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Of Sovereignty, States, and Standing

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Abstract

Massachusetts v. EPA, the global warming case, created two tiers of an Article III case or controversy for purposes of ascertaining standing to sue in federal court. The constitutional core of standing requires a litigant to have an actual or immediately threatened injury in fact that is caused by the defendant’s actions and susceptible to judicial redress. In EPA the Court 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 were an individual the plaintiff. While that sounds very technical and limited, the principles endorsed stretch far beyond the holding.

Massachusetts v. EPA substantially broadens the scope of state standing. States may assert sovereign, proprietary, or quasi-sovereign interests. After EPA, a state’s quasi-sovereign interests extend to protection of the undifferentiated public rights of its citizens. Although prior parens patriae doctrine limited such claims to those involving either the health and well being of a state’s citizens or vindication of the benefits of federal union, EPA’s rationale confers upon states the power to assert almost any undifferentiated public right possessed by its citizens.
This article describes how EPA produces this effect, whether or not intended by the Court, assesses the scope of this increase in state standing, and offers several justifications for two tiers of an Article III case or controversy. These justifications are rooted in principles of federalism, separation of powers, and optimal accountability of our governmental agents.
Of Sovereignty, States, and Standing

By treating states as “entitled to special solicitude in our standing analysis,” the Supreme Court in Massachusetts v. EPA\(^1\) created substantial new uncertainty in the law of standing. At least since Valley Forge Christian College v. Americans United for Separation of Church and State\(^2\) it has been established that Article III’s limitation of federal jurisdiction to “cases” or “controversies” requires a litigant to plead and prove actual or imminent personal injury in fact that is “fairly traceable” to the defendant’s conduct and that the requested relief will redress the claimed injury.\(^3\) This “irreducible constitutional minimum”\(^4\) of standing – injury in fact,

\(^1\) 127 S. Ct. 1438 (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. The EPA contended that it lacked statutory authority to regulate these gases. Massachusetts contended that the EPA was required by the Clean Air Act to regulate such gases. The threshold issue was whether Massachusetts and its fellow plaintiffs had standing. 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.

\(^2\) 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. (5 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. 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 (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 (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. . . . Under 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 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 (C. Cullen ed. 1984). Marshall’s insight was echoed in Elk Grove Unified School District v. Newdow, 541 U.S. 1 (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.”” Id. at 11, quoting Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). 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 (1992). Sunstein reserves particular scorn for
causation, and redressability – constitutes the core of standing. As a limit upon the federal

the injury-in-fact requirement, which he characterizes “as a prominent contemporary version of early twentieth-century substantive due process.” Id. at 167.

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).

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. APWU, 498 U.S. 517 (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. 567 (1984). On associational standing, see Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977) (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’
judicial power, these elements necessarily apply to all litigants. After EPA, however, the meaning of these elements varies 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.

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 is an effort toward answering those questions.

There are several possible alternative interpretations of *EPA* that must be considered before concluding 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 have created a different constitutional understanding of a case or controversy when a state is a party, regardless of whether it is acting 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 participation). *See also* Laurence Tribe, 1 American Constitutional Law §3-20, 450-452 (3d ed. 2000).
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 its citizens with respect to vindication of rights rooted entirely in federal law. Part I provides the flesh for these skeletal answers.

Description is only part of the task. 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, when EPA is read as a case 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, a federalism-based justification emerges. Diffusion of governmental power between the states and the central government is a device to check concentration of authority in one locus, with attendant risk of authoritarian consequences. As Professor Rapaczynski has written, “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.”

Although ordinary citizens may 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. In the structure of federalism lies the best justification for treating states as capable of asserting in federal court generalized injuries suffered in common by all its citizens that are attributable to claimed violations of public rights. Part II develops and extends this argument.

I. 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:” Just Another Case of Procedural Injury.

Justice Stevens, writing for the majority, placed considerable stress on the existence of a procedural right possessed by Massachusetts. He noted that “Congress has . . . authorized this

7 The phrase “What hath God wrought?” is from Numbers 23:23 (King James Version), and was what Samuel F. B. Morse chose for the first telegraphic transmission on May 24, 1844.
type of challenge to EPA action,” 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. Although the procedural right was not altogether clear from the face of the cited statute, I shall assume, as did the majority, that Massachusetts possessed such a right. According to *Lujan*, a “person who has been accorded a procedural right to protect his concrete

8 127 S. Ct. at 1453.

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

10 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. 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, provides that “[a] person . . . adversely affected 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), which provides that “any person may commence a civil suit” 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, 162 (1997); George E. Warren Corp. v. EPA, 159 F. 3d 616, 620 (D.C. Cir. 1998).
interests can assert that right without meeting all the normal standards for redressability and immediacy.”\textsuperscript{11} To Justice Stevens, that meant that a plaintiff asserting a procedural right “has standing if there some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”\textsuperscript{12} Even though redressability and immediacy may be diluted when procedural rights are at issue, \textit{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.\textsuperscript{13} Justice Stevens did not quarrel with that requirement. Indeed, he labored to identify a personal, particularized concrete interest of Massachusetts that was 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 was a sufficient “particularized injury in its capacity as a landowner.”\textsuperscript{14} But Justice Stevens went further and characterized the predicted future inundation of Massachusetts’s coastline during the twenty-first century as sufficient threatened injury. Although the remedy sought by Massachusetts was to direct the EPA to regulate greenhouse gas emissions from new cars, and the greenhouse gases from those vehicles represent only a minute fraction of all greenhouse gases, the majority in \textit{EPA thought}

\textsuperscript{11} 504 U.S. at 572, n.7.

\textsuperscript{12} 127 S. Ct. at 1453.

\textsuperscript{13} 504 U.S. at 572, n.7.

\textsuperscript{14} 127 S. Ct. at 1456.
that this remedy would redress Massachusetts’s threatened future injury: “The risk of catastrophic harm [is] remote [but] would be reduced to some extent” by granting the requested relief.¹⁵

If this was all the Court said and did it might be reasonable to conclude that the Court simply located Massachusetts’s 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, in a move related to its notion of concrete harm, pushed the concepts of immediate harm and redressability to new frontiers. Second, it made a great deal hang on the fact that Massachusetts is a state, a dimension wholly unnecessary to the prior notions of standing premised upon a procedural right.

When a litigant asserts a procedural right, the reason to relax the requirements of immediate threatened harm and likely judicial ability to redress that harm is to ensure full compliance with the procedural requirements imposed by Congress that were intended to protect against the asserted concrete harm. It is not simply to ensure that such procedural requirements are met, regardless of the absence of any threatened concrete harm or when compliance with such requirements will not redress any particularized injury. To confer standing to assert the latter version of procedural injury would enable 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

¹⁵ Id. at 1458.
Article III case or controversy."\textsuperscript{16} Instead, the Court identified two different injuries suffered by Massachusetts, one actual and another that was threatened, but the problem ignored by the Court was 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. The threatened injury was the prospect of the loss of some uncertain additional amount of coastline as the effects of global warming are manifested during the twenty-first century. The actual injury is real and particularized, but it is simply not capable of being remedied by a judicial order to the EPA that it regulate greenhouse gas emissions from new cars. The Court relied upon the scientific consensus concerning global warming to establish the existence of Massachusetts’s actual injury, but the scientific consensus is also that the presently felt effects of global warming are not reversible. Thus, no amount of regulation of greenhouse gas emissions from newly manufactured cars will restore the state’s lost coastline.

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’s 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

\textsuperscript{16} \textit{Lujan}, 504 U.S. at 573-574.
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. 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’s 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’s 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 can hardly be the case, for 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’s claim as a simple assertion of a procedural right, it is inexplicable why the majority went to such pains to emphasize
Massachusetts’s status as a “sovereign State [–] not . . . a private individual.” 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 of state standing as parens patriae. But that is what the Court seemed to do: “Given the procedural right and Massachusetts’[s] stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”

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.

B. “The World Turned Upside Down:” 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 that 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

17 EPA, 127 S. Ct. at 1454.

18 Id. at 1454-1455 (footnote omitted).

19 See section I.C., infra.
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. Standing premised on this injury necessitates a conclusion that the Court eliminated redressability, but we cannot rest on this conclusion because the Court also conceived of Massachusetts’s injury as inhering in 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 cannot be said with confidence that the Court altered the injury in fact requirement with respect to all litigants.

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. 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. 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 of its coastline. 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’s 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 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 in order to conform to a biological opinion of a different agency (the Fish and Wildlife Service) that such reductions were needed to accommodate two endangered species of fish. The Court rested its conclusion upon the practical reality that 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. 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. Never mind that some 94% of worldwide carbon dioxide emissions come from sources beyond the EPA’s regulatory authority over new cars. To be consistent with the “independent action” limit on causation, one of two results must obtain. Either those emissions are not the product of independent actions of third parties, or only the unregulated carbon dioxide fumes belched from American autos are the cause of Massachusetts’s coastal woes.

Of course, these conjectures are fanciful; thus the conclusion must be that the Court has 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 incremental way to the asserted injury. Because procedural injury claims do not ordinarily dispense with or 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.

23 “While . . . it does not suffice if the injury complained of is “the 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. 555, 560-561 (emphasis added) (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976))).
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.”24 In EPA, the likelihood that court-ordered regulation of carbon dioxide emissions from new cars would restore Massachusetts’s coastline to its nineteenth century contours was nil.25 The likelihood that such regulation would prevent Massachusetts’s threatened injury was virtually nil. First, carbon dioxide composes only a fraction of all the gases that produce the global greenhouse effect.26 Second, hydrocarbon combustion accounts for only about 65% of the world’s carbon dioxide emissions.27 Third, by the Court’s calculation, carbon dioxide emissions from new cars in the United States account for between six and seven percent of worldwide carbon emissions,28 which means that 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,29 and it is a reasonable supposition that the pace of emissions from


25 See note 20, supra.

26 See, e.g., http://yosemite.epa.gov/oar/globalwarming.nsf/

27 See, e.g., http://www.wri.org/climate/pubs_content_text.cfm?cid=2162

http://www.physicalgeography.net/fundamentals/7h.html

28 EPA, 127 S. Ct. at 1457.

29 Id. at 1469 (Roberts, C.J., dissenting).
such rapidly industrializing and populous nations as China and India will sharply increase as
their economies grow, their citizens become wealthier, and consumer appetites for autos and

In short, Massachusetts’s coastline is doomed, and there is nothing the Court, nor the EPA, can do to stop it. Not only is Massachusetts’s injury unlikely to be redressed by the requested relief, it is a virtual certainty that it is incapable of such redress.

Of course, “the normal standards for redressability” need not be met to prosecute a procedural right.\footnote{Lujan, 504 U.S. at 573 n.7.} 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.” 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 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 majority’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 warming 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. In which of these capacities did Massachusetts sue in EPA?

When a state asserts its proprietary interests it is acting just like a private citizen. A private citizen who has suffered loss of his land due to wrongful action of another must prove the

32 EPA, 127 S. Ct. at 1458.
Lujan elements to maintain an action in federal court. So, too, must a state establish the Lujan elements. Because Massachusetts’s 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’s status as a state in analyzing its claim to standing – a fact that is utterly irrelevant if Massachusetts was 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. It need not explicitly do so 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. That injury is caused by the actions of the law violator, 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. 33

Whatever interest Massachusetts was asserting, it was presenting it 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 the states or the federal government. Nothing in the text of Article III suggests that “case 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 it 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 a debatable topic, but closing the federal courts to state claims founded on sovereign interests denies to the federal judiciary even 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 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. Both its actual and threatened injuries were injuries to a single proprietary interest – the loss of its coastal land. 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 interest but then identified the injury in fact that supported its claim to standing as a run-of-the-mill proprietary interest. This is not to say that Massachusetts lacked a quasi-sovereign interest, but only to note that the Court did not rely on such an interest

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34 *But see* text following note –, *infra.*

35 127 S. Ct. at 1454-1455 (“Given . . . Massachusetts’[s] stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

36 Id. at 1455-1456.

37 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
in analyzing the state’s claim to have standing.

Much of the confusion generated by the Court in EPA lies in its use of Massachusetts’s injury. In Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez\textsuperscript{38} the Court described the nature of a quasi-sovereign interest that supports state standing as *parens patriae*. A “State 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. . . .”\textsuperscript{39} *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 act, 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 Company\textsuperscript{40} the Court in EPA appeared to conclude that Massachusetts was suing as *parens patriae*, but the injury upon which Massachusetts relied and the Court credited was the state’s loss of coastal land, an injury precisely the same as that suffered by private littoral landowners.

The upshot is that 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 and distinct

\textsuperscript{38} 458 U.S. 592 (1982).

\textsuperscript{39} Id. at 607.

\textsuperscript{40} 206 U.S. 230 (1907).
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”\textsuperscript{41} 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.”\textsuperscript{42} Massachusetts claimed that the EPA was shirking its obligation under the Clean Air Act to regulate carbon dioxide emissions from new cars. 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, to say nothing of national boundaries, the alleged failure of the EPA to act excluded Massachusetts residents from one of the benefits that flow from our federal system. Thus, one reading of \textit{EPA} is simply that the requisite quasi-sovereign interest was twice present, but the Court did not dwell on the existence of either interest. The other reading, of course, is that the Court in \textit{EPA} broadened \textit{parens patriae} standing by permitting states to assert a proprietary interest, rather than a quasi-sovereign interest, as the basis for such standing.

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 \textit{parens patriae}, the

\textsuperscript{41} \textit{Alfred L. Snapp}, 458 U.S. at 607.

\textsuperscript{42} Id. at 607-608.
general interest of its residents “in respect of their relations with the Federal Government.”

Although in *Massachusetts v. Mellon* the Court stated that when it comes to “relations with the

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44 262 U.S. 447 (1923). In *Mellon* an individual taxpayer and Massachusetts challenged the constitutional validity of federal monetary grants to the states to promote maternal health. The Court ruled that Massachusetts’s claim was not justiciable because it presented abstract questions of political power, sovereignty, and governance. 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 by 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 and the case is widely regarded as an articulation of standing doctrine. It is relevant to the argument developed in Part II 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 II.
Federal Government . . . it is the United States, and not the State, which represents them,”45 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,”46 but it did have such standing to demand that its residents (most of whom are also federal citizens) be provided the benefits of federal law.47 To be sure, in distinguishing Mellon, the Court stated that Massachusetts was asserting “its rights under federal law,”48 a locution that suggests that Massachusetts’s interest was either a proprietary interest (its loss of land) or a sovereign interest (its interest in securing some federal benefit bestowed upon state governments). The former interpretation of this cryptic comment is consistent with the Court’s reliance upon Massachusetts’s proprietary interest as a littoral landowner as its injury in fact, and 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

45 Id.

46 Id. at 485 (emphasis added).

47 EPA, 127 S. Ct. 1438, 1455 n.17.

48 According to the Court, “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.
Mellon’s dismissal of a state’s sovereign interest as a basis for challenging the legitimacy of federal action.⁴⁹

In Mellon, the Court rejected Massachusetts’s sovereign interest as only an “abstract question[] of political power, of sovereignty, of government.”⁵⁰ In EPA, by contrast, Massachusetts had a sovereign interest in its territorial integrity. Ironically, that sovereign interest was also a prosaic proprietary interest. The Court was remiss in not noting this complete overlap and taking the occasion to clarify the extent to which a state may assert its sovereign interests against the federal government in a federal court. The most notable prior case in which a state’s claim that its sovereign interests had been wrongly invaded by the federal government was Georgia v. Stanton,⁵¹ but Stanton arose in the charged circumstances of Reconstruction and presented an attempt by a state to shield itself from federal law by asserting its sovereign interests. In EPA Massachusetts sought to protect its sovereign interest in territorial inviolability by demanding the benefits of federal law.

⁴⁹ 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 185 (1990).

⁵⁰ 262 U.S. at 485.

⁵¹ 73 U.S. (6 Wall.) 50 (1868).
However, if the Court’s reference in *EPA* to Massachusetts’s 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’s interest as a quasi-sovereign interest. Second, the Court repeatedly relied upon the presence of a quasi-sovereign interest in the prior *parens patriae* cases that it cited, and identified that quasi-sovereign interest as some form of preserving the well-being of a state’s residents. 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. 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.”

Not all difficulty is removed by this reading. 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 polities it may be reasonable to assume that state interests are adequately “protected by procedural safeguards inherent in the structure of the federal system.”\textsuperscript{52} 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.

The reality that intrudes is the vast federal bureaucracy that composes the contemporary administrative state. The “procedural safeguards” that apply to Congress are singularly lacking when it comes to administrative agencies. 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 sort of dispute at issue in \textit{EPA} – differing interpretations of a congressional command to an executive agency. While agencies have vast discretion to carry out such commands,\textsuperscript{53} the antecedent question of who has standing to question 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

\textsuperscript{52} Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 552 (1985).

representatives with the power to vindicate that right, so long as the requisite elements of an article III case or controversy are present.

The nature of the federal system is that the people have two representatives. As a default condition, it might be that the federal representative is the proper agent to act as *parens patriae* with respect to federal law, and the state representatives are the proper agents to act as such with respect to state law, but 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 the accountable organ, 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 said none of 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. The explanation offered here is an attempt to supply a missing rationale. *Mellon’s* insistence upon an exclusive role for the federal government as *parens patriae* with respect to federal law ignores the fact that a prominent feature of federalism is concurrent power. Of course it is true that many powers are exclusively federal, but when Congress uses its commerce power, which it shares concurrently with the states, to regulate air pollutants (and at the same time creates a procedural right in enforcement of that regulation) it is myopic to think that the only body that can act as *parens patriae* is the federal 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.
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, but not only is that 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 II addresses that question.

II. 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 vehicle 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,” 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 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 be one that involves a “concrete” injury. To evaluate these claims, consider the following hypothetical explorations of these possibilities.

1. How “Concrete” Must Be the Injury?

Suppose that Congress were to amend the War Powers Resolution 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 the President orders American armed forces into northwestern Pakistan to locate and apprehend Osama bin Laden and his confederates. California seeks to enforce section five of the Resolution, which requires termination of this military exercise after sixty days, unless Congress has specifically authorized this use of force. The federal governmental defendants argue that California lacks standing; on the merits they contend that the War Powers Resolution is an unconstitutional usurpation of executive power but, if not, the challenged military action is authorized by the September 18, 2001 joint resolution that empowered the President “to use all necessary and appropriate force

54 Lujan, 504 U.S. at 580 (Kennedy, J., concurring).

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.”

Does EPA adequately support California’s claimed standing as parens patriae?

California’s injury in fact may take several possible forms. First, California may argue that it seeks to prevent the threatened or actual 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, but this objection may be misplaced. The Court has recognized that a state’s 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. The Court has characterized the former interest as including the physical


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

58 Parens patriae “does not involve the State’s stepping in to represent the interests of particular citizens . . . . [If] 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.” Snapp, 458 U.S. at 600.

59 Id. at 607-608.
and economic interests of its citizens, but has not limited 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.”

Surely if California were an independent sovereign it would be a near certainty that it would exercise its sovereign lawmaking power to address the question of whether its citizens should be engaged in military operations in Pakistan. While Californians serving in the armed services are immediately (and quite concretely) 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. That distinction, said the Court in EPA, is critical to state eligibility to act as parens patriae with respect to rights originating in federal law.

The question with respect to the second injury is whether it is sufficiently concrete to constitute quasi-sovereign injury. In EPA the Court dodged this question. Even though the

60 Id. at 607.

61 Id.

62 “A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.” Snapp, 458 U.S. at 602.
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 littoral 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’s standing was the looming threat to the health and welfare of its citizens posed by global warming. If that injury is concrete, it is a very wet and sloppy form of concrete that has barely begun to set. 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 accompanies any military adventure. Not only is such injury as equally inevitable as global warming, it 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.”\(^{63}\) By constitutional union, the states ceded to the federal government their authority to conduct war, but simultaneously placed limitations on the process by which the federal government can commit the nation to war. 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.

\(^{63}\) Id. at 607-608.
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 littoral 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 clause64 (found to be inadequate injury in *Schelisinger*) or the Statement and Account clause65 (held to be inadequate injury in *Richardson*), 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. The upshot is that states may assert the undifferentiated interest of all citizens in governmental conformity to law when Congress has empowered them to do so, and generalized injury is sufficient to constitute quasi-sovereign injury.


Suppose that Congress were to react to *Hein v. Freedom From Religion Foundation* 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; 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 *Schelisinger* or *Richardson*? More to the point, is this interest any more general than Massachusetts’s 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’s interest was no more solid. The best that can be said for Massachusetts’s interest was that the threatened injury, though highly speculative as to the details, had a strong odor of inevitability. That might also be true in this hypothetical: Over time (and different presidential administrations) there is a near certainty that 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 be so gossamer as to 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 27th

Amendment, 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 27th Amendment ensures that Ohioans can oust their federal representatives before they can profit from a pay raise they have enacted for themselves, Ohioans could also do so after the fact. In the absence of the 27th Amendment Ohioans would suffer the extremely slight financial loss that would result from earlier implementation of congressional pay raises, but that injury is redressed by the amendment. Perhaps the amendment inflicts on 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. Solid injury is necessary; this injury is pure vapor.

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 is much removed from
the injury that would be 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 pay check 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 and undifferentiated 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.” 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 Executives’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” Whether or not this is so 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 rights, so

67 *Lujan*, 504 at 576.

68 Id. at 577, quoting U.S. Const. Art II, §3.
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 this latter action is constitutionally objectionable, 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. Presumably this is so because the absence of concrete individual injury transforms what might be a case or controversy into a disembodied and abstract consideration of whether the executive’s exercise of discretion is appropriate. Yet, if the executive is flouting law, why should not courts adjudicate that fact? The usual reason is that, without an individual stake in the controversy, a court will be asked to “serve as a convenient forum for policy debates.”⁶⁹ The vice in this, of course, 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”⁷⁰ – 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. In the former situation there is no alchemical conversion of undifferentiated public interests into private injuries. Rather,

⁶⁹ *EPA*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting).

⁷⁰ *Valley Forge*, 454 U.S. at 472.
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, but may do so only with those undifferentiated public rights that lie within that domain. Moreover, to the extent that the concern with individuals litigating undifferentiated public rights is that the federal courts will become clogged with disembodied, abstract arguments over policy choices, this is not a realistic concern when such assertions of public rights is limited to states as parens patriae. State attorneys general have limited resources and are politically constrained by accountability to the state electorate. Only the most prominent or pressing of public interests will be asserted by states as litigants, and then only to the extent that Congress has empowered them to do so. This will hardly result in a

71 Forty-three states elect their Attorneys General by popular vote. The Maine Attorney General is chosen by secret ballot of the legislature. Tennessee vest in its Supreme Court the power to appoint the Attorney General. 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, 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. 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.
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 place in the constitutional constellation.

This conclusion is reinforced by principles of federalism. A key point of our federal system is the belief that federalism will better preserve liberty by diffusion of 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 discrete polities of the union, a diffusion of power that permits multiple opportunities for checking abuses of authority.

A pragmatic and cynical critic might ask why Congress would permit states to challenge what 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. 72 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 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 unconstitutionally transfers 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 statutory 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. Nor is there any reason that a Congress disinclined to make a public accounting of the expenditures of the Central Intelligence Agency would permit

72 Of course, 42 U.S.C. §7607(b)(1), on which the majority in EPA relied for Massachusetts’s 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.
the states to make the claim raised in *Richardson*. 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 at least a new and more limited form. Although Congress may not enable ordinary citizens to prosecute public rights in the absence of a personal injury in fact caused by the defendant that can be redressed 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? Whatever the answer to that question, what justifies two tiers of Article III cases or controversies?

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 to be unavailing 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
injuries suffered in common 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. 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,” which, in turn, is grounded in the constitutional principle of separation of powers. On this view, Congress

73 Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). See also Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) (the “generalized interest of all citizens in constitutional governance . . . is an abstract injury” insufficient to support standing); United States v. Richardson, 418 U.S. 166, 176 (1974) (“generalized grievance” shared in common was insufficient injury); Ex Parte Levitt, 302 U.S. 633, 634 (1937) (“not sufficient that [a litigant] has merely a general interest common to all members of the public”); Fairchild v. Hughes, 258 U.S. 126, 129-130 (1922) (“the 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”).


75 “[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
cannot engage in constitutional alchemy by turning undifferentiated public rights into individual rights that individual plaintiffs may redeem at the courthouse door.\textsuperscript{76}

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 vindicate human liberty.\textsuperscript{77} 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,”\textsuperscript{78} a process that the Court admits is “[s]low,

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\textsuperscript{76} \textit{Lujan}, 504 U.S. at 572.


\textsuperscript{78} United States v. Richardson, 418 U.S. 166, 179 (1974).
cumbersome, and unresponsive.”79 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.80 One need not invoke ante-bellum conceptions of federal union as a compact among the states to recognize that union as having aspects of contract. “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 ante-bellum southerners claimed; it does mean that the states have a special right and obligation 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

79 Id.

courts the Chief Executive’s most important constitutional duty,” faithful execution of the law. This objection necessarily assumes that faithful execution is a matter of considerable executive discretion, and that judicial oversight of that discretion poaches upon the President’s authority. If correct, this view would apply with equal force to suits brought at the behest of 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. 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 state assertions of undifferentiated public rights that would be imprudent to adjudicate. An example

illustrates the point. 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 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 within the ability of the judiciary to answer, but should the answer be that McCain is not eligible to serve as President it would be more prudent not to answer the question, and accept the judgment of the political branches. The instability that would result from unwinding a long series of executive actions is too great a price to pay.

The presence or absence of a procedural right is thus seen to be 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.

*C. The Justification for Two Tiers of Article III Cases or Controversies.* The most challenging aspect of *EPA* is that it creates 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 nugget of a case or controversy that is 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 the entirety of the sphere. Within the core,
individuals and states in their proprietary capacity are required to demonstrate palpable and personal actual injury or imminent threat of such injury, establish that such injury is 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* are permitted to assert quasi-sovereign injuries, which can consist of pure public rights (though not all public rights) that may only be weakly attributable to the injury and which pose merely the possibility that judicial action may ameliorate the injury.

There are several justifications for this condition. 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 that are 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, there is reason to suppose that the meaning of a case or controversy might be as variable as the categories of federal jurisdiction. That judgment is, of course, borne out by the law of standing as it existed prior to *EPA*.82

An elastic conception of case or controversy as applied to standing is not only consistent

82 Even *Lujan* admitted that causation and redressability are relaxed with respect to procedural rights. *See* 504 U.S. at 572, n.7 (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 Snapp*, 458 U.S. 592, 607 (1982) (as *parens patriae* a state may assert the “health and well-being – both physical and economic – of its residents in general”).
with constitutional structure, but enhances that design. 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 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.” An illimitable executive power to violate the law when the effects are evenly distributed among the populace is not consistent with that command.

A conception of the case or controversy requirement to permit states as parens patriae to assert claims of undifferentiated public rights is prudent. The nature of lawmaking is that “a certain degree of discretion . . . inheres in most executive . . . action.” While it is untenable to permit any citizen to challenge the exercise of that discretion without a showing of personal injury caused by the challenged exercise of discretion that may be redressed by judicial action, 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 diffuse and undifferentiated injury.

The problem is one of agency costs, a concept familiar to economists and students of the

83 U.S. Const. Art. II, §3 (emphasis added).

modern public corporation. Agency costs arise from differing objectives of the principal and the agent. In a public corporation the objectives of shareholders (the principals) may be different from the objectives of corporate management (the agents). For example, management may act to build a larger empire, or reap personal benefits from corporate philanthropy, while shareholders prefer wealth maximization. One way to minimize agency costs is to increase the ability of principals to oversee the agents’ actions. 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 propensity to take unlawful action that leaves nobody with any 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 task in controlling agency costs is to minimize those costs without stifling the efficiency gains produced by agency. An appropriate balance must be struck, and permitting states as *parens patriae* to seek judicial oversight of our executive agents is a prudent judgment.

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 to identify and check executive violations of undifferentiated public rights is to abandon all means (short of the ballot box) of controlling such executive misbehavior, one must reckon these added 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. 86

Finally, parens patriae suits to vindicate undifferentiated public rights will be limited by the requirement that a state assert a quasi-sovereign interest. As indicated earlier, not every claim of executive or legislative wrongdoing will implicate a quasi-sovereign interest. 87

86 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.

87 See text accompanying notes —, supra.
Consider the Watergate saga. 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 investigation of the crime. After political pressure forced the President to appoint a special and independent prosecutor to investigate individual complicity in this scheme, indictments were issued and several of the President’s associates were convicted of their crimes. 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 elegant quarters of 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 (or other concrete) injury to the health or well-being of any state’s citizens. A distasteful and illegal scene played out that was arrested through other political and legal machinery.

Consider the facts of Schlesinger. Some members of Congress hold reserve commissions in the armed forces of the United States, apparently in violation of Article I’s prohibition upon a member of Congress “holding any office under the United States” while serving in Congress.88

88 See U.S. Const. Art. I, §6, cl.2 (“no Person holding any office under the United States, shall be a member of either House during his Continuance in Office”). There is historical
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 is a concrete injury presented by that union? 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 redux lacks any such solidity; at best there is an intangible threat of some future injury, the nature of which is ominous but uncertain.

Accordingly, there is little reason to think that parens patriae actions to vindicate undifferentiated public rights will produce a torrent of suits that enable continuing federal judicial oversight of executive or legislative discretion. 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 quasi-sovereign injury, albeit diluted by EPA, preserves that understanding of separated powers.

**Conclusion**

Massachusetts v. EPA created two tiers of an Article III case or controversy for purposes 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 468-469, 483, 496 (1995).
of ascertaining standing to sue in federal court. Although the holding of the case is 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 were an individual the plaintiff, the principles endorsed stretch beyond that holding. Particularly critical to subsequent understanding of EPA will be the Court’s understanding of injury in fact. 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’s standing in EPA was neither actual nor immediate, but it was apparently inevitable. Moreover, the fact that the magnitude of the prospective injury is speculative posed no barrier to establishment of 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 no violence to 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 nobody 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, there are substantial fetters of political accountability upon the state actors who must decide whether to institute parens patriae litigation. 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.