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Special State Standing is Environmental: Clarifying Massachusetts v. EPA

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SPECIAL STATE STANDING IS ENVIRONMENTAL: CLARIFYING *MASSACHUSETTS V. EPA*

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> *This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.*[1]

INTRODUCTION

When the Court granted states "special solicitude in [its] standing analysis" in *Massachusetts v. EPA*, it left lower courts with more questions than answers.[2] While legal scholars continue to debate these questions thirteen years later,[3] the practical impacts of *Massachusetts v. EPA* are coming into focus.[4] Today states are suing the federal government, often in multistate coalitions, to enforce or challenge federal administrative policies.[5] This intergovernmental, public-law litigation increased dramatically

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[1] Massachusetts v. EPA, 549 U.S. 497, 518–19 (emphasis omitted) (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

[2] *Id.* at 520; *see* Tara L. Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 853–54 (2016) (discussing the varying reactions to *Massachusetts* in the lower courts).

[3] Tara L. Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1883 (2019) (noting that "there seem to be as many questions as answers" about *when* states should have standing to sue the United States).

[4] *See* discussion *infra* Part II.

[5] Paul Nolette, *Multistate Litigation Database,* ATTORNEYSGENERAL.ORG, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/ [https://perma.cc/M2L8-JCME] (last updated Sept. 6, 2020) (providing a searchable tool allowing site visitors to filter and search litigation brought by states from 1980 to present); *see also Attorney General Actions,* N.Y.U.: STATE ENERGY & ENV'T IMPACT CTR. [hereinafter N.Y.U.], https://www.law.nyu.edu/centers/state-impact/ag-actions?field_states

during the Obama administration and has further skyrocketed since January 2017.[6] States do not exclusively rely upon special state solicitude in suing the federal government.[7] However, this lowered procedural bar is likely a contributing factor to the dramatic rise in state-initiated litigation.[8]

The Trump administration's regulatory "rollback" efforts are also inspiring public-law litigation. These rollbacks are arguably more pronounced than the characteristic "ebb and flow" of environmental policy since the 1970s.[9] The administration is hollowing out existing environmental and climate policies, increasing atmospheric pollutants like carbon dioxide, methane, sulfur dioxide, nitrogen dioxide, and particulate matter.[10] Instead of merely slowing progress on clean energy development and emissions reductions, the administration's rollbacks are reversing decades of environmental policy development and are pushing the globe toward climate catastrophe.[11]

The Trump administration's rollbacks include stays and repeals of dozens of environmental rules. These rules affect national air quality, water quality, endangered species, automobile emissions, and coal-fired

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_target_id=All&field_agency_target_id=All&field_issue_target_id=All&field_document_type_target_id=1721&field_action_type_target_id=1729 [https://perma.cc/FZZ2-4EQ3] (last visited Oct. 13, 2020) (providing a database of actions taken by state attorneys general "working to advance clean energy, climate and environmental laws and policies" since 2017).

[6] *See* Nolette, *supra* note 5; *see also* N.Y.U., *supra* note 5.

[7] Depending on the injury alleged, states can join plaintiffs whose injuries meet the regular Article III standing requirements or intervene in litigation initiated by other groups. *See generally* Nolette, *supra* note 5.

[8] Grove, *supra* note 3, at 1884 (citing Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1309 (2019) (attributing the rise in intergovernmental litigation to the Massachusetts v. EPA decision). Other factors may include increased political polarization and political motivations of state attorneys general. *See* discussion *infra* Part II.

[9] Leif Fredrickson et al., *History of US Presidential Assaults on Modern Environmental Health Protection*, 108 AM. J. PUB. HEALTH S95, S95 (2018) (arguing Trump's attacks on environmental regulation could be more impactful than that of Ronald Reagan and George W. Bush). *But see* David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS 345, 365 (2018) (arguing that even the "severe" transition from President Obama to Trump reflects environmental policy's historic ebb and flow).

[10] N.Y.U.: STATE ENERGY & ENV'T IMPACT CTR., CLIMATE & HEALTH SHOWDOWN IN THE COURTS: STATE ATTORNEYS GENERAL PREPARE TO FIGHT, 4–6 (2019) [hereinafter STATE ATTORNEYS GENERAL PREPARE TO FIGHT], *available at* https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf [https://perma.cc/CX8A-5TG4] (estimating that Trump's actions will result in 209 million metric tons of carbon dioxide to be emitted into the atmosphere that would otherwise be avoided by existing policies).

[11] *Id.* at 5 ("The Trump administration's actions amount to a virtual surrender to climate change.").

power plants.[12] Keeping with its stated goals, the administration is successfully slowing implementation of, reversing, and replacing many Obama-era climate policies like the Clean Power Plan.[13] But these changes have not gone unchallenged.

Over a dozen states, primarily led by California, New York, and Massachusetts, are challenging these deregulatory efforts, creating multi-state coalitions with other interested states.[14] State attorneys general are leading this litigation charge.[15] Historically, attorneys general have been empowered to sue on behalf of their citizens as *parens patriae* or "parent of his or her country."[16] However, the Court's decision in *Massachusetts v. Mellon* limited states in this representative capacity.[17] Following that decision, states remained empowered to sue to protect their own interests, like their property and the enforcement of their own laws.[18] Some argue that attorneys general are uniquely situated as popularly accountable officials to initiate litigation against the federal government.[19] This is because intergovernmental state public-law litigation can serve as a checking function for the federal executive.[20] For example, the Court's grant of special state solicitude in *Massachusetts v. EPA* relies on this principle, namely that states can sue the federal government in their capacity as a quasi-sovereign.[21] In that case, the court held that the state had established standing to challenge how EPA was enforcing the Clean Air

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[12] *See* DAVID J. HAYES ET AL., N.Y.U. STATE ENERGY & ENV'T IMPACT CTR., 300 AND COUNTING: STATE ATTORNEYS GENERAL LEAD THE FIGHT FOR HEALTH AND THE ENVIRONMENT, 2 (2019), https://www.law.nyu.edu/sites/default/files/300%20and%20Counting%20-%20State%20Impact%20Center.pdf [https://perma.cc/ZR7P-TXHE].

[13] Maegan Vazquez, *Trump's Dismantling of Environmental Regulations Unwinds 50 Years of Protections*, CNN (Jan. 25, 2020), https://www.cnn.com/2020/01/25/politics/trump-environmental-rollbacks-list/index.html [https://perma.cc/NQF3-V5SQ].

[14] *See* STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10.

[15] *See id.*

[16] *Parens Patriae*, NOLO, https://www.nolo.com/dictionary/parens-patriae-term.html [https://perma.cc/B3Z8-VF9U] (last visited Oct. 13, 2020); *see* Grove, *supra* note 2, at 863.

[17] Massachusetts v. Mellon, 262 U.S. 447, 448 (1923) (denying state standing to enforce the rights of citizens because suffering "in some indefinite way in common with people generally" was not an adequate basis for the courts to intervene via judicial review).

[18] *See* discussion *infra* Part III.

[19] Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1895 (2019); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 113 (2018) (arguing private and public litigation are different because state attorneys general, unlike non-profit groups, are often democratically elected and therefore more accountable).

[20] Ernest A. Young, *Federalism as a Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization*, 22 TEX. REV. L. & POL. 305, 316 (2017).

[21] Massachusetts v. EPA, 549 U.S. 497, 518–19 (2017).

Act ("CAA"), because EPA's failure to regulate greenhouse gases threatened that state's coastal property.[22]

This Note clarifies the scope of the *Massachusetts v. EPA* Court's grant of special solicitude to states challenging federal administrative policies. To clarify muddy doctrine, this Note proposes a "limiting principle" to special state standing: courts should ask whether a state asking for special standing solicitude claims an *environmental injury*.[23] This Note argues that states have benefitted from a lowered standing threshold with little guidelines, and this lack of guidance led to an overbroad application of *Massachusetts v. EPA*.[24] This Note concludes that special state standing is limited to environmental injuries to states' quasi-sovereign interests. This limitation is supported by Supreme Court precedent, the unique spillover effects of environmental injuries, and the policy considerations that anthropogenic climate change requires.[25]

Part I of this Note outlines the ebb and flow of environmental policy and argues that the Trump administration has moved from the typical deregulatory strategy of "low profile" policy retrenchment to an aggressive policy reversal approach.[26] Specifically, this section summarizes the history of environmental policy in the United States, and the political "ebb and flow" of environmental policy[27]—and it discusses how the Trump administration is decidedly reversing environmental laws in the name of industry.[28]

Part II outlines state intergovernmental litigation as a response to federal environmental policy making and policy retrenchment.[29] This

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[22] *Id.* at 519–20 (stating "[t]hat Massachusetts does in fact own a great deal of the 'territory to be affected'").

[23] *See* David M. Howard, *State Parens Patriae Standing to Challenge the Federal Government: Overruling the Mellon Bar,* 11 N.Y.U. J.L. & LIBERTY 1089, 1127 (2018); Grove, *supra* note 2, at 855 (arguing that special state standing should be limited to cases where states "seek to enforce or defend state law"). Discussion of states' quasi-sovereign rights to enforce their own laws is outside the scope of this Note.

[24] *See* discussion *infra* Part III.

[25] *See* discussion *infra* Part III.

[26] *See* discussion *infra* Part I.

[27] *See id.*

[28] For example, in repealing the Clean Power Plan, the administration advertised the move as removing regulatory burdens on the coal industry, when in fact other factors, like the increasing supply of natural gas, were actually what had caused the coal industry to decline. Richard L. Revesz, *Exposing the Contradictions in Trump's Assault on Climate Change Policy*, THE HILL (Nov. 27, 2019), https://thehill.com/opinion/energy-environment/472245-exposing-the-contradictions-in-trumps-assault-on-climate-change [https://perma.cc/MY37-87CD].

[29] *See* discussion *infra* Part II.

section examines the development of state-led intergovernmental litigation and the impact of political polarization in both state coalitions and the federal government. Part II further proposes a limiting principle to special state standing. Part III elaborates on this limiting principle that states are entitled to special standing when protecting quasi-sovereign, environmental rights. After defining states' quasi-sovereign rights, it argues that the Fifth Circuit in *Texas v. United States* misappropriated the *Massachusetts v. EPA* holding. It concludes that because that court granted special solicitude to a mere economic, non-environmental injury, it overextended the intended scope of *Massachusetts v. EPA* special state standing.[30]

Environmentally focused state public-law litigation is different from the other policy-influencing actions brought by state attorneys general. In light of this difference, this Note asks whether non-environmental lawsuits by state attorneys general, like in *Texas*, should receive special state standing. This Note answers this question in the negative and concludes that special state standing should be limited to intergovernmental litigation where states allege environmental injuries to their quasi-sovereign rights.[31]

I. TRUMP'S TRANSITION FROM "LOW PROFILE" POLICY RETRENCHMENT TO EXPLICIT POLICY REVERSALS

Together, key environmental legislation and administrative rulemaking have created a comprehensive set of environmental laws.[32] These laws mitigate many of the collective-action problems posed by anthropogenic environmental degradation.[33] True to campaign promises, the Trump administration has worked persistently to collapse the Obama administration's policy trademarks like the Clean Power Plan, as well as other long-standing environmental laws.[34] This initiative is a platform that

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[30] *See* discussion *infra* Part III.
[31] *See* discussion *infra* Part III.
[32] This key environmental legislation includes the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, and the Endangered Species Act. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1969); Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (1972); Clean Air Act, 42 U.S.C. § 7401 et seq. (1970); Endangered Species Act, 16 U.S.C. § 1531 et seq. (1973). For a more comprehensive list *see Laws and Executive Orders*, EPA, https://www.epa.gov/laws-regulations/laws-and-executive-orders [https://perma.cc/76AE-CTR9] (last visited Oct. 13, 2020).
[33] Brian Palmer, *Why We Need the EPA*, NRDC (Feb. 14, 2017), https://www.nrdc.org/stories/why-we-need-epa?gclid=Cj0KCQiAtOjyBRC0ARIsAIpJyGOzonuDNDlg22B_Co-nqxbiE1HEZnTmJkwsTRZacrZ-rg8tAnJMf2saAlMkEALw_wcB [https://perma.cc/3NER-XD8B].
[34] Vazquez, *supra* note 13.

any Republican administration would likely implement following a two-term Democratic administration, and vice versa.[35] Some political scientists argue that administrative changeover can appear to drastically destroy progress in environmental policy.[36] But, this appearance is not always reality, and the retreat of a Republican administration often results in a mere "green drift."[37] This green drift resulting from administrative changeover is less drastic than retrenchment, because right-leaning administrations have been incapable of repealing "major golden era" legislation like CAA.[38]

A. Historical Green Drift of the Clean Air Act

CAA,[39] when enacted in 1970 under the Nixon administration, did not initially contemplate the impacts of greenhouse gas emissions.[40] Rather, the policy, enacted to further the health and safety of the American people, was a reaction to environmental events involving visible and dramatic air pollution.[41] During the mid-twentieth century, Congress developed legislation in response to growing concern for the impacts of air pollution on public health.[42] After multiple attempts and revisions, Congress passed CAA and concurrently created EPA to implement CAA's four major environmental regulatory programs.[43] Later, in 1990, the H.W. Bush administration enacted the Clean Air Act Amendments to limit the sulfur dioxide and nitrous oxide pollution causing acid rain.[44] However, a decade later, the W. Bush administration prioritized reducing the regulatory scope of EPA in a subtle way, by denying the legitimacy of climate science and utilizing science to back pro-industry policies.[45]

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[35] David J. Sousa & Christopher M. Klyza, *"Whither We Are Tending": Interrogating the Retrenchment Narrative in U.S. Environmental Policy,* 132 POL. SCI. Q. 467, 468–69 (2017).
[36] *Id.*
[37] *Id.*; *see* discussion *infra* Section I.B.
[38] *Id.*
[39] This Note focuses specifically on CAA, a "golden era" environmental statute. While the policy rollbacks by the Trump administration are not limited to CAA, discussion of those policy changes and resulting litigation are outside the scope of this Note.
[40] Sousa & Klyza, *supra* note 35, at 479.
[41] *See* WILLIAM N. ROM, ENVIRONMENTAL POLICY AND PUBLIC HEALTH: AIR POLLUTION, GLOBAL CLIMATE CHANGE, AND WILDERNESS 2–3 (2011).
[42] *See id.* (discussing the development of CAA); *Clean Air Act Overview: Evolution of the Clean Air Act*, EPA [hereinafter *Clean Air Act Overview*], https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act [https://perma.cc/W65G-JQXX] (last updated Jan. 3, 2017).
[43] *Clean Air Act Overview*, *supra* note 42.
[44] *Id.*
[45] Fredrickson et al., *supra* note 9, at S98–99.

At the conclusion of the W. Bush administration, the Court in *Massachusetts v. EPA* reinforced the broad scope of CAA and held that "air pollutants" in CAA included substances affecting the climate.[46] The Court further held that the term "welfare" in CAA includes "'effects on . . . weather . . . and climate.'"[47] Following the deregulatory and science doubting approach of the Bush administration, the Obama administration prioritized furthering the scope of environmental regulations.[48] For example, Obama joined the Paris Climate Agreement, raised fuel emissions standards, set national emissions limits through the Clean Power Plan, and prioritized clean energy through the American Recovery and Reinvestment Act.[49]

Because of the *Massachusetts v. EPA* Court's holding, the Obama administration was both required and empowered to use CAA to curb greenhouse gas emissions.[50] The effects of this holding were significant. In 2008 and 2009, gross greenhouse gas emissions relative to the previous year decreased by 2.8% and 6.3%, respectively, marking a drastic change from previous years of increasing emissions.[51] Before the Obama administration, gross emissions were gradually increasing by 1–2% each year.[52]

Since its enactment, the implementation of CAA as amended has changed in scope and intensity depending on the presidential administrative priorities.[53] But, for the most part, CAA's central objectives and regulatory programs have survived rollback efforts of hostile administrations.[54] The Trump administration's approach, however, presents new challenges to the resiliency of golden era environmental laws.[55]

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[46] Massachusetts v. EPA, 549 U.S. 497, 506 (2007).
[47] *Id.* (citing 42 U.S.C. § 7602(h)).
[48] *A Look at Barack Obama's Environmental Platform and Record*, GRIST, https://grist.org/article/obama_factsheet/ [https://perma.cc/F3HC-6CV3] (last updated Aug. 22, 2008).
[49] Anna Aurillo & Margie Alt, *Celebrating President Obama's Environmental Legacy*, ENV'T AM. (Jan. 10, 2017), https://environmentamerica.org/news/ame/celebrating-president-obama%E2%80%99s-environmental-legacy [https://perma.cc/X6PS-P66E].
[50] Sousa & Klyza, *supra* note 35, at 487.
[51] U.S. ENV'T PROT. AGENCY, 430-P-20-001, DRAFT INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2018, ES-5 (2019), *available at* https://www.epa.gov/sites/production/files/2020-02/documents/us-ghg-inventory-2020-main-text.pdf [https://perma.cc/2PXQ-T345].
[52] *Id.* at ES-7.
[53] Sousa & Klyza, *supra* note 35, at 469.
[54] *Id.* at 469–70.
[55] *Id.* (explaining, however, that "any major retrenchments in the environmental field will come through statutory change").

B. Trump's Novel and Explicit Deregulatory Approach

In their 2017 article, Sousa and Klyza predict that the "green drift" over the past forty to fifty years could shift to a "retrenchment narrative," where the administrative rollbacks in fact undermine golden era environmental policies.[56] Since 2017, the Trump administration has aggressively pressed forward with its attempts at gutting CAA and many other environmental regimes.[57] As of July 15, 2020, the administration reversed sixty-eight environmental rules and was in the process of rolling back thirty-two more.[58] The strategy includes a "one-two punch," where the administration first delays the implementation of rules and then repeals the rule completely.[59]

The current administration's rollback strategy is different than that of previous presidents.[60] Historically, as enumerated by Judith Layzer in 2012, deregulatory politicians implemented "low-profile" policies to hamper environmental regulation by:

> [a]dding riders to budget and other must-pass legislation, changing the wording interpretation, or enforcement of existing rules; devolving greater responsibility for interpreting and enforcing those rules to the states, regardless of their regulatory capacity or inclination; encouraging lawsuits by development interests, declining to appeal judicial rulings that benefit development, or settling lawsuits on terms favorable to industry; and downplaying, denying, or even modifying scientific analysis when it conflicts with development priorities.[61]

Those actors recognized that challenging environmental policies directly was not effective and therefore employed these low-profile, passive

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[56] *Id.*
[57] Nadja Popovich et al., *95 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html [https://perma.cc/CV3K-7NQJ].
[58] *Id.*
[59] *Id.* (noting that these rollbacks have not always been procedurally sound and that some legal challenges have been successful); CON. RSCH. SERV., R44615, EPA'S METHANE REGULATIONS: LEGAL OVERVIEW Summary (2018) (summarizing delays in implementation of environmental regulations).
[60] *See* discussion *supra* notes 40–48 and accompanying text.
[61] JUDITH LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION 334 (2012).

strategies.[62] But instead of adopting subtle policy strategies and narratives to push its deregulatory agenda, the Trump administration has and continues to explicitly challenge environmental regulatory programs.[63] These explicit challenges have shifted environmental policy from a green drift to a retrenchment narrative.

C. Environmental Policy Retrenchment and Anthropogenic Climate Change

Environmental policy retrenchment poses an existential threat to Americans and global citizens alike.[64] The rollback of controls on methane emissions and changes to automobile emissions standards, for example, will undoubtedly increase greenhouse gas emissions above the already unsustainable, business as usual rates.[65] In October 2018, The International Panel on Climate Change ("IPCC") released an alarming special report warning that "[g]lobal warming is *likely* to reach 1.5°C between 2030 and 2052."[66] The IPCC made these projections not necessarily considering the impacts of the drastic rollbacks and deregulatory agenda of the Trump administration.[67]

In 2018 alone, the United States emitted around 5.429 billion metric tons of carbon.[68] The State Energy & Environmental Impact Center of New York University Law School estimates that, by rolling back six main regulatory programs, the administration will be forgoing a total of 2.09 million metric tons of annual CO2 emission reductions.[69] This will be a "virtual surrender" to the catastrophic humanitarian impacts of climate change and will impose additional public health costs by decreasing air quality.[70]

Although 2.09 million tons seems insignificant when compared to 5.429 billion tons, the urgency of the IPCC report indicates otherwise.[71]

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[62] *Id.*
[63] *Compare* LAYZER, *supra* note 61, *with* Popovich et al., *supra* note 57.
[64] STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10, at 5.
[65] *Id.* at 14, 21 (citing also the foregone health and economic benefits of rolling back EPA clean car and methane rules).
[66] IPCC, Summary for Policymakers *in* GLOBAL WARMING OF 1.5°C. 6 (Masson-Delmotte et al. eds., 2018).
[67] *See generally id.*
[68] U.S. ENV'T PROT. AGENCY, *supra* note 51, at ES-5.
[69] STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10, at 5.
[70] *Id.*
[71] *See generally* IPCC, *supra* note 66.

The report maps a best-case scenario of 1.5 degree warming if global emissions reach net-zero by 2050 and 2.0 degree warming if emissions reach net-zero by 2070.[72] The catastrophic impacts of such warming shows that nations like the United States should be dramatically reducing its emissions toward a net-zero goal, rather than increasing emissions.[73]

Perhaps a silver lining of the explicit and aggressive retrenchment of environmental regulations by the Trump administration is the considerable attention and opposition it has stirred up.[74] Numerous stakeholders—youth climate activists, non-governmental organizations, cities, counties, and state attorneys general—are protesting and challenging these proposed rules and rollbacks in the streets and in the courts.[75] Additionally, some argue that while the rhetoric of the Trump administration has been aggressive, the actual impacts of the administration's actions will not cause much change, because the golden era environmental laws, as enacted by Congress in the 1970s, remain intact.[76] On the other hand, others argue that these narratives, as well as the Trump administration's actions, pose an existential threat to the possibility of returning to a stable climate.[77] Regardless, the Trump administration is acting to intentionally cripple environmental regulations in one of the most critical moments in human history.[78] This approach presses the foot on the gas as we race towards 2030, when the window for maintaining a habitable Earth will slam shut.[79]

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[72] *Id.* at 16.
[73] *See id.*
[74] However, not all of the challenges to the administration have been successful and some efforts to undermine regulations appear to be working. *See* Vazquez, *supra* note 13. On the other hand, courts are invalidating some of EPA's efforts to stay and reconsider rules for lack of process. *See* CON. RSCH. SERV., *supra* note 59, at 9.
[75] Scott Neuman & Bill Chappell, *Young People Lead Millions To Protest Global Inaction On Climate Change*, NPR (Sept. 20, 2019), https://www.npr.org/2019/09/20/762629200/mass-protests-in-australia-kick-off-global-climate-strike-ahead-of-u-n-summit [https://perma.cc/V4G9-AZKS]. Some claim that citizen environmental litigation is too insignificant to have any real impact on federal policies. *See, e.g.*, David E. Adelman & Robert L. Glicksman, *The Limits of Citizen Environmental Litigation*, 33 A.B.A. SEC. NAT. RES. & ENV'T 17 (Spring 2019), *available at* https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2018-19/spring/the-limits-citizen-environmental-litigation/ [https://perma.cc/PD3N-RB46] (last visited Oct. 13, 2020).
[76] Sousa & Klyza, *supra* note 35, at 471.
[77] *See* STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10, at 5.
[78] *See* IPCC, *supra* note 66, at 18.
[79] *Id.*

II. STATE INTERGOVERNMENTAL LITIGATION AS A RESPONSE TO FEDERAL POLICY RETRENCHMENT

States are responding to this critical climate moment by challenging Trump's environmental policy rollbacks in the federal courts.[80] Legal scholars debate whether public-law litigation is an appropriate use of the federal courts.[81] For example, some argue "that attorneys general are abandoning their traditional role 'as representatives of their states.'"[82] Some believe that special state standing has gone too far, citing the increased number of lawsuits proliferating from the Supreme Court's holding in *Massachusetts v. EPA*.[83] These scholars argue that the increase in lawsuits is a threat to the legitimacy of both the federal courts and the Offices of Attorneys General.[84] Because state-led litigation "against the national government is inherently 'political'" and the appearance of the court as a political body threatens the court's legitimacy and role in democracy.[85]

Young, however, argues that state standing has not gone too far. He claims that the proliferation of lawsuits resulting from the Supreme Court's holding in *Massachusetts v. EPA*, is beneficial, even if political.[86] He reasons that these lawsuits are no different than the actions of private individuals, like non-profit organizations.[87] Additionally, he cites that this litigation can effectively remedy the failure of elected officials to legislate these issues.[88] Young further argues that states might actually be better positioned than non-profit organizations to initiate these cases.[89]

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[80] *See* STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10, at 2; *see generally* Popovich et al., *supra* note 57.
[81] *See* Lemos & Young, *supra* note 19, at 48.
[82] *Id.* (internal citations omitted).
[83] Article III § 2 of the Constitution restricts the judicial power to "cases and controversies." Constitutional standing requires parties to meet three irreducible constitutional requirements in order to litigate their case in federal court: injury, causation, and redressability. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Constitutional standing requirements apply to states when they are litigants; however, states can receive "special solicitude" under the standing analysis. Massachusetts v. EPA, 549 U.S. 497, 520 (2007).
[84] *See* Young, *supra* note 19, at 1902 (describing viewpoints that the article ultimately challenges).
[85] *Id.* at 1894–95 (internal citations omitted).
[86] *See id.* at 1902.
[87] *Id.*
[88] *Id.* at 1895.
[89] *Id.* at 1896.

This Note refutes this argument that "hot-button" political issues are best litigated through the federal courts merely because (1) nonprofits would do this anyway and (2) popularly elected officials are failing to solve these issues.[90] Neither of these arguments are persuasive, and these justifications offend both long-held constitutional principles and normative justifications.[91] Practically speaking, *Massachusetts v. EPA* and *Texas v. United States*, taken together, opened the proverbial "floodgates" of state-led litigation against the federal government.[92] This expansion poses a threat to the constitutional separation of powers.[93] While retaining the integrity of the Court's holding in *Massachusetts v. EPA*,[94] the Court should clarify and narrow the scope of state standing.[95] Clarification would be particularly helpful in the context of highly politicized and polarizing debates like immigration and health care.

A. Development of State-Led Intergovernmental Litigation

Before 2007, states challenged the federal government less frequently and on a more bipartisan basis.[96] For example, during the W. Bush administration, states only acted affirmatively as initial plaintiffs or intervenors against the federal government in three lawsuits.[97] During the Obama administration, however, states launched or participated in sixty-eight lawsuits, winning forty, with an overall success rate of 68%.[98]

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[90] Young, *supra* note 19, at 1895.
[91] Grove, *supra* note 2, at 856 (arguing that "a more expansive definition of special state standing might threaten to erode the limits of the Article III judicial power—by enabling every dispute between a State and the federal government to wind up in court").
[92] *See* discussion *infra* Part III.
[93] *See* Grove, *supra* note 2, at 856.
[94] This Note assumes that *Massachusetts v. EPA* was correctly decided but argues instead that the litigation to follow incorrectly interpreted the scope of applicability of the Massachusetts v. EPA Court's reasoning.
[95] Grove, *supra* note 2, at 855.
[96] *See* Nolette, *supra* note 5.
[97] *Id.* (Filter by Administration: "George W. Bush;" filter by Type of State Involvement: "States as Initial Plaintiffs," and "States as Intervenors").
[98] Fred Barbash, *Litigation Against Executive Branch by Coalitions of States Grows in Response to Unilateral Actions by President and Gridlocked Congress*, WASH. POST (Aug. 24, 2019), https://www.washingtonpost.com/national-security/litigation-against-executive-branch-by-coalitions-of-states-grows-in-response-to-unilateral-actions-by-president-and-gridlocked-congress/2019/08/24/34267560-c5bf-11e9-b72f-b31dfaa77212_story.html [https://perma.cc/B7ER-ARGH].

This shocking increase in litigation during the Obama administration, from three to sixty-eight lawsuits, only expanded during the Trump administration.[99] Since January 2017, states have participated in 104 lawsuits against the federal government.[100] For the past three years, state challenges have far surpassed those against previous administrations.

If challenges continue at the current rate, the federal government could face 260 multistate litigation challenges, an unprecedented number.[101]

These extraordinary numbers present themselves in an urgent context. Each day the atmosphere swallows increasing amounts of greenhouse gas emissions.[102] Meanwhile, Trump's agenda remains explicitly hostile to environmental regulation.[103]

The dire state of the global climate compounds the destructiveness of this hostility, and states are responding accordingly. Columbia Law School researchers characterize the litigatory responses to the Trump administration's climate-related deregulation in five categories:

1. "Defending Obama Administration Climate Policies and Decisions" (17%),
2. "Demanding Transparency & Scientific Inquiry from the Trump Administration" (15%),
3. "Integrating Consideration of Climate Change into Environmental Review Permitting" (28%),
4. "Advancing or Enforcing Additional Climate Protections through the Courts" (13%), and
5. "Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters" (27%).[104]

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[99] Nolette, *supra* note 5 (Filter by Administration: "Donald Trump;" filter by Type of State Involvement: "State as Initial Plaintiffs," and "State as Intervenors") (showing 91 total cases as of March 1, 2020).
[100] *Id.* (Filter by Administration: "Donald Trump").
[101] *Id.*
[102] *See* U.S. ENV'T PROT. AGENCY, *supra* note 51, at S5.
[103] *See* discussion *supra* Sections I.B–C.
[104] DENA P. ADLER, SABIN CTR. CLIMATE CHANGE L., U.S. CLIMATE CHANGE LITIGATION IN THE AGE OF TRUMP: YEAR ONE, 29–30, 33 (2018), *available at* http://columbiaclimatelaw.com/files/2018/02/Adler-2018-02-U.S.-Climate-Change-Litigation-in-the-Age-of-Trump-Year-One.pdf [https://perma.cc/WQ9Z-4E6C] (clarifying that litigation not only reacts but also interacts with the Trump administration's deregulatory activities).

These lawsuits include challenges by multiple stakeholders to numerous agencies within the administration,[105] including EPA and the President himself.[106] Category (5) "Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters," shows that some state parties continue to challenge Obama-era climate policies.[107] However, today, 73% of the time, state parties are suing to challenge attempts by the Trump administration to upend climate policy progress.[108]

B. State Litigation, Polarization, and the Constitution

While state litigation has increased in frequency, it has also become increasingly polarized. Prior to 2007, intergovernmental litigation by states existed; however, many of these multistate actions were bipartisan in nature.[109] Bipartisan multistate litigation occurs when the state plaintiffs, represented by attorneys general from both political parties, form a coalition to sue the federal government.[110] During the Clinton administration, states sued the federal government seven times, and six of those lawsuits were brought by "bipartisan" coalitions.[111] Not only were these lawsuits predominately bipartisan, they primarily involved energy policy or environmental administrative challenges.[112] The bipartisan and environmental nature of state-led litigation predating *Massachusetts v. EPA* also occurred during the H.W. Bush administration. Under the H.W. Bush administration, five of eight lawsuits led by states were bipartisan. Even during the Reagan administration, six of

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[105] Other agencies sued by states include the Federal Highway Administration, Bureau of Land Management, Department of the Interior, National Oceanic and Atmospheric Administration, Department of Commerce, Food and Drug Administration, Office of Management and Budget, Federal Energy Regulatory Commission, U.S. Department of Agriculture, U.S. Forest Service, Department of Homeland Security, Customs and Border Patrol, Department of State, Fish and Wildlife Service, National Highway Traffic Safety Administration, Department of Transportation, Department of Energy. *Id.* at 85–106.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 33 (showing 73% of climate change litigation to be "'pro' cases in favor of climate-related protections").

[109] *See* Nolette, *supra* note 5 (filter by Partisan Coalition: "Bipartisan").

[110] "Bipartisan coalitions" refers to groups of states participating in a lawsuit as joint parties while being represented by both Republican and Democratic attorneys general. *See* Nolette, *supra* note 5.

[111] *Id.* (Filter by Administration: "Bill Clinton;" and filter by Partisan Coalition: "Bipartisan").

[112] *Id.*

nine state actions consisted of bipartisan coalitions, seven of which related to environmental or energy policy enforcement.[113]

In addition to the polarization of state litigation, the federal government has been deeply polarized and gridlocked since the 1980s.[114] This gridlock ensures the impossibility of any novel environmental legislation by Congress.[115] Some argue that state-led intergovernmental litigation plays an important role in an era of polarization by enforcing existing rules and regulations.[116] Others argue, however, that these often highly political fights should not occur in the federal courts.[117] Intergovernmental state litigation permits a small subset of states, now mostly reflecting one political party, to challenge and change federal policies affecting the entire Union.[118] This litigatory power, when coupled with special state standing, upsets the constitutional balance of both separation of powers and federalism. This combination gives litigating states disproportionate influence over federal policies affecting non-party states.[119] Instead, the other branches of the federal government, Congress and the Courts, should lead this charge.

Today, state-led lawsuits are not bipartisan, and their scope extends far beyond environmental disputes. The numbers alone show that the grant of special solicitude to states has dramatically altered the ways in which state attorneys general operate. As the then Texas Attorney General Gregg Abbott said, "I go to the office, I sue the federal government and I go home."[120] But is this the role that states should adopt?

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[113] *Id.* (Filter by Administration: "Ronald Reagan;" and filter by Partisan Coalition: "Bipartisan").

[114] Sousa & Klyza, *supra* note 35, at 467; Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/ [https://perma.cc/EMT7-K65L].

[115] *See* Sousa & Klyza, *supra* note 35, at 470–71.

[116] Lemos & Young, *supra* note 19, at 49–50.

[117] Grove, *supra* note 2, at 856.

[118] *Id.* at 856–57.

[119] *See id.* at 885–86.

[120] Young, *supra* note 19, at 1893 (internal citation omitted). These lawsuits were arguably a contributing factor to Abbott's gubernatorial victory in 2014. Rachel Weiner, *Five Things to Know About Greg Abbott*, WASH. POST (July 15, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/07/15/five-things-to-know-about-greg-abbott/ [https://perma.cc/8XJL-W92Y]. Other attorneys general have received similar political recognition for their public-law litigation against the Obama administration. *See* Robin Bravender, *State Lawyers Use Pruitt's Playbook Against Him—By Suing*, E&E NEWS (Aug. 22, 2017), https://www.eenews.net/stories/1060059026 [https://perma.cc/H87C-W7WM] ("When Scott Pruitt was Oklahoma's top attorney, he made a name for himself by suing the Obama administration.").

Professor Tara Grove argues that while states can and should play a role in protecting the interests and preferences of their residents, that role should not be so broad as to allow states to influence how the executive branch implements federal policies.[121] This idea furthers Grove's argument that state litigation related to separation of powers is not justified.[122] Rather than states, it is the role of the Congress and the Federal Courts to fulfill this checking role.[123] States should only intervene when federalism concerns arise—when the federal government infringes upon state interests.[124] This argument creates a cleaner rule for standing and would surely limit the proliferation of litigation against the Trump administration and future presidents. Grove assumes that if special state standing is to be limited, at the very least states should receive the same treatment as private parties under the doctrine of standing.[125]

This Note, however, argues for a slightly more specific limit to special state standing.[126] Instead of limiting special solicitude to federalism concerns, states should still receive special treatment, as compared to private parties, when they are suing to redress an environmental injury affecting quasi-sovereign interests.

The *Massachusetts v. EPA* Court held that states have special solicitude to protect their quasi-sovereign interests.[127] While the Court established that Massachusetts had special solicitude to protect its quasi-sovereign interests from the threat of climate change, the Court left many legal questions unanswered.[128] For example, the Court did not determine "to what extent and under what circumstances" states should receive a lower standing requirement in federal court.[129]

Some argue that this lack of guidance regarding the scope of special state standing gives states considerable power in the federal courts to challenge administrative decisions.[130] However, the Court challenged some guidelines and emphasized the difference between "'protect[ing] her

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[121] Grove, *supra* note 2, at 856.
[122] *Id.* at 898–99.
[123] *See id.* at 897–99.
[124] *Id.* at 897–98.
[125] *Id.* at 854–55.
[126] *See* discussion *infra* Part III.
[127] Massachusetts v. EPA, 549 U.S. 497, 520 (2007).
[128] Grove, *supra* note 3, at 1883.
[129] Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1786 (2008).
[130] *S*ee Kathryn A. Watts & Amy J. Wildermuth, Essay, Massachusetts v. EPA*: Breaking Ground on Issues Other than Global Warming*, 102 NW. UNIV. L. REV. 1029, 1046 (2008).

citizens from the operation of federal statutes' . . . and allowing a State to assert its rights under federal law (which it has standing to do)."[131] While states cannot litigate *parens patriae*,[132] they can bring claims against the federal government when the state asserts its own, quasi-sovereign right.[133] Because Massachusetts was acting to protect its quasi-sovereign interests, climate change's effects on the state's property, it was entitled to special standing.[134] These quasi-sovereign interests asserted under CAA are "independent of and behind the titles of its citizens, in all the earth and air within its domain."[135] As the Court's holding in *Massachusetts v. EPA* shows, courts should grant states special solicitude in the standing analysis when they sue to protect an interest that is a quasi-sovereign, environmental right "in all the earth and air within its domain."[136]

III. STATES ARE ENTITLED TO SPECIAL STANDING WHEN PROTECTING QUASI-SOVEREIGN, ENVIRONMENTAL RIGHTS

Unfortunately, courts have misinterpreted and misappropriated the *Massachusetts v. EPA* holding. States have weaponized the Court's holding in *Massachusetts v. EPA*, departing from precedent and disrupting the careful constitutional balance of both federalism and separation of powers.[137] Hot-button political issues should not be litigated by states through the federal courts. And states should not have an unrestricted license to challenge federal policies that they dislike.[138] *Massachusetts v. EPA* held that states should only receive special treatment for the purposes of standing when they claim injury to a quasi-sovereign right.[139] However,

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[131] In Footnote 17 of Massachusetts v. EPA, the Court majority rejects Chief Justice Roberts's contention that Georgia v. Tennessee Copper, Co. is not a standing case and further rejects a broad reading of *Massachusetts v. Mellon*, prohibiting states to sue on their quasi-sovereign rights. In *Mellon*, the Court specified that it was adjudicating "not rights of person or property, not rights of dominion over physical domain, [and] not quasi-sovereign rights actually invaded or threatened." *Massachusetts*, 549 U.S. at 520 n.17.
[132] *See* Grove, *supra* note 3, at 1883.
[133] *Massachusetts*, 549 U.S. at 520.
[134] *Id.*
[135] *Id.* at 520 n.17 (quoting *Tennessee Copper Co.*, 206 U.S. at 237).
[136] *Id.*
[137] *See* Grove, *supra* note 2, at 895–99 (discussing state standing's impact on federalism and separation of powers).
[138] *See id.* at 884 (discussing Alexander Bickel's concern that the federal courts would turn into a "council of revision" for states challenging federal laws) (citing Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 88–90).
[139] *Massachusetts*, 549 U.S. at 520.

this decision led to confusion and debate about the meaning and proper application of special state standing.[140]

The Fifth Circuit's decision in *Texas v. United States* capitalized on this confusion,[141] stretching special state standing from cases with environmental, nuisance-like injuries to purely economic injuries.[142] *Texas* introduced "economic injury" into the special state standing equation, a novel injury used in the context of *parens patriae*.[143] Historically, the foundational state standing concept of *parens patriae* did not involve purely economic injuries, especially those cases relied upon by the *Massachusetts v. EPA* Court. Instead it aimed to protect interests that concern "the health and wellbeing of residents in general."[144] *Texas*'s extension of *Massachusetts v. EPA* departs from the Court's environmental-specific reasoning and has intensified the flood of highly polarized, state intergovernmental litigation proliferating therefrom.[145]

This Note argues that in order to prevent states from easily challenging polarizing federal policy issues in the courts, the Court should specify that special state standing applies exclusively in cases of environmental injuries to a state's quasi-sovereign interests. If the Court applies this principle to the Fifth Circuit's holding in *Texas*, it would be reversed.[146] This clarification would not only be consistent with precedent, but would decrease the problems associated with state-led intergovernmental litigation.[147] Further, while environmental issues have recently been framed as political,[148] anthropogenic climate change is an existential crisis that

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[140] Grove, *supra* note 3, at 1883.
[141] Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).
[142] *See* discussion *infra* Section III.B.
[143] *See* discussion *infra* Section III.A.
[144] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 485 U.S. 592, 607 (1982).
[145] *See* discussion *supra* notes 103–08 and accompanying text. The Supreme Court through an equally divided Court affirmed *Texas* by per curiam opinion. United States v. Texas, 579 U.S. 2271, 2272 (2016). The Court has yet to explicitly state in what contexts states have special standing. *See generally* Grove, *supra* note 3.
[146] *See* discussion *infra* Section III.B.
[147] *See* discussion *supra* Part II.
[148] Because of disinformation campaigns like that of the Bush and Trump administrations, the public underestimates the scientific consensus among experts. Abel Gustafson & Matthew Goldberg, *Even Americans Highly Concerned About Climate Change Dramatically Underestimate the Scientific Consensus*, YALE PROGRAM CLIMATE CHANGE COMMC'N (Oct. 18, 2018), https://climatecommunication.yale.edu/publications/even-americans-highly-concerned-about-climate-change-dramatically-underestimate-the-scientific-consensus/ [https://perma.cc/WQ8S-X5WR]. "The partisan divide [over whether climate change should be a priority] began in the late 1990s and has increased over time." Elaine Kamarack,

transcends politics.[149] This is not to say that who is to pay or who is to blame for climate change is not political, but rather that, unlike immigration policy or health care, climate change impacts states differently.[150] Interpreting special state standing as outlined in *Massachusetts v. EPA*, to protect environmental, quasi-sovereign rights,[151] serves policy goals of limiting the flood of polarizing, state-led intergovernmental litigation while also permitting states to stand up to the federal government when it infringes on their quasi-sovereign environmental rights.

A. The Quasi-Sovereign Rights of States

States should be held to a lower, special standing threshold in cases of environmental injury. "Environmental," for the purposes of this Note, refers to cases involving rights to land, air, water, climate, and well-being of citizens, and affect the state's quasi-sovereign interests and property rights.[152] Supreme Court precedent shows that special state standing relies on the idea that states have quasi-sovereign rights.[153] Further, these quasi-sovereign rights, most often, if not exclusively, relate to the rights of states to protect the environment. Environmental disputes, like overpollution, implicate both a state's property and the health and well-being of their citizens in a way that is distinct from other policy concerns.[154] Despite this history of special state standing for environmental disputes, the

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The Challenging Politics of Climate Change, BROOKINGS (Sept. 23, 2019), https://www.brookings.edu/research/the-challenging-politics-of-climate-change/ [https://perma.cc/TLP8-K2QE]. While many agree that anthropogenic climate change exists, Democrats and Republicans sharply diverge on the extent of the issue and how it should be addressed. *Id.*

[149] *See* discussion *infra* Section III.B.

[150] *See id.* Even though environmental justice concerns and climate change impacts on individuals is beyond the scope of this Note, it is essential to mention that low income and minority communities are and will continue to be disproportionately affected by climate change. ALEXA JAY ET AL., U.S. GLOB. CHANGE RES. PROGRAM, Overview *in* IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT 33, 36 (2018).

[151] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

[152] *See* Mank, *supra* note 129, at 1736–37 (explaining that *Massachusetts* held that the state had both a quasi-sovereign right and a property right). It is beyond the scope of this Note to discuss the distinction between these two rights and instead treats them as under the umbrella of quasi-sovereign rights.

[153] *See Massachusetts*, 549 U.S. at 519–20.

[154] Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). *But see* Grove, *supra* note 2, at 865 (arguing that "Justice Holmes was using the term 'quasi-sovereign' in a very different sense—to refer to the State's sovereign interest in the continued enforceability of state law").

Supreme Court did not expressly limit special solicitude to environmental cases.[155] As a result, states like Texas have weaponized special state standing to interfere with federal policy making, challenging regulations that do not affect a state's environmental, quasi-sovereign rights.[156]

Some argue "that the State's interest in protecting the health and wellbeing of its citizens from transboundary nuisances is the paradigm case of a quasi-sovereign interest that will support *parens patriae* standing."[157] Transboundary nuisances affecting the health and well-being of citizens are inherently environmental, because nuisance law serves as a key background principle for modern environmental law.[158] The common law of public nuisance targets uses that negatively impact public health and welfare, and private nuisance imposes liability for uses that interfere with the use and enjoyment of land.[159] These interests, in protecting both welfare and property, extend beyond land to other ecological elements. For example, the Court has held that states have a quasi-sovereign interest in fresh and coastal water ecosystems and resources.[160] Overall, the Court has awarded states special treatment under Article III standing when the states allege nuisance-like, environmental injuries.[161]

The special treatment states receive, however, while "judicially created," is construed as a narrow exception to regular standing.[162] It is a "narrow exception," because, historically, the Court lowered the standing hurdle for state plaintiffs in particular situations.[163] For example, in two early twentieth-century nuisance cases, *Missouri v. Illinois* and *Tennessee Copper Co. v. Georgia*, the Court did not require that the states show "direct and particularized harm" to recover for the environmental nuisances created by defendants.[164] States today do not sue under nuisance doctrines

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[155] *Massachusetts*, 549 U.S. at 520.
[156] *See* discussion *infra* Section III.B; *see generally* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).
[157] Mank, *supra* note 129, at 1767 (quoting Thomas A. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV'T L. 293, 304 (2005)).
[158] *Environmental Law 101: Governance: Overview*, ENV'T L. INST., https://www.eli.org/keywords/governance [https://perma.cc/DX9R-3773] (last visited Oct. 13, 2020).
[159] *Id.*
[160] Mank, *supra* note 129, at 1767 (identifying a number of twentieth-century Supreme Court and state cases in which states asserted a quasi-sovereign right to water or claimed *parens patriae* to protect water resources).
[161] *Id.* at 1768.
[162] *Id.* (citing Estado Unidos Mexicanos v. DeCoster, 229 F.3d 332, 335 (1st Cir. 2000)).
[163] *Id.*
[164] *Id.*; *see generally* Missouri v. Illinois, 180 U.S. 208 (1901); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

present in those cases, because federal environmental regulations like CAA have stepped in to regulate transboundary and national environmental issues.[165] However, these holdings, which the Court relied upon in *Massachusetts v. EPA*,[166] show that states should receive special standing when litigating environmental injuries to quasi-sovereign interests.

The Court in *Massachusetts v. Mellon* held that states could not bring citizen's interests to court as *parens patriae*.[167] However, the *Mellon* Court also found that Massachusetts could have established standing by asserting its own justiciable rights.[168] But Massachusetts failed to do so, and the Court denied standing to Massachusetts suing in its capacity as a sovereign.[169]

That case did not concern environmental harm or a public nuisance. Instead, in *Mellon,* Massachusetts sued on behalf of tax payers.[170] The Court denied standing to the state as a sovereign and reasoned that Massachusetts did not allege a "direct and immediate" injury.[171] The Court's decision to avoid a more permissible standing test in *Mellon* shows how environmental and economic harms are distinguishable.[172] In *Tennessee Copper Co*., *Missouri*, and *Mellon*, citizens were adversely affected by taxes and pollution; however, the Court chose to grant standing only to remedy the environmental harms—those harms implicating the states' proprietary interests.[173] Because the environmental harm implicated the quasi-sovereign interests of the states, the Court granted standing in *Tennessee Copper Co.* and *Missouri*.[174] Meanwhile in *Mellon*, the Court held that the state did not allege standing on its own, because it "did not have an interest in the subject matter" of the suit.[175]

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[165] ENV'T L. INST., *supra* note 158.
[166] *See* Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007).
[167] Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).
[168] *Id.* at 484–85 ("rights of dominion over physical domain, . . . quasi sovereign rights actually invaded or threatened, [and] abstract questions of political power, of sovereignty, of government").
[169] *See id.* at 480 (holding "the state of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens").
[170] *Id.* at 486.
[171] *See id.* at 485.
[172] *See id.* at 480.
[173] *Compare Mellon*, 262 U.S. at 480, *with Missouri*, 180 U.S. at 248 *and Tennessee Copper Co.*, 206 U.S. at 239.
[174] *See Missouri*, 180 U.S. at 208; *Tennessee Copper Co.*, 206 U.S. at 237.
[175] *Mellon*, 262 U.S. at 480; Grove, *supra* note 2, at 872 ("Indeed, *Massachusetts v. Mellon* assumed the validity of the 'quasi-sovereign' standing theory in *Missouri v. Holland*.").

When states sue to enforce their quasi-sovereign, environmental rights, they are asserting their right to protect their own interests, either under the common law or by statute.[176] States lost their independent sovereignty when they ratified the Constitution; however, the states retained some interests, which are preserved through the delicate balance of federalism.[177] These remaining interests, like their property, are "quasi-sovereign interests."[178] Ensuring the integrity of the ecosystems within that state's property has positive spillover effects on citizens' health and well-being. Therefore, when states protect their own property from environmental nuisances, they simultaneously guard the well-being of their citizens. Even though the states are not suing as *parens patriae*, asserting the rights of citizens, by asserting their own rights, states in turn guard the general welfare of their residents.

As held in *Mellon*, states cannot sue as *parens patriae* on behalf of individual residents.[179] In environmental cases, however, states can sue not as a parent but as an individual state, protecting its *own* interests. Even though the states are suing on their own behalf, to protect their water, air, and land from environmental harm, these lawsuits create positive externalities which simultaneously protect their own residents' health and well-being.

B. Texas Failed to Allege a Quasi-Sovereign Right

The Court's failure to define the scope of special state standing permitted lower courts to expand *Massachusetts v. EPA's* applicability.[180] In *Texas v. United States*, state plaintiffs challenged the Obama administration's Deferred Action for Parental Arrivals ("DAPA") program, which aimed to transition immigrants without legal status to legal residents.[181] In that case, the Fifth Circuit engaged in a standing analysis which purported to compare the case to that of *Massachusetts v. EPA*.[182] That court reasoned that Texas merited special standing because Texas would have

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[176] *See* Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007).
[177] *See* U.S. CONST. art. VI, cl. 2.
[178] Mank, *supra* note 129, at 1729 (stating that the majority in *Massachusetts v. EPA* "implied that the federal government owes states greater standing rights because states have surrendered sovereign powers to the federal government").
[179] *Mellon*, 262 U.S. at 485.
[180] *See generally* Grove, *supra* note 2 (discussing the undefined scope of state standing).
[181] Texas v. United States, 809 F.3d 134, 146–48 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).
[182] *Id.* at 151–55.

to change its laws and incur costs to issue approximately 500,000 drivers' licenses to accommodate the newly documented DAPA parents.[183] The court also asserted in a conclusory manner that because "states are not normal litigants for the purposes of invoking federal jurisdiction" and Texas was similar enough to Massachusetts, Texas had standing.[184]

With its questionable reasoning, the Fifth Circuit in *Texas* broadened the scope and applicability of special state standing.[185] The alleged injury of issuing drivers' licenses did not concern the quasi-sovereign rights of the state of Texas, so Texas's challenge to DAPA did not impact its land, air, water, or the welfare of its citizens. Therefore, Texas did not implicate any quasi-sovereign rights, and the injury claimed by the state was purely economic.[186] The court nevertheless held that the state had special standing, such that it could interfere with the federal executive's actions.[187] This abuse of special state standing in *Texas* is problematic because it departs from precedent, it has encouraged a flood of partisan, state-led litigation, and it violates the delicate balance of separation of powers.

C. Proposed Limited Principle: Special Standing for Environmental Injuries to Quasi-Sovereign Interests

To avoid the negative effects of a broad special state standing doctrine, the Court should clarify that its holding in *Massachusetts v. EPA* intended to grant special standing to states in cases alleging environmental injuries to quasi-sovereign interests. This limitation to state standing would be justified because environmental injuries, especially in the context of climate change, are different than pure economic injuries.

Health care and immigration policy have dramatic humanitarian impacts on national and international scales. However, these issues are governed by the health of the global climate system. Therefore, the severity of health care and immigration issues are not independent of, but rather are dependent upon our changing climate.[188] For this reason, the

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[183] *Id.* at 155; *see also* Pennsylvania v. Trump, 351 F. Supp. 3d 791, 805 (E.D. Pa. 2019).
[184] *Texas*, 809 F.3d at 152–55.
[185] *See* discussion *supra* Part II.
[186] *See* Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).
[187] *Texas*, 809 F.3d at 152–55.
[188] STATE ATTORNEYS GENERAL PREPARE TO FIGHT, *supra* note 10, at 3–6, 38–39 (discussing how rollback of environmental rules will impact public health); John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS (July 25, 2019), https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/ [https://perma.cc/9HPZ-UPEG].

concern raised in *Massachusetts v. EPA* for regulating carbon emissions is fundamentally different than Texas's distaste for DAPA.

Further, the science behind environmental injuries like climate change is sound.[189] In addition to the overwhelming scientific consensus, the *Massachusetts v. EPA* Court endorsed and the "EPA [did] not dispute the causal connection between manmade greenhouse gas emission and global warming."[190] This concrete science further distinguishes environmental injuries from the injury alleged in *Texas*. For example, if the federal government decreases its enforcement of immigration laws, this change will impact states with significant migrant populations like Texas and Arizona.[191] But the question of whether this impact is actually "harmful" or causing an "injury" is purely a political and economic question.[192] However, if the federal government decreases enforcement of emissions standards under CAA, all states will undoubtedly be harmed by decreased air quality and increased risk of climate change related impacts.[193]

Unlike the perceived "harm" of decreasing immigration enforcement, the harm of decreasing environmental regulation is backed by decades of climate science.[194] The scientific backing of environmental injuries will prevent state attorneys general from creating ad hoc "injuries" to further their xenophobic and partisan agendas to enjoin federal policies with which they disagree.[195] Therefore, unlike Texas's fabricated injury in *Texas v. United States*,[196] states alleging environmental injuries to their land, air, water, and the welfare of their citizens—or quasi-sovereign rights—deserve special standing.

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[189] *See* discussion *supra* Part I.
[190] Massachusetts v. EPA, 549 U.S. 497, 523 (2007).
[191] *See* Texas v. United States, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).
[192] Plaintiffs in *Texas* alleged that DAPA would cost the state "several million dollars" to issue drivers' licenses to the estimated 500,000 undocumented people in the state. *Id. But see* Lizet Ocampo, *The Economic Benefits and Electoral Implications of DAPA*, CTR. AM. PROGRESS (May 19, 2015), https://www.americanprogress.org/issues/immigration/news/2015/05/19/113481/the-economic-benefits-and-electoral-implications-of-dapa/ [https://perma.cc/GV8F-5XMB] (estimating that DAPA would create thousands of jobs and increase gross domestic product by $164 billion and the cumulative income of all Americans by $88 billion over ten years).
[193] *See* discussion, *supra* Part I.
[194] *See id.*
[195] *See* Weiner, *supra* note 120. Opposition to immigrants regardless of legal status, on the other hand, is increasingly based in xenophobia rather than actual data and facts.
[196] *But see Texas*, 809 F.3d at 159 (holding that Texas's injury was not self-inflicted to manufacture standing because the driver's license law was in effect three years prior to DAPA).

CONCLUSION

Because of the history and precedent of state standing, states should, at the very least, have special standing to protect their quasi-sovereign interests. These quasi-sovereign interests, however, are not unlimited, and states should not be authorized to claim any interest to justify state standing. Rather, states should be given special state standing, as declared in *Massachusetts v. EPA*, in cases where the state alleges an environmental injury to a quasi-sovereign right. An environmental injury is an injury that affects the state's land, air, water, and citizen welfare. This proposed limiting principle for standing is not drastically restrictive and does not disrupt the Court's standing decisions. However, it would likely yield a different result in cases like *Texas v. United States*, a highly political state-led lawsuit based on a diminutive economic injury.

From a policy perspective, this interpretation of *Massachusetts v. EPA* could decrease the inundation of the federal courts with politically charged challenges focused merely on enjoining an unpopular federal policy. Further, this principle would allow states to ensure that the federal government upholds its duties to protect the life and liberty of Americans and their posterity from a deadly, unstable climate system.