A Theoretical Justification for Special Solicitude: States and the Administrative State

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In Massachusetts v. EPA, the Court declared that the state of Massachusetts, because it sought to protect a quasi-sovereign interest, was “entitled to special solicitude in our standing analysis.”¹ The discussion of special solicitude—an issue that was not briefed by the parties² and that was taken up only briefly during oral argument³—consisted of little more than one page in the Court’s opinion. Justice Stevens, writing for the Court, put forward scant justification for the pronouncement. Though the opinion attempted to place special solicitude in the context of established standing doctrine and federalism concerns, the efforts were brief and unconvincing. The dissenters, in an opinion written by Chief Justice Roberts, criticized the “conspicuously absent” support for special solicitude in the Court’s opinion.⁴ This paper addresses the question of whether a theoretical justification for special solicitude for state standing exists. I conclude that it does.

The strongest argument for special solicitude—one that may have been latent in the Court’s opinion—is rooted in federalist concerns, though not the concerns that provide the foundation for originalist states’ rights theories. Whereas states’ rights arguments seek to restrict federal congressional action vis-à-vis states, special solicitude

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² Id. at 1466 (Roberts, C.J., dissenting).
⁴ Massachusetts v. EPA, 127 S.Ct. at 1464.
focuses on providing states greater access to courts due to the effects of executive action (or inaction) on states. In other words, while traditional states’ rights arguments seek to restrict federal congressional power over states, special solicitude seeks to properly effectuate federal congressional dictates. Special solicitude, through greater access to the courts, provides states a means to protect their quasi-sovereign interests, a means otherwise lacking because of states’ lack of clout in the executive branch, particularly with respect to administrative agencies. Thus, the special solicitude doctrine can act to ensure states are provided a forum to challenge the non-enforcement or over-enforcement of legislation by agencies that exist to benefit a state and its citizens through federal action. Where Congress has established federal agencies in order to regulate a given field, states have a quasi-sovereign basis for special solicitude in the standing analysis when they seek judicial intervention for the purpose of directing Executive Branch compliance with federal law.

The paper will proceed in three parts. Parts I and II will establish the foundation for the theoretical discussion of special solicitude to follow in Part III. In Part I, the relevant portions of *Massachusetts v. EPA* will be recounted. This discussion will provide an appreciation of the context in which a rule of special solicitude emerged, the attempted justifications for such a rule, and the vigorous dissent that the rule engendered. Part II will depart from *Massachusetts v. EPA* and special solicitude in order to consider two doctrines that bear on any consideration of special solicitude: standing doctrine and the political question doctrine. In that both doctrines act as a limitation on the judicial power, they are closely related. While standing concerns the nature of the litigant seeking judicial intervention, political question focuses instead on the nature of the issue.
at hand. Both represent hurdles that the special solicitude doctrine must overcome. Part III will return to a direct consideration of special solicitude informed by Part II’s theoretical groundwork, ultimately finding justification for special solicitude in state quasi-sovereignty. This part will discuss how the underlying concerns that animate the standing and political question doctrines are overcome in the circumstance where a state seeks judicial review of administrative agency action or inaction.

I. Massachusetts v. EPA And Special Solicitude For State Standing

In order to understand the context in which special solicitude for state standing arose and the justifications offered for its application, this section takes a detailed look at the particular circumstances of Massachusetts v. EPA. The first part will address the procedural history and background issues underlying the action. The second part will consider the portion of Justice Stevens’s opinion for the Court that recognizes special solicitude for Massachusetts’ standing to sue. It will also address the justifications offered by the Court for such solicitude. The third part will address Chief Justice Roberts’s opinion for the dissent, which criticizes both special solicitude in this circumstance and, more generally, the lack of justification for a general rule of special solicitude.

a. Procedural History and Background Issues

In Massachusetts v. EPA, the Supreme Court heard an action by several states, local governments and environmental organizations seeking review of an EPA order denying a petition for rulemaking to regulate greenhouse gases under the Clean Air Act.5 The action stemmed from a rulemaking petition asking the EPA to regulate greenhouse gases under the Clean Air Act.

5 Id. at 1446.
gas emissions from new cars under § 202 of the Act. Almost four years after the petition, and after receiving more than 50,000 comments during the notice and comment period, the EPA denied the requested rulemaking. It gave two reasons for the denial: (1) the Clean Air Act does not authorize the issuance of mandatory regulations to address global climate change; and (2) that even if such authority existed, it would be unwise to set greenhouse gas emission standards at this time.

The rulemaking petitioners were joined by intervenor states and local governments in seeking review of the EPA’s denial in the D.C. Circuit Court of Appeals. In a two-to-one ruling with each judge writing a separate opinion, the court denied the petition for review. Judge Randolph based his denial on the reasonable basis for EPA’s reliance on scientific uncertainty with regard to greenhouse gases and the worry that unilateral U.S. vehicle emissions regulation could weaken efforts to reduce emissions from other countries. Judge Sentelle wrote separately to argue that petitioners lacked standing because they could not allege particularized injuries. In dissent, Judge Tatel wrote that at least one petitioner, Massachusetts, had satisfied the Article III standing requirements; that the Clean Air Act provided the EPA with authority to regulate greenhouse gas emissions; and that its policy concerns did not justify a refusal to exercise that authority.

When petitioners appealed to the Supreme Court, a five-member majority held that Massachusetts had Article III standing to challenge the denied petition for

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6 Id. at 1449.
7 Id. at 1450.
8 Id.
9 Id. at 1451.
10 Id. at 1451-52.
11 Id. at 1451-52.
12 Id.
rulemaking,\textsuperscript{13} that because greenhouse gases fit within the Clean Air Act’s definition of “air pollutant” the EPA has the statutory authority to regulate such emissions,\textsuperscript{14} and that because the EPA offered no reasoned explanation for its refusal to decide whether greenhouse gases contribute to or cause climate change the refusal to act was “arbitrary, capricious, . . . or otherwise not in accordance with the law.”\textsuperscript{15} Two vigorous dissents were filed, each joined by the four-member minority: Chief Justice Roberts’s dissent virulently criticized the Court’s standing analysis,\textsuperscript{16} while Justice Scalia’s dissent objected to the Court’s invasive oversight of the Administrator of the EPA.\textsuperscript{17} This paper focuses exclusively on the standing dispute, and in particular on the following statement by Justice Stevens in the Court’s opinion:

Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.\textsuperscript{18}

b. Special Solicitude for State Standing

The Court’s standing analysis is conducted in two parts. The second part addresses what is recognizable as the traditional standing analysis: whether a petitioner can demonstrate injury in fact, whether the defendant’s action caused the injury, and whether the injury was redressable by judicial decision.\textsuperscript{19} Yet prior to the traditional standing analysis, in a separate section of the Court’s opinion it embraced a rule of special solicitude for state standing.\textsuperscript{20} The logic of the two-part standing analysis is curious: if Massachusetts had standing to bring suit under the traditional analysis—as the

\textsuperscript{13} Id. at1458.
\textsuperscript{14} Id. at 1462.
\textsuperscript{15} Id. at 1463.
\textsuperscript{16} Id. at 1463-1471 (Roberts, C.J., dissenting).
\textsuperscript{17} Id. at 1471-1478 (Scalia, J., dissenting).
\textsuperscript{18} Id. at 1455-55 (Stevens, J.).
\textsuperscript{19} See id. at 1455-1458. Article III standing is discussed in more depth in Section II, infra.
\textsuperscript{20} See id. at 1452-55.
Court’s opinion seems to hold\(^\text{21}\)—what is the purpose of special solicitude? As Chief Justice Roberts writes in dissent, “It is not at all clear how the Court’s ‘special solicitude’ for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.”\(^\text{22}\)

In fact, the Court’s traditional standing analysis is questionable at best.\(^\text{23}\) At the very least, standing could not have been found without special solicitude unless the majority was willing to significantly change the traditional standing analysis. It would be difficult to describe injury to Massachusetts’ coastline as imminent.\(^\text{24}\) Regarding causation, Chief Justice Roberts’s dissent pointedly dismisses causation as “far too speculative to establish” the necessary connection between greenhouse gas emissions on the one hand and the loss of Massachusetts’ coastline on the other.\(^\text{25}\) In large part because of “the tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue,” redressability is even more problematic.\(^\text{26}\) In light of what an optimist would consider a perilously weak case for standing as traditionally understood, special solicitude appears to provide a necessary boost for the substantive claims alleged to go forward.

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\(^{21}\) See id. at 1458 (“In sum—at least according to petitioners’ uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.”).

\(^{22}\) Id. at 1466 (Roberts, C.J., dissenting).

\(^{23}\) See id. at 1466-70 (persuasively criticizing the majority’s traditional standing analysis).

\(^{24}\) Id. at 1455-56, 1458 (Stevens, J.) (citing petitioners’ allegation that there is “environmental damage yet to come” and stating that the severity of the injury will only increase over the next century; “The risk of catastrophic harm, though remote, is nevertheless real.”) (emphasis added).

\(^{25}\) Id. at 1468-69 (Roberts, C.J., dissenting) (citing the EPA’s denial of petitioners’ request for rulemaking, in which the EPA referred to the “complex web of economic and physical factors” resulting in future climate change).

\(^{26}\) Id. at 1469. Writing for the Court, Justice Stevens hedges the redressability criterion, concentrating solely on the potential to reduce the risk of catastrophic harm by “some extent.” Id. at 1458 (Stevens, J.).
The Court grounds special solicitude for state standing on a two-part foundation: (1) congressional authorization to challenge EPA action under the Clean Air Act and (2) state quasi-sovereignty. With regard to congressional authorization, Justice Stevens points out that Congress explicitly authorized judicial challenges to EPA actions under the Clean Air Act. “That authorization is of critical importance to the standing inquiry.” Stevens cites Justice Kennedy’s concurring opinion in Lujan v. Defenders of Wildlife, which discusses the importance of congressional authorization to the standing inquiry: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” While Lujan required a litigant demonstrate standing according to the traditional three-part test, it also held that a litigant to whom Congress has “accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Thus, because Stevens reads 42 U.S.C. § 7607(b)(1) to provide litigants the right to challenge agency action unlawfully withheld, he concludes that “a litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”

Justice Stevens’s discussion of the congressional grant of a procedural right, however, does not contribute to special solicitude towards state standing. The Congressional grant does not differentiate between private litigants on the one hand and

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27 Id. at 1454-55 (Stevens, J.).
28 Id. at 1453 (citing 42 U.S.C. § 7607(b)(1)).
29 Id.
30 504 U.S. 555, 580 (Kennedy, J., concurring) (quoted in Massachusetts v. EPA, 127 S.Ct. at 1453).
31 Id. at 572, n.7.
33 Massachusetts v. EPA, 127 S.Ct. at 1453.
states on the other. The respondents in *Lujan*—the case to which Stevens cites—were environmental organizations, not governmental entities.\(^{34}\) Thus, though he cites such a procedural right as one foundation of special solicitude for state standing,\(^{35}\) it is difficult to see how the procedural right plays a part Stevens’s conclusion; the analysis is similarly persuasive for a private interest group as it is for a state. Further, § 7607(b)(1), which provides the right to petition the courts for review of any final action taken by the Administrator under the Clean Air Act, does not directly mention or indirectly allude to states. Rather, the statute’s right is in general terms.\(^{36}\) It is one thing to say that Congress can create a procedural right of access to the courts where none previously existed. It is quite another to connect that procedural right with greater state access to the courts where the statute is silent with respect to states. In addition, Stevens’s interpretation of § 7607(b)(1) is questionable if not erroneous. The statute does not create a cause of action at all; rather, it merely instructs those wishing to challenge agency action where to file such actions.\(^{37}\) As a result, the procedural right cited by Stevens as one of the factors militating towards special solicitude does not stand up.

It is apparent then that if justification for special solicitude is to be found in the Court’s opinion, it lies in the second basis mentioned: state quasi-sovereignty. “Well before the creation of the modern administrative state,” Justice Stevens states, “we recognized that States are not normal litigants for invoking federal jurisdiction.”\(^{38}\) Stevens locates the Court’s recognition of such extraordinary jurisdiction primarily in *Georgia v. Tennessee Copper Co.*:

\(^{34}\) *Lujan*, 504 U.S. at 559.

\(^{35}\) See *Massachusetts v. EPA*, 127 S.Ct. at 1454-55.

\(^{36}\) See 42 U.S.C. 7607(b)(1) (“A petition for review . . . may be filed” – implicitly, by anyone).

\(^{37}\) See id.

\(^{38}\) *Massachusetts v. EPA*, 127 S.Ct. at 1454.
The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. 39

Stevens analogizes Massachusetts’ “well-founded desire to preserve its sovereign territory” to Georgia’s “independent interest . . . in all the earth and air within its domain.” 40 The discussion of Tennessee Copper is Stevens attempt to situate special solicitude firmly within a previously established doctrinal framework.

Having gestured towards doctrine, Justice Stevens turns briefly to a federalism-based constitutional argument in support of special solicitude:

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. 41

Stevens cites to Alfred L. Snapp & Son, Inc. v. Puerto Rico, which held that one of the factors in determining whether a state has standing to sue is “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmakers.” 42 Implicit in Stevens’s analysis is that because Massachusetts could have regulated if it was an independent sovereign, and because Massachusetts has surrendered certain sovereign prerogatives—including the right to enforce emissions standards—to the federal government, its interest in protecting its citizens and territory

40 Massachusetts v. EPA, 127 S.Ct. at 1454.
41 Id.
42 Id. (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1999)).
are heightened in comparison to the interests of an individual litigant. Therefore, because the federal government has been ordered by Congress to protect Massachusetts from emissions of air pollutants and because Massachusetts has a stake in protecting its quasi-sovereign interests, “the Commonwealth is entitled to special solicitude in our standing analysis.”

C. The Dissent’s Criticism of Special Solicitude

In a strongly worded dissent, Chief Justice Roberts accuses the Court of adopting “a new theory of Article III standing for States.” Doctrinally, Roberts argues that relaxed standing requirements for states have “no basis in our jurisprudence” and remarks that support for “‘special solicitude’ is conspicuously absent from the Court’s opinion.”

Justice Roberts first deconstructs the Court’s reliance on a Congressional grant of the procedural right of states to sue under § 7607(b)(1). Noting that, “Congress knows how to do that when it wants to,” Roberts points out that Section 7607(b)(1) says nothing about the particular right of states to sue. Roberts also criticizes the case law on which Stevens relies, arguing that while Tennessee Copper does draw a distinction between a state and private litigants, it does so solely in the context of available remedies. Thus, while Tennessee Copper stands for the proposition that a state has a right to sue in a representative capacity as parens patriae, “[n]othing about a State’s ability to sue in that

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43 Id. at 1454-55.
44 Id. at 1466 (Roberts, C.J., dissenting) (Roberts also labeled it “ironic” that such a “new theory” was adopted in the absence of briefing or argument by the parties on the point. Id.)
45 Id. at 1464.
46 Id. at 1464-65 (in support of his assertion that Congress knows how to say something about the particular rights of States, Roberts cites Section 7426(b) of the Clean Air Act, which affords States the right to petition the EPA to directly regulate certain sources of pollution).
47 Id. at 1465.
capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III.\textsuperscript{48}

Closely related to Chief Justice Roberts’s criticism of special solicitude is his implicit reliance on the political question doctrine, which holds that courts should avoid weighing in on decisions better left to the popularly elected branches of government: \textsuperscript{49}

[Global warming] is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change . . .

I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here “is the function of Congress and the Chief Executive,” not the federal courts. \textsuperscript{50}

Thus, before undertaking a discussion of whether, and if so, how, quasi-sovereignty provides a legitimate basis for special solicitude for state standing, it is necessary to momentarily pull back the focus in order to detail the reasons for the emergence of standing doctrine and the political question doctrine. Doing so will enable a consideration of whether special solicitude violates those underlying rationales.

\section{Standing and Political Questions}

While the above discussion gives a case-specific context for the Court’s adoption of special solicitude for state standing, there are two doctrines that need to be discussed in broader terms in order to allow for a theoretical discussion of the rule’s justifications.

Both standing doctrine and the political question doctrine have important implications as

\footnotesize{\textsuperscript{48} Id. \\
\textsuperscript{49} The political question doctrine will be discussed further in Part II, \textit{infra}. \\
\textsuperscript{50} \textit{Massachusetts v. EPA}, 127 S.Ct. at 1463-64 (Roberts, C.J., dissenting) (quotin \textit{Lujan}, 504 U.S. at 576).}
applied to special solicitude. This section aims to define the doctrines and, more importantly, the constitutional justifications that led to their development.

a. Standing: A Limitation on Litigants

The Court has routinely grounded its doctrine of standing in Article III, Section 2’s “Case” or “Controversy” requirement. In its entirety, the operative clause reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The standing doctrine, in contrast, 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 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.” The direct links between the case or controversy clause and standing doctrine are murky at best. Thus, it is worthwhile to consider how the former has been interpreted to require the latter.

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51 For example, in Massachusetts v. EPA both the majority and dissent start their standing discussions with a statement about Article III. See 127 S.Ct. at 1452 (“Article III of the Constitution limits federal-court jurisdiction to “Cases” and “Controversies.”); id. at 1464 (Roberts, C.J., dissenting) (“Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of “Cases” and “Controversies.”).
In order to understand why the case or controversy clause has been interpreted to require a three-part standing test that can appear to be a departure from the constitutional text, it is instructive to demonstrate the difficulty of deriving meaning directly from the clause. A strictly textual interpretation of the case or controversy clause provides only the weakest limitations on federal courts’ abilities to adjudicate disputes. As Professor Richard Pierce has written, “Neither ‘case’ nor ‘controversy’ is defined, and both terms are broad enough linguistically to encompass every case the Court has declined to resolve on standing grounds.” Definitions of “case” in particular are either so broad as to render the restraint meaningless or self-referential. Further, the phrases that qualify the use of “case” and “controversy” in the operative clause are hardly limiting. The case requirement is modified in a way that appears to concern the subject matter jurisdiction of federal courts: “cases” are limited to those arising under the Constitution, federal statutes and treaties; those that affect public officials; those that arise in admiralty or maritime jurisdiction; and those to which the United States is party. The “controversies” qualifiers appear to speak to federalist concerns, defining federal, as opposed to state, jurisdiction: controversies include those between states, between citizens of different states, between citizens of the same state involving land in another state, and between a state or its citizens, and foreign states or its citizens or subjects.

As for the Framers’ intent, it provides no more clarity than the above textual interpretation. The only Framer to directly reference the limits of judicial power was

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54 The discussion that follows borrows in large part from Richard J. Pierce, Jr., *Is Standing Law or Politics*, 77 N.C.L. REV. 1741, 1763-75 (1999).
55 Pierce, *supra* note 54, 1763.
56 *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005) (“[A]n instance of a particular situation; an example of something occurring: a case of mistaken identity . . . the situation affecting or relating to a particular person or thing: one's circumstances or position . . . an incident or set of circumstances under police investigation.”).
57 *See, e.g.*, id. (“[A] legal action, esp. one to be decided in a court of law.”).
Madison, who stated that the judicial power should “be limited to cases of a Judiciary Nature.” While circular in construction, Madison’s comment implicitly invokes then-contemporary notions of “cases of a Judiciary Nature” as a limitation. Thus, one would hope that a study of the practices of English and colonial courts would provide meaning to Madison’s otherwise circular phrase. However, research by leading scholars has shown that such practices fail to illuminate Madison’s meaning. “Absolutely no historical support exists for the proposition that Article III imposes limits on the types of plaintiffs that can obtain access to federal courts.” Synthesizing the scholarly work done on the historical antecedent for interpreting the case or controversy requirement as one implicating standing, Professor Pierce states that:

The findings of the . . . studies are remarkably consistent. Both English and colonial courts regularly resolved disputes brought by “strangers” and “informers.” Neither English nor colonial courts applied any jurisdictional limit that bore any resemblance to the modern law of standing. Standing is not mentioned at all in any English case until 1807. No English case even discussed the possibility that a private individual might not have standing to assert a public right until 1897. Neither English nor colonial courts required a plaintiff to establish “injury-in-fact” as a prerequisite to judicial resolution of a dispute. All courts applied the doctrine of damnum absque injuria as the basis for potential dismissal of a cause of action. That doctrine, however, bore no relation to the modern law of standing. The relevant “injuria” was not the “injury-in-fact” required by the modern law of standing. “Injuria” existed if a plaintiff had a cause of action rooted in the common law, equity, or a statute. Thus, at the time the Constitution was drafted and ratified, any court would have held that a plaintiff who had a statutory cause of action had suffered an “injuria.”

Nor did the years following the drafting and ratification of the Constitution provide much guidance. Remarkably, the first case to reference standing as an Article III

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60 Pierce, supra note 54, at 1765.
61 Id. (internal citations omitted).
limitation on the judiciary was *Stark v. Wikard*, decided in 1944.62 “In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions . . . Of those 117, 109, or nearly all, of the discussions occurred after 1965.”63 As Professor Cass Sunstein remarks, “The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon.”64 Thus, standing doctrine as an implementation of the case or controversy requirement is a relatively new interpretation.

However, in contrast to the tenuous links between Article III’s text and intent and the evolution of tripartite standing doctrine, a structural analysis of separation of powers concerns firmly roots the standing requirement in the Constitution.65 In other words, when courts commence their standing analysis with a statement of Article III principles, they are implicitly giving voice to such principles in light of the structural relationship between the three branches of federal government. It is this contextual, rather than strictly textual, reading of the case or controversy requirement upon which the strongest justification for the standing requirements lie.

While the doctrine of standing did not arise until the mid twentieth century,66 the concerns that led to the doctrine predate its articulation. As Professors John Ferejohn and Larry Kramer document, courts have required adverse interests between parties—a

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63 Sunstein, *supra* note 59, at 169.
64 *Id.* Professor Sunstein clarifies that while the case or controversy requirement is of recent vintage, a plaintiff has always been constitutionally required to have a cause of action. *See id.* at 170.
66 *Id.* at 1009.
concern that underlies both injury in fact and causation—for more than two centuries.\(^{67}\)

In addition, “The requirement that a ruling of the court have some actual effect on the parties,” another way of describing the redressability requirement, “has manifested itself in a variety of settings.”\(^{68}\) What emerged was a “law of justiciability,”\(^{69}\) one that would be later codified in part through the doctrine of standing.

Justice Scalia illuminated the connection between the Court’s standing doctrine and a structural reading of the constitution in \textit{Lujan:} because neither “case” nor “controversy” is specific enough to provide much guidance, “the Constitution’s \textit{central mechanism of separation of powers} depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”\(^{70}\) One of the “landmarks” defining the judiciary, “setting apart the ‘Cases’ and ‘Controversies’” that are justiciable, is the doctrine of standing.\(^{71}\) The standing requirement is thus at once constitutional and prudential, a doctrinal interpretation of the case or controversy requirement and an element of judicial self-government.\(^{72}\)

Yet it is interesting to note that despite the separation of powers concerns at the heart of standing, the doctrine operates on litigants. In other words, standing doctrine acts on the judiciary—and preserves the separation of powers—only indirectly, through an evaluation of who is empowered to bring cases or controversies before a court.

\(\textsuperscript{67}\) \textit{Id.} at 1007.

\(\textsuperscript{68}\) \textit{Id.} at 1008.

\(\textsuperscript{69}\) \textit{Id.}

\(\textsuperscript{70}\) 504 U.S. at 559-60 (emphasis added). Regarding the meanings of “case” and “controversy,” Scalia states, “To be sure, it limits the jurisdiction of federal courts to “Cases” and “Controversies,” but an executive inquiry can bear the name “case” (the Hoffa case) and a legislative dispute can bear the name “controversy” (the Smoot-Hawley controversy).” \textit{Id.} at 559.

\(\textsuperscript{71}\) \textit{Id.} at 560.

\(\textsuperscript{72}\) \textit{Id.}
However, the same separation of powers justification also provides the foundation for the political question doctrine, which acts directly on the judiciary.

b. The Political Question Doctrine: A Direct Restriction on Courts

A similar structural reading of constitutional separation of powers lies at the heart of the political question doctrine, a “ruling by the Justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches.” Unlike standing, however, the political question doctrine is wholly prudential; where as standing establishes the minimum required for a litigant to seek judicial review, the political question doctrine asks judges to evade controversial political questions even when standing has been established. Another difference is that the political question doctrine effects courts directly; whereas standing prevents Courts from hearing issues brought because of the relationship of the litigant to the issue, the political question doctrine calls on courts to absent themselves from the hearing of particular issues independent of the relationship of the litigant to the issue at hand.

Professor Alexander Bickel described a political question as where:

[T]he Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (in a mature democracy), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.74

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73 Jesse H. Choper, The Political Question Doctrine: Suggested Criteria, 54 DUKE L.J. 1457, 1461 (2005). For a more prosaic description, see Ferejohn & Kramer, supra note 65, at 1013-14 (stating that political questions are those which the court should not consider because they are “too political . . . [they are] potentially controversial questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counterattack”).

The political question doctrine is therefore one of judicial restraint. When viewed through the lens of the political question doctrine, standing can be seen as a coordinate doctrine that helps the Court weed out a number of, but not all, political questions. While the standing and political question doctrines are independent considerations, examining the three standing requirements through the lens of the political question doctrine sheds light on justifications for standing’s rules: Cases or controversies concern injuries in fact, concrete and particularized, actual or imminent; whereas political questions concern injuries that are general and distant. Cases or controversies concern injuries that are causally connected to the conduct complained of; whereas political questions concern injuries that could be the result of the interaction of multiple or unknown causes. And cases or controversies are redressable by the courts; whereas political questions are those which the court should not address for fear of overstepping its institutional competence, usurping power better left to the elected branches of government.

Constitutional theorists have long articulated the structural boundaries that animate the political question doctrine. Professor Herbert Wechsler stated, “the only proper judgment that may lead to an abstention from [judicial] decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”75 Though the statement is phrased in terms of judicial duty, its implied converse suggests the contours of the political question doctrine: where the Constitution has committed the determination of an issue to another agency of government than the courts, courts should abstain from judicial decision. It is this negative construction that lies at political question doctrine’s heart.

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In *Baker v. Carr*, the Court defined the limitations of the political question doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\(^7^6\)

Thus articulated, the political question doctrine seeks to distinguish those questions that political in nature, and therefore beyond the proper boundaries of judicial interpretation. At its core, the operative question is “whether the political branches at both the national and local levels can be trusted to determine the meaning and scope of a particular constitutional provision.”\(^7^7\)

Professor Jesse Choper identifies four criteria a court should consider when considering whether something is a political question, and therefore outside judicial competence: (1) when the Constitution commits a question to a coordinate political department, the Court should refrain from deciding the question; (2) when judicial review is unnecessary for the preservation of our constitutional scheme, the Court should defer to the political branches for functional reasons; (3) where the Court cannot formulate principled, coherent tests due to a lack of discoverable and manageable standards, the Court should defer to the political branches; and (4) where injuries are general and widely shared, the Court should be hesitant to exercise power.\(^7^8\) These guidelines seek to

\(^7^6\) 369 U.S. 186, 217 (1962).
\(^7^7\) Choper, *supra* note 73, at 1462.
\(^7^8\) *Id.* at 1462-63.
“identify questions either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution.” 79 These criteria speak to the structural capacities of each branch of government; a belief that difficult questions are best decided in our constitutional system by a branch of government capable of being held accountable to the people. 80 Where a difficult question does not raise the possibility of political accountability, however, the judiciary is the only branch of government capable of addressing the issue.

Thus, the questions that demand consideration regarding special solicitude are: (1) whether giving Massachusetts easier access to courts violates the structural concerns at the heart of the standing doctrine; and (2) whether the Court can trust the political branches of government to address the issue of the EPA’s denial of Massachusetts’ rulemaking petition.

III. Is There A Theoretical Justification For Special Solicitude?

With the preceding summary of the standing and political question doctrines as foundation, it is time to return to Massachusetts v. EPA and the question of whether special solicitude for states is constitutionally proper. Justice Stevens’s reliance on a theory of state quasi-sovereignty as the basis for special solicitude implicates a discussion of “Our Federalism,” the system of dual state-federal sovereignty that is at heart of the Constitution. Thus, the following analysis will progress from a general discussion of federalism as applied to the situation in Massachusetts v. EPA, to locating a viable quasi-sovereign interest implicated in the case sufficient to lower the standing requirement for

79 Id. at 1463.
80 Id. at 1467.
Massachusetts, to overcoming the additional hurdle provided by the political question doctrine. The conclusion reached is that because Massachusetts has an interest in protecting its citizens and an interest in securing the protection promised under the Clean Air Act for those citizens, it deserves special solicitude in the standing analysis. Further, because Massachusetts has no clout vis-à-vis the EPA, the political question doctrine does not present an impediment to the Court’s exercise of jurisdiction over the matter. Finally, the contours of a rule of special solicitude thus justified will be detailed.

a. Original Intent and Federalism

A logical starting point for any theoretical discussion of special solicitude for state standing must consider both federalism and separation of powers: federalism in the discussion of state quasi-sovereignty vis-à-vis federal law and separation of powers with regard to the limited power of the court to hear generalized (i.e. political) grievances. While Article III standing more directly concerns separation of powers, it is in the principles of federalism that special solicitude is rooted. Perhaps paradoxically, by understanding the federalist principles that provide support to special solicitude, separation of powers barriers to special solicitude may be lessened and overcome.

The nature of “Our Federalism” has changed over time, but we remain a nation in which each citizen is a citizen of two sovereigns: the United States and the state in which that citizen lives. Dual sovereignty was a purposeful design, and it is one of the fundamental innovations of the United States Constitution. Madison, in Federalist No. 51, highlighted the unique nature of American dual sovereignty:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government . . . In the compound republic of America, the power surrendered by the people is first divided by two distinct governments, and then the portion allotted to each subdivided among distinct and separate
departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.81

Both Hamilton and Madison envisioned a potentially adversarial relationship between state and federal governments. In Federalist No. 28, Hamilton detailed “an axiom”: “the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.”82 Thus, when the relationship between state and federal government turn adversarial, it is the state that is envisioned as more responsive to its citizenry. Further, not only were states seen as protectors against a potentially invasive federal government, Madison firmly believed states would be capable of protecting the interests of their citizenry against the federal government by force:

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.83

Subsequent history has proven Madison’s proclamation of state militia strength incorrect. (Madison himself bore early witness to the relative weakness of states as political actors when he attempted to rally the States against the Alien and Sedition Acts; when Madison attempted to rally opposition, “Kentucky and Virginia issued their famous

81 The Federalist No. 51.
82 The Federalist No. 28.
83 The Federalist No. 46.
resolutions and . . . nothing happened.” More importantly, the role of state as protector against federal incursion on the rights of the citizenry was, in large part, destroyed by the Civil War and its aftermath.

Yet despite the apparent naiveté of the Framers’ belief in the states’ superior position vis-à-vis the federal government as protectors of citizens, especially with regard to the apportionment of military strength in the dual sovereign system, there is a strong argument to be made that courts serve at least some of the purpose that Madison envisioned the threat of violence by state militia to have. According to Professor Calvin Massey, “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.” The transformation of state/federal conflict from the battlefield imagined by Madison to the Judiciary is complete; Professor Massey identifies the courts as the arena in which the sovereign state and the sovereign federal government will battle.

However, in Massachusetts v. EPA the state was not seeking to protect a sovereign interest; rather the Court identified Massachusetts’ interest as quasi-sovereign and declared such an interest to be sufficient for a lowered standing bar. What was the quasi-sovereign interest at issue? Once identified, does the quasi-sovereign interest tie to the Framers’ idea that states are (at least sometimes) better protectors of citizens’ interests than the federal government? And, most importantly, is the issue such that states can affect change politically instead of utilizing the judiciary?

b. Quasi-Sovereignty in Massachusetts v. EPA

The special solicitude rule of *Massachusetts v. EPA* hinges on Massachusetts’ quasi-sovereign interest in the litigation. Perhaps the clearest way to understand quasi-sovereignty is to explore what it means in relation to sovereignty on the one hand, and proprietary (private) interests on the other. To put it simply, if circularly, sovereign interests include those that are attributes of a state’s sovereignty. For example, a state’s actions to enforce its own laws are expressions of the state’s sovereignty. On the other hand, a state’s proprietary or private interests are those that are parallel to a private litigant’s interest—a state’s action to protect its land is parallel to a private litigant’s action to protect his or her land. Quasi-sovereignty falls between these two: an action based on a state’s quasi-sovereignty is one that seeks to protect or assert the rights of its citizens en masse.

The trouble with this definition of quasi-sovereignty is that the Court’s opinion seems to identify Massachusetts’ interest in the protection of its coastline as a quasi-sovereign interest when such an interest is properly regarded as proprietary. That Massachusetts’ interests in its coastline is proprietary is made clear by the traditional standing evaluation—particularly the discussion of the alleged injury that Massachusetts suffers—following the declaration that Massachusetts deserves special solicitude. “Because the Commonwealth owns a substantial portion of the state’s coastal property, it has alleged a particularized injury in its capacity as a landowner.” The fear is that sea levels will continue to rise, resulting in coastal property “either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.”

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86 *Id.* at 22.
87 *Id.* at 21.
88 *Massachusetts v. EPA*, 127 S.Ct. at 1456 (internal quotation omitted).
89 *Id.* (internal quotation omitted).
Remediation is estimated at hundreds of millions of dollars. These alleged injuries are the very definition of private injuries; they are no different than those that would be suffered by private landowners whose property included Massachusetts’ coastline. A litigant seeking to establish standing to litigate those injuries should be required to establish standing under the traditional standing analysis.

The Court confuses the issue by focusing on the quasi-sovereign parens patriae interest: “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.” The Court cites to Tennessee Copper, which elaborated on the difference between proprietary and quasi-sovereign interests:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

The citation, however, is selective. Tennessee Copper continues in a sentence not cited by the Massachusetts v. EPA Court: “The alleged damage to the state as a private owner is merely a makeweight.” Thus Justice Stevens fails to distinguish an important feature of Tennessee Copper. The Tennessee Copper Court was dismissive of the mere

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90 Id.
91 See Massey, supra note 85, at 23.
92 Id. at 25. If an interest is of the same character as that suffered individually by its citizens, the state can seek standing as a private citizen, but that again raises the requirement of meeting the standing requirements in full. See id.
93 Tennessee Copper, 206 U.S. at 237 (quoted in Massachusetts v. EPA, 127 S.Ct. at 1454).
94 Id.
proprietary interest Georgia’s claim; the proprietary claim was, as the Court stated, merely a makeweight. However, in *Massachusetts v. EPA*, the Court alludes to no interest asserted by Massachusetts above and beyond the titles of its citizens except those proprietary interests for which it could seek redress in the same way that individual citizens could. “[T]he 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 states’ loss of coastal land, an injury precisely the same as that suffered by private littoral landowners.”

To read the Court’s opinion carefully is to discover that the only injury discussed with regard to Massachusetts is what the *Tennessee Copper* Court would have labeled a makeweight.

However, despite the Court’s misplaced focus on Massachusetts’ proprietary interests as quasi-sovereign Professor Massey identifies two possible quasi-sovereign interests—both reliant on language in *Alfred L. Snapp*—that Massachusetts possessed, either of which would be sufficient to support *parens patriae* standing. First, Massachusetts had an interest in protecting the physical and economic health and well being of its residents. Second, because Congress had acted to displace state law under the Clean Air Act, Massachusetts had an interest in alleging that the EPA’s failure to act excluded Massachusetts’ residents from a federal benefit that was supposed to flow their way. These two suggested quasi-sovereign interests are explored in turn below.

**c. Quasi-Sovereignty and Physical/Economic Health**

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95 Massey, *supra* note 85, at 25.
96 *Id.* at 26.
97 *Id.*
The Court’s states that Massachusetts was “asserting its rights under federal law,” a clear incantation of a proprietary rather than quasi-sovereign interest. However, Professor Massey argues that the passage from which the above quotation comes is more persuasively read as implicating quasi-sovereign interests for three reasons:

First, in the same passage the Court explicitly identified Massachusetts’ 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 a federal law to its residents, the Court implied that a state has standing to enforce the benefits of federal law for its residents.

More generally, the idea of a lessened standing requirement for quasi-sovereignty based on a state’s ability to protect the health and welfare of its citizens hints at what Professor Henry Monaghan called the “special function model” of standing, which he contrasts to the “private rights model” of standing.

The private rights model of standing embraces doctrines such as ripeness, mootness, standing, political question, abstention and exhaustion, “reflect[ing] a strong ambivalence about the propriety of judicial review in a democratic society, which, in turn, import[s] that judicial intervention should occur only when unavoidably necessary and under carefully structured circumstances.” Such reluctance also reflected in the worry that frequent judicial intervention in the political process would generate a backlash “destroying” the Court in its wake. Additionally, the private rights model serves the function of allowing “the current dimensions of judicial review to proceed at

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98 127 S.Ct. at 1455, n.17.
99 Massey, supra at 85, at 30.
101 *Id.* at 1365-66.
102 *Id.* at 1366.
an acceptable political pace.” Such a model explains the standing doctrine as it has emerged, and in this reasoning one finds support for Justice Roberts’s dissent in *Massachusetts v. EPA*. Roberts opines that while “[g]lobal warming may be a crisis . . . [i]t is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.” Thus, “redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.” The issue here, in Roberts’s view, is a political question.

However, the “private rights model” led the Court to an “extraordinary” result: the Court rejected federalism claims brought by the states themselves because they did not concern “private rights or private property infringed, or in danger of actual or threatened infringement.” States were prevented from litigating federalism claims unless there was injury-in-fact, causation, and redressability. In other words, under the private rights model only private litigants or states acting to protect their private/proprietary interests have standing to bring cases concerning the constitutional relationship between the states and the federal government. States have, in essence, no quasi-sovereign role to play. Chief Justice Roberts’s dissent implicitly endorses the private rights model: it is no part of the states’ quasi-sovereign duty as *parens patriae* “to enforce their rights in respect of their relations with the Federal Government.”

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103 Id.
104 *Massachusetts v. EPA*, 127 S.Ct. at 1463-64 (Roberts, C.J., dissenting) (internal quotations omitted).
105 Id. at 1464 (quoting *Lujan*, 504 U.S. at 576).
107 See Monaghan, *supra* note 100, at 1368.
108 Id. at 1466 (quoting *Mellon*, 262 U.S. at 485-86).
Professor Monaghan, in response to opinions such as *Massachusetts v. Mellon*—the case quoted by Chief Justice Roberts in the excerpt of his dissent above—states that “[s]urely the reasoning of such decisions is wholly unsatisfactory.” The “real contestants” in cases “presenting major questions concerning federalism and the separation of powers . . . were Congress and the states,” but “the private rights model remains formally unimpaired: Constitutional adjudication is still viewed as the by-product of preventing unjustified injury to private interests.” In response to his dissatisfaction with the private rights model, Professor Monaghan defined a competing theory of standing: the “special function model.” The special function model is based on the following assertions: (1) that the Constitution needs authoritative interpretation; (2) that the Court is uniquely suited to that task; and (3) that “it is by no means evident that [such a task] should be a function of ordinary litigation concerning private rights.”

The implication underlying the special function model is that the standing requirements that have evolved to give teeth to the case or controversy clause are misplaced when constitutional interpretation is at issue. Thus, “[i]t is an error to assume that, either as a matter of case or controversy or of substantive law, constitutional adjudication absent some specific complaint of injury in fact is beyond judicial competence.” Further, because Americans fully expect the Court to exercise judicial

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109 Monaghan, *supra* note 100, at 1368.
110 Id.
111 Id. at 1368-1371.
112 Id. at 1368 (citing Alexander Bickel, *The Least Dangerous Branch* (1962)).
113 Id. (citing Henry P. Monaghan, *First Amendment “Due Process,”* 83 Harv. L. Rev. 519, 523-24 (1970)). Monaghan argues, “Congress in the twentieth century is far too overwhelmed to give a systematic and coherent development to constitutional principles.” Id. at 1368, n.32.
114 Id.
115 Id. at 1368-69.
review to maintain the constitutional order. “it is unacceptable to dismiss state challenges to federal authority or a case of far-reaching national importance, simply because the particular litigants no longer have a ‘personal interest’ in the outcome.”

The special function model perceives constitutional litigation as a public action, whether or not private rights are involved.

Though Professor Monaghan defined the special function theory of standing more than thirty years prior to *Massachusetts v. EPA*, the theory can be read as both an explicit rejection of Chief Justice Roberts’s dissent and as implicit support for the Court’s majority opinion. While Roberts explained that the states should not have standing to determine the contours of their role vis-à-vis the Federal Government, the majority opinion stressed the “considerable relevance” that a sovereign state sought review. Justice Stevens did not explicitly embrace Monaghan’s special function model and as such one is left to connect the dots in the Court’s opinion in order to argue that such a model provides theoretical support—but the dots are there to be connected. In order to do so, it is, however, necessary to reframe *Massachusetts v. EPA* as a case about principles of federalism, and more particularly, principles of federalism that arise in the context of the administrative state.

Justice Stevens not only speaks about the heightened interests of states in and of themselves, but also elliptically speaks to the federalism principles at issue:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in

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117 Monaghan, *supra* note 100, at 1370.
118 *Id*. at 1371.
119 *Massachusetts v. EPA*, 127 S.Ct. at 1466 (Roberts, C.J., dissenting).
120 *Id*. at 1454 (Stevens, J.).
some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. [Citations omitted.] “One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”  

The importance of this passage is that it reveals Stevens’s concern with the federalist contract between Massachusetts and the federal government. It implies a bargain at the heart of “Our Federalism”—where a state willingly submits to the power of the federal government they do so with the expectation that the federal government will protect the state, at least in a way consistent with federal goals. That Massachusetts brought suit indicates a longing for protection from greenhouse gases, a protection that it cannot seek for itself. As Professor Massey explains:

> 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.  

In this reading, Massachusetts has a quasi-sovereign interest in compelling the federal government to grant the protection from air pollution that it guaranteed—protection that Massachusetts cannot provide for itself not only due to the stateless nature of the problem, but also due to federal preemption of the state’s ability to regulate.

Yet while this may contribute to special solicitude it surely does not provide full justification for the rule; it cannot explain the Court’s willingness to enter what appears to be a political dispute. In terms of the political question doctrine, states have a voice in federal politics. Congressmen and -women, though federal actors, are elected by citizens

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121 Id. (*quoting Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).  
of individual states and Congressional districts. Thus, while the power exercised by Congress is national in scope, individual legislators are accountable to local interests. Those eligible to vote for U.S. Senators are also eligible to vote for statewide political positions; Congressional districts are often the same as their state counterparts.

According to Professor Wechsler, such a design makes the federal government’s political departments responsive to state influence, ensuring that national lawmakers react to “local sensitivity to central intervention.”\(^{123}\) The Framers created a legislative branch composed entirely of local representatives. Thus, “states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.”\(^ {124}\) Not only did the Framers create a system of checks and balances between the three branches of government, they created the political branches such that they represented the People as citizens of two sovereigns: the Executive Branch is elected by the people as citizens of the nation; the Legislative Branch represents the people as citizens of states.

Given that Massachusetts had a voice in Congress, what explains the Court’s willingness to reach the merits of the case? Why would the Court not only lessen the showing necessary to establish standing for reasons related to Massachusetts’ quasi-sovereign interests, but do so in a case that seems to fall squarely within the political question doctrine? Justification can be found in the nature of the administrative state and its relationship—or, more precisely, the lack thereof—with states.

\(^{123}\) Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954).

\(^{124}\) *Id.* at 546. For an argument criticizing Wechsler’s formalist understanding of federalism, see Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). Professor Kramer argues that the political parties, not tradition nor political safeguards inherent in the separation of powers provide political protection to the states in our federalist system.
d. Quasi-Sovereignty and the Administrative State

In the end, it is the unique nature of the administrative state, and the near-absolute powerlessness of states vis-à-vis administrative agencies, that helps overcome the political question doctrine. Administrative agencies, though creations of Congress, reside within the Executive Branch. Because of the states’ political impotence with respect to the Executive Branch, they are left with a lack of political influence. Thus, the issue is not a political question; it is up to the judiciary, in light of Massachusetts’ quasi-sovereign interest in protecting its citizens, to maintain the proper balance of federalism interests. Because Massachusetts lacks the political clout to influence the EPA or the White House, the Courts provide a necessary forum to hear the state’s claim.

In order to fully understand the conclusion outlined above, it is necessary to consider, for a moment, the nature of the administrative state. Congress is the body responsible for creating administrative agencies and defining their role. Once created, however, the operation of agencies passes to the Executive. Congressional input on the functioning of agencies is limited to the passage of new statutes that alter or amend agency functioning. 125 Otherwise, the Executive, by way of the agency administrator, not only has broad discretion in the operation of agencies, but also broad discretion in the interpretation of legislation governing their operation. 126 While Congressional intervention on agency operation by way of a newly enacted statute is theoretically possible, the very reasons that agencies were created make Congress unlikely to act. The creation of administrative agencies was a de facto Congressional admission that it lacked

125 See INS v. Chadha, 462 U.S. 919 (1983) (holding that once Congress has established an agency, it cannot retain veto power on agency decisions).
the flexibility, agility and expertise to effectively legislate over large fields of activity. Not only does Congress lack the power to control agencies, as Congress is sidelined states lose their lever of pressure in the federal government.

As Professor Richard Stewart\textsuperscript{127} described, the current state of agency regulation is “a faction-ridden maze of fragmented and often irresponsible micro-politics within the government,”\textsuperscript{128} where vast decision-making power is delegated to unelected bureaucrats and judges.\textsuperscript{129} Yet it is those unelected judges who provide our elected state representatives the only viable means to challenge the faction-ridden maze of irresponsible micro-politics. Because of the institutional impotence of Congress vis-à-vis the administrative state, and because the micro-politics of the administrative state exists in large part separate from the person of the President, political safeguards are circumvented. Thus it is the Judiciary that provides the sole forum for a challenge to agency action or inaction.

e. The Contours of Special Solicitude for State Standing

The contours of special solicitude for state standing are best introduced by referring to the transcript of the \textit{Massachusetts v. EPA} oral argument. Despite the special solicitude doctrine enunciated in the Court’s decision, only once during argument did the issue of a “special,” lowered bar for state standing arise. Justice Kennedy was the first to bring it up, and the following discussion between Attorney General Milkey, representing Massachusetts, and Justices Kennedy, Ginsburg and Scalia represents the entirety of discussion related to special solicitude:

\footnotesize{\begin{itemize}
\item \textsuperscript{127}Professor Stewart is the former Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice.
\item \textsuperscript{129}Id. at 355.
\end{itemize}}
Justice Kennedy: I’m asking whether you have some special standing --

Mr. Milkey: Yes . . . Your Honor, first of all, I do think we have special standing . . .

Justice Ginsburg: Mr. Milkey, does it make a difference that you’re not representing a group of law students, but a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn’t exercising it? I thought you had a discrete claim based on the sovereignty of States and their inability to regulate dependent on the law Congress passed that gives that authority to the EPA. I thought it was —

Mr. Milkey: Your Honor, you are correct that we are saying that provides us also an independent source of our standing.

Justice Scalia: I don’t understand that. You have standing whenever a Federal law preempts state action? You can complain about the implementation of that law because it has preempted your state action? Is that the basis of the standing you’re alleging?130

Though the argument petered out at that point not to resurface during oral argument, Justice Scalia’s incredulous questions begin to sketch the contours of special solicitude—both in terms of what special solicitude covers, and what it should not. States should not have special solicitude any time a Congressional law preempts state action, because states are represented in the political process.131 However, states should have standing when an agency action (or inaction) preempts state action because agencies lack political accountability for their actions. As discussed above, the political question doctrine provides these boundaries.

This limit on special solicitude answers the political question doctrine’s concerns, which are most clearly articulated by Professors Bickel132 and Choper.133 Because

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131 For more discussion of the political question doctrine in this context, see Part III.d, supra.
132 See Bickel, supra note 74.
133 See Choper, supra note 73, at 1462-63.
administrative agencies are involved, there is no textually demonstrable constitutional 
commitment of the issue to another branch.¹³⁴ Judicially discoverable and manageable 
standards exist—namely, that states should have a lowered expectation of standing where 
they seek to challenge agency action that acts to enforce agency compliance with 
Congressionally passed law.¹³⁵ While the Court will thus be forced to enter a policy 
debate, it will do so as the party whose role is to arbitrate such disputes not only between 
two sovereigns, but also between its coordinate branches—the state alleges that the 
Executive Branch is improperly enforcing law as passed by Congress, and Congress, 
because of the nature of the administrative state, finds it difficult if not impossible to 
represent itself. 

Agencies are Frankenstein’s, conceived by the Legislative Branch only, upon 
birth, to become entities over which it can assert little if any control. Thus, judicial 
review is necessary to preserve our constitutional scheme, lest agencies act as a true 
fourth branch of government, politically unaccountable to states and largely insulated 
from Congressional control. Though the injuries at issue in Massachusetts v. EPA and 
the other cases that would trigger special solicitude are general, the state as quasi-
sovereign has a claim to representing those widely held interests in a way that a private 
litigant would not. 

CONCLUSION

¹³⁴ A discussion of the constitutional implications of the administrative state is beyond the limits of this 
paper. In short, agencies live a hybrid existence. They are created by Congress and controlled by the 
Executive; they legislate, enforce/prosecute, and adjudicate. However, what is clear is that there is no 
textually demonstrable constitutional commitment of agencies to another branch. 
¹³⁵ This assumes that the standards concern standing, not the substantive claims at the heart of the issue. 
The substantive claims, however, face a Congressionally defined arbitrary and capricious standard, 5 
U.S.C. § 706(2)(A). Thus, clearly defined standards are articulated in either instance.
Special solicitude for state standing is therefore based on state quasi-sovereignty regarding federal laws passed for the benefit of state citizens and the unique position of states vis-à-vis federal administrative agencies. Though states are theoretically able to exert political pressure on Congress, the evolution of the administrative state has emasculated Congressional control of the agencies it creates. Further, with regard to the agencies themselves, states have negligible, if any, political clout. The state is left with little (if any) influence through the political process so the political question doctrine is surmounted. With regard to the doctrine of standing, states have a quasi-sovereign interest in seeing that federal laws passed to protect their citizens are enforced. Principles of federalism require the courts to adjudicate state claims against agency action or inaction to protect citizens of the state, overcoming concerns regarding the separation of powers.

There is much to be said about the potential ramifications of and potential arguments against a special solicitude doctrine as outlined in this paper. The ramifications and counterarguments demand further consideration, though I will offer several brief thoughts regarding anticipated criticism. The shared goals of standing doctrine and the political question doctrine are limitations on the power of the Judiciary. The special solicitude doctrine as outlined will retain strict limitations on the Judiciary’s power; the expansion of its exercise will be minimal and specifically cabined. Further, such expansion will serve a compelling constitutional purpose: restoring the balance between state and federal government. Finally, to make an obvious but necessary point, special solicitude will not ensure that agency action or inaction will fail; the bar for overturning agency interpretation and execution of the laws under their purview remains
high. Once a state gains standing, it still must prove an agency’s action to be “arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law”\(^{136}\) in order to gain relief. (That the Court found the EPA’s inaction in *Massachusetts v. EPA* to satisfy that standard is the subject of Justice Scalia’s dissent, and should properly be the subject of other scholarly work.) Special solicitude does not guarantee states a win—far from it. Rather, it is the only way to keep them in the game.