil effects of illegal immigration that the Court's opinion dutifully recites in its prologue but leaves unremedied in its disposition." (citation omitted)).

248. *See supra* Part II.C.2. *But see* Colorado v. Gonzales, 558 F. Supp. 2d 1158, 1162–65 (D. Colo. 2007) (denying state standing for violation of the Invasion Clause).

249. GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE, at v (1924) ("The vast changes wrought in the social and economic aspects of society during the nineteenth century, due to the introduction of new mechanical forces, the penetrating influence of science, large scale industry and progressive urbanization have reflected themselves in a steady extension of legal control of social and economic interests. State intervention at first expressed itself largely through specific legislative directions depending, in most instances, for enforcement upon the rigid, cumbersome and inevitably ineffective machinery of the

structure of dual sovereigns, could not have anticipated such a situation. This expansion of federal authorities operating in fields traditionally under the states' sovereign police powers creates regulatory conflicts with no easy constitutional answers.[250] Even before this division of authority can be addressed, the appropriate venue must be determined. Traditional understandings place the appropriate venue for the states to work out these political questions in the Congress, where they have elected representatives to restrain potential federal overreach.[251] Yet as seen in *Massachusetts*, the burden and responsibility of making these determinations is shifting, in some limited circumstances, out of the legislature and into the federal court system.

Following *Puerto Rico*, the doctrine underlying this shift has linked parens patriae standing against federal agencies to states' quasi-sovereign interests in accessing the benefits of the federal system. In this light, the doctrine of "special solicitude" implies a relaxation of the cause and redressability requirements of the *Lujan* standing test on the basis of parens patriae injuries that state litigants claim vis-à-vis federal administrative programs.[252] The injury in *Massachusetts* under a parens patriae theory is not to the State as a property owner or even as the sovereign over the territory, but the collective injury to private property owners that the State represents through its sovereignty.[253] In *Texas*, similarly, the Fifth Circuit found injuries to the state fisc "caused" by the increased number of applicants for state driver's licenses (which would result from a change in immigration policy) to be an economic injury to the State in its capacity as parens patriae.[254]

criminal law. More recently, legislative regulation of economic and social interests has resorted to administrative instruments in the enforcement of legislative policy."). *See generally* Edward L. Metzler, *The Growth and Development of Administrative Law*, 19 MARQ. L. REV. 209 (1935).

250. Consider, for instance, the "abrupt" overturning of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), when trying to determine the extent of Congress's power in the Commerce Clause to regulate "areas of traditional governmental functions." *Garcia*, 469 U.S. at 557–58, 561–62 (Powell, J., dissenting).

251. *See Garcia*, 469 U.S. at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."); THE FEDERALIST NO. 45, *supra* note 77, at 226 (James Madison) ("Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them.").

252. Per a recent article by Professors Tom Ginsburg and Nicholas Stephanopoulos, it should not be surprising that causation and redressability rise and fall together in jurisprudential analysis given their conceptual linkage as the *cause* of the harm and *cause* of the harm's relief. Tom Ginsburg & Nicholas Stephanopoulos, *The Concepts of Law*, 84 U. CHI. L. REV. 147, 172–73 (2017).

253. Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (noting that if Massachusetts were granted parens patriae standing, actual injury to its citizens would have to be established).

254. Texas v. United States, 809 F.3d 134, 152–53 (5th Cir. 2015) ("DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and

Although this formulation of "special solicitude" makes some intuitive sense, especially insofar as it empowers the states to check the federal agencies over matters that might not otherwise have capable or interested parties,[255] granting states standing against the federal government on the basis of parens patriae suffers from notable constitutional, jurisprudential, and functional problems that should incline against adoption in future decisions of the Supreme Court. However, what can be gained from these analyses is that the states, in their capacity as sovereigns acting in the context of administrative federalism, should be granted some relief from the *Lujan* test for Article III standing. This Part will begin by considering the problems with the parens patriae interpretation of state injuries under special solicitude and conclude by finding value in the relaxation of the causation and redressability elements that such analyses tend to promote.

1. Precedential Problems with Parens Patriae and Administrative Federalism

a. Parens Patriae, Supremacy, and Massachusetts v. Mellon

The first flaw in states using parens patriae standing to challenge the federal government is the constitutional bar laid out in *Mellon*.[256] There the Court denied states the right to bring suits against the federal government as parens patriae because, by virtue of the Supremacy Clause, the federal government holds a privileged position in citizen representation.[257] Chief Justice Roberts's dissent in *Massachusetts v. EPA* expressly noted this precedent and lamented the majority's failure to sufficiently attend to it.[258] Justice Stevens, in a footnote, attempted to distinguish the two cases by arguing that *Mellon* prohibits a state from "protect[ing] her citizens from the operation of federal statutes" whereas in *Massachusetts*, the Court recognized a state's quasi-sovereign interest as asserted

many would do so, resulting in Texas's injury."), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

255. *See* Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 70–71 (2011) (noting that states may be uniquely positioned to act as effective overseers of federal administrative agencies because of their knowledge related to involvement in implementing federal programs, experience with their own regulatory schemes, and special access to Congress and its agency oversight mechanisms); *see also* Matthew S. Melamed, *A Theoretical Justification for Special Solicitude: States and the Administrative State*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 604–06 (2010) (arguing that the political impotence of the states in the face of administrative agencies demands state access to the federal judiciary).

256. 262 U.S. 447, 485–86 (1923).

257. *Id.* at 486 ("In that field it is the United States, and not the State, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."); *see also* U.S. CONST. amend. XIV, § 1 (privileging United States citizenship over specific state citizenship); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406–07, 435 (2011) (noting that the Fourteenth Amendment was intended to overrule Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

258. *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting).

through a statutorily granted procedural right.[259]

Many scholars have followed Justice Stevens's argument that procedural grants of standing by Congress can allow for the relaxed standing requirements of states.[260] And further, that such congressionally granted procedural rights are a positive development in securing states' rights in the institutional context of administrative federalism.[261] Other lines of scholarship limit *Mellon* to a holding on political question and not parens patriae doctrine[262] or distinguish *Mellon*'s challenge against the enforcement of a federal law from *Massachusetts*'s failure to enforce a law.[263] Against these interpretations, it must be reminded that the understanding of *Mellon* as a bar on parens patriae suits by states against the federal government upholds the constitutional framework of dual sovereignty against a procedural common law device derived from the legal needs of a monarchy.[264] To chip away at precedents arrived at through constitutionally inclined jurisprudence, even if under the flag of prudence, should provide pause, especially if narrower but firmer arguments for standing can be found elsewhere in the American legal tradition.

b. The General Welfare and the State Fisc

Moreover, if one tries to align *Massachusetts* and *Texas* under the parens patriae theory of *Puerto Rico*, additional problems of precedent arise. In *Massachusetts*, one can recognize the State's desire to obtain for its citizens both

259. *Id.* at 520 n.17 (quoting Georgia v. Pa. R.R. Co., 324 U.S. 439, 447 (1945)).

260. *See, e.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1079–80 (2015); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 193 (2012); Massey, *supra* note 186, at 261; Metzger, *supra* note 255, at 63–64. But see *supra* Part II.B.2 and accompanying text for a discussion of how prudential, statutory grants of standing by Congress cannot go beyond the limits of Article III standing that the *Lujan* test purports to effect.

261. *See* Metzger, *supra* note 255, at 73 ("A stronger constitutional argument, both for expanded federal court access and for a special role for the states in policing federal administration more broadly, is that the delegation of extensive policymaking responsibilities to agencies eviscerates the political checks traditionally relied upon to defend state interests. On this account, ensuring states access to federal court to challenge federal administrative action is necessary to preserve constitutional federalism in the administrative era. . . . [I]t makes sense to conclude that special protections for the states must develop in the administrative realm if federalism is to have continuing relevance in the world of national administrative governance that increasingly dominates today." (footnotes omitted)).

262. *See, e.g.*, Sandefur, *supra* note 175, at 336–43.

263. *See, e.g.*, Mank, *Greater Standing*, *supra* note 185, at 1771–72.

264. *See* Pennsylvania v. Kleppe, 533 F.2d 668, 677 (D.C. Cir. 1976) ("While it is debatable whether the Court in that case meant to bar all state *parens patriae* suits against the Federal Government, the opinion makes clear at least that the federal interest will generally predominate and bar any such action. The substantial importance of this federalism interest has been repeatedly recognized, both in opinions which offered it as the primary grounds for denying standing, and in at least one case where standing was allowed, with the Court hastening to point out that no federal defendant was involved." (footnotes omitted)); Bickel, *supra* note 180, at 86–87; Woolhandler & Collins, *supra* note 73, at 410–19 (noting that even prior to *Mellon*, states were unable to "vindicate their extrastatutory interests in protecting their citizenry" in federal courts, *id.* at 393); *see also supra* note 122 and accompanying text.

(1) access to the benefits of the federal system, and (2) protection of their health and welfare through a suit to enjoin enforcement of the CAA and its provisions for reduced greenhouse gas emissions.[265] The quasi-sovereign interests that the Fifth Circuit found to underlie Texas's parens patriae claim, on the other hand, are far more attenuated. The court focused on the costs that Texas would have to bear due to the federal policy change.[266] These speculated costs were driven by Texas's own legislation, which provided any lawfully present person with a driver's license.[267] Thus, the expansion of the category of lawfully present persons would bear injuries proportional to the number of newly lawfully present persons requesting driver's licenses.[268] And Texas's self-remedy to change the law would risk federal litigation based on either preemption, insofar as Texas redefined "lawful persons" for its own benefit,[269] or equal protection, insofar as Texas discriminated against aliens.[270]

The problem with this injury is threefold. First, it is not clear that injuries to a state's fisc, whether income or expenditures, are justiciable by federal courts when caused by the legislation of other sovereigns.[271] In *Texas*, the litigants argued over whether *Wyoming v. Oklahoma*,[272] in which standing was granted, or *Pennsylvania v. New Jersey*,[273] in which it was denied, should control.[274] In each, the internal legislative actions of one state impacted the tax revenues of another. In *Wyoming*, Wyoming's severance tax revenue, related to coal mined in the state, was reduced by an Oklahoma law that required state power plants to use a higher percentage of locally mined coal.[275] In *Pennsylvania*, the Court found no injury to Pennsylvania from a New Jersey income tax on nonresident commuters that reduced Pennsylvania's own tax haul.[276] The Fifth Circuit followed *Wyoming* but failed to recognize that standing in that case was granted under the Supreme Court's original jurisdiction in trying a Commerce Clause action for a direct injury—and expressly not a parens patriae injury!—to the

265. Massachusetts v. EPA, 549 U.S. 497, 520–21 (2007) (noting both these factors in granting special solicitude in the standing analysis).

266. Texas v. United States, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

267. *Id.*

268. *Id.*

269. *See* Transcript of Oral Argument at 8–11, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674).

270. *Id.* at 37–38; *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (noting that aliens are persons for purposes of equal protection analysis).

271. *See, e.g.*, Florida v. Mellon, 273 U.S. 12, 15, 17–18 (1927) (holding that Florida did not have standing for injuries to its fisc for not having a state estate tax that could be credited by the federal government for up to eighty percent of the tax on the citizen).

272. 502 U.S. 437 (1992).

273. 426 U.S. 660 (1976).

274. Texas v. United States, 809 F.3d 134, 157–59 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

275. *Wyoming*, 502 U.S. at 440–41.

276. *Pennsylvania*, 426 U.S. at 662–64.

State.[277]

Second, "injuries" to the state fisc derived from the impact of federal legislation upon state law implicitly raise questions of preemption and self-infliction.[278] Any federal legislation and its administrative implementation are likely to have broad economic repercussions, and states should have baked the potential for such costs into their own legislative policymaking.[279] The Supremacy Clause should, in the context of a constitutional structure of dual sovereignty, protect the federal government from litigation premised entirely on a theory of costs externalized to the states.[280] Both the constitutional and functional problems that would derive from such a liberal theory of standing are daunting.

And third, these injuries tend to rest on speculative grounds, seeking either injunctive or declaratory relief before actual harm has occurred. In oral arguments in *Texas*, Justice Sotomayor suggested, for instance, that Texas would certainly have had standing to challenge the legality of DAPA in response to a suit from a DAPA beneficiary to whom Texas denied a license.[281] But considering speculative costs of federal legislation as de facto grounds for Article III standing would open up a massive new avenue for states to litigate against the federal government, as any "financial harm that indirectly flows from a change in policy would be subject to attack."[282]

277. *See Wyoming*, 502 U.S. at 451; *see also* Brief for the Petitioners at 26–27, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) (arguing that *Wyoming* should be distinguished as a case where the defendant State's legislative actions were specifically targeted at the plaintiff State).

278. *See* Roesler, *supra* note 100, at 700–01 (arguing that recognizing injuries to the state fisc under a traditional injury-in-fact test, as held in *Texas*, would support "state standing to challenge virtually any federal law or action").

279. *See* Pennsylvania v. Kleppe, 533 F.2d 668, 672 (D.C. Cir. 1976) ("The allegation that tax revenues were reduced embodies a comprehensible harm to the economic interests of the state government. However, it appears to us likely that this is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing. . . . Still, the unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing. By analogy to the taxpayer standing cases, it seems appropriate to require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged. This would prevent state standing in cases like the present one, where diminution of tax receipts is largely an incidental result of the challenged action." (footnote omitted)).

280. *See id.* at 672, 676–77.

281. Transcript of Oral Argument at 14–15, *Texas*, 136 S. Ct. 2271 (No. 15-674).

282. *Id.* at 64 ("[T]hat [argument] really pits the States against every Federal agency."); *see also* Brief for the Petitioners at 19, *Texas*, 136 S. Ct. 2271 (No. 15-674) ("[I]t would be extraordinary to find Article III standing based on such assertions by a State, as virtually any administration of federal law by a federal agency could have such effects.").

2. Functional Problems with Administrative Federalism Arguments

a. Vertical Powers: The Accountability of State Attorneys General

A notable similarity between *Massachusetts* and *Texas* is the fact that in each case the federal executive was challenged by a state official from the political party opposite the President.[283] The federal laws of which the nonenforcement was being challenged were ideologically disfavored by the President's party. In the case of *Massachusetts*, the second President Bush failed to enforce environmental statutes.[284] And in *Texas*, President Obama failed to enforce immigration statutes.[285] This suggests that, in expanding the scope of state standing for judicial review of federal executive actions, there is a concomitant shift in dictating the course of national policy from the federal government (and specifically Congress) down to the state attorneys general.[286] Yet unlike Congress, which must structurally have national interests in mind when it legislates,[287] states and their attorneys general "have little incentive to be mindful of the national public interest in the enforcement (or non-enforcement) of federal law."[288] This creates a perverse accountability incentive for state actors to pursue ideological agendas that play well to a localized base but could have outsized national impacts.[289] The Framers actually envisioned the constitutional structure of dual sovereignty to be a check on states spreading a

283. *Cf.* Metzger, *supra* note 255, at 71–72 (noting that state attorneys general will often promote ideologically driven litigation for the sake of political accountability).

284. *See* Massachusetts v. EPA, 549 U.S. 497, 510–14 (2007) (explaining the EPA's denial of a rulemaking petition requesting the EPA to regulate greenhouse gas emissions from new motor vehicles under the CAA).

285. *See* Texas v. United States, 809 F.3d 134, 146–50 (5th Cir. 2015) (setting forth the arguments that DHS's implementation of DACA violated the APA and constituted an abrogation of the President's duty to faithfully execute the laws), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

286. *See* Stevenson, *supra* note 533, at 38–41 (noting that the expansion of state standing shifts state attorneys general into positions of influencing national policy through bringing regulatory lawsuits against the federal government); Wildermuth, *supra* note 184, at 288 (noting that state attorneys general are beginning to see their role as one of shaping national public policy through federal litigation); *see also* DANIEL BÉLAND, PHILIP ROCCO & ALEX WADDAN, OBAMACARE WARS: FEDERALISM, STATE POLITICS, AND THE AFFORDABLE CARE ACT 26–27 (2016).

287. Metzger, *supra* note 255, at 72–73 ("But Congress was also expected to play a central—indeed, *the* central—role in resolving interstate disputes, and political safeguards of state interests in Congress are acknowledged to form their primary protection against harmful federal enactments. Thus, simply the fact that the states have ceded sovereign prerogatives to the federal government does not necessarily translate into greater access to federal court[s] for states seeking to challenge federal action." (footnotes omitted)).

288. Grove, *supra* note 163, at 896.

289. *See* Stevenson, *supra* note 53, at 43 ("Special solicitude also permits a state [attorney general] to effect change, or at least contribute significantly to it, on a more grandiose scale."); *see also* THE FEDERALIST No. 46, *supra* note 77, at 231 (James Madison) ("If an act of a particular State, though unfriendly to the national government, be generally popular in that State, and should not too grossly violate the oaths of the State officers, it is executed immediately and of course, by means on the spot, and depending on the State alone."). *See generally* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015).

"wicked project" throughout the union, not a precedent for it.[290]

b. Horizontal Powers: Judicial Overreach and Paralysis

In addition to the vertical concerns, greater state access to the federal courts in actions against federal administrative agencies would expand the power of the judiciary at the expense of both the executive and legislative branches. This expansion risks obstructing the effectiveness of the executive branch through additional—and often political—litigation and remedial injunctions;[291] the effectiveness of the legislative branch by subjecting more laws with implications for federalism to judicial review;[292] and even the effectiveness of the judicial branch by flooding the courts with litigation[293] and undermining procedural efficiency through the forum-shopping incentives created by national injunctive remedies.[294] Horizontal separation of powers has long been a justification for the prudential limitations on standing more generally.[295] But in cases where the federal executive is the defendant, that prudential concern is all the more starkly

290. *See* THE FEDERALIST NO. 10, *supra* note 77, at 46 (James Madison) ("Hence it clearly appears, that the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic – is enjoyed by the Union over the States composing it. . . . The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. . . .").

291. *See, e.g.*, California *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 880–83 (N.D. Cal. 2006) (detailing the case history where a national injunction granted by a previous state suit against a new "roadless rule," promulgated by the Department of Agriculture, inspired the agency to modify the rule, only to be sued by different states that were environmentally harmed by the modification of the rule), *stay granted in part* 710 F. Supp. 2d 916 (N.D. Cal. 2008), *aff'd*, 575 F. 3d 999 (9th Cir. 2009); Stevenson, *supra* note 53, at 63 (noting the likely increase in regulations and concomitant costs as agencies make more rules to hedge against the likelihood of state suits for nonenforcement).

292. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954) (arguing "that it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 371–72 (2002) (arguing that the Rehnquist Court "has restricted the constitutional power of Congress to act under its power to regulate interstate commerce and to enforce the guarantees of the Fourteenth Amendment").

293. *See* Vladeck, *supra* note 112, at 872 (noting the "risk of converting the federal courts into councils of revision").

294. The Fifth Circuit's holding had an immediate impact in this regard as seen in a national injunction that was granted by a Texas district court under the Fifth Circuit's jurisdiction, enjoining implementation of a federal policy interpreting transgender identity to be protected by federal civil rights law. *See* Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) *appeal dismissed*, 679 F. App'x. 320 (5th Cir. 2017); *see also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. (forthcoming 2017) (discussing the national injunction as an archaism of common law that should be restricted in scope to prevent forum shopping and conflicting injunctions). Professor Mark C. Rahdert, in conversation about this Comment, suggested a possible solution to the problem of national injunctions through a congressional statute that eliminates preliminary injunctions and temporary restraining orders as remedies in state litigation against the federal government.

295. *See* Harmanis, *supra* note 76, at 736 (noting that the Supreme Court does not permit public interest standing in order to ensure separation of powers).

revealed.[296]

3. Cause, Redressability, and Administrative Federalism

In *Massachusetts*, under the doctrine of "special solicitude," the Court granted standing on the basis of extremely attenuated instances of cause and redressability.[297] Even accepting the scientifically based premise that climate change would lead to nonspeculative injuries to Massachusetts's coastline, the proposed regulation of automotive greenhouse gas emissions would have too miniscule an impact on climate change itself to provide a meaningful remedy to the State.[298] Justice Stevens grounded this "uniquely relaxed"[299] and "notably lenient"[300] theory of causation and redressability on the incremental nature of regulatory mechanisms:

> [The EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.[301]

Texas presents less of a challenge to the traditional causation and redressability elements, at least accepting the above premise that injuries to the state fisc are sufficient to create a cause of action.[302] "DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury."[303] And therefore, enjoining enforcement or at least reconsidering the federal administrative policy would provide an injunctive remedy to the injury.[304]

296. *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (explaining the history and constitutionality of assuming judicial review should be presumed for agency actions).

297. *See* Massey, *supra* note 186, at 262.

298. *See* Massachusetts v. EPA, 549 U.S. 497, 544–45 (2007) (Roberts, C.J., dissenting) ("Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.").

299. *See* Massey, *supra* note 186, at 256.

300. *See* Metzger, *supra* note 255, at 68.

301. *Massachusetts*, 549 U.S. at 524; *see also* Percival, *supra* note 163, at 129 ("Justice Stevens's majority opinion . . . . rejects the idea that standing is defeated if success enforcing a regulatory statute is unlikely to resolve more than a small portion of the problem the statute seeks to address. This represents a welcome appreciation of the realities of the modern administrative state and the purposes of precautionary regulation.").

302. Texas v. United States, 809 F.3d 134, 159–60 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

303. *Id.* at 152–53.

304. *Id.* at 161.

Clearly the elements of the *Lujan* test are relaxed in both *Texas*, with respect to injury in fact, and *Massachusetts*, with respect to causation and redressability. However, the question remains as to what extent the *Lujan* test still applies, or if the Court is establishing an alternative test for standing in certain procedural or state-initiated cases.[305] Traditionally, states were not able to use the doctrine of parens patriae to get around procedural hurdles that individuals might face.[306] The relaxation of the elements of the *Lujan* test in these cases thus suggests that *Puerto Rico*'s incorporation of quasi-sovereign interests into the parens patriae doctrine may have opened the door to a novel expansion of standing based on (contested) functional benefits to the regime of administrative federalism.[307] Rather than following such a novel doctrine to its logical consequences and enabling the ideological gridlock of the national legislature to infect the federal courts, this Comment proposes a more limited approach by understanding the decision in *Massachusetts* to reground the doctrine of quasi-sovereignty not in the functional tangles of parens patriae and administrative federalism but instead in the constitutional principles of dual sovereignty.

C. Federalism: Sovereignty and Its Injury

Given that neither common law interests nor parens patriae interests provide either the constitutional or functional weight to justify Justice Stevens's special solicitude analysis, sovereignty interests must be considered as a potential ballast. Specifically, this Part will argue that quasi-sovereign interests, insofar as they trigger special solicitude standing analysis, should be limited to direct injuries to a state's residual sovereign interests in its territorial integrity and jurisdiction.[308] This form of standing strongly resembles more traditional Tenth

305. *See* Brown, *supra* note 60, at 264 ("The Court should take the further step of construing 'procedural rights' to enable standing in a broader class of cases—one in which plaintiffs demonstrate a concrete stake in the government's compliance with statutorily required procedures, even if that stake would not independently satisfy each nuance of the standard injury-in-fact test—and make clear that the *Lujan* majority's injury-in-fact analysis does *not* apply in that context."); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 802–03 (1997) (arguing for relaxed causality and redressability for actions against "procedural breaches of law" by federal agencies so long as there is a concrete interest at stake); Fletcher, *supra* note 55, at 272–76 (arguing that claims to validate constitutional rights should not be limited according to traditional cause and redressability elements).

306. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966) (denying South Carolina parens patriae standing to litigate its citizens' Fifth Amendment rights); Kansas v. United States, 204 U.S. 331, 340–41 (1907) (denying standing in Kansas's suit for original jurisdiction against the federal government on grounds that it was a nominal party with the real interest lying in a private railroad company); New Hampshire v. Louisiana, 108 U.S. 76, 88–91 (1883) (denying standing to New Hampshire after its citizens assigned their Louisiana bonds to New Hampshire in order to get around the Eleventh Amendment prohibition on citizen suits against other states).

307. *See supra* note 255 and accompanying text.

308. "The Court [in *Puerto Rico*] nowhere seemed to suggest that anything other than a direct injury to the state *as such* would support standing to sue the federal government." Vladeck, *supra* note 112, at 856 (discussing Justice White's categorization of quasi-sovereign interests in Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)). See *infra* notes 329–36 for examples of

Amendment standing.[309] In those cases, the interest is the state's sovereign lawmaking interest, the injury is through the coercion of that interest, and the state has no self-derived or administrative remedy to preserve its sovereign capacity.[310] This formulation ensures that courts rest on express or implied provisions of sovereignty to grant standing for states to sue *qua* states only when the "state truly is the federal stakeholder against the federal government."[311]

1. Original Jurisdiction

Article III of the Constitution grants the Supreme Court original jurisdiction over all cases "in which a State shall be Party."[312] While the grant is broad in theory, in practice the Supreme Court has limited its application to cases that implicate the sovereign interests of states with respect to their borders,[313] their resources,[314] and their relations to other sovereigns.[315] Quasi-sovereign interests, at their inception, may have been a legal theory through which to litigate otherwise private interests of states under the Court's original jurisdiction.[316] But even if so, the Court's subsequent acceptance of quasi-sovereign interests as a basis for the exercise of original jurisdiction suggests that there is a legally recognized similarity between sovereign and quasi-sovereign interests that ought to be explored.[317] Doing so highlights the fact that the primary value that drives the recognition of states' standing against the federal government is not a common law formalism or the dictates of the administrative state but rather the fundamental constitutional value of federalism.[318]

cases based on traditional Tenth Amendment standing.

309. See *infra* notes 329–36 for examples of cases based on traditional Tenth Amendment standing.

310. *See infra* notes 329–35.

311. Vladeck, *supra* note 112, at 848.

312. U.S. CONST. art. III, § 2, cl. 2.

313. *E.g.*, New Jersey v. Delaware, 552 U.S. 597, 601–02 (2008); Virginia v. Maryland, 540 U.S. 56, 60–61 (2003); New Jersey v. Delaware, 291 U.S. 361, 363–64 (1934); New York v. Connecticut, 4 U.S. (4 Dall.) 1, 3 (1799).

314. *See supra* note 107 and accompanying text.

315. Percival, *supra* note 163, at 129 (noting *Tennessee Copper Co.* was decided when the Supreme Court was providing original jurisdiction "for resolving environmental disputes between states").

316. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 239–40 (1907) (Harlan, J., concurring) (concurring in the judgment but disagreeing with the Court's exercise of original jurisdiction on the basis that "[w]hen the Constitution gave this court original jurisdiction in cases 'in which a State shall be a party,' it was not intended, I think, to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties" (quoting U.S. CONST. art. III, § 2, cl. 2)).

317. *See* Grove, *supra* note 163, at 869.

318. Massey, *supra* note 186, at 262 ("When federal law arguably invades state sovereignty in a constitutionally invalid manner, the balance of federalism is distorted if a state is unable to assert its sovereign interests in federal court. Whether federalism should primarily be politically or judicially enforceable is debatable, but closing the federal courts to state claims founded on sovereign interests denies the federal judiciary the opportunity to decide when federalism issues are properly decided by the judiciary."); *see also* Metzger, *supra* note 255, at 72–73.

2. Injuries to Sovereignty Through Infringements of Governing Interests

While the Court has recognized the justiciability of sovereignty claims under its Article III grant of original jurisdiction, it has consistently denied standing for sovereign claims based upon federal preemptions of state lawmaking powers.[319] Despite the consistency of these precedents, several scholars have suggested, in the wake of *Massachusetts*, that injuries to a state's ability to make and enforce a code of laws ought to be recognized as a basis for standing.[320] These arguments share a few fundamental features. First, they dismiss the political question holding precedents of *Cherokee Nation* and *Stanton* as historical relics, based not on strong legal analysis but instead on political realities of unenforceability in the case of *Cherokee Nation* and unique post-Civil War historical circumstances in *Stanton*.[321] Second, they either rely on the functional arguments related to administrative federalism discussed above[322]—basically shifting the interest from a parens patriae claim to a sovereignty claim to achieve the same justiciable purpose;[323] or, still in the domain of administrative federalism, they argue that states should have standing against ultra vires federal regulatory authority that preempts state law.[324] In practice, this latter justification simply opens the door for facially farcical and ideologically motivated challenges to federal law that raise the same state actor concerns noted above.[325]

A more limited version of the argument based on preempted sovereignty bears a strong resemblance to the position of this Comment. Namely, special solicitude is called for "to challenge the 'federal government's *failure to regulate*'" whenever state law is preempted.[326] Yet even this argument places the injury on the state's sovereign ability to regulate, rather than the territorial and

319. *See supra* Part II.D.3.a. *But see* Hawaii v. Trump, 859 F.3d 741, 763–66 (9th Cir.) (finding for Hawaii on for both its proprietary theory of standing and, alternatively, its sovereign interest theory of standing related to the state's "sovereign interests in carrying out its refugee policies"), *cert. granted, stay granted in part sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

320. *See, e.g.*, Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr. & Wesley G. Russell, Jr., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89, 91–94 (2012); Grove, *supra* note 163, at 855 (arguing that states "have broad standing to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law"); Sandefur, *supra* note 175, at 327–33.

321. *See supra* Part II.D.3.a.

322. *See supra* Part III.B.

323. *See* Grove, *supra* note 163, at 875 (arguing that state laws passed as part of a cooperative program of state-federal regulation should be protected "against interference by federal agencies").

324. *See* Cuccinelli et al., *supra* note 320, at 91–94.

325. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 270 (4th Cir. 2011) (holding the Virginia law declaring that residents are not required to maintain health insurance, passed immediately prior to the enactment of the Affordable Care Act (ACA), "creates no sovereign interest capable of producing injury-in-fact" in its conflict with the individual mandate of the ACA). For a discussion regarding the interests of state attorneys general, see *supra* Part III.B.2.a.

326. Grove, *supra* note 163, at 888 (emphasis added) (quoting Nash, *supra* note 185, at 1073–74).

jurisdictional integrity of the state.[327] Placing preemption into the injury-in-fact component of the *Lujan* test raises the structural problems discussed throughout this Comment that, fundamentally, throw into question the primacy of the Supremacy Clause and its core presence in the doctrines of constitutional federalism and dual sovereignty.[328] By maintaining preemption in the causation and redressability prongs of the *Lujan* test, implicitly bound up as they are in an analysis of the federal administrative scheme and the procedural remedies in play, such interests and their functional importance are still recognized via the relaxation of the standards of those components, but at a less constitutionally steep cost. This position is fundamentally in line with both Justice Stevens's opinion in *Massachusetts* and the Fifth Circuit's holding in *Texas*.

3. Injuries to Sovereignty Through Infringements of Constitutional Rights

It is unnecessary to seek novel theories of state standing on sovereign interest grounds when the Court already allows standing for federal violations of the constitutional rights of the states. The logic behind these decisions demonstrates limits to the sort of governing interests that the Court finds prudential to consider as a basis for standing. The two primary lines through which these cases come are the Voting Rights Act cases[329] and the undue coercion cases.[330] The undue coercion cases are divided into cases of direct coercion such as *New York v. United States*,[331] where federal law expressly required state officials to act in certain capacities,[332] and cases of indirect coercion such as *South Dakota v. Dole*,[333] where Congress used the tax and

327. *Id.* at 888–89.

328. *See* Woolhandler, *supra* note 73, at 209–10 ("[D]isallowing intergovernmental suits to vindicate sovereignty interests reinforce[s] the federalism principle that state and federal governments should act primarily on the people rather than on each other.").

329. *See* Oregon v. Mitchell, 400 U.S. 112, 117 n.1 (1970) (allowing Oregon to file a challenge to the Voting Rights Act with no clear holding on standing), *superseded by*, U.S. CONST. amend. XXVI; South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (holding that South Carolina can bring suit to protect interests "against the reserved powers of the States" as regards lawmaking related to voting requirements).

330. *See* New York v. United States, 505 U.S. 144, 188 (1992) (finding a violation of the Tenth Amendment in a federal law requiring New York to take title to waste or legislate according to Congress's mandate). *But see* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (rejecting South Dakota's claim that Congress had violated the Tenth Amendment and engaged in an unduly coercive use of the tax and spend power). For cases where private litigants made state standing analysis unnecessary but a Tenth Amendment holding was issued regardless, see, for example, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 576–78 (2012) (holding that the ACA's Medicaid expansion was undue coercion of states' Tenth Amendment sovereignty rights), and *Printz v. United States*, 521 U.S. 898, 919–20 (1997) (finding that federal acts that coerce the states into action violate the Tenth Amendment).

331. 505 U.S. 144 (1992).

332. *See New York*, 505 U.S. at 149–51.

333. 483 U.S. 203, 205 (1987)

spend power to induce state officials to act at risk of losing federal funding.[334] The Voting Rights Act cases—for which, it should be reminded, Professor Bickel found state standing so unwarranted[335]—are justified through a constitutional reservation of powers in the states.[336] The undue coercion cases likewise rely, either expressly or implicitly, on theories of injuries to state sovereignty interests constitutionally protected by the Tenth Amendment. Although the standing analysis in these cases overlaps with the merits analysis in determining whether there are in fact constitutional rights reserved to the states in either the regulation of elections or being compelled to act by federal law, these forceful examples of constitutional reservations of states' rights provide the best template going forward in discerning the constitutional extent of state standing against the federal government.[337]

4. Quasi-Sovereign Interests as a Category of Constitutional Sovereign Interests

Following the reasoning of the late Professor Massey, it is evident that in *Massachusetts* the State "had a sovereign interest in its territorial integrity. . . . Massachusetts sought to protect its sovereign interest in territorial inviolability by demanding the benefits of federal law."[338] However, the majority declined to denote the interest litigated as a sovereignty interest,[339] and instead found standing on a confused analysis of "makeweight" property injuries to quasi-sovereign interests.[340] Professor Massey emphasizes Justice Stevens's locution "that Massachusetts was asserting '*its* rights under federal law'" to imply a "cryptic" undermining of parens patriae doctrine even as the Court avoided a ruling that upset precedents against standing for sovereign governing interests.[341] Rather than contorting parens patriae doctrine into an ill-fitting, expansive grant of standing,[342] scholars and the Court would be wise to apply *Massachusetts* as shifting the use of quasi-sovereign interests from part of a parens patriae test to

334. *See Dole*, 483 U.S. at 205.

335. *See supra* notes 179–80.

336. *Katzenbach*, 383 U.S. at 323 ("These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution."); Vladeck, *supra* note 112, at 859 ("Underlying [the discussion in *Oregon v. Mitchell*] was a key insight—that the Constitution confers upon the states *themselves* a uniquely federal interest in supervising state and local elections.").

337. *But see* Sandefur, *supra* note 175, at 313 (arguing that standing based on injuries to states' rights protected by the Tenth Amendment should be expanded to include challenges to ultra vires federal actions in order to "cast legal protection over the residuum of individual rights").

338. Massey, *supra* note 186, at 265 (footnotes omitted).

339. *Id.* ("The Court was remiss in not noting this complete overlap, which the Court could have used to clarify the extent to which a state may assert its sovereign interests against the federal government in federal court.").

340. *See supra* notes 237–38 and accompanying text.

341. Massey, *supra* note 186, at 264–65 (footnote omitted) (quoting Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007)). For precedents and arguments related to standing for sovereign governing interests, see also *supra* Part III.C.2.

342. *See supra* Part III.B.1.

part of a sovereign interest test. This shift would continue to recognize political question restrictions on governing interests, while opening up a pathway for litigating sovereign interests related to the jurisdiction of a state deriving from its territorial integrity. Such a quasi-sovereign interest test might be outlined as (1) is there a sovereign interest related to jurisdictional integrity that the state ceded to the federal government as part of joining the union,[343] (2) is the jurisdictional integrity of the state itself the site of injury,[344] and (3) can the state self-remedy the injury.[345]

As a benefit of ex post facto rationalizations, when applied in *Massachusetts* the state passes the test: (1) Massachusetts ceded ultimate arbitration of its physical borders to the federal government at ratification,[346] (2) Massachusetts's physical territory was being injured by the effects of climate change,[347] and (3) Massachusetts's power to regulate a distinct cause of the injury was preempted by federal law.[348] When applied to the Fifth Circuit's opinion in *Texas*, however, there is a different result: (1) Texas ceded immigration authority to the federal government at admittance,[349] (2) Texas's jurisdictional integrity was not itself injured but was in fact expanded,[350] and (3) the injuries to Texas's state fisc could easily be self-remedied through legislation.[351] While *Texas* meets the first prong of this quasi-sovereign test, it falls short on the other two.

343. *See* Texas v. United States, 809 F.3d 134, 153–54 (5th Cir. 2015) ("Moreover, these plaintiff states' interests are like Massachusetts's in ways that implicate the same sovereignty concerns. When the states joined the union, they surrendered some of their sovereign prerogatives over immigration. They cannot establish their own classifications of aliens, just as 'Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] cannot negotiate an emissions treaty with China or India.' The states may not be able to discriminate against subsets of aliens in their driver's license programs without running afoul of preemption or the Equal Protection Clause; similarly, 'in some circumstances[, Massachusetts's] exercise of its police powers to reduce in-state motor-vehicle emissions might well be preempted.' Both these plaintiff states and Massachusetts now rely on the federal government to protect their interests. These parallels confirm that DAPA affects the states' 'quasi-sovereign' interests." (alterations in original) (footnotes omitted) (quoting *Massachusetts*, 549 U.S. at 519)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

344. *See Massachusetts*, 549 U.S. at 518–19.

345. The question of self-remedy is wrapped up in the causation and redressability prongs of *Lujan*. As previously discussed in Part III.B.3, *supra*, the causation and redressability requirements appear to be lowered through the procedural rights granted in relation to the operation of administrative law. The exact mechanism of how specific causation and redressability are related to more generalized injuries—that is, why Massachusetts cannot self-remedy by reducing some equivalent amount of in-state greenhouse gas emissions—is unclear, but may hinge on questions of capacity, scale, and the compounding of factors at play in climate change. While the impact of federal regulation of automotive greenhouse gas emissions in the United States might be incremental relative to the enormous complexity of climate change, it remains substantially greater than Massachusetts's individual capacity to regulate analogous (nonpreempted) emissions at comparable economic costs.

346. *Massachusetts*, 549 U.S. at 519.

347. *Id.* at 522–23.

348. *Id.* at 519–20.

349. *See* Arizona v. United States, 567 U.S. 387, 394–97 (2012).

350. *See supra* note 268 and accompanying text (noting increase in "lawfully present" persons subject to Texas's jurisdiction).

351. *See supra* notes 269–82 and accompanying text.

IV. CONCLUSION

Although *Massachusetts* granted special solicitude to state standing analysis on the basis of injuries to a state's quasi-sovereign interests, the Fifth Circuit's standing analysis in *Texas* represents an erroneous application of that holding. Unsurprisingly, after its decision in *Texas*, the Fifth Circuit is now fielding a host of state-sponsored litigation against federal agencies for largely speculative fiscal injuries from preempted fields of action, with holdings and injunctions of national effect.[352] Other circuits thus far appear to recognize the dangers posed by such an expansive reading of *Massachusetts*.[353] In *Washington v. Trump*,[354] the state-led suit challenging the legality of President Trump's first executive order limiting immigration from seven Muslim-majority countries,[355] the Court of Appeals for the Ninth Circuit ducked the question of quasi-sovereign interests by ruling on the proprietary interest the states had in their universities.[356] Yet in *Hawaii v. Trump*,[357] which similarly took up President Trump's revised executive order to limit immigration from certain Muslim-majority countries,[358] the Ninth Circuit granted standing alternatively on the state's proprietary interest in its universities[359] *and* a "sovereign interest[] in carrying out its refugee policies."[360] Yet it is the *Puerto Rico* Court's quasi-sovereign interest analysis that provides the direct basis for the latter holding.[361] And the state refugee policies, as legislative acts regulating foreign persons,[362] straddle both the state's governing interests[363] and territorial concerns.[364] The confusion of quasi-sovereign interests thus remains in play and has been given further sanction by another circuit. In

352. *See, e.g.*, Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 525–26 (E.D. Tex.) (finding state standing for costs associated with implementing new Fair Labor Standards Act overtime rules), *appeal docketed*, No. 16-41606 (5th Cir. Dec. 1, 2016); Texas v. United States, 201 F. Supp. 3d 810, 819–23 (N.D. Tex. 2016) (finding state standing for policy changes required by transgender bathroom guidance in education facilities), *appeal dismissed*, No. 16-11534 (5th Cir. Mar. 3, 2017); Texas v. United States, No. 7:15-cv-00151-O, 2016 WL 4138632, at *9 (N.D. Tex. Aug. 4, 2016) (finding state standing for fees associated with participation in the ACA's Medicaid expansion).

353. West Virginia *ex rel.* Morrisey v. U.S. Dep't of Health & Human Servs., 827 F.3d 81, 82–84 (D.C. Cir. 2016) (rejecting state standing to challenge presidential decision to delegate enforcement of ACA provisions to states), *cert. denied*, 137 S. Ct. 1614 (2017); Otter v. Jewell, 227 F. Supp. 3d 117, 121–26 (D.D.C.) (rejecting state standing against federal land use plan), *appeal filed sub nom.* Otter v. Zinke, No. 17-5050 (D.C. Cir. Mar. 28, 2017).

354. 847 F.3d 1151 (9th Cir.) (per curiam), *reconsideration en banc denied*, 858 F.3d 1168, 1168 (9th Cir. 2017).

355. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

356. *Washington*, 847 F.3d at 1158–61.

357. 859 F.3d 741 (9th Cir.), *cert. granted, stay granted in part sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

358. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

359. *Hawaii*, 859 F.3d at 763–65.

360. *Id.* at 765–66.

361. *Id.* at 765.

362. *See id.*

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

364. *See supra* Part III.C.4.

future litigation, the Supreme Court should reject those theories that *Texas* might be supposed to stand on, such as federal interference with governing interests or a renewed role in administrative federalism. Instead, the Court should make clear that special solicitude standing analysis, which relaxes the standing requirements of causation and redressability, should only be granted to injuries to ceded but still constitutionally protected sovereign interests in territorial and jurisdictional integrity.