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Calvin Massey

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STATE STANDING AFTER *MASSACHUSETTS v. EPA*

*Calvin Massey** **

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I. INTRODUCTION

By granting states “special solicitude in our standing analysis,” the Supreme Court in *Massachusetts v. EPA*¹ created substantial new

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1. 549 U.S. 497, 520 (2007). Massachusetts, joined by eleven other states and additional plaintiffs, challenged the EPA’s denial of a petition to regulate carbon dioxide and other greenhouse gases emitted by new cars. *Id.* at 505. The EPA contended that it lacked statutory authority to regulate these gases. *Id.* Massachusetts contended that the EPA was required by the Clean Air Act to regulate such gases. *Id.* The threshold issue was whether Massachusetts and its fellow plaintiffs had standing. *Id.* The Court concluded that the plaintiffs had standing, that the Clean Air Act authorized the EPA to regulate the gases in question, and that the EPA was required to do so unless it could determine that the gases do not contribute to global warming or has some credible reason why it cannot make that determination. *Id.* at 534–35.

uncertainty in the law of standing. At least since *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*² Article III's limitation of federal jurisdiction to "cases" or "controversies" has required a litigant to plead and prove actual or imminent personal injury in fact that is "fairly traceable" to the defendant's conduct and that will be redressed by the requested relief.³ This "irreducible constitutional

2. 454 U.S. 464 (1982).

3. As an aspect of the Article III case or controversy requirement, standing appears to have a long pedigree. As early as 1809, in *Owings v. Norwood's Lessee*, 9 U.S. (1 Cranch) 344, 348 (1809), the Court ruled that a dispute concerning title to land did not arise under Jay's Treaty of 1794, so as to invoke federal jurisdiction, because the litigants' claims to title were "not affected by the treaty." The only person whose title was so affected was not a party. *Id.* In other words, a plaintiff needs to assert his own injury to have a "case." That point was given modern shape in *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), in which the Court ruled that neither a state nor a federal taxpayer possessed sufficient injury to challenge the validity of a federal spending program to promote maternal health. The state's injury was an

abstract question[] of political power, of sovereignty, of government. No rights of the state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute, and this court is . . . without authority to pass abstract opinions upon the constitutionality of acts of Congress

Id. at 485. The taxpayer's injury—taxation to support an allegedly unconstitutional program—was insufficient to constitute a case or controversy because it was "shared with millions of others, [was] comparatively minute and indeterminable, and the effect upon future taxation [was] . . . remote, fluctuating and uncertain." *Id.* at 487. Neither plaintiff was "able to show [that it had] . . . sustained or [was] immediately in danger of sustaining some direct injury"; all they could demonstrate was they "suffer[ed] in some indefinite way in common with people generally." *Id.* at 488. The other side of the coin was that the presence of such personal injury gave rise to a presumption of standing. For example, in *Stark v. Wickard*, 321 U.S. 288, 309–10 (1944), the Court concluded that milk producers affected by a marketing order issued by the Secretary of Agriculture had alleged sufficient personal financial injury to possess standing:

When . . . definite personal rights are created by federal statute . . . the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction [U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

But standing was always an implied aspect of a case or controversy. When serving in the House of Representatives, John Marshall declared that the case or controversy requirement in Article III limited federal jurisdiction to

a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every

minimum⁴—injury in fact, causation, and redressability—establishes the core of standing.⁵ As limits upon the federal judicial power, these elements necessarily apply to all litigants. After *EPA*, however, the meaning of these elements vary with the litigant and the type of claim presented. Individuals asserting public rights, even when Congress has sought to authorize them to do so, must confront a robust version of these elements. By contrast, states acting as *parens patriae* and asserting public rights need only surmount a flaccid version of these elements.

question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of the federal government] could exist no longer, and the other departments would be swallowed up by the judiciary.

4 PAPERS OF JOHN MARSHALL 95 (Charles Cullen ed., 1984). Marshall's insight was echoed in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11 (2004), where the Court declared that "[t]he standing requirement is born partly of 'an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government'" (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). By contrast, Professor Cass Sunstein has argued that the present-day elements of Article III are unsupported by text or history, but are a recent invention of federal judges. See Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992). Sunstein reserves particular scorn for the injury-in-fact requirement, which he characterizes "as a prominent contemporary version of early twentieth-century substantive due process." *Id.* at 167.

4. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Court has stated that this irreducible minimum requires

(1) that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997).

5. Federal courts can and do impose a variety of additional, prudential limitations upon standing. For example, a plaintiff's injury must come "within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984); see also *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 (1991). Other examples include the doctrines that pertain to third-party standing and associational, or organizational, standing. On third-party standing, see generally Henry Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984), which discusses the trouble with reducing third-party standing to discretionary rules of judicial practice. On associational standing, see *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), which recognized a three-part test of standing for an association to sue on behalf of its members: the members would have standing on their own, the interests asserted are germane to the association's purpose, and neither the claim nor the requested relief requires the members' participation. See also LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-20, at 450–52 (3d ed. 2000).

What are the implications of this relaxation of the requirements for state standing? To what extent does the easier version of standing apply when states seek to vindicate public rights on behalf of their citizens? What, if anything, justifies a two-tiered view of Article III's case or controversy requirement? This Article attempts to answer those questions.

Several possible alternative interpretations of *EPA* necessarily precede any conclusion that it dilutes the case-or-controversy requirement for assertions of public rights by states as *parens patriae*. First, *EPA* might make no change at all to the constitutional core of standing. Perhaps it merely reiterates the prior understanding of standing founded on procedural injury. Second, *EPA* might change the elements of the constitutional core of standing for all litigants. Third, *EPA* might create a different constitutional understanding of a case or controversy when a state is a party, regardless of whether it acts as *parens patriae*.

I contend that *EPA* does more than simply restate familiar principles of standing to vindicate procedural injuries, but does not make global alterations to the constitutional core of standing. The most persuasive understanding of *EPA* is that it permits states, as *parens patriae*, to assert generalized claims of injury suffered in common by all of its citizens that would not be judicially cognizable if asserted by any individual citizen. Moreover, with respect to such generalized injury, *EPA* softens both causation and redressability. Causation is satisfied when the defendant's actions contribute to the injury, and redressability is present if the requested relief will abate, to any degree, the identified injury. Finally, states may act as the parent of their citizens with respect to vindication of rights rooted entirely in federal law. Part II provides the flesh for these assertions.

After teasing out this reading of *EPA*, this Article then undertakes to answer the question: Should such a reading of *EPA* stand? Is there an adequate justification for these changes, or is *EPA* aberrational, a *sui generis* case highly colored by the alarm surrounding the prospect of global warming? The Court made almost no attempt to justify its alteration of the constitutional core of standing; indeed, its opinion is founded on the implicit presumption that it makes no changes to our understanding of the constitutional limits upon standing. Yet, reading *EPA* as conferring on states the ability to assert the generalized injuries of its citizens, including the amorphous injury inherent in lawless governmental conduct that produces no particularized harm, reveals a justification based on federalism. Diffusion of governmental power between the states and the central government checks concentration of authority in one locus, with attendant risk of authoritarian consequences. As Professor Rapaczynski wrote, "because the states are governmental bodies that break the national authorities' monopoly on coercion . . . they constitute the most fundamental bastion against a successful conversion of the federal

government into a vehicle of the worst kind of oppression.”⁶ Although ordinary citizens do not present a cognizable “case or controversy” when they seek to vindicate a pure public right—the common entitlement of citizens to demand that their government obey the law—the states occupy a unique role in the liberty-enhancing structure of federalism. States may properly be seen as fiduciaries of the public rights of the citizens, especially with respect to those rights that citizens cannot vindicate in federal court. The structure of federalism provides the best justification for allowing states to assert in federal court generalized injuries suffered in common by all its citizens that are attributable to claimed violations of public rights. Part III develops this argument.

II. DESCRIPTION: WHAT HATH MAN WROUGHT?⁷

There are three plausible readings of the effect of *EPA* on the constitutional limits upon standing: (1) *EPA* involves only the special case of procedural injury and merely restates prior doctrine on that point; (2) *EPA* relaxes and broadens the concepts of injury in fact, causation, and redressability with respect to all litigants, thus effecting a major alteration in our understanding of the constitutional limits upon standing; and (3) *EPA* applies only to instances in which states are litigants, but with respect to that category, *EPA* alters the constitutional limits upon standing to permit states to prosecute claims in federal court that would not be cognizable if asserted by individuals. Each of these possibilities will be considered below; all but the last possibility will be rejected.

A. “*Ain’t Nobody Here But Us Chickens*”⁸: *Just Another Case of Procedural Injury*

Justice Stevens, writing for the majority, placed considerable stress on the existence of a procedural right that Massachusetts possessed. He noted that “Congress has . . . authorized this type of challenge to EPA action,”⁹ citing a statute that restricts to the U.S. Court of Appeals for the D.C. Circuit any judicial review of EPA action in promulgating air quality standards for new motor vehicles.¹⁰ Although the procedural right was not

6. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 389 (1985).

7. The phrase “What hath God wrought!” (emphasis added) is from *Numbers* 23:23 (King James), and was what Samuel F. B. Morse chose for the first telegraphic transmission on May 24, 1844. See Library of Congress, American Memory, Today in History: May 24, <http://memory.loc.gov/ammem/today/may24.html> (last visited Dec. 22, 2008).

8. LOUIS JORDAN, *Ain’t Nobody Here But Us Chickens*, on SWINGSATION (Mercury Records 1946).

9. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

10. See 42 U.S.C. § 7607(b)(1) (2006) (“A petition for review of action of the [EPA]

altogether clear from the face of the cited statute, I shall assume, as did the majority, that Massachusetts possessed such a right.¹¹ According to *Lujan*, a “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.”¹² To Justice Stevens, that meant that a plaintiff asserting a procedural right “has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”¹³ Even though redressability and immediacy may be diluted when procedural rights are at issue, *Lujan* made clear that a plaintiff asserting a procedural right must do so with respect to a particular and personal “concrete interest[.]” that the procedural right is intended to protect.¹⁴ Justice Stevens did not quarrel with that requirement. Indeed, he labored to identify Massachusetts’ personal, particularized concrete interest injured by the EPA’s failure to regulate greenhouse gas emissions from new cars. Massachusetts, he said, had lost between ten and twenty centimeters of its coastline during the twentieth century due to global warming, and that loss was a sufficient “particularized injury in its capacity as a landowner.”¹⁵ But Justice Stevens went further and characterized the predicted future inundation of Massachusetts’ coastline during the twenty-first century as sufficient threatened injury.¹⁶ Although Massachusetts sought to direct the EPA to regulate greenhouse gas emissions from new cars, which represents only a minute fraction of all greenhouse gases, the majority in *EPA* thought that this remedy would redress Massachusetts’ threatened future injury: “The risk of catastrophic harm [is] remote . . . [but] would be reduced to some extent” by granting the requested relief.¹⁷

Administrator in promulgating any . . . standard under section 7521 of this title [pertaining to emissions from new motor vehicles] or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.”)

11. Nowhere in § 7607(b)(1) is there any indication that the statute authorizes “any person,” or “any aggrieved person,” or “any person who has urged the EPA Administrator to adopt a contrary standard,” to institute suit in the Court of Appeals for the D.C. Circuit. *Id.* At best, it authorizes any person who might *otherwise* have a right to sue to bring the action only in the D.C. Circuit. Of course, the Administrative Procedure Act, 5 U.S.C. § 702 (2006), provides that “[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” The citizen-suit provision of the Clean Air Act, 42 U.S.C. § 7604(a) (2006), which provides that “any person may commence a civil action” to enforce the provisions of the Clean Air Act, is of no help, for it merely eliminates any prudential barriers to standing, such as the zone-of-interests requirement. *See, e.g.,* *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621 (D.C. Cir. 1998).

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

13. *EPA*, 549 U.S. at 518.

14. *Lujan*, 504 U.S. at 572 n.7.

15. *EPA*, 549 U.S. at 522.

16. *Id.* at 522–23.

17. *Id.* at 526.

If the Court stopped here, it might be reasonable to conclude that the Court simply located Massachusetts' claim within the existing structure of standing based on procedural rights. The Court did more than this, however, in two dimensions. First, it stretched the notion of concrete harm that is protected by the grant of a procedural right and, as part of this stretch, pushed the concepts of immediate harm and redressability to new frontiers. Second, it placed exceptional weight on the fact that Massachusetts is a state, a consideration foreign to prior notions of standing premised upon a procedural right.

When a litigant asserts a procedural right, the reason to relax the requirements of immediacy and redressability is to ensure full compliance with the procedural requirements Congress imposed to protect against the asserted concrete harm. This relaxation is to protect against the infliction of real harm, not simply to ensure that such procedural requirements are met for their own sake. Conferring standing in the absence of any threatened concrete harm would enable individual plaintiffs to raise pure public rights. A "generally available grievance about government"—the abstract interest of "proper application of the Constitution and laws" that is shared equally by "the public at large—does not state an Article III case or controversy."¹⁸ Instead, the Court identified two different injuries suffered by Massachusetts, one actual and another threatened.¹⁹ But the Court never acknowledged that the actual injury could not be remedied by the relief sought, and the threatened injury was both too speculative to qualify as injury (even to support a procedural interest) and was not capable of redress (in the way that term has been previously understood).

The actual injury was the loss of an estimated four to eight inches of the state's coastline during the course of the twentieth century.²⁰ The threatened injury was the prospect of the loss of some uncertain additional amount of coastline if global warming continued through the twenty-first century.²¹ The actual injury is real and particularized, but is simply not capable of being remedied by a judicial order to the EPA requiring regulation of greenhouse gas emissions from new cars. The Court relied on the scientific consensus concerning global warming to establish Massachusetts' actual injury, but the scientific consensus also holds that the presently felt effects of global warming are not reversible.²² Thus, no amount of regulation of greenhouse gas emissions from newly manufactured cars will restore the state's lost coastline.

18. *Lujan*, 504 U.S. at 573–74.

19. *EPA*, 549 U.S. at 521.

20. *See id.* at 521 Joint Appendix at 225, *EPA*, 549 U.S. 497 (No. 05-1120), 2006 WL 2569818.

21. *Id.* at 521.

22. *Id.* at 522–23.

The threatened injury is said to be almost certain to occur, but the scientific community cannot agree on its timing and magnitude. Given the scientific consensus that the future effects of global warming are inevitable, even if carbon emissions were to be frozen at present levels or reduced to some earlier level of industrialization and consumption, it is difficult to understand how Massachusetts' inevitable future injury can be redressed by forcing the EPA to regulate greenhouse gas emissions from a tiny fraction of the global output of such gases. Indeed, it is hardly clear that such regulation will reduce to any extent the risk of this apparently inevitable inundation. Moreover, according to the dissent, the computer models offered to support the predicted future injury contain such a large margin of error that it is difficult to be certain that the claimed future injury is inevitable.²³ If this is so, Massachusetts may well have failed to establish the concrete harm that is required for standing to assert a procedural right. Of course, if the bare *possibility* of speculative and remote future injury is sufficient to constitute concrete harm, it is far more likely that a judicial order to the EPA to regulate greenhouse gases emitted from new cars will reduce the risk of this speculative future injury.

Several possible conclusions follow from this analysis. If Massachusetts' standing was founded on a procedural interest alone, the Court lowered the level of concrete harm necessary to support such standing to include speculative and temporally remote injury, or reduced redressability to a concept of some possibility that the relief might imperceptibly reduce the risk of an inevitable but temporally remote future injury, or both. Perhaps the Court regarded Massachusetts' standing to assert its procedural right as founded entirely upon its actual injury of past inundation, but if this is so, the Court scrapped redressability as a required element. This conclusion is unlikely, because the Court gave no indication that it was eliminating redressability and, if it were doing so, it would have been incumbent upon the majority to explain why this element of the Article III case or controversy requirement is no longer necessary. Instead, the Court accepted the necessity of establishing redressability, but did so in the context of the threatened future injury facing Massachusetts.

In any event, if the Court viewed Massachusetts' claim as a simple assertion of a procedural right, it is inexplicable why the majority went to such pains to emphasize Massachusetts' status as a "sovereign State and not . . . a private individual."²⁴ Perhaps the Court was intent on creating a uniquely relaxed interpretation of Article III's case-or-controversy requirement when a state asserts a procedural right. If so, it is hard to fathom why the Court grafted that notion onto the quite separate concept

23. *Id.* at 542 (Roberts, C.J., dissenting).

24. *Id.* at 518 (majority opinion).

of state standing as *parens patriae*. But that is what the Court seemed to do: “Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”²⁵ The possibility that the Court fashioned, inadvertently or deliberately, a new facet of standing—a flaccid conception of Article III’s case-or-controversy requirement when a state asserts a procedural right as *parens patriae*—will be considered later.²⁶

B. “*The World Turned Upside Down*”²⁷: *Global Warming Thaws Article III*

Despite the Court’s emphasis on the sovereign status of Massachusetts and its assertion of a procedural right, perhaps *EPA* should be read as reducing, for all litigants, the quantum of proof necessary to establish each of the three elements of standing necessary to meet the case-or-controversy requirement. There are a number of problems with this reading, not the least of which is the Court’s implicit denial that it was doing any such thing. For the sake of argument, however, assume the Court actually did what it never said it did. How much of a difference would that reading of *EPA* make in our understanding of the Article III limits on standing?

The major constraint with respect to assertion of an injury in fact is the need to establish that the injury is personal or particularized. At first glance, *EPA* works no change here. Massachusetts offered uncontroverted scientific evidence that it had lost four to eight inches of its coastline. However, as noted earlier, this injury is not capable of judicial redress, given the scientific evidence that the present effects of global warming are irreversible in any humanly meaningful time frame.²⁸ Standing premised on this injury necessitates a conclusion that the Court eliminated redressability, but we cannot rest on this conclusion because the Court also characterized Massachusetts’ injury as including an inevitable future loss of its coastline, however remote and quantitatively uncertain that loss may be. This conception of threatened injury reduces the requirement of immediate injury to a vaporous incantation with no substance. Yet, if the case is treated as an unremarkable instance of procedural injury, at most the Court reduced immediacy to a gossamer film only with respect to procedural rights. Thus, it is unlikely the Court altered the injury-in-fact requirement with respect to all litigants.

25. *Id.* at 520.

26. *See infra* Part II.C.

27. THE WORLD TURNED UPSIDE DOWN (English Ballad 1643).

28. *See, e.g.*, James J. MacKenzie, *Climate Protection and the National Interest: The Links Among Climate Change, Air Pollution, and Energy Security*, World Resources Institute, 1997, available at http://www.wri.org/climate/pubs_content_text.cfm?cid=2149.

The argument that the Court loosened the causation requirement is more plausible. According to *Lujan*, the case-or-controversy requirement demands that the plaintiff show that the injury of which he complains is “fairly traceable” to the defendant’s conduct.²⁹ Whatever the outer limits of the nebulous concept of that which is “fairly traceable,” it is at least clear (or was clear before *EPA*) that it does not include injuries produced by the independent action of a stranger to the litigation.³⁰ Massachusetts asserted that global warming caused it to lose a minute portion of its coastline, and that future inevitable increases in global temperatures would cause it to lose more. Some of that global warming is attributable to carbon dioxide emissions from new cars sold in the United States. The EPA’s failure to regulate those emissions caused the total greenhouse gas emissions to be higher than they would have been with such regulation. Accordingly, Massachusetts’ injury was “fairly traceable” to the EPA’s failure to regulate.

This chain of reasoning is not consistent with prior renditions of the causation requirement. In *Bennett v. Spear*,³¹ the Court held that the “fairly traceable” test was met when the Bureau of Reclamation injured agricultural water users by reducing the water available to them to conform to a biological opinion of the Fish and Wildlife Service.³² The Court concluded the opinion of the Fish and Wildlife Service had a powerful coercive effect on the legally independent decision of the Bureau of Reclamation to restrict water supply to the plaintiffs.³³ No such coercive effect was established in *EPA*; rather, simply because the EPA’s failure to regulate could be said to contribute to global warming, however minimally, the injury suffered by Massachusetts was “fairly traceable” to the EPA’s regulatory sloth. Nevermind that 94% of worldwide carbon dioxide emissions come from sources beyond the EPA’s regulatory authority.³⁴ To be consistent with the “independent action” limit on causation, one of two results must follow. Either those emissions are not the product of independent actions of third parties, or only the unregulated

29. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

30. See, e.g., *Allen v. Wright*, 468 U.S. 737, 757–59 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (“[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”); *Warth v. Seldin*, 422 U.S. 490, 504–05, 514 (1975).

31. 520 U.S. 154 (1997).

32. *Id.* at 157, 167, 170–71.

33. “While . . . it does not suffice if the injury complained of is “th[e] result [of] the independent action of some third party not before the court,” that does not exclude injury produced by determinative or coercive effect upon the action of someone else.” *Id.* at 169 (quoting *Lujan*, 504 U.S. at 560–61 (alterations in original) (emphasis added)).

34. *EPA*, 549 U.S. at 544.

carbon dioxide fumes belched from American autos are the cause of Massachusetts' coastal woes.

Of course, these conjectures are fanciful; thus the conclusion must be that the Court rendered the requirement that injury be "fairly traceable" to the defendant's challenged action into something quite different. After *EPA*, it might be said that causation is established if a plaintiff can show that the defendant's actions contribute in some tiny way to the asserted injury. Because procedural injury claims do not ordinarily relax the Article III requirement of causation, at the very least, the Court in *EPA* diluted causation for procedural injuries and, at most, deflated the entire concept for all litigants, turning it into a limp rhetorical balloon.

For an injury to be sufficiently redressable to pose an Article III case or controversy, it must "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."³⁵ In *EPA*, the likelihood that court-ordered regulation of carbon dioxide emissions from new cars would restore Massachusetts' coastline to its nineteenth century contours was nil.³⁶ First, carbon dioxide composes only a fraction of all the gases that produce the global greenhouse effect.³⁷ Second, hydrocarbon combustion accounts for only about 65% of the world's carbon dioxide emissions.³⁸ Third, by the Court's calculation, carbon dioxide emissions from new cars in the United States account for between 6% and 7% of worldwide carbon emissions,³⁹ meaning these American auto emissions represent about 4.5% of all carbon dioxide emissions. Fourth, about 80% of global greenhouse gas emissions originate from outside the United States,⁴⁰ and it is a reasonable supposition that the pace of emissions from such rapidly industrializing and populous nations such as China and India will sharply increase as their economies grow, their citizens become wealthier, and consumer appetites for autos and other carbon-fuel-using creature comforts increase.⁴¹ In short, Massachusetts' coastline is doomed,

35. *Bennett*, 520 U.S. at 167.

36. *See supra* note 28 and accompanying text.

37. *See* U.S. Environmental Protection Agency Global Greenhouse Gas Data, <http://www.epa.gov/climatechange/emissions/globalghg.html>.

38. *See* MICHAEL PIDWIRNY, FUNDAMENTALS OF PHYSICAL GEOGRAPHY ch. 7 (2d ed.), <http://www.physicalgeography.net/fundamentals/7h.html>; World Resources Institute, Sources, Properties, and Emission Trends of the Important Greenhouse Gases, http://www.wri.org/climate/pubs_content_text.cfm?cid=2162.

39. *EPA*, 549 U.S. at 525.

40. *Id.* at 545 (Roberts, C.J., dissenting).

41. *See, e.g., China's Auto Demand to Reach 20 Million in 2020*, CHINA AUTOMOBILE NEWS, Jan. 20, 2004; *China's Demand for Autos Expected to Reach 4.6 Million by 2005*, ASIA PULSE NEWS, Jan. 16, 2003; Clifford Krauss, *China and U.S. Demand Drives Commodities Surge*, N.Y. TIMES, Jan. 15, 2008, at C1; Somini Sengupta, *Indians Hit the Road Amid Elephants*, N.Y. TIMES, Jan. 11, 2008, at A1.

and there is nothing the Court or the EPA can do to save it. Not only is Massachusetts' injury unlikely to be redressed by the requested relief, it is a virtual certainty that it is incapable of being redressed.

Of course, "the normal standards for redressability" need not be met to prosecute a procedural right.⁴² Thus, the easiest and most plausible reading of *EPA's* dispensation of the redressability component to standing is that it has been jettisoned only when a procedural right is at issue. But that reading may be too dramatic. The Court evidently thought redressability was satisfied (at least in the context of a procedural right) when the relief requested would "slow the pace of global [carbon dioxide] emissions . . . no matter what happens elsewhere."⁴³ In this new world of redressability, if sea levels rise by six feet due to greenhouse gas emissions from elsewhere, but a millionth of a millimeter of Massachusetts coastline is preserved by court-ordered EPA regulation of carbon dioxide emissions from American autos, the state's injury has been redressed.

Given the sea of change wrought by the Court with respect to redressability, one might have expected the Court to discuss the rationale for its virtual elimination, if it was indeed the Court's intent to dispense with redressability as a core component of the Article III case-or-controversy requirement. The fact that the Court did not do so, coupled with its labored effort to demonstrate a smidgen of redress in the context of a state's assertion of a procedural right, argues strongly for the conclusion that the Court was not seeking to accomplish a global renovation of redressability. At most, one might conclude that *EPA* elongated the permissible length of the causal chain that must be demonstrated to support standing. Even that conclusion is tenuous, for it must be qualified by the unavoidable fact that the Court placed great emphasis on the dual facts that a state was a litigant, and the state was asserting a procedural right.

C. *Parens Patriae* and Procedural Rights: When a State Comes Marching In

A state may assert its own claims as a sovereign or as a proprietor, or, via the doctrine of *parens patriae*, it may assert the non-sovereign or "quasi-sovereign" interests of the public it represents.⁴⁴ This Section concludes that Massachusetts sued the EPA, in the latter capacity, by asserting at least two possible quasi-sovereign interests.

42. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992).

43. *EPA*, 549 U.S. at 526.

44. *Parens Patriae*: "A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

When a state asserts its proprietary interests it acts just like a private citizen. Just as a private citizen who has suffered loss of his land due to wrongful action of another must prove the *Lujan* elements to maintain an action in federal court, so, too, must a state establish the *Lujan* elements. Because Massachusetts' injury was the loss of its coastal land, its claim would appear to have been as a proprietor, but if so, the Court strangled by construction the causation and redressability elements of *Lujan*, and did so for all litigants. However, as discussed above, the Court did not appear to effect a global alteration of the constitutional understanding of standing. Moreover, because the Court attached significance to Massachusetts' status as a state in analyzing its claim to standing—a fact that is utterly irrelevant if Massachusetts were asserting only a proprietary interest—we may assume that the Court treated Massachusetts as asserting either its own uniquely sovereign interests or, as *parens patriae*, the public well-being of its citizenry.

When a state asserts a sovereign interest it seeks to vindicate an attribute of its sovereignty, as when it brings a criminal prosecution, or institutes a civil action to enforce its own laws. When the federal government asserts such an interest in federal court, it has never been formally required to prove injury in fact, causation, or redressability because the presence of those elements is obvious. Inherent in violation of law is injury to the polity for which the government is the agent. Whatever other injury may be occasioned, defiance of the will of the people, as manifested through their democratically selected representatives, is injurious to the democratic process we have chosen to govern us. The violator's actions caused the injury, and the only remedy is judicially imposed criminal punishment or civil sanctions. Thus, it is misleading to suggest that compliance with the *Lujan* requirements is unnecessary when the federal government asserts a sovereign interest in the federal courts.⁴⁵

1. The Role of the Federal Forum

Whatever interest Massachusetts was asserting, it did so in federal court, a court of another sovereign—a fact that raises the question of whether different standing rules ought to apply to sovereign claims made by the federal government in its own courts and sovereign interests asserted by a state in the federal courts. Because the *Lujan* elements describe the “irreducible minimum” for an Article III case or controversy, they should apply to sovereign interests, whether asserted by a state or the federal government. Nothing in the text of Article III suggests that “case

45. See, e.g., Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 300–01 (2005); cf. Ann Woolhandler & Michael Collins, *State Standing*, 81 VA. L. REV. 387, 506, 510 (1995).

or controversy” has two levels of meaning, with a lower threshold for cases or controversies presenting sovereign interests. On the contrary, the case or controversy requirement limits all federal judicial power. Only then does Article III proceed to specify the categories of federal jurisdiction, among which are included cases or controversies in which the states or the United States may be a party.

The best argument for relaxing the meaning of the *Lujan* elements when a state asserts a sovereign interest in federal court is that doing so is a necessarily implied aspect of the structural design of dual sovereignty. 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. Of course, the *Lujan* elements will likely be satisfied in most instances of federal invasion of state sovereign interests. Such actions will likely inflict injury adequate to meet *Lujan*’s requirements, that the injury will be directly traceable to the challenged action of the federal government, and invalidation of the challenged action would provide complete redress.

However, Massachusetts was not asserting a sovereign interest.⁴⁶ Both its actual and threatened injuries were injuries to a single proprietary interest—the loss of its coastal land.⁴⁷ Yet the Court did not treat Massachusetts as it would a private litigant because it permitted Massachusetts to press its claim without adequate proof of either causation or redressability, as those elements have been previously understood. The Court said that Massachusetts was asserting a quasi-sovereign interest⁴⁸ but then identified the injury in fact that supported its claim to standing as a run-of-the-mill proprietary interest.⁴⁹ This is not to say that Massachusetts lacked a quasi-sovereign interest,⁵⁰ but only to note that the Court did not rely on such an interest in analyzing the state’s claim of standing.

Much of the confusion generated by the Court in *EPA* lies in its use of Massachusetts’ injury. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex*

46. *But see infra* note 48.

47. *See supra* note 15.

48. *EPA*, 549 U.S. at 520 (“Given . . . Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

49. *Id.* at 521–22.

50. Massachusetts certainly has a quasi-sovereign interest in protecting its citizens from the effects of global warming, an interest in protecting “the health and well-being . . . of its residents.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

rel. Barez,⁵¹ the Court described the nature of a quasi-sovereign interest that supports state standing as *parens patriae*.⁵² A “[s]tate must articulate an interest apart from the interests of particular private parties . . . [M]ore must be alleged than injury to an identifiable group of individual residents”⁵³ *Parens patriae* standing permits a state to seek judicial review of public rights, but such standing must be founded upon an interest, or injury, that is not of the same character as that suffered individually by its citizens. If a state suffers an injury that is of the same type as that suffered by its citizens, it can seek vindication of its own injury, just as private citizens may, but it may not use its own injury to represent its citizens as *parens patriae*. By relying on a string of *parens patriae* cases, particularly *Georgia v. Tennessee Copper Co.*,⁵⁴ the Court in *EPA* appeared to conclude that Massachusetts was suing as *parens patriae*, but the injury upon which Massachusetts relied was the state’s loss of coastal land, an injury precisely the same as that suffered by private coastal landowners.⁵⁵

2. Massachusetts’ Two Quasi-Sovereign Interests

Either the Court expanded the universe of injury upon which *parens patriae* standing can be founded, or it identified but did not articulate a different quasi-sovereign interest of Massachusetts. There are at least two possible quasi-sovereign interests that Massachusetts possessed, and either of them would have been sufficient to support *parens patriae* standing. First, Massachusetts had a separate interest in protecting the “health and well-being—both physical and economic—of its residents in general”⁵⁶ from the effects of global warming. Second, Massachusetts had “an interest in securing observance of the terms under which it participates in the federal system, [which] means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.”⁵⁷ Massachusetts claimed that the EPA was shirking its obligation under the Clean Air Act to regulate carbon dioxide emissions from new cars.⁵⁸ Because Congress had exercised its power to displace state law in this area, and had undertaken to deliver the benefits of unpolluted air to all Americans by addressing a problem that in its nature transcends state boundaries, the alleged failure of the EPA to act excluded

51. 458 U.S. 592 (1982).

52. *Id.* at 607.

53. *Id.*

54. 206 U.S. 230 (1907).

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

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

57. *Id.* at 607–08.

58. *EPA*, 549 U.S. at 505.

Massachusetts residents from one of the benefits of our federal system. Thus, one reading of *EPA* is simply that the requisite quasi-sovereign interest was present twice, but the Court did not dwell on the existence of either interest. The other reading is that the Court in *EPA* broadened *parens patriae* standing by permitting states to assert a proprietary interest as a basis for standing rather than a quasi-sovereign interest.

The quasi-sovereign reading is strengthened by the fact that the Court did address the related, but conceptually distinct, question of whether a state may assert, as *parens patriae*, the general interest of its residents “in respect of their relations with the federal government.”⁵⁹ Although in *Massachusetts v. Mellon*,⁶⁰ the Court stated that when it comes to “relations with the federal government . . . it is the United States, and not the state, which represents them,”⁶¹ the Court in *EPA* construed *Mellon* to mean only that a state had no *parens patriae* standing “to protect citizens of the United States from the operation of [federal] statutes,”⁶² but it did have such standing to demand that its residents be provided the *benefits* of federal law.⁶³ To be sure, in distinguishing *Mellon*, the Court stated that Massachusetts was asserting “its rights under federal law,”⁶⁴ a locution that

59. *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923).

60. *Id.* In *Mellon*, both an individual taxpayer and Massachusetts challenged the constitutional validity of federal monetary grants to the states to promote maternal health. *Id.* at 479. The Court ruled that Massachusetts’ claim was not justiciable because it presented abstract questions of political power, sovereignty, and governance. *Id.* at 483. The taxpayer’s claim was rejected because her injury—taxation to support the allegedly unconstitutional spending—was remote and uncertain, and if it occurred at all, the effect on the taxpayer was “minute and indeterminable” and “shared with millions of others.” *Id.* at 487. Although the Court did not use the term “standing,” it attributed its result to the case or controversy requirement, *id.* at 480, and the case is widely regarded as an articulation of standing doctrine. It is relevant to the argument developed in Part III of this Article that the Court’s rationale partook of separation of powers concerns:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act . . . [Judicial review] amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.

Id. at 488. While the case or controversy requirement limits judicial review, one must wonder about a construction of that requirement that denies to anyone the ability to challenge the validity of governmental action. That important issue will be taken up in Part III.

61. *Id.* at 486.

62. *Id.* at 485 (emphasis added).

63. *EPA*, 595 U.S. at 520 n.17.

64. *Id.* (emphasis added). According to the Court,

suggests that Massachusetts' interest was either a proprietary interest or a sovereign interest. The former interpretation of this cryptic comment is consistent with the Court's reliance upon Massachusetts' proprietary interest as a coastal landowner as its injury in fact. The latter interpretation, while unsupported by the Clean Air Act (because none of its relevant provisions confer any unique or special sovereign benefit upon states), might be taken as a repudiation of *Mellon*'s dismissal of a state's sovereign interest as a basis for challenging the legitimacy of federal action.⁶⁵

In *Mellon*, the Court rejected Massachusetts' sovereign interest as only an "abstract question[] of political power, of sovereignty, of government."⁶⁶ In *EPA*, by contrast, Massachusetts had a sovereign interest in its territorial integrity.⁶⁷ 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. *Georgia v. Stanton*⁶⁸ was the most notable prior case of a state's claim that its sovereign interests had been wrongly invaded by the federal government, but *Stanton* arose in the charged circumstances of Reconstruction and presented an attempt by a state to shield itself from federal law.⁶⁹ In *EPA*, Massachusetts sought to protect its sovereign interest in territorial inviolability by demanding the benefits of federal law.⁷⁰

there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do). Massachusetts does not . . . dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.

Id.

65. The late Professor David Currie, for one, contended that *Mellon*'s conclusion that

a state could not sue to protect merely sovereign interests was not at all obvious. Not only would such a proceeding assure judicial review of actions that might otherwise go unreviewed, but the state seems a logical defender of the position that state rights have been invaded by federal legislation—and that was the claim in *Mellon*.

DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986* 185 (1990).

66. *Mellon*, 262 U.S. at 485.

67. *EPA*, 595 U.S. at 519.

68. 73 U.S. (1 Wall.) 50 (1867).

69. *See id.* at 60–62.

70. *EPA*, 595 U.S. at 520 n.17.

However, if the Court's reference in *EPA* to Massachusetts' rights under federal law was not meant to permit a state to assert its sovereign interests, the remaining possibilities are that the reference was to the state's proprietary interests or to its quasi-sovereign interests, as *parens patriae*. The proprietary interest reading of this passage is less persuasive than the quasi-sovereign interest reading for three reasons. First, in the same passage the Court explicitly identified Massachusetts' interest as a quasi-sovereign interest.⁷¹ Second, the Court repeatedly relied upon the presence of a quasi-sovereign interest in the prior *parens patriae* cases that it cited, and identified quasi-sovereign interest as some form of preserving the well-being of a state's residents.⁷² Third, by describing the *Mellon* limitation upon *parens patriae* standing as only prohibiting states from contesting the applicability of federal law to its residents, the Court implied that a state has standing to enforce the benefits of federal law for its residents.⁷³ In this context, the Court's declaration that a state has standing to assert "its rights under federal laws" is careless usage. If *Mellon* only denies to states standing to shield its residents from federal law, its mirror image must be to permit states to wield a sword to ensure that its residents are included within the protections of federal law. When so understood, the Court in *EPA* was actually saying that a state has standing to assert the rights of its residents under federal law.

This reading fails to remove all difficulties. Because the entire concept of *parens patriae* standing is rooted in the notion of a government representing its people, the *Mellon* limitation could mean that only the federal government has standing as *parens patriae* to obtain either judicial enforcement or limitation of federal law. While such a reading of *Mellon* is consistent with two structural principles of our federal system, it ignores an even more important reality. Federal union created a national government that may act directly upon (and for) the people and, because Congress is composed of members elected by state politics, it may be reasonable to assume that state interests are adequately "protected by procedural safeguards inherent in the structure of the federal system."⁷⁴ Those principles might be sufficient to explain why a state ought not have standing to contest the application of federal law to its residents, but they are not sufficient to explain why a state lacks standing to demand that its residents be given the benefits that accrue from enforcement of federal law.

71. *Id.* at 520.

72. *Id.* at 520 n.17.

73. *Id.*

74. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

3. State Limits on the Federal Administrative State

The vast federal bureaucracy that composes the contemporary administrative state lacks the “procedural safeguards” that apply to Congress. Agencies operate under broad delegations of authority, and are never directly answerable to state polities. Moreover, for the most part, administrative agencies are ultimately controlled by the President, which leads to the dispute at issue in *EPA*—differing interpretations of a congressional command to an executive agency. Because agencies have vast discretion to carry out Congress’ commands,⁷⁵ the question of who has standing to challenge the exercise of that discretion should be informed by the disconnection between Congress and administrative agencies. The method of electing Congress provides a “procedural safeguard” for state polities that is wholly absent with respect to administrative agencies. Especially when Congress has conjoined a command to an agency with a procedural right, it is reasonable to infer that Congress has endowed the people’s representatives with the power to vindicate that right, so long as the requisite elements of an Article III case or controversy are present.

By the design of the federal system, the people have two representatives. The federal representative may be the proper agent to act as *parens patriae* with respect to federal law, and the state representatives may be the proper agents to act as such with respect to state law. However this condition breaks down when Congress delegates to an agency the power to grant or withhold the benefits of federal law because of the rupture of accountability to the people that this delegation entails. Thus, when Congress creates procedural rights in agency commands, it should be seen to have vested in two sovereigns a concurrent power to act as *parens patriae*.

Of course, the Court did not say this in *EPA*, even though it explicitly concluded that a state has standing as *parens patriae* to enforce the *benefits* of federal law to secure the well-being of its people.⁷⁶ The explanation offered here supplies a missing rationale. *Mellon*’s insistence upon an exclusive role for the federal government as *parens patriae* with respect to federal law ignores a prominent feature of federalism: concurrent power. Of course many powers are exclusively federal, but when Congress uses its commerce power, which it shares concurrently with the states, to regulate air pollutants and simultaneously creates in the states a procedural right in enforcement of the regulation, it is myopic to think that the only body able to act as *parens patriae* is the federal

75. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 844 (1984).

76. *EPA*, 595 U.S. at 520 n.17.

government. Federal regulation bottomed on a concurrent power, coupled with an expansive procedural right to its enforcement, implies that either the federal or a state governmental agent of the people has power to seek judicial enforcement of the measure.⁷⁷

The most plausible explanation of *EPA* is that it is a *parens patriae* case, but one in which the doctrine of *parens patriae* is extended in either, or both, of two directions. First, the Court may have permitted *parens patriae* standing to be founded upon proprietary or sovereign injury. Not only is this explanation an abrupt and unexplained departure from the prior understanding of *parens patriae*, it is both unnecessary to the result and inconsistent with some of the Court's rationale. Second, the Court definitely repudiated *Mellon's* broad assertion that only the federal government could act as *parens patriae* with respect to rights or obligations arising under federal law. By recognizing that states may act for their residents by asserting the quasi-sovereign interest of preserving the well-being of their residents with respect to benefits to which they may be entitled under federal law, the Court in *EPA* opened a portal for adventurous state litigation as *parens patriae*. What is the scope of this broadened power of states to litigate in federal court? Part III addresses that question.

III. PRESCRIPTION: WHY FEDERALISM JUSTIFIES EXPANSIVE *PARENS PATRIAE* STANDING

Because the Court in *EPA* combined its expansion of *parens patriae* standing with a state's assertion of a congressionally created procedural right, the question of the proper scope of *parens patriae* standing must be examined twice. The first question occurs when a state acts as *parens patriae* to assert a procedural right. The second, and more speculative question, is presented when a state acts as *parens patriae* to assert a quasi-sovereign interest unsupported by any claim of procedural injury.

A. *Parens Patriae and Procedural Rights*

Creation of a procedural right is, by itself, an insufficient launch pad for *parens patriae* standing. While Congress may be able to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,"⁷⁸ to create *parens patriae* standing it must do so by defining injury to a quasi-sovereign interest. If a quasi-sovereign interest inheres in preserving a state's residents from

77. The issue of state standing to enforce federal requirements has arisen in numerous contexts. See, e.g., Samantha K. Graff, *State Taxation of Online Tobacco Sales*, 58 FLA. L. REV. 375, 383–84 (2006).

78. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

generalized and undifferentiated injury—which is the injury threatened by global warming—Congress may be able to endow states with the ability to assert such generalized injuries as *parens patriae*, even though individuals are barred from doing so. Yet that power, assuming it has been created by *EPA*, is not unlimited. A quasi-sovereign interest must still involve a “concrete” injury. To evaluate these claims, consider the following hypotheticals.

1. How “Concrete” Must the Injury Be?

Suppose that Congress amended the War Powers Resolution⁷⁹ to grant to any state, acting in its capacity as *parens patriae*, the power to bring suit in the federal district court for the District of Columbia to enforce the provisions of the statute. Then, following the amendment, the President orders armed forces into northwestern Pakistan to locate and apprehend Osama bin Laden. California seeks to enforce Section 5 of the Resolution, which requires termination of this military exercise after sixty days, unless Congress has specifically authorized this use of force. The federal government argues that California lacks standing. On the merits, the federal government contends that the War Powers Resolution is an unconstitutional usurpation of executive power. In the alternative, it contends that the challenged military action is authorized by the September 18, 2001 joint resolution that empowered the President “to use all necessary and appropriate force against those nations . . . or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons.”⁸⁰ Does *EPA* adequately support California’s claimed standing as *parens patriae*?⁸¹

California’s injury in fact may take several possible forms. First, California may argue that it seeks to prevent the loss of life or health to its citizens serving in the armed forces in Pakistan. Second, California may contend that one aspect of the well-being of its citizens is ensuring that the federal government acts in conformity with law. The objection to the first injury is that the state is but a nominal party, lacking any interest of its own, whether sovereign, proprietary, or quasi-sovereign,⁸² but this objection may be misplaced. The Court has recognized that a state’s

79. 50 U.S.C. §§ 1541–1548 (2006).

80. Authorization for Use of Military Force § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001).

81. Of course, this issue may be a non-justiciable political question, but that is a separate issue with which this Article is not concerned.

82. *Parens patriae* “does not involve the States stepping in to represent the interests of particular citizens [I]f nothing more than this is involved—*i.e.*, if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 600 (1982).

interest in securing either the “general well-being of its residents” or “observance of the terms under which it participates in the federal system” qualifies as a quasi-sovereign interest.⁸³ The Court characterized the former interest as including the physical and economic interests of its residents,⁸⁴ but did not limit it to those categories. A useful indicator of the presence of a state’s quasi-sovereign interest in the “health and welfare of its citizens . . . is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”⁸⁵ Surely if California were an independent sovereign it would exercise its sovereign lawmaking power to address whether its citizens should be engaged in military operations in Pakistan. While Californians serving in the armed services are susceptible to this injury, the State’s interest goes well beyond the individual interest; the impact of combat wounds to Californians resonates in the economic and emotional climate of the state. If Massachusetts has *parens patriae* standing to protect the geophysical climate that affects its citizens, California might have *parens patriae* standing to protect the physical and emotional welfare of its people. In both cases the state is acting to make the federal government include its citizens within the benefits of federal law, not to wall its citizens off from the obligations of federal law. In *EPA*, the Court said that distinction is critical to state eligibility to act as *parens patriae* with respect to rights originating in federal law.

The question is whether the second injury is sufficiently concrete to constitute quasi-sovereign injury.⁸⁶ In *EPA*, the Court dodged this question. Even though the Court treated Massachusetts as possessing *parens patriae* standing, the injury it overtly credited to support that standing was the proprietary or sovereign injury of loss of its coastal lands. Yet, because the Court never even intimated that it was dispensing with the requirement of a quasi-sovereign interest, it is far more likely that the covert injury that supported Massachusetts’ standing was the looming threat to the health and welfare of its citizens posed by global warming. Thus, *EPA* implicitly recognizes that speculative, though possibly inevitable, injury to the welfare of a state’s citizens is sufficient injury to support the quasi-sovereign interest that is the foundation of *parens patriae* standing. California’s interest in ensuring that the federal government’s foreign military expeditions conform to federal law is no less concrete. Californians will inevitably be subject to this expedition and will incur some portion of the grief and loss that accompany any military

83. *Id.* at 607–08.

84. *Id.* at 607.

85. *Id.*

86. “A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.” *Id.* at 602.

adventure. Not only is such injury as equally inevitable as global warming, it is far more immediate.

Moreover, a state has a quasi-sovereign interest in securing “observance of the terms under which it participates in the federal system.”⁸⁷ By constitutional union, the states ceded to the federal government their authority to conduct war,⁸⁸ but simultaneously placed limitations on the process by which the federal government can commit the nation to war.⁸⁹ Thus, one of the terms under which states participate in the federal system is an implicit promise that the federal government will adhere to the constitutional limits upon its war-making power. Vindication of this promise is not a sovereign interest of a state, because constitutional union extinguished the states’ sovereign power to wage war, but it is a quasi-sovereign interest.

An objection to this conclusion is that the injury suffered by the state is really the undifferentiated interest of all citizens in ensuring that the government conform to law, and this interest has been repeatedly held to be insufficient to support injury in fact. While *parens patriae* standing doctrine holds that a state must have an injury as concrete as that needed to support individual standing, and *EPA* does not purport to overturn that requirement, the effect of *EPA* is to call that proposition into question. The only concrete injury proffered by Massachusetts was loss of coastal lands, an injury suffered in both its proprietary and sovereign capacities. The quasi-sovereign injury asserted by Massachusetts was the speculative deleterious effects attributable to the increase in global warming produced by the EPA’s failure to regulate carbon dioxide emissions from new cars sold in America. That quasi-sovereign injury is as undifferentiated as the alleged failure of the federal government to observe the Incompatibility Clause⁹⁰ (held to be inadequate injury in *Schlesinger*⁹¹) or the Statement and Account Clause⁹² (held to be inadequate injury in *Richardson*⁹³), yet was sufficient to support standing in *EPA*. The explanation must be that *EPA* tacitly altered the injury-in-fact requirement for *parens patriae* standing, at least when Congress has acted to create a procedural right. Post-*EPA*, states may now assert the undifferentiated interest of all citizens in governmental conformity to law when Congress has empowered states to do so, and generalized injury is sufficient to constitute quasi-sovereign injury.

87. *Id.* at 607–08.

88. U.S. CONST. art. I, § 10, cl. 3.

89. *Id.* at art. I, § 8, cl. 11.

90. *Id.* at art. I, § 6.

91. *See infra* note 107 and accompanying text.

92. U.S. CONST., art. I, § 9, cl. 7.

93. *See infra* note 107 and accompanying text.

Suppose that Congress were to react to *Hein v. Freedom From Religion Foundation, Inc.*⁹⁴ by vesting in states the authority to bring suit in federal court to determine whether discretionary executive expenditures in aid of religion violate the Establishment Clause. *Hein* established that individual taxpayers lack standing to bring such challenges.⁹⁵ Does a state have a quasi-sovereign interest in making the same claim? While part of the “well-being” of a state’s residents may be the knowledge that the federal government is not using public funds to aid religion in a constitutionally prohibited fashion, that interest is generalized and undifferentiated. Is there any material difference between this interest and that of the plaintiffs in *Schlesinger* or *Richardson*?⁹⁶ Is this interest any more general than Massachusetts’ quasi-sovereign interest in slowing the effects of global warming on its residents?

Perhaps this quasi-sovereign interest is inadequate because it is insufficiently concrete, but Massachusetts’ interest was no more solid. The best that can be said for Massachusetts’ interest was that the threatened injury, though lacking in details, had a strong odor of inevitability. That might also be true in this hypothetical: over time certainly some executive spending in aid of religion will occur.

Yet, not every general and undifferentiated injury may suffice to support *parens patriae* standing, even when Congress has acted to create a procedural right, because some injuries may fail even the diluted post-*EPA* concrete injury requirement. Suppose that Congress were to endow states with power to bring suit to contest the validity of the Twenty-Seventh Amendment,⁹⁷ and Ohio does so, contending that the amendment is invalid by reason of its non-contemporaneous ratification. Although the quasi-sovereign interest implicated here is no less (or more) generalized than in *EPA* or the prior examples, what concrete injury to the health and welfare of Ohio residents exists? Is there concrete injury to the terms upon which Ohio participates in the Union? The connection between the well-being of Ohioans and the procedure by which congressional pay raises are implemented is tenuous at best. While the Twenty-Seventh Amendment ensures that Ohioans can oust their federal representatives before representatives can profit from a self-enacted pay raise, Ohioans could also do so after the pay raise. Without the Twenty-Seventh Amendment Ohioans would suffer the extremely slight financial loss resulting from earlier implementation of congressional pay raises, but that injury is redressed by the amendment. Perhaps the amendment inflicts on

94. 127 S. Ct. 2553 (2007) (holding that taxpayers lack standing to challenge discretionary executive expenditures as Establishment Clause violations).

95. *Id.* at 2559.

96. *See infra* note 107 and accompanying text.

97. U.S. CONST. amend. XXVII.

Ohioans a less-qualified Congress, due to heightened congressional reluctance to raise members' pay, and consequent diminution of an incentive to serve in Congress. Such injury is fanciful. Concrete injury is necessary.

Nor would Ohio possess a quasi-sovereign interest in securing the terms of its participation in federal union adequate to support *parens patriae* standing. Ohio's interest in limiting constitutional amendments to those that have some unspecified range of contemporaneous ratification is hardly obvious. The amendment procedure set forth in Article V of the Constitution may be a term of state participation in the union but any requirement of contemporaneous ratification is a later gloss on that text. The only injury Ohio has suffered by non-contemporaneous ratification is annoyance that a series of state legislatures, far removed in time from one another, could combine to alter the national charter. This situation is far removed from the injury presented should ratification of a constitutional amendment be premised on, say, inclusion of the Guam and Puerto Rico legislatures for purposes of reaching the requisite super-majority. Moreover, Ohio has no interest in the underlying substance of the amendment—the timing and amount of the paycheck its federal representatives receive from the federal government. The quasi-sovereign interest sought to be asserted here is simply absent.

2. Separation of Powers and Public Interests

The principle of separation of powers is most often advanced as a reason for denying standing to individuals who assert only generalized grievances. In *Lujan*, the Court reasoned that generalized grievances about governmental infidelity to law presented no concrete *individual* injury, but only a *public* interest, and “[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”⁹⁸ Because the “concrete injury requirement” is grounded in separation of powers, to permit “Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer, from the President to the courts, the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”⁹⁹ Whether or not this transfer exists when Congress attempts to permit individuals to vindicate such public rights, the objection is much less forceful when Congress seeks to permit states, as *parens patriae*, to vindicate quasi-sovereign public rights. Quasi-sovereign rights are public

98. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

99. *Id.* at 577 (quoting U.S. CONST. art II, § 3).

rights, so the argument that Congress cannot endow *individuals* with power to vindicate undifferentiated public rights is irrelevant to the question of whether Congress may vest such authority in states acting as *parens patriae*. If it is constitutionally objectionable to allow states to assert public rights, it must be due to some other aspect of separation of powers.

In *Lujan*, the Court declared, with no further explanation, that allowing individuals to vindicate in court the undifferentiated public interest of governmental compliance with law would transfer the executive's duty to faithfully execute the law to the courts.¹⁰⁰ Presumably this is so because the absence of concrete individual injury transforms what might be a case or controversy into an abstract consideration of whether the executive's exercise of discretion is appropriate. Yet, if the executive is flouting law, why should courts not adjudicate that? The usual reason is that, without an individual stake in the controversy, a court would "serve as a convenient forum for policy debates."¹⁰¹ The vice in this, is that a court steps out of its judicial role—to resolve "legal questions . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"¹⁰²—and thus unnecessarily constrains the discretion of the political branches to make or enforce law.

The question that arises when Congress acts to give the states the power to vindicate public rights in federal court is whether the same separation-of-powers dangers are present as when Congress purports to endow individuals with that power. When states assert public rights there is no alchemical conversion of undifferentiated public interests into private injuries. Rather, Congress's power to vest the states with authority to vindicate federal public rights is limited by the requirement that Congress may only do so with respect to quasi-sovereign interests. Congress is not free to empower the states to act as *parens patriae* to vindicate an interest that is outside the realm of quasi-sovereign interests. Moreover, the concern that individuals litigating undifferentiated public rights will clog federal courts with abstract arguments over policy choices, is not realistic when such assertions of public rights are limited to states as *parens patriae*. State attorneys general have limited resources and are politically constrained.¹⁰³ States will only assert the most pressing of public interests

100. *Id.*

101. *Massachusetts v. EPA*, 595 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

102. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

103. Forty-three states elect their Attorneys General by popular vote. The Maine Attorney General is chosen by secret ballot of the legislature. Me. Const., Art. IX, § 11 (2008). Tennessee vests in its Supreme Court the power to appoint the Attorney General. Tenn. Const., Art. VI, § 5 (2008). In five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) the Attorney General is appointed by the Governor. Attorneys General in the territories of American Samoa,

and then only to the extent that Congress has empowered them to do so. This will hardly result in a flood of abstract policy disputes masquerading as federal lawsuits. What will result is litigation of relatively few issues of compliance with federal law—those issues that have a significant impact upon the welfare of a state’s residents or that threaten to deny a state its rightful Constitutional place.

A key point of our federal system is the belief that federalism will better preserve liberty by diffusing governmental power. This principle is no less key to our understanding of separation of powers. Recognition of a congressional power to authorize states to litigate quasi-sovereign public rights is an additional diffusion of power. It introduces a further level of accountability of the executive to courts at the behest of any of the states of the union. This diffusion of power permits multiple opportunities for checking abuses of authority.

A pragmatic and cynical critic might ask why Congress would permit states to challenge that which it could resolve on its own. There are several possible answers. First, most such instances would likely occur when Congress has charged an executive agency to carry out a legislatively prescribed scheme, and Congress might desire to use the states, as *parens patriae*, to enforce the congressional design. Congress embraced the notion of citizen suits to enforce federal regulatory measures in the years before *Lujan* curbed such grants of standing, so it is reasonable to think that Congress would be equally willing to adopt this method of enforcing public rights in federal court. Second, there may be some instances in which Congress might wish to allow the courts to resolve a disputed issue of the scope of executive discretion to carry out a legislative directive, rather than directly narrowing the scope of executive discretion. Indeed, global warming might be such an issue.¹⁰⁴

While this approach, when done consciously, may be an abdication of political responsibility, as a constitutional matter it is no more of an abdication than what is presently permitted under the moribund non-delegation doctrine. Moreover, there is no persuasive force in the argument

Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands are also appointed. In the District of Columbia, the Mayor appoints the Corporation Counsel, who functions similarly to a state Attorney General. *See generally* National Association of Attorneys General, http://www.naag.org/how_does_one_become_an_attorney-general.php. With respect to popularly elected Attorneys General, accountability may be diluted by term limits on service as Attorney General, or accountability may be enhanced by those term limits, assuming that an Attorney General forced to leave office may aspire to some other public office for which he or she might be eligible.

104. Of course, 42 U.S.C. § 7607(b)(1) (2006), on which the majority in *EPA* relied for Massachusetts’ procedural right, was enacted before global warming entered our consciousness, but even after that moment Congress could have given explicit direction to the EPA concerning regulation of carbon dioxide emitted by new cars.

that broad delegations of legislative authority to agencies are valid grants of executive discretion concerning enforcement of the legislative charge, but vesting states with power to vindicate public rights in federal court are unconstitutional transfers of executive discretion to the judiciary. Such an argument ignores the fact that states, unlike individuals, are appropriate custodians of public rights, and state assertion of public rights in federal court does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal law. Inasmuch as both separation of powers and federalism are structural doctrines designed to check concentration of power, it is reasonable to join federalism with separation-of-powers principles when the result is to create an additional check on power wielded by a single branch of government.

There may well be some public rights that Congress would refuse to consign to the courts via the *parens patriae* role of the states. For example, there is no reason to think that a Congress composed of reserve officers in the armed services would act to give the states authority to bring the challenge actually raised in *Schlesinger*.¹⁰⁵ Nor is there any reason that a Congress disinclined to make a public accounting of the expenditures of the Central Intelligence Agency would permit the states to make the claim raised in *Richardson*.¹⁰⁶ Indeed, the likelihood that Congress would not freely authorize the states to act as *parens patriae* to vindicate public rights should be of some comfort to those who fear that *EPA* approved *parens patriae* standing as a vehicle for unlimited litigation of public rights in federal court.

Lujan may have sought to bury the citizen suit to vindicate public rights, but *EPA* revives it in a new and more limited form. Although Congress may not enable ordinary citizens to prosecute public rights in the absence of a personal injury caused by the defendant and dressable by the courts, Congress may empower states, as *parens patriae*, to vindicate public rights even when injury, causation, or redressability is insufficient to support citizen standing. *EPA* thus creates two tiers of Article III cases or controversies. Two questions emerge from that fact. Is *parens patriae* standing to litigate public rights dependent upon congressional action? What justifies two tiers of Article III cases or controversies?

105. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 214 (1974) (finding no standing, as either citizens or taxpayers, for a group of former members of the Armed Forces Reserve who challenged the Reserve membership of Congressional members as violating the Incompatibility Clause of the Constitution).

106. See *United States v. Richardson*, 418 U.S. 166, 167–68 (1974) (finding that the respondent had no standing as a federal taxpayer in questioning provisions, under Article I, § 9, clause 7 of the Constitution, concerning public reporting of agency expenditures by the Central Intelligence Agency).

B. *Parens Patriae Without Procedural Injury*

State standing as *parens patriae* to assert undifferentiated public rights should not depend on congressional authorization of such claims. *EPA* did not decide that question, of course, because Congress had created a procedural right, but it implicitly approved *parens patriae* standing in the absence of a procedural right. The objections to state standing as *parens patriae* to assert undifferentiated public rights are identical whether or not a procedural right is present. Because *EPA* found those objections unpersuasive when Congress had acted, they should have no more force when Congress has not acted.

The principal objection is that to permit states, as *parens patriae*, to assert claims rooted in injuries suffered by all members of the polity is to repudiate the principle that injury suffered “in some indefinite way in common with people generally” is insufficient to support standing.¹⁰⁷ That principle is founded on the claim that only a “concrete factual context [is] conducive to a realistic appreciation of the consequences of judicial action,”¹⁰⁸ which, in turn, is grounded in the constitutional principle of separation of powers.¹⁰⁹ On this view, Congress cannot engage in constitutional alchemy by turning undifferentiated public rights into individual rights that individual plaintiffs may redeem at the courthouse door.¹¹⁰

However, recognizing state power to vindicate in federal court undifferentiated public rights is consistent with both federalism and separation of powers, and is not a recognition of a general power to transmute public rights into individual rights. The engine of federalism is not simply state autonomy; federalism’s value also lies in its potential to

107. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Schlesinger*, 418 U.S. at 217 (“[T]he generalized interest of all citizens in constitutional governance . . . is an abstract injury” insufficient to support standing.); *Richardson*, 418 U.S. at 176 (concluding that a “generalized grievance” shared in common was insufficient injury); *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (remarking that it was “not sufficient that [a litigant] has merely a general interest common to all members of the public”); *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922) (“[T]he right, possessed by every citizen, to require that the government be administered according to law . . . does not entitle a private citizen to institute in the federal courts a suit.”).

108. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

109. “[T]he concrete injury requirement has . . . separation-of-powers significance . . . : To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’ ‘Individual rights’ . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.”

Lujan v. Defenders of Wildlife, 504 U.S. 555, 577–78 (1992) (citation omitted).

110. *Id.* at 572–73.

vindicate human liberty.¹¹¹ That potential is better realized by permitting states to prosecute public rights on behalf of their citizens than it is by admitting that “the absence of any particular individual or class to litigate” undifferentiated public rights leaves enforcement of such rights “to the surveillance of Congress, and ultimately to the [federal] political process,”¹¹² a process that the Court admits is “[s]low, cumbersome, and unresponsive”¹¹³ Surely liberty is advanced by permitting states to assert public rights in federal court to curb official lawlessness.

A neglected aspect of *parens patriae* doctrine suggests that a feature of federal union is state authority to assert the undifferentiated public rights of its citizens. States are entitled to “observance of the terms under which [they] participate[] in the federal system,” and neither the states nor their citizens may be “excluded from the benefits” of federal union.¹¹⁴ One need not invoke antebellum conceptions of federal union as a compact among the states to recognize the federal Union’s contractual aspects. “We the people,” the ultimate sovereigns, created a federal government endowed with limited and enumerated powers. By implication of that enumeration and through the various state constitutional arrangements, the popular sovereign has vested residual authority in their state governments, including the authority to guard the people’s rights from federal invasion should that ever be necessary. That does not mean that states have authority to nullify federal power, as the antebellum southerners claimed; it does mean that the states have a special right to insist that the federal government conduct itself lawfully. That is surely one of the benefits of federal union.

Nor does such a reading of *parens patriae* standing interfere with a proper understanding of separation of powers. An objection to permitting undifferentiated public rights to be vindicated in federal court is that it would “permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty,” faithful execution of the law.¹¹⁵ This objection necessarily assumes that faithful execution is a matter of considerable executive discretion, and that judicial oversight of that discretion encroaches upon the President’s authority. If correct, this view would apply with equal force to suits brought at the behest of

111. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 (1997) (describing federalism as “one of the Constitution’s structural protections of liberty”); Rapaczynski, *supra* note 6, at 389 (“[B]ecause the states . . . break the national authorities’ monopoly on coercion . . . they constitute the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression.”).

112. *Richardson*, 418 U.S. at 179.

113. *Id.*

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

115. *Lujan*, 504 U.S. at 577.

individuals and states as *parens patriae*. The objection may be recast, however, in a form that distinguishes between citizen suits to enforce public rights and such suits brought by states as *parens patriae*.¹¹⁶ If any citizen may vindicate public rights, the risk of constant judicial supervision of executive discretion is greatly increased, but if standing for such suits is limited to states as *parens patriae* that risk is diminished.

Not only is the number of possible plaintiffs reduced to fifty, the political process within each state will likely operate to restrain wholesale challenges to the exercise of federal executive discretion. State attorneys general are elected officials who must allocate their scarce resources among a variety of issues that compete for official attention. An attorney general who devotes inordinate attention to litigation of public rights in federal court, thus slighting more local concerns, may encounter voter discontent. It is thus reasonable to suppose that a general extension of *parens patriae* standing to public rights will not produce a torrent of suits broadly challenging the exercise of executive discretion. Only particularly egregious executive violations of public rights are likely to trigger such litigation.

Moreover, other justiciability doctrines will control excessively exuberant state attorneys general. Some challenges are surely non-justiciable political questions; others may not be ripe. The political question doctrine may be an artful dodge, but it does exist as a brake upon imprudent state assertions of undifferentiated public rights. Suppose that John McCain is sworn in as President, and some six months later a state attorney general challenges the validity of newly enacted federal legislation on the ground that it lacks a presidential signature because John McCain is not a natural-born citizen. The judiciary can answer the question of whether a person born to two American citizens in the Panama Canal Zone at a time when that territory was under the virtually complete sovereignty of the United States is a natural-born citizen. But should a court decide that McCain is not eligible to serve as President, prudence would direct a court not to answer the question, and defer instead to the judgment of the political branches. The instability that would result from unwinding a long series of executive actions is too great.

The presence or absence of a procedural right is irrelevant to the ability of states, as *parens patriae*, to assert the undifferentiated public rights of their residents. Whether knowingly or not, *EPA* opens the door for such challenges, regardless of congressional sanction. Such a conclusion requires justification, however, for it assumes two tiers of cases or controversies, one sharply confined and the other broadly inclusive.

116. *Id.*

C. *The Justification for Two Tiers of Article III Cases or Controversies*

The most challenging aspect of *EPA* is its creation of two different conceptions of an Article III case or controversy. Because the federal judicial power is confined to cases or controversies, one would think that those terms would be uniformly applicable to all attempts to invoke federal jurisdiction. Instead, *EPA* approves, for states as *parens patriae*, a relaxed conception of a case or controversy while leaving in place the hard standard of a case or controversy exemplified by *Lujan*. If the set of cases or controversies is visualized as a sphere, individual litigants are confined to the core of the sphere, while states enjoy its entirety. Within the core, individuals and states in their proprietary capacity must demonstrate actual injury or imminent threat of such injury, establish such injury directly attributable to the defendant, and show a strong probability that judicial action can redress the injury. In the mantle that surrounds the core, states as *parens patriae* may assert quasi-sovereign injuries, which can consist of pure public rights (though not all public rights) only weakly attributable to the injury and posing merely the possibility that judicial action may ameliorate the injury.

There are several justifications for this arrangement. A two-tiered conception of Article III cases or controversies is consistent with constitutional text, precedent, and structure. It is also justified by prudential considerations related to constitutional structure.

Constitutional text does not mandate a uniform conception of a case or controversy. Because federal jurisdiction spans a wide range of categories, varying with party alignment and subject matter, the meaning of a case or controversy may be as variable as the categories of federal jurisdiction. The law of standing in existence prior to *EPA* supports this conclusion.¹¹⁷

An elastic conception of case or controversy as applied to standing is not only consistent with constitutional structure, but enhances it. A fundamental aspect of our constitutional architecture is the diffusion of governmental power in order to prevent its accretion in the hands of a single entity. That principle is the *raison d'être* of federalism and separation of powers within the federal government. The complete elimination of the ability of any actor—citizen or government—to seek judicial review of the validity of executive actions that inflict no

117. Even *Lujan* admitted that causation and redressability are relaxed with respect to procedural rights. *Id.* at 572 n.7 (stating that the holder of a procedural right may “assert that right without meeting all the normal standards for redressability and immediacy”). The understanding of *parens patriae* standing before *EPA* recognized that states could assert diffuse non-individualized injury in fact. See *Alfred L. Snapp*, 458 U.S. at 607 (stating that as *parens patriae* a state may assert the “health and well-being—both physical and economic—of its residents in general”).

individualized injury grants to the executive a limited but unfettered power to violate law. However narrow that power may be, its very existence is an affront to constitutional structure. It is no objection to say that judicial enforcement of undifferentiated public rights infringes upon the President's duty to execute the laws, for that duty is a responsibility to "take Care that the Laws be *faithfully* executed."¹¹⁸ An illimitable executive power to violate the law when the effects are evenly distributed among the populace is not consistent with that command.

A prudent conception of the case or controversy requirement would permit states as *parens patriae* to assert claims of undifferentiated public rights. Inherent in congressional lawmaking is "a certain degree of discretion action"¹¹⁹ vested in the executive branch. While it is untenable to permit any citizen challenge of the exercise of that discretion without showings of personal injury and redressability, it is prudent to permit states, as partners in the federal system whose officials are accountable to their citizens, to challenge executive discretion that inflicts undifferentiated injury.

The problem is agency costs, a concept familiar to economists and students of the modern public corporation. Agency costs arise from differing objectives of the principal and the agent.¹²⁰ In a public corporation the objectives of shareholders (the principals) may be different from the objectives of corporate management (the agents).¹²¹ For example, management may act to build a larger empire, or reap personal benefits from corporate philanthropy, while shareholders prefer wealth maximization.¹²² One way to minimize agency costs is to increase the ability of principals to oversee the agents' actions.¹²³ Transposed to government, the federal executive is the agent of the people, but if the people are stripped of any ability to obtain judicial review of executive action, their oversight capabilities are reduced to the franchise. Voting is important, of course, but the exercise of the franchise is always a choice among prospective agents (who may all share the same disposition to exercise their discretion unlawfully so long as there is no judicial oversight). Moreover, rarely do voters choose their agents on the basis of a single trait and, when they do, that trait is not likely to be the agent's

118. U.S. CONST. art. II, § 3 (emphasis added).

119. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

120. *See, e.g.*, Agency Costs, in *Economics A-Z*, Economist.com, <http://www.economist.com/research/Economics/alphabetic.cfm?LETTER=A#agencycosts>.

121. *Id.* *See also* Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 152 (2008) (noting that "the theory of agency costs suggests that agents do not have the same personal stake in the outcome of a corporate decision as would a shareholder").

122. *Id.*

123. *Id.*

propensity to take unlawful action that leaves nobody with personalized injury. By contrast, permitting states to raise in federal court claims of public rights on behalf of their citizens increases the degree of oversight of executive action and thus diminishes agency costs without strangling lawful and desirable executive discretion. Principals retain agents because they cannot, or are unwilling, to do the job, so agents must have the freedom to perform efficiently. The challenge in controlling agency costs is to minimize those costs without stifling the efficiency gains produced by agency. An appropriate balance would permit states as *parens patriae* to seek judicial oversight of executive agents.

Of course, the use of states and the federal judiciary as the vehicle for monitoring executive discretion injects another dimension of agency costs, for both state attorneys general and federal judges are agents of the people. There is no perfect control of agency costs, but if the alternative to using these agents is to abandon all means (short of the ballot box) of controlling such executive misbehavior, one must reckon these agency costs to be worthwhile. First, there are fifty state electorates that may use the franchise to control state actors who misuse (or fail to use) the *parens patriae* power, instead of a national electorate acting through the Electoral College to choose a President every four years. Second, while the agency costs of a life-tenured and unelected federal judiciary are not inconsequential, the historical verdict suggests that the judiciary is a reasonable check on executive malfeasance, regardless of whatever agency costs may be the product of a judiciary that ignores popular interpretations of law.¹²⁴

Finally, *parens patriae* suits to vindicate undifferentiated public rights will be limited by the requirement that a state assert a quasi-sovereign interest. Not every claim of executive or legislative wrongdoing will implicate a quasi-sovereign interest. Consider Watergate: After members of President Nixon's reelection campaign burglarized the Democratic National Committee's headquarters, the President and many of his principal advisors conspired to obstruct the investigation of the crime.¹²⁵ After political pressure forced the President to appoint an independent prosecutor,¹²⁶ several of the President's associates were convicted of

124. Of course, the general response to this observation is that the judiciary is intended to ignore, or even act contrary to, popular interpretations of law. Judicial independence is a special form of agency cost that presumes that the agents know better than the principal what is best for the principal. To the extent that popular will is at odds with constitutional or statutory guarantees, this assumption is correct.

125. *United States v. Nixon*, 418 U.S. 683, 687 & n.3 (1974).

126. *Id.* at 687–88.

crimes.¹²⁷ Of course, the federal government had a quintessentially sovereign interest in these prosecutions, but could any state, as *parens patriae*, have sought to obtain a judicial declaration of the President's violation of law? While every American suffered the injury of witnessing a criminal conspiracy to obstruct justice take place in the Oval Office, what concrete injury to the health and well-being of the citizenry occurred? *EPA* implicitly relied upon scientific evidence that carbon dioxide emissions contribute to global warming in concluding that the undifferentiated threat of climate change attributable to global warming was sufficiently concrete (in the sense that it was inevitable) to support *parens patriae* standing. In the case of Watergate, however, the spectacle of a criminal conspiracy led by the President posed no inevitable injury to the health or well-being of any state's citizens. Other political and legal machinery corrected a distasteful and illegal act.

Consider the facts of *Schlesinger*.¹²⁸ Some members of Congress held reserve commissions in the armed forces of the United States, apparently in violation of Article I's prohibition against a member of Congress "holding any [o]ffice under the United States" while serving in Congress.¹²⁹ Although all Americans suffer the indignity of observing the flouting of this provision, what concrete injury upon their health or well-being do they suffer? An alliance of military and civil authority is dangerous to liberty, and ought not be countenanced by people committed to democratic institutions, but does a concrete injury result? *EPA* does not provide good authority for that proposition. The inevitability of personal and economic harm from global warming gave enough solidity to this undifferentiated public injury to support *parens patriae* standing. *Schlesinger* lacks any such solidity; at best there is an intangible threat of some future injury, the nature of which is uncertain.

Accordingly, there is little reason to think that *parens patriae* actions to vindicate undifferentiated public rights will produce a torrent of suits. The development of separation of powers doctrine suggests that it is a flexible tool, to be used to prevent either encroachment by one branch upon the powers of another or aggrandizement of one branch by its *ultra vires* exercise of power. The requirement of concrete injury to a state's

127. See, e.g., *United States v. Mitchell*, 389 F. Supp. 917 (1975) (denying motion for new trial following conviction).

128. See *supra* notes 105, 107 and accompanying text.

129. See U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). There is historical support for the proposition that this clause requires military officers to surrender their commissions in order to serve in Congress. For example, during the Civil War, Frank Blair, Jr., served as a Major General in the U.S. Army, but resigned his commission in order to sit in the House of Representatives, and was reappointed to that rank by President Lincoln when he left the House. See DAVID HERBERT DONALD, *LINCOLN* 468–69, 483, 496 (1995).

quasi-sovereign injury, albeit diluted by *EPA*, preserves that understanding of separated powers.

IV. CONCLUSION

Massachusetts v. EPA created two tiers of an Article III case or controversy for purposes of ascertaining standing to sue in federal court. Although the case held that when Congress has created a procedural right a state may bring suit, as *parens patriae*, to vindicate a federal right that implicates the health or well-being of the state's citizens without the quantum of proof of injury in fact, causation, or redressability that would be necessary with an individual plaintiff. The Court's interpretation of injury in fact will be particularly critical to subsequent understanding of *EPA*. Whether or not Congress has created a procedural right, states as *parens patriae* may assert undifferentiated public rights in federal court, so long as they can establish a quasi-sovereign interest. To do so, they need only plead and prove that the injury suffered is (1) either a concrete injury to the health and well-being of their citizens, or (2) implicates the terms under which it participates in the federal union. A concrete injury may take a variety of somewhat plastic forms in connection with a quasi-sovereign injury. The quasi-sovereign injury that supported Massachusetts' standing in *EPA* was neither actual nor immediate, but it was inevitable. Moreover, the fact that the magnitude of the prospective injury is speculative posed no barrier to establishing concrete injury to the state's quasi-sovereign interest in the health or well-being of its citizens.

This relaxation of the injury in fact requirement for *parens patriae* suits that seek to vindicate undifferentiated public rights advances federalism principles and does not violate the principle of separated powers. A foundational element of federalism is the diffusion of power between states and the federal government, with the prospect of the states acting as a check upon unlawful or unwarranted federal power. Vesting the states with limited authority to challenge the validity of federal action that harms everyone (but no one in a sufficiently personal fashion to support individual standing) buttresses that key element of federalism. Nor will this dilution of injury in fact for *parens patriae* suits offend separation of powers principles. Unlike individual suits to prosecute undifferentiated public rights, the state actors who must decide whether to institute *parens patriae* litigation are constrained by substantial fetters of political accountability. Moreover, there are significant prudential barriers to such suits. Finally, not every claim of undifferentiated public rights will present either a concrete injury (as understood after *EPA*) or implicate a quasi-sovereign interest. The net result of *EPA* is a salutary breach of the hitherto impenetrable Maginot Line of standing that prevented judicial consideration of executive lawlessness which inflicts universal but impersonal harm on the citizens of our nation.