

# OREGON LAW REVIEW

---

2018

---

VOLUME 96

NUMBER 2

---

## *Articles*

RAYMOND H. BRESCIA\*

### On Objects and Sovereigns: The Emerging Frontiers of State Standing

Introduction .....	364
I. Public Law Litigation: Engine of Social Change and Target of Opposition .....	370
II. Contemporary Standing Jurisprudence: From the Constitutional to the Trivial.....	376
A. The Contemporary Consensus: <i>Lujan v. Defenders of Wildlife</i> .....	376
B. Injury in Fact: Constitutional Requirement or Trivial Formality? .....	383

---

\* Professor of Law, Albany Law School. The author would like to thank Andrew Ayers, Ted DeBarbieri, Keith Hirokawa, Sarah Hill Rogerson, and Michael J. Wishnie for helpful comments on earlier versions of this Article. All errors and omissions are mine, of course. I would also like to thank my research assistants, Martha Mahoney and Tess McLaughlin, for their tireless efforts supporting this work, and the able and hardworking editorial team at the *Oregon Law Review* that has strengthened this piece considerably.

III.	State Standing, the <i>Parens Patriae</i> Lawsuit, and Public Injuries.....	394
IV.	<i>Massachusetts v. EPA</i> .....	404
	A. The Majority Opinion .....	404
	1. Background .....	404
	2. Injury in Fact .....	405
	3. State Standing to Sue the Federal Government .....	407
	B. The Dissent.....	409
	C. The Ramifications of <i>Massachusetts v. EPA</i> .....	414
V.	State Standing in Litigation After <i>Massachusetts v. EPA</i> : Public Law Litigation Through Private Injuries.....	414
	A. Challenges to Federal Authority to Regulate Firearms ..	415
	B. State Challenges to the Affordable Care Act .....	417
	C. Challenges to Obama Administration’s Overtime Rules.....	419
	D. Challenges to President Obama’s Immigration Actions .....	421
	E. Challenges to President Trump’s Executive Order on Travel from Certain Predominantly Muslim Countries .	424
VI.	Public Law Litigation, State Standing, and Federalism .....	429
	Conclusion.....	439

#### INTRODUCTION

For nearly as long as public law litigation<sup>1</sup> has been a fixture of the political, social, economic, and jurisprudential landscape of the United States, some judges and interest groups have sought ways to scale it back. Many praise the social change that has taken root as a result of such efforts; whether it is the fruits of desegregation, marriage equality, or environmental justice litigation, public law litigation brought about significant social change and altered the social justice landscape of the United States in profound ways. At the same time, whether through the construction of barriers in the courts or legislative efforts that have sought to scale back opportunities for such actions, the critics of public law litigation have undertaken a sustained effort to weaken the ability of public law plaintiffs and their advocates to pursue social change through the courts.

In recent years, however, a new form of this sort of public law activism has taken root, with state governments becoming central

---

<sup>1</sup> See *infra* text accompanying notes 4–9 for a discussion of the phenomenon of public law litigation.

figures in efforts to advance social change and, at times, rein in federal government power. States are prosecuting what can only be described as very public law litigation, yet are overcoming the most significant barrier imposed by the courts to such litigation: the requirement that a litigant has standing to sue. Whether in lawsuits to challenge the Patient Protection and Affordable Care Act, or to check the Executive Branch's power to set immigration policy, states have commenced public law litigation, pursuing very social and political ends. While courts imposed the requirement of standing and erected other significant barriers to public law litigation, states developed a critical strategy for overcoming the standing requirement: that is, asserting not "public law" harms, but rather harms that can only be characterized as "private law" in nature. Thus, despite the barriers to public law litigation imposed by the courts in recent decades, by characterizing their harms as private law in nature, states can pursue public law ends through private law means. Moreover, by doing so, they have become central players in a legal discourse on the breadth and contours of federal authority, state power, and federalism itself, relying on the federal courts as an institutional setting in which to shape such power.

But states are no strangers or newcomers to public law litigation. Courts have long recognized state standing in various contexts; moreover, in a landmark case from 2007, the Supreme Court said states should be afforded "special solicitude" in standing inquiries.<sup>2</sup> Whether asserting their own rights as sovereigns within a federal system, vindicating their own proprietary interests, or pursuing so-called "quasi-sovereign" interests under a *parens patriae* theory of recovery to vindicate the rights of their citizens, states utilize a range of approaches when challenging federal power.

This third form of action, however, the *parens patriae* suit, has long been premised on the fact that states can bring actions on behalf of their citizens to vindicate those citizens' rights. In 1923, in *Massachusetts v. Mellon*, the Supreme Court found that this authority is limited in one critical way: states generally cannot pursue such actions on behalf of their constituents against the federal government to vindicate federal rights.<sup>3</sup> It is the federal government, not the states, that enjoys *parens patriae* standing to protect important rights on

---

<sup>2</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

<sup>3</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 485–87 (1923).

behalf of all citizens in the system.<sup>4</sup> As a result, one of the barriers to the use of a state's *parens patriae* power against the federal government is that states need not protect the interests of their citizens to assert certain federal rights. Courts have established that the proper way to bring a *parens patriae* action to preserve important federal rights is to have the federal government assert such rights on behalf of its citizens, displacing the role of the states in such settings.<sup>5</sup>

Moreover, contemporary standing jurisprudence has become more skeptical of third-party standing: when the party to the lawsuit is not an "object" of the challenged action, but rather is seeking to bring the suit on behalf of another. This jurisprudence privileges those who are the objects of a challenged action, preferring to recognize the tangible and formal harms those objects suffer, like distinct and discrete economic injury or threats to long- and well-recognized property interests. When coupled with the *Mellon* restriction on state *parens patriae* authority to sue the federal government to vindicate federal rights, one would think a state's capacity to serve as a check on federal authority would be limited.

In the face of the trend toward restricting the grant of standing to those suffering traditional injuries and the barriers to states seeking to sue the federal government in their capacity as *parens patriae*, lawsuits by states against the federal government show no signs of disappearing. Just as states represented by conservative elected officials brought litigation against the Obama administration, states with progressive leaders are beginning to bring actions against the Trump administration in just the first year of its political existence. Yet these very public lawsuits are taking on a fairly private character, at least in terms of the nature of the harms those state plaintiffs are alleging. This private character of harms comes at a time when standing doctrine, as it has evolved, seems to permit lawsuits based on harms to private interests more than public ones, where plaintiffs allege more ideological, or less direct, forms of injuries.

The apparent growth of state-initiated lawsuits with very "public law" components that allege traditional, common law harms, evokes a narrower vision of Article III of the U.S. Constitution. Consistent with that vision, a class of harms, those typically vindicated in private law contexts, are privileged in the standing analysis. Despite bringing

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 485–86; Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 (1982).

sweeping public law litigation to halt actions of the federal government, states have faced little resistance from the courts when doing so. States appear to have greater success satisfying the standing requirement, particularly when they allege private law harms in many different contexts. Two reasons for this may be the following: first, courts developed a formalistic approach to standing that focuses heavily on the first prong of standing analysis—the “injury-in-fact” requirement; and second, in response perhaps, states pursued actions against the federal government emphasizing simple and direct economic injuries, rather than ideological ones or ones based on third-party interests. What has resulted is the emergence of a new frontier and climate for state standing, one created by states for the states through intention or mere adaptation.

This new climate focuses on direct harms and traditional types of injuries suffered by the states. These harms include injuries to economic interests and property rights in property owned by such states. This climate privileges these types of injuries over injuries to political interests or a desire to promote a particular vision of federalism and the states’ roles within the federal system. Paradoxically, this phenomenon has, perhaps, opened a dialogue about that vision after all, despite the purportedly narrow nature of the harms states are pursuing. Indeed, as this Article explores, recent litigation in health care reform, regulation of firearms, labor law, and immigration policy has begun to test the traditional barriers and open new fronts in the debate over the proper role of the states, the federal government, and the courts in the American federal system.

In recent years, the evolution of standing doctrine, with its emphasis on traditional harms, like economic injury suffered by actors in a market economy, has meant that the Supreme Court’s entreaty—that states should enjoy “special solicitude” in standing analysis—is of little utility. Instead, states find more traction in the courts by emphasizing more traditional types of harms. As a result, instead of enjoying special status, especially in state-initiated lawsuits against the federal government, where the ability of the states to bring actions based on their position as *parens patriae* is limited, states find a different jurisprudential landscape. Indeed, they now find themselves in a position to file actions against the federal government, even when a traditional view of the *parens patriae* authority might restrict them from doing so. Pursuant to this new approach, states enjoy a status similar to that of any other litigant and they are doing so by describing their injuries as similar or even

identical to those more common, private litigants face and allege. As a result, instead of being hamstrung in their ability to sue the federal government, the doctrinal evolution in standing law has meant that courts need not recognize that states have a special status—nor that they face any particular impediment—in suits where they are asserting, and can assert, more traditional types of harms: the types of harms that the standing doctrine now embraces. Thus, while limits on the states' *parens patriae* authority would appear to narrow a state's ability to sue the federal government, the more traditional approach to injuries that are cognizable in the federal courts means that states are actually in a better position to allege such harms and establish standing to sue.

More and more over the years, the standing doctrine has evolved and appeared as a barrier to litigation, particularly litigation to pursue broad claims of violations of federal rights, whether by government or private actors. Like other barriers the federal courts have erected in recent memory (like heightened pleading requirements and restrictions on class actions), standing doctrine has made it more difficult for litigants to pursue what might be considered public law actions. By alleging private law harms—despite the fact that they are pursuing very public law claims—states are finding ways to pursue sweeping actions. These actions are brought against broad federal policies that have implications for third-party interests, like those of their constituents, all the while alleging narrow, first-party interests.

To explore these issues, this Article proceeds as follows. Part I provides an introduction to the concept of public law litigation and draws a distinction between it and a private law model of adjudication. It will briefly discuss the history of public law litigation, but also discuss some of the efforts to scale back such litigation through the imposition of both jurisprudential and statutory barriers.

The barrier that will ultimately draw the greatest attention is the standing doctrine, which is the basis of the discussion for Part II, which provides an overview of contemporary standing jurisprudence. It explores its evolution and some of its roots, stressing the origins of the so-called “injury-in-fact” requirement and the belief that aggrieved individuals who are the objects of a defendant's actions are recognized as having standing more readily than those who sue on behalf of third parties. This Part also refers to critiques of the contemporary approach and that approach's resistance to so-called third-party standing. It identifies trends in current standing law in which common law and traditional private law approaches to

standing—typically invoked in the injury-in-fact component of the analysis—serve as the yardstick against which public law litigation is measured.

Part III then provides an overview of situations in which state governments traditionally bring actions in their capacity as *parens patriae*—both in their own capacity, alleging a range of harms, and on behalf of their citizens. It also highlights the judicial resistance to actions brought by states in that *parens patriae* capacity when the federal government is the defendant and identifies those situations in which states have been authorized to sue federal defendants. As this overview will show, while there are exceptions to the bar on *parens patriae* suits by states against the federal government, prohibition has been the norm.

Following this description of the *parens patriae* action and other forms of state lawsuits against the federal government, Part IV reviews the Supreme Court’s landmark decision in *Massachusetts v. EPA*, in which the Court engaged in a lengthy discussion of state standing to sue, most notably dealing with the issue of a state’s power to sue the federal government.

Part V then explores the implications of the *Massachusetts v. EPA* case, detailing recent trends in lawsuits brought by states, often against the federal government in a range of areas, including health law and policy, firearms regulation, labor law, and immigration policy. Further, Part V addresses a state-initiated challenge to the recent Executive Order related to travel to the United States from several predominantly Muslim countries. This exploration reveals that states are not relying exclusively on their ability to sue on behalf of their citizens; instead, states are alleging direct harms to traditional interests to secure standing to sue. And, when states have alleged these sorts of direct harms, the courts have often recognized such standing—even when an action is brought by the states against the federal government. Thus, states appear willing to move away from the traditional *parens patriae* suit when bringing actions against federal entities. Instead, states will resort to invoking harms they suffer in some other capacity, not necessarily as third-party representatives of their citizens’ interests. This trend means that states can utilize a private law model of litigation to advance very public interests and rights.

Finally, Part VI explores the implications of this trend for future litigation brought by states against the federal government, where a private law model appears to dominate a very public law context. It

will also pose questions about the extent to which standing doctrine becomes a vehicle through which questions about federalism can play out. Putting aside the substance of the claims that states raise, these public litigants are positioning themselves as being no different from private litigants and alleging private law harms when doing so. At the same time, they are raising weighty constitutional questions, utilizing the narrow, typically hostile-to-public-law-litigation formalism of standing doctrine, all while bringing sweeping public law actions nonetheless. By opening the door to such litigation by privileging a private law model of standing, the courts have invited such public law litigation, but states are learning to allege private law harms when they take such legal action. In this way, a narrow approach to standing has not curtailed public law litigation nor has it limited the ability of the states to pursue public law claims. Rather, it has made such litigation more likely, as states are well-positioned to allege private law harms even as they pursue public law claims. What this likely means is that states will continue to assume a critical role in the push-and-pull between federal and state power, ensuring an ongoing dialogue about the proper role of the states within the constitutional system, with the courts moderating that debate. Additionally, this all has broader implications, as states may be able to reopen the courthouse doors to public law litigation, even as they—at least nominally—seek to vindicate private law harms.

## I

### PUBLIC LAW LITIGATION: ENGINE OF SOCIAL CHANGE AND TARGET OF OPPOSITION

The phenomenon known as public law litigation arose in the mid-twentieth century as a result of a confluence of forces: the advent of more liberal procedural rules ushered in by the adoption of the Federal Rules of Civil Procedure; the expansion of private rights of action under federal law; and the rise of advocacy groups that would use the courts to promote recognition and protection of civil and political rights, advance environmental claims, and promote consumer protection.<sup>6</sup> Unlike the much more common private law action—which involves litigation between two private parties to resolve claims arising between them and which tends not to have broad

---

<sup>6</sup> Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272–79 (1989) (tracing the rise of public law litigation in relation to adoption of the Federal Rules of Civil Procedure in 1938 and the expansion of private rights of action by Congress).

ramifications beyond those parties—public law litigation often involves complex or amorphous party structures, statutory or constitutional claims, and a government defendant or defendants. Finally, the relief awarded tends to impact individuals and institutions beyond just those parties who are before the court.

Abram Chayes, who spent many years as a law professor at Harvard and also served as a legal advisor in the State Department, described the difference between a traditional view of litigation as being between private parties to resolve private claims, and the notion of what he calls the “public law model” of litigation.<sup>7</sup> Private lawsuits, he argued, exhibit the following characteristics: (1) they are “*bipolar*” with respect to the litigants;<sup>8</sup> (2) they are retrospective in terms of resolving past injuries; (3) the rights and remedies are interdependent and “derived more or less logically from the substantive violation” of the law;<sup>9</sup> (4) the plaintiff will receive compensation “measured by the harm caused by the defendant’s breach of duty”;<sup>10</sup> (5) the lawsuit represents a “*self-contained* episode,” the outcome affects only the parties;<sup>11</sup> and, (6) litigation is “*party-initiated*” and “*party-controlled*.”<sup>12</sup> This private law model is different from the public law model, which, Chayes argued, involves the following: (1) a “sprawling and amorphous” party structure,<sup>13</sup> (2) the adversary relationship is “suffused and intermixed” with mediation throughout the conflict,<sup>14</sup> (3) the judge is the dominant figure in controlling the case and draws from other entities beyond the parties (like special masters and experts) to assist in oversight of the matter,<sup>15</sup> and (4) the judge “has increasingly become the creator and manager of complex forms of ongoing relief,” which affects the parties and others outside the litigation.<sup>16</sup>

---

<sup>7</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

<sup>8</sup> *Id.* at 1282.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1283.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1284.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Harold Hongju Koh traced Chayes’s public law model to the transnational context; see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347 (1991) (“Like its domestic counterpart[,] . . . transnational public law litigation seeks to vindicate public rights and values through judicial remedies.”).

David Sloss's perspective on public law litigation adopts what he calls a "functional approach" and is a bit narrower than Chayes's. He defines such litigation as "compris[ing] litigated cases involving a dispute between a private party and a government actor in which the private party alleges that the government actor committed, or threatened to commit, a violation of some established legal norm."<sup>17</sup> What this Article explores is a type of case that would seem to lie outside of Sloss's definition: the action of a state government pursuing constitutional and statutory claims against the federal government. It is hard to argue that such litigation should exist outside the definition of public law litigation just because it is a public plaintiff lining up against a public defendant.

Definitional disputes aside, public law litigation is responsible for bringing about dramatic change to political, civic, and social relations in the United States. From arguably the most dramatic example of this type of litigation, *Brown v. Board of Education*,<sup>18</sup> to more recent instances, like cases to promote marriage equality, public law litigation has shaped life in the United States for generations.<sup>19</sup>

But not everyone has seen the rise and success of public law litigation as an entirely positive development in law, politics, and jurisprudence. A confluence of interests, what Derrick Bell might call an "interest convergence,"<sup>20</sup> led to a backlash against this type of litigation and other similar lawsuits filed against business interests. With the election of Ronald Reagan in 1980, conservative government officials sought to rein in public law litigation as a means of protecting not just federal actors, but also state and local government allies, from judicial oversight,<sup>21</sup> while representatives of

---

<sup>17</sup> David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 WASH. & LEE L. REV. 1757, 1768 (2014).

<sup>18</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>19</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding state laws banning same-sex marriage unconstitutional).

<sup>20</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing shared interests between those advocating equal treatment for racial minorities and elites that sought to improve perceptions of the United States throughout the world); see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 118–19 (1988) (supporting Bell's analysis of the political environment in which the *Brown* decision was reached). See generally David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663 (2007) (advancing the use of the interest-convergence theory as a tool for social change).

<sup>21</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1552 (2014) (describing how the first issue the Reagan

business interests sought a means to relieve themselves of the burdens of litigation.<sup>22</sup> At the same time, some members of the judiciary, whether because of their political affinities or a desire for self-preservation and to control their dockets, joined in an effort to rein in litigation of all types—both public and private.<sup>23</sup> As a result, the very success of public law litigation, perhaps perceived by some as a threat, led to a change in the accessibility of courts to both private and public litigants. This change makes it more difficult to commence and sustain public law litigation through the erection of procedural barriers, some of them the product of congressional action, but most initiated through the courts.

Indeed, in contrast to the open ethos of the Federal Rules of Civil Procedure (Rules) as adopted in 1938, a range of barriers now exist that make all litigation, public law litigation in particular, more difficult to advance in the courts. These barriers include, but are not limited to, the following: first, in decisions like *Bell Atlantic v. Twombly*<sup>24</sup> and *Ashcroft v. Iqbal*,<sup>25</sup> the Supreme Court, for all intents and purposes, changed the pleading rules, forcing parties to allege their claims and defenses with sufficient specificity to raise what is considered a “plausible” claim for relief before commencing discovery.<sup>26</sup> Second, the Supreme Court made summary judgment

---

administration attempted to address in terms of litigation reform was limiting access to courts to pursue federal rights, not torts that business interests might seek to limit).

<sup>22</sup> In recent years, according to a compelling empirical study, litigants looking for a judiciary more favorable to business interests found it, at least in the Supreme Court. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471–72 (2013) (finding more pro-business justices in Roberts Court than in previous eras).

<sup>23</sup> See, e.g., Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1859–67 (2014) (describing growth of civil caseloads and judicial response thereto); see also Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1114 (2006) (describing “hostility to litigation” as a driving force behind procedural jurisprudence of the Rehnquist Court). As Siegel found in his analysis of the precedents of the Rehnquist Court, “[t]he common thread throughout is doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise.” *Id.* at 1115; see also Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 823–40 (2011) (raising prospect that expanded access to the courts can provoke a judicial backlash out of concerns over increased court dockets).

<sup>24</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>25</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>26</sup> See, for example, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010), for a description of

more readily available by interpreting Rule 56 of the Rules in a way that is more favorable to those seeking adjudication without trial.<sup>27</sup> Third, courts are restrictive in their interpretation of fee-shifting statutes, lowering the incentives to litigate, particularly in civil rights cases where the availability of attorney's fees to a winning plaintiff may offer the only chance of vindicating important rights.<sup>28</sup> Fourth, courts recognized immunity to suit for state and local officials under the Eleventh Amendment and qualified immunity for government officials in many settings.<sup>29</sup> Fifth, courts made it more difficult to recognize expert witnesses.<sup>30</sup> Sixth, in cases like *Wal-Mart v. Dukes*, courts narrowly interpreted Rule 23 to raise the bar for class certification.<sup>31</sup> Seventh, courts readily accepted the validity of arbitration clauses to keep lawsuits out of the federal courts.<sup>32</sup> Eighth, courts evinced a reluctance to maintain long-standing oversight of institutions, like prisons and school systems, in institutional reform litigation.<sup>33</sup> Finally, Congress enacted additional limitations on

---

the *Twombly* and *Iqbal* decisions and their impact on pleading requirements in civil cases in the federal courts.

<sup>27</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016–73 (2003) (noting "shifting judicial attitude" in favor of more readily granting summary judgment).

<sup>28</sup> See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001); see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1133 (2007) (describing *Buckhannon* as part of an "ominous shift of power away from private enforcement of rights toward government power both to resist civil rights mandates and to control the enforcement of these rights").

<sup>29</sup> Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 322–26 (2012) (describing the trend toward recognizing government immunity in different settings).

<sup>30</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993) (setting standard for recognition of expert witness); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 551–56 (2010) (describing the impact of *Daubert* on civil rights litigation).

<sup>31</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

<sup>32</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). For a discussion of the *AT&T* and *Wal-Mart* cases, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2011); see also, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 *passim* (2003) (describing judicially imposed limits on civil rights litigation brought by private litigants).

<sup>33</sup> See, e.g., Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation after Home v. Flores*, 46 U.C. DAVIS L. REV. 1435, 1466–68 (2013) (describing judicial endorsement of institutional defendants' efforts to terminate consent decrees in public law litigation); Jason Parkin,

prisoner lawsuits, class actions, and antitrust actions, making each more difficult to pursue. Although many of the judicial decisions which imposed these barriers are products of the Roberts Court, the trend toward narrowing access to the courts started long before his tenure, beginning with the Supreme Court under the leadership of Chief Justice Burger.<sup>34</sup>

While not all of these barriers impede public litigation and private litigation in the same way, the bottom line is that they all make it more difficult to commence and sustain public law litigation. Some of the cases through which the barriers described above were erected are “traditional” public law cases, like *Iqbal*, filed against the U.S. Attorney General and the Director of the Federal Bureau of Investigation, among others. Many of these cases are between private parties, yet their holdings certainly impact public law litigants as well. Moreover, the animus behind some of the opinions in these cases, even private law cases, may have been to use them as vehicles for reining in public law litigation only indirectly. Many of the same justices who wrote the opinions in those cases were also in the dissent in *Massachusetts v. EPA* (discussed *infra*), which would have foreclosed the action on several grounds, not the least of which was the dissenters’ view that the lead State plaintiff failed to satisfy an additional barrier to litigation imposed by the courts: the requirement of standing. This requirement is the main subject of this Article.

With standing doctrine, the judicial hostility to public law litigation is revealed in high relief. Indeed, through this doctrine, one can see a privileging of the private law plaintiff over the public law plaintiff and a judicial preference for the type of plaintiff who seeks relief from an injury akin to common law claims, like a threat to a property or contract right as opposed to a more political or nonmonetary interest.<sup>35</sup> Indeed, among the barriers to public law litigation erected

---

*Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 187 (2017) (noting that institutional reform litigation “has lost much of the prominence and momentum it had during its initial phases”).

<sup>34</sup> See, e.g., Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979) (describing the trend away from public law litigation as a “counterrevolution” in the courts); see also Siegel, *supra* note 23, at 1114 (describing the Rehnquist Court’s “litigation hostility” as a “powerful force shaping the Court’s basal understanding of its institutional project”).

<sup>35</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386–87 (2000) (lamenting diminution in the ability of private plaintiffs to overcome standing requirements in public law litigation).

over the last fifty years, one of the first that the courts erected (and certainly one of the most effective in precluding certain plaintiffs from invoking the jurisdiction of the federal courts) is the standing requirement, which the next Part explores.

## II

### CONTEMPORARY STANDING JURISPRUDENCE: FROM THE CONSTITUTIONAL TO THE TRIVIAL

To understand the modern state of standing doctrine and state government standing in relation thereto, this Part will explore the development of standing doctrine, starting with a discussion of the contemporary state of the jurisprudence on the topic. It will then provide a brief overview of the history of standing doctrine as it has evolved to reach its current state. Because of the central importance of the injury-in-fact component of the standing inquiry and its preeminence in discussions that center around state standing, as subsequent discussions show, I have confined much of the discussion that follows to that aspect of the standing inquiry.<sup>36</sup>

#### A. *The Contemporary Consensus: Lujan v. Defenders of Wildlife*<sup>37</sup>

The requirement that a party wishing to bring a lawsuit must have standing to sue has become not just axiomatic, but part of what many have seen as a constitutional imperative. Indeed, a plaintiff's standing has been described as an "irreducible constitutional minimum" of any lawsuit.<sup>38</sup> While a vast jurisprudence has emerged, most notably over the last fifty years, in which the standing question has been addressed, the state of contemporary judicial thinking on the standing doctrine can be traced to the now-landmark case *Lujan v. Defenders of Wildlife*,<sup>39</sup> a case from 1992. There, building on prior precedent, the Supreme Court described the standing requirement as containing three core elements.<sup>40</sup> First, the plaintiff has to have suffered an "injury in fact," which has been described as "an invasion of a legally protected interest" that is both "concrete and particularized," and "actual or

---

<sup>36</sup> As the cases set forth in Part V reveal, the injury-in-fact question is central to the issue of state standing, and a discussion of all aspects of the standing inquiry is mostly beyond the scope of this Article.

<sup>37</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

<sup>38</sup> *Id.* at 560.

<sup>39</sup> *Id.* at 555.

<sup>40</sup> *Id.* at 560.

imminent” and not merely “conjectural” or “hypothetical.”<sup>41</sup> Second, there “must be a causal connection between the injury and the conduct complained of”—that is, the injury has to be traceable to the action of the defendant and not of some third party “not before the court.”<sup>42</sup> Third, it must be “likely” that the injury can be “redressed by a favorable decision” of the court.<sup>43</sup>

In addition to these three essential elements of the standing requirement, courts also identify so-called “prudential”<sup>44</sup> limitations that further narrow a litigant’s path to standing. These include that the litigant must “assert his own legal rights and interests,”<sup>45</sup> and the Supreme Court “has refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.”<sup>46</sup> Lastly, the plaintiff’s complaint must “fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”<sup>47</sup>

While some argue that the standing requirement emanates from the use of the terms “cases” and “controversies” in Article III of the U.S. Constitution, as will be described shortly, the Supreme Court also indicated that the purposes of the standing requirement include ensuring that as disputes come before the courts they are “presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”<sup>48</sup> For example, courts have rejected lawsuits that appear to present questions that place a court in the position of offering a mere “advisory opinion.”<sup>49</sup> Such lawsuits are those in which the litigants seek a ruling from a court in light of a dispute between the parties over the meaning of a statute or the legality of a particular practice but the dispute is, at most,

---

<sup>41</sup> *Id.* (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>42</sup> *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

<sup>43</sup> *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

<sup>44</sup> *Id.* at 560.

<sup>45</sup> *Whitmore*, 495 U.S. at 161 n.2 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

<sup>46</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (citation omitted).

<sup>47</sup> *Id.* (footnote omitted) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

<sup>48</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>49</sup> *See, e.g., Lujan*, 504 U.S. at 598 n.4 (Blackmun, J., dissenting) (noting one of the purposes of the standing doctrine is to prevent federal courts from issuing advisory opinions); *Muskrat v. United States*, 219 U.S. 346, 352–60 (1911) (describing origins of the prohibition on judicial advisory opinions).

theoretical in nature and has not manifested itself in an actual conflict other than one over terms, meanings, and definitions. Some of the concerns in such settings include that courts might venture into waters more appropriately left to other branches by the Constitution<sup>50</sup> or that the parties are not necessarily in an adversarial position, and, as a result, they may not present the arguments as zealously as they might had they had an actual stake in the outcome<sup>51</sup>—a concern that often results from being in a position to present no more than theoretical concerns about the consequences of challenged practices.

Furthermore, the standing requirement “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>52</sup> It “reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order,”<sup>53</sup> and rejects efforts to use the federal courts to serve as “no more than a vehicle for the vindication of the value interests of concerned bystanders”<sup>54</sup> and as “publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding.”<sup>55</sup> In this way, the “‘cases and controversies’ language of [Article] III” should have the effect of “foreclose[ing] the conversion of courts of the United States into judicial versions of college debating forums.”<sup>56</sup>

By protecting the “autonomy [of parties] . . . most directly affected by a judicial order,”<sup>57</sup> then, in addition to protecting the courts’ jurisdiction, resources, and reputation, the standing requirement also has a component of litigant self-determination to it—that is, the requirement places “the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.”<sup>58</sup> The distinction described in the first of the prudential limitations—that

---

<sup>50</sup> See *Morrison v. Olson*, 487 U.S. 654, 678 (1988).

<sup>51</sup> See *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (requiring party before the court have a sufficient stake in the outcome and be in a position to present the issues with “adversarial zeal”).

<sup>52</sup> *Valley Forge Christian Coll.*, 454 U.S. at 472.

<sup>53</sup> *Id.* at 473.

<sup>54</sup> *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973).

<sup>55</sup> *Valley Forge Christian Coll.*, 454 U.S. at 473.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

courts are less willing to allow litigants to press the rights of others as opposed to those of themselves—has an aspect of this notion of “standing as self-determination” to it.<sup>59</sup>

That a litigant must assert his or her own interests, and, by extension, his or her own injuries, is embodied in the *Lujan* decision, an opinion by Justice Scalia, with a concurring opinion by Justice Kennedy.<sup>60</sup> In *Lujan*, the plaintiffs were environmental groups challenging the Environmental Protection Agency’s (EPA) interpretation of the Endangered Species Act (ESA) that it should not be applied extraterritorially.<sup>61</sup> The groups were asserting the rights of their members and alleging that the lack of extraterritorial reach of the ESA meant that actions abroad that the groups wanted covered by the Act increased “the rate of extinction of endangered and threatened species.”<sup>62</sup> The *Lujan* Court recognized that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing.”<sup>63</sup> The Court went on, however, to state that the “injury-in-fact” test required “more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”<sup>64</sup> In order to do this, the Court stressed, the respondents would have to “submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be

---

<sup>59</sup> For a discussion of the role of self-determination as a justification for standing doctrine, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 310–15 (1979). *But see* Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1724 (1980) (critiquing the notion that self-determination as a justification for standing doctrine is sufficient to foreclose actions by a public interest litigant).

<sup>60</sup> *See Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Justice Scalia wrote the majority opinion, the critical portions of which, those that related to the failure of the respondents to have alleged sufficient injury in fact to afford them standing, was joined by Chief Justice Rehnquist, Justices White, Thomas, Kennedy, and Souter. Kennedy authored a concurring opinion with respect to that portion of the majority opinion, in which Souter joined. Justice Stevens concurred in the judgment only. Justice Blackmun filed a dissenting opinion that Justice O’Connor joined. *Id.* at 556.

<sup>61</sup> *See id.* at 585–88 (Stevens, J., concurring) (discussing the issue of the extraterritorial reach of the ESA).

<sup>62</sup> *Id.* at 562.

<sup>63</sup> *Id.* at 562–63 (citing *Sierra Club*, 405 U.S. at 734).

<sup>64</sup> *Id.* at 563 (citing *Sierra Club*, 405 U.S. at 734–35).

‘directly’ affected apart from their ‘special interest’ in th[e] subject.”<sup>65</sup>

The plaintiffs submitted affidavits that purported to allege injuries to individual members of the plaintiff-organization. Those affidavits stated that members of the organization visited sites where federal funds were being used on projects in India and Egypt that would affect the habitats of already endangered species.<sup>66</sup> The Scalia opinion would complain, however, that, by failing to make any showing that the affiants had any specific plans to visit the sites of these projects in the future, their affidavits failed to establish any concrete injury to the members’ interests.<sup>67</sup> Thus, the affidavits “plainly contain[ed] no facts . . . showing how damage to the species will produce ‘imminent’ injury to” the members.<sup>68</sup> Indeed, the opinion would continue, “the affiants’ profession of an ‘inten[t]’ to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough” to

---

<sup>65</sup> *Id.* The Court also referenced the leading case to address the issue of when a group may assert the rights of its individual members, which put the plaintiff organization in the position of bringing suit on behalf of those members, assuming those individual members were, themselves, harmed in some way by the challenged action or inaction at the center of the suit. *Id.* (citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)).

<sup>66</sup> *See id.* The Court highlighted the fact that the Court of Appeals “focused on the affidavits of two Defendants’ members—Joyce Kelly and Amy Skilbred.” *Id.* The allegations with respect to Ms. Kelly were that

she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,” and that she “will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt’s . . . Master Water Plan.”

*Id.* (citation omitted). The allegations with respect to Ms. Skilbred were that she “traveled to Sri Lanka in 1981 and ‘observed th[e] habitat’ of ‘endangered species such as the Asian elephant and the leopard’ at what is now the site of the Mahaweli project funded by the Agency for International Development (AID) . . .” *Id.* (citation omitted). The Court noted that “although she ‘was unable to see any of the endangered species;’ ‘this development project,’ she continued, ‘will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited[,] . . . [which] may severely shorten the future of these species’ . . .” *Id.* (citation omitted). According to Skilbred, that threat “harmed her because she ‘intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.’” *Id.* The Court also referenced the deposition of Ms. Skilbred in which she admitted that she had no current plans to return to Sri Lanka, but only hoped to “in the future.” *Id.* at 564.

<sup>67</sup> *Id.* at 563–65.

<sup>68</sup> *Id.* at 564.

establish standing.<sup>69</sup> As the majority opinion found, “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”<sup>70</sup>

The majority opinion also shot down other theories on similar grounds, including what was called the “animal nexus” approach, “whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the ‘vocational nexus’ approach, under which anyone with a professional interest in such animals can sue.”<sup>71</sup> Justice Scalia was not moved by either, stating as follows:

It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.<sup>72</sup>

Justice Kennedy’s concurring opinion, with which Justice Souter joined, endorsed the majority’s view of injury in fact, even while recognizing that the formalist approach to injury might appear “trivial.”<sup>73</sup> As Justice Kennedy wrote:

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return . . . this is not a case where it is reasonable to assume that the affiants will be using the sites on a

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (footnote omitted) (citation omitted).

<sup>71</sup> *Id.* at 566.

<sup>72</sup> *Id.* at 567. As the majority opinion would explain:

Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic exercise in the conceivable,” but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist.

*Id.* at 566–67 (citations omitted).

<sup>73</sup> *Id.* at 579 (Kennedy, J., concurring).

regular basis, nor do the affiants claim to have visited the sites since the projects commenced.<sup>74</sup>

Although the *Massachusetts v. EPA* decision, discussed in Part IV, established somewhat new standing doctrine for state plaintiffs, *Lujan* serves as the pivotal opinion in standing jurisprudence more generally, setting the course taken by the federal courts for the ensuing twenty-five years. As it turns out, the formalism of the injury-in-fact analysis as it played out in the Court's opinion, containing the requirement that members of the plaintiff-group have a definite plan to visit the allegedly affected area, is consistent with the trend in the doctrine as it was evolving at the time. As the following discussion shows, this search for private harms even in public cases actually predates *Lujan*, yet it was not inevitable. A deeper review of the Court's precedents leading up to *Lujan*, however, reveals that standing doctrine evolved over nearly a century (at least), and, as subsequent Parts explain, seems to be evolving even more, especially with respect to the standing of state governments as litigants. The next subpart traces the historical evolution of standing doctrine, revealing that the Court's *Lujan* decision was but one part of a far longer jurisprudential story.

---

<sup>74</sup> *Id.* (citation omitted). In addition, this concurrence supported the notion of so-called "statutory standing": i.e., that Congress can create rights, and afford standing to sue, in areas not recognized by a more traditional or formal approach to the injury in fact requirement:

As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of *Marbury* suing Madison to get his commission, or *Ogden* seeking an injunction to halt *Gibbons'* steamboat operations. In my view, 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, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation."

*Id.* at 580 (citations omitted).

*B. Injury in Fact: Constitutional Requirement or Trivial Formality?*

In addition to Justice Kennedy’s possible unease over the fact that the deficiency in plaintiffs’ allegations in *Lujan*—that they had not purchased a plane ticket to visit one of the identified sites—might “seem trivial,”<sup>75</sup> in a dissenting opinion by Justice Blackmun and joined by Justice O’Connor, this idea that the plaintiffs needed to have shown that they had concrete plans to visit the projects allegedly affected by government inaction was “an empty formality.”<sup>76</sup> For Justice Blackmun, “[n]o substantial barriers prevent[ed] [the plaintiff-group’s members] from simply purchasing plane tickets to return to the Aswan and Mahaweli projects.”<sup>77</sup> Constitutional law scholar Cass Sunstein expressed skepticism over the Court’s narrow view of the injury-in-fact requirement, sharing Justice Blackmun’s characterization, referring to the approach as it evolved into its embodiment in *Lujan* as an example of “unnecessary formalism”<sup>78</sup> and an injection of “common law conceptions of harm into the Constitution”<sup>79</sup> that are “a product of courts’ value-laden judgments.”<sup>80</sup>

For some, the requirement that the injury-in-fact component of the standing inquiry incorporates common law conceptions of harm can be traced to the meaning of the “cases” and “controversies” language of Article III of the U.S. Constitution. Justice Frankfurter made this argument explicitly and succinctly in his concurring opinion in *Joint Anti-Fascist Refugee Commission v. McGrath*.<sup>81</sup> There, he argued that the case and controversy requirement of Article III

mean[s] that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.<sup>82</sup>

---

<sup>75</sup> *Id.* at 579.

<sup>76</sup> *Id.* at 592 (Blackmun, J., dissenting).

<sup>77</sup> *Id.*

<sup>78</sup> Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 203 (1992).

<sup>79</sup> *Id.* at 167.

<sup>80</sup> *Id.*

<sup>81</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149–57 (1951) (Frankfurter, J., concurring).

<sup>82</sup> *Id.* at 150.

Consistent with this view of standing, only individuals who are the “objects” of government actions that have invaded a common law or statutory right are afforded standing to sue to remedy such an invasion. Despite some concerns among the courts and commentators with respect to this overly formalistic view of the injury-in-fact requirement, in subsequent Supreme Court opinions, even in those cases where plaintiffs are found to have had standing, the Court routinely analyzes whether the plaintiffs have alleged that they have suffered an individualized and particularized harm.<sup>83</sup>

But the criticisms of the injury-in-fact component of the standing requirement are not the only ones lobbed against standing doctrine as it has evolved in the contemporary era. Writing as a law professor, and even before the *Lujan* opinion, now Judge William Fletcher argued as follows:

standing is . . . formulated at a high level of generality and applied across the entire domain of law. In individual cases, the generality of the doctrine often forces us to leave unarticulated important considerations . . . . This consequence is obvious in the apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine.<sup>84</sup>

Similarly, Richard Pierce argued that “the doctrines that purport to govern standing disputes are sufficiently malleable to allow the Justices to use them as tools to further their ideological agendas.”<sup>85</sup>

One of the most important criticisms of standing doctrine is that it simply has no direct support in the Constitution; thus, it is a judicial construct. Indeed, Justice Scalia’s opinion in *Lujan* opens the standing discussion by describing the doctrine as having evolved “over the years.”<sup>86</sup> This “constitutionally irreducible minimum,” it turns out, appears mostly a product of jurisprudence over the last 100 years, at most, emerging in cases in the last 50 years.

---

<sup>83</sup> See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185–89 (2000) (holding individuals who personally used area threatened by potential discharge from wastewater treatment facility in violation of Clean Water Act had standing to challenge such conduct); *Fed. Election Comm’n v. Aikins*, 524 U.S. 11, 13–14 (1998) (holding plaintiffs who suffered direct injury by not having information about donors to political action committee had standing to seek disclosure of such information where required by statute).

<sup>84</sup> William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

<sup>85</sup> Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999).

<sup>86</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Sunstein identified five eras of standing doctrine, and I will use these eras to organize my own discussion of the evolution of standing doctrine “over the years.” In reality, though, it is more like four eras, given that Sunstein finds, and this is difficult to refute, that in the first era, from the founding of the American republic to the 1920s, there does not seem to be any evidence of a standing requirement. That is, there is little in the way of precedent that requires that one seeking to invoke the powers of the courts must assert that he or she is suffering a direct injury as opposed to an injury to someone else, nor was there one in the courts of England preceding the forming of the new American nation. During that era, in both the state and federal courts, there is no evidence that individuals could not bring actions if they were not the victims of a particular defendant’s conduct and had not suffered a direct injury. Noting the regularity with which litigants in state courts brought actions on behalf of others, following the tradition of the English courts, Sunstein finds “no reason to think that the American practice was more restrictive than that in England.”<sup>87</sup>

For example, on the national level, congressional support for *qui tam* actions and informer suits, and the courts’ recognition of writs like prohibition, which were all instances where litigants sued to restrain actions that did not cause direct harm to them, meant that federal courts ended up entertaining suits without requiring a distinct injury to the plaintiffs before them.<sup>88</sup> The *qui tam* and informer actions in particular, for Sunstein, “seem to be powerful evidence against the claim that an injury in fact is an Article III requirement.”<sup>89</sup> He argues further that “[t]here is no affirmative evidence of a requirement of a ‘personal stake’ or an ‘injury in fact’—beyond the genuine requirement that some source of law confer a cause of action.”<sup>90</sup> Stephen Winter described these types of actions during this period as follows:

Characterized neither by the private rights model of the seven common law forms of action nor by the “injury-in-fact” paradigm of modern standing doctrine, these matters took forms astonishingly similar to the “standingless” public action or “private attorney general” model that modern standing law is designed to thwart.<sup>91</sup>

---

<sup>87</sup> Sunstein, *supra* note 78, at 173.

<sup>88</sup> *Id.* at 173–77.

<sup>89</sup> *Id.* at 177.

<sup>90</sup> *Id.* at 178.

<sup>91</sup> Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988).

Following this early period in the nation's history, doctrines that limited access to the courts, like standing, appear to have emerged in Sunstein's second era, which begins in the wake of the Great Depression, in the shadow of the expansion of the federal government's role in economic life through the enterprise of the New Deal. Justices Brandeis and Frankfurter, in their desire to insulate such federal intervention from suits to enjoin them, sought to draw some limits on the rights of litigants to challenge federal action; hence the emergence of standing doctrine among other similar, judicially constructed tools for limiting judicial review of legislative and administrative action.<sup>92</sup>

Sunstein's third period of standing doctrine's development follows the enactment of the Administrative Procedure Act (APA) in 1946.<sup>93</sup> This statute authorizes judicial relief to anyone "suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ."<sup>94</sup> In the regime ushered in by the APA, Sunstein argues, there was "standing for people whose common law or statutory interests were at stake, as well as for people expressly authorized to bring suit under statutes other than the APA."<sup>95</sup> Under this approach, "the principal question, for purposes of standing, was whether the law had conferred a cause of action. Injury in fact was neither a necessary nor a sufficient element."<sup>96</sup>

The fourth stage in the standing doctrine evolution occurs in the period spanning the early 1960s through the mid-1970s, and it is here where the injury-in-fact requirement appears to have arisen, emerging in the opinion *Association of Data Processing Service Organizations v. Camp*.<sup>97</sup> There, a group of data processing service agencies challenged a ruling by the Comptroller of the Currency that banks could enter into the field of data processing and infringe on the

---

<sup>92</sup> Sunstein, *supra* note 78, at 179–80. For examples of the Frankfurter and Brandeis jurisprudence on some of these issues, see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring). On the intellectual origins of the concept of "judicial self-restraint," see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012).

<sup>93</sup> 5 U.S.C. § 551 (2012).

<sup>94</sup> 5 U.S.C. § 702 (2012).

<sup>95</sup> Sunstein, *supra* note 78, at 182.

<sup>96</sup> *Id.*

<sup>97</sup> See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

plaintiffs' market.<sup>98</sup> There too, in an opinion by Justice Douglas, the Court found that “[g]eneralizations about standing to sue are largely worthless as such,”<sup>99</sup> yet identified what it saw as the constitutional source of the standing doctrine, that is, the cases and controversies requirement of Article III of the Constitution. Thus, the Court found that it could make at least one generalization about standing: i.e., that “the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’”<sup>100</sup> Quoting *Flast v. Cohen*, the Court concluded that “[i]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”<sup>101</sup>

Douglas’s opinion embraces the notion that the standing doctrine emanates from the Article III pronouncement that the “judicial power” extends to cases and controversies “historically viewed” as appropriate for resolution in the courts. These are those situations described in the Constitution, like “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,” and “Controversies to which the United States shall be a Party.”<sup>102</sup> But this is not the only purpose that has been articulated for the standing doctrine.

In addition to the cases and controversies argument, as Judge Fletcher explained, “[t]he stated purposes and black-letter doctrine of standing” include ensuring that the courts adjudicate disputes between litigants that are “truly adverse.”<sup>103</sup> This means they are “likely to present the case effectively,” making sure those “most directly concerned” with a dispute “are able to litigate the questions at issue.”<sup>104</sup> This helps to make the court aware of “the consequences of its decisions” and “prevent[s] the anti-majoritarian federal judiciary

---

<sup>98</sup> *Id.* at 151–53.

<sup>99</sup> *Id.* at 151.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 151–52 (alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 101 (1968)).

<sup>102</sup> U.S. CONST. art. III, § 2.

<sup>103</sup> Fletcher, *supra* note 84, at 222 (citations omitted).

<sup>104</sup> *Id.* (footnote omitted).

from usurping the policy-making functions of the popularly elected branches.”<sup>105</sup>

In *Data Processing*, the Court held that the plaintiffs were aggrieved by agency action because their economic interests were affected by the Comptroller’s decision to allow banks to compete in their market.<sup>106</sup> For the Court, this was a cognizable injury for the purposes of the standing inquiry, satisfying the “first question” for standing purposes: “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”<sup>107</sup>

The plaintiffs in *Data Processing* alleged that government action harmed their economic interests directly, as opposed to merely permitting a competitor to get away with something, which might have enabled a court to see this as a “competitor lawsuit,” the type that the Court had rejected in the past.<sup>108</sup> In *Data Processing*, the Court distinguished a prior decision, *Tennessee Electric Power Co. v. TVA*, which held that a party did not have standing “unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”<sup>109</sup> Recognizing that such an analysis “goes to the merits,” the Court in *Data Processing* declared that the determination of whether a party has standing “is different.”<sup>110</sup> Such an analysis, “apart from the ‘case’ or ‘controversy’ test,” asks “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>111</sup> And the interest in question, “may reflect ‘aesthetic, conservational, and recreational’ as well as economic values.”<sup>112</sup> The Court explicitly referenced what it called “noneconomic values” in order to “emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here,” noting that “[c]ertainly he who is ‘likely to be

---

<sup>105</sup> *Id.* (citations omitted).

<sup>106</sup> *Data Processing*, 397 U.S. at 153–56.

<sup>107</sup> *Id.* at 152.

<sup>108</sup> *See, e.g., Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 136–40 (1939) (rejecting competitor suit against entry of government-authorized actor into market for generation and sale of electricity).

<sup>109</sup> *Id.* at 137–38.

<sup>110</sup> *Data Processing*, 397 U.S. at 153.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 154 (citations omitted).

financially' injured, may be a reliable private attorney general to litigate the issues of the public interest in the present case."<sup>113</sup>

Despite the apparently expansive view of the types of injuries a court might recognize as satisfying the injury-in-fact component of the standing inquiry, the fact remains that the Court did inject this requirement into that inquiry. Yet, as Sunstein asks, "[w]hat was the source of the injury-in-fact test?" and "[d]id the Supreme Court just make it up?"<sup>114</sup> His answer: "[B]asically yes."<sup>115</sup> He traces the sources of the injury-in-fact test to an administrative law treatise by Kenneth Culp Davis,<sup>116</sup> where the author interpreted the meaning of the APA's "adversely affected or aggrieved" language, claiming that anyone who is adversely affected is one who has suffered an injury "in fact."<sup>117</sup>

But it is here where we see an apparent liberalization of standing doctrine. At this point in its evolution, the doctrine would appear to move beyond common law principles, as seen in the Court's departure from the *Tennessee Valley* view of standing. There, standing was limited to those who have suffered common law injuries. At the same time, even though the doctrine evolves, it still deploys a similar, formalistic view of injury by relying on a litigant's ability to identify some injury in fact.<sup>118</sup> Indeed, even while recognizing a shift in the law during the time frame in which the *Data Processing* decision was issued, and despite the notion that the injury-in-fact requirement finds little early support in the case law before *Data Processing*, just three years after reaching that decision, the Court pronounced its fealty to the notion that a plaintiff may assert only an injury to him or herself.<sup>119</sup> Noting that "the law of standing has been greatly changed in the last 10 years," the Court noted that it has "steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing," plaintiffs in the federal courts "must allege some threatened or actual injury resulting

---

<sup>113</sup> *Id.* (citation omitted).

<sup>114</sup> Sunstein, *supra* note 78, at 185.

<sup>115</sup> *Id.* For the argument that standing's requirements are rooted in long-standing constitutional jurisprudence, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004).

<sup>116</sup> KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

<sup>117</sup> Sunstein, *supra* note 78, at 186 (citing DAVIS, *supra* note 116, § 22.02, at 211–13).

<sup>118</sup> *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–56 (1970).

<sup>119</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

from the putatively illegal action before a federal court may assume jurisdiction.”<sup>120</sup>

Such a view would appear to run counter to the ethos of the New Deal and the post-New Deal eras, with their expansion of the federal government’s role in protecting rights and carrying out important governmental functions. It draws an unnecessary distinction between interests (common law on the one hand and statutory on the other) precisely at a time when Congress and the executive branch were seeking to expand interests to protect both common law rights and new claims based on statutorily created interests alone. Indeed, even in a case that appeared to recognize the possibility of statutorily created rights, the endorsement of the injury-in-fact standard and all it has come to represent appears as a departure from the New Deal expansion of rights and interests, the very protection of which, ironically, was to serve as the impetus for standing doctrine. The distinction between objects of legislation and beneficiaries of it, and the expansive view of who had standing to sue, would be undermined by the continuing reliance on more formalistic views of the injury-in-fact requirement.<sup>121</sup>

In order for the courts to act in accordance with the new, expansive view of the federal government’s role in protecting rights, a restrictive approach toward access to the courts had to be replaced by one that recognized new interests and those interests should have “receive[d] no less protection than the interests traditionally protected by the common law.”<sup>122</sup> Such an effort would make no distinctions between the objects of legislation and those who were supposed to benefit from it. It was supposed to have served as a rejection of a private law model of standing and an embrace of a public law model; one that

---

<sup>120</sup> *Id.*

<sup>121</sup> As Sunstein explains:

[W]e might understand the grant of standing to regulatory beneficiaries as a broad judicial effort to adapt administrative law to the principles and aspirations of the modern state. The New Deal reformation of the American legal system would ultimately make it impossible and indeed hubristic for courts to say that the “objects” of regulation, equipped with common law interests, would receive greater protection than the beneficiaries, equipped with statutory interests. The New Deal had itself been a wholesale attack on the idea that common law interests deserved special constitutional status. Under the New Deal view, the common law was a regulatory system that should be evaluated pragmatically, in terms of whether it served human liberty and welfare. When it failed to do so, the system had to be supplemented or replaced.

Sunstein, *supra* note 78, at 187 (footnote omitted).

<sup>122</sup> *Id.*

looked beyond traditional common law interests, vindicated those rights protected by the modern state, expanded the sphere of interests—and individuals—to be protected, and strengthened the ability of the courts to serve as a platform for the protection of such interests and individuals.

In his dissent in *Flast v. Cohen*, Justice Harlan recognized this distinction between private and public litigants, yet noted the long-recognized practice of the courts to entertain causes of action brought by representative parties (whom he calls “non-Hohfeldian plaintiffs”),<sup>123</sup> and not just those who were able to show some discrete and individualized injury.<sup>124</sup> The dissent stressed that “the rights and interests of taxpayers who contest the constitutionality of public expenditures are markedly different from those of ‘Hohfeldian’ plaintiffs, including those taxpayer-plaintiffs who challenge the validity of their own tax liabilities.”<sup>125</sup> Such litigants are “indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike.”<sup>126</sup> At the same time, however, “suits brought by non-Hohfeldian plaintiffs” are not “excluded by the ‘case or controversy’ clause of Article III of the Constitution from the jurisdiction of the federal courts.”<sup>127</sup> As Harlan would argue, “[t]his and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest.’”<sup>128</sup>

Justice Harlan was referring to the entreaty of Louis Jaffe, that courts are not limited to entertaining suits by just those pressing their own direct legal interests. As Jaffe would write, “[t]here is nothing in our experience or in our understanding of human nature which shows that [non-Hohfeldian] plaintiffs will not be effective advocates.”<sup>129</sup> He would add that “[c]itizen participation” through, among other

---

<sup>123</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20–25 (1913–1914) (recognizing rights as emerging from relations between parties).

<sup>124</sup> *Flast v. Cohen*, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).

<sup>125</sup> *Id.* at 119 (footnote omitted).

<sup>126</sup> *Id.* at 119–20.

<sup>127</sup> *Id.* at 120.

<sup>128</sup> *Id.* (citations omitted).

<sup>129</sup> Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1043 (1968).

things, the bringing of litigation “is not simply a vehicle for minority protection, but a creative element in government and lawmaking.”<sup>130</sup>

As Sunstein argues, any resistance to move beyond the recognition of just common law interests represents a “private law model of standing,” which is “the idea that standing should be reserved principally to people with common law interests and denied to people without such interests.”<sup>131</sup> It represents a “*Lochner*-like conception of public law,” which “defines modern public law by reference to common law principles that appear nowhere in the Constitution.”<sup>132</sup> For Sunstein, “[w]hether an injury is cognizable, however, should not depend on its familiarity or its common law pedigree . . . .”<sup>133</sup> To do so would “represent a conspicuous reintroduction of *Lochner*-era notions of substantive due process.”<sup>134</sup> Instead, “[w]hether an injury is cognizable should depend on what the legislature has said, explicitly or implicitly, or on the definitions of injury provided in the various relevant sources of positive law.”<sup>135</sup>

The fifth stage of standing doctrine is best represented by the Court’s decision in *Lujan*, already discussed. Whereas the fourth stage had “witnessed a fundamental assault on the distinction between regulated objects and regulatory beneficiaries[,] . . . the Supreme

---

<sup>130</sup> *Id.* at 1045; see also Tushnet, *supra* note 59, at 1713 (arguing that “ideological plaintiffs, who usually have a reasonably adequate commitment to continuing efforts, will do a better job of representing absentees than will Hohfeldian litigants”).

<sup>131</sup> Sunstein, *supra* note 78, at 187.

<sup>132</sup> *Id.* (referencing *Lochner v. New York*, 198 U.S. 45 (1905)). Sunstein continues:

The private law model of standing is based on understandings that are not only without constitutional foundation, but that seemed to be foreclosed by democratic judgments following the New Deal. Indeed, that model seemed to draw upon the discredited view that common law and laissez-faire principles are part of the Constitution, to be deployed by unelected judges as the vehicle for the definition of a system of public law sharply opposed to modern regulatory institutions.

We can go even further. After the New Deal, the very distinction between regulatory beneficiaries and regulatory objects seemed based on a conceptual mistake. That distinction treated the common law as the normal and natural state of affairs; it saw a deviation from the common law as an intrusion on some “object,” and as a protection of some “beneficiary.” Indeed, the definition of the “object” and the “beneficiary” was parasitic on common law. But this was a way for courts to load the dice. Indeed, this understanding was no longer consistent with the practices and values of modern government.

*Id.* at 187–88.

<sup>133</sup> *Id.* at 191.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

Court has unmistakably if usually implicitly insisted on that very distinction.”<sup>136</sup>

This distinction in the jurisprudence between cases brought on behalf of individuals who are asserting their own rights, and those advanced by individuals on behalf of third parties, is articulated in scholarship on the subject, most notably an influential article written by Antonin Scalia, then a circuit court judge.<sup>137</sup> In it, Scalia argued as follows,

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*. Thus, when an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a “generalized” one.<sup>138</sup>

Scalia would contrast this “classic form of court challenge” with what he called the “increasingly frequent administrative law cases in which the plaintiff is complaining of an agency’s unlawful *failure* to impose a requirement or prohibition upon *someone else*.”<sup>139</sup> He would characterize this failure as depriving the plaintiff “as a citizen, of governmental acts which the Constitution and laws require.”<sup>140</sup> This harm, Scalia would assert, “is, so to speak, a *majoritarian* one.”<sup>141</sup> Although the plaintiff “may *care* more about it,” he or she “may be a more ardent proponent of constitutional regularity or of the necessity of governmental act that has been wrongfully omitted.”<sup>142</sup> Such an interest does not establish that the plaintiff “has been harmed distinctively—only that he assesses the harm as more grave, which is a fair subject for democratic debate in which he may persuade the rest of us.”<sup>143</sup>

---

<sup>136</sup> *Id.* at 195.

<sup>137</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

<sup>138</sup> *Id.* at 894.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

The distinction between private harms vindicated by private litigants, and more general injuries—ones that would not serve as the basis of a suit by someone in the general public—is apparent in Scalia’s writing—appearing to have made its way into the *Lujan* decision and the standing doctrine more generally. But, as the following discussion shows, there is one class of litigant who is very public, often pursues very public harms, and has done so for over a century: state governments. Indeed, as Ann Woolhandler and Michael Collins argued, “[i]n some sense . . . it is possible to view the state as an early prototype of the modern public law plaintiff.”<sup>144</sup> In the next Part, I explore the role of states as plaintiffs and the ways in which the courts have viewed their standing in suits to vindicate a range of rights—both those that may be characterized as private or proprietary rights and those that are more public in nature.

### III

#### STATE STANDING, THE PARENS PATRIAE LAWSUIT, AND PUBLIC INJURIES

States are litigants in their own rights in many contexts. They bring criminal actions in their own courts for violation of their own laws. They enforce civil protections found in state and federal law against private actors. On rare occasions, they bring actions against other states, invoking the Supreme Court’s original jurisdiction established in Article III of the U.S. Constitution.<sup>145</sup> In many of these instances, the states are vindicating either their interests as parties in a market economy, just like any other landowner, business, or enterprise, or what are considered their sovereign interests within the American federal system. The states do this to ensure their laws are faithfully executed and to preserve the power over their geographic limits, both in terms of their jurisdictional authority as well as their natural assets. In the former context, those interests are generally referred to as propriety interests. In the latter instances, states are exercising their rights within a larger, federal system. In both instances, they are protecting “first-party” interests—their own interests as institutions—whether political, economic, or both. At the same time, courts often recognize a state’s “quasi-sovereign” interest in protecting the rights

---

<sup>144</sup> Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 464 (1995).

<sup>145</sup> U.S. CONST. art. III, § 2.

of the citizens of that state. In this way, a state may pursue such interests in a third-party capacity, in a *parens patriae* action.

Although states had sued each other by invoking the Supreme Court's original jurisdiction for centuries, this third-party approach—*parens patriae* meaning “parent of the country”<sup>146</sup>—was first recognized by the Supreme Court in 1900.<sup>147</sup> In the case *Louisiana v. Texas*, the state of Louisiana brought an action against Texas to protect commerce coming from the port of New Orleans that was subject to a quarantine in Texas, which harmed the interests of businesses that moved products through that port.<sup>148</sup> Although the Court rejected the suit because Louisiana failed to properly invoke the original jurisdiction of the Court in actions between states, the Court recognized the right, for the first time, of a state to sue in a third-party/*parens patriae* capacity on behalf of its citizens.<sup>149</sup> The Court explained that the case was not “an action by a private person.”<sup>150</sup> Rather, Louisiana had presented “herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.”<sup>151</sup> Indeed, Louisiana was not asserting its own rights, over its own property or interests, the Court would find, but, instead “the matters complained of affect[ed] her citizens at large.”<sup>152</sup> As a result, the Court would not entertain the suit as one between states, which would have warranted the exercise of the Court's original jurisdiction.

Despite rejecting the suit, the Court did not necessarily reject the notion that the state could bring an action generally, not invoking that original jurisdiction, in a third-party capacity.<sup>153</sup> The problem for Louisiana was that the Court could not entertain the suit sitting in its limited capacity as a court of first—and last—resort, finding “in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another.”<sup>154</sup>

---

<sup>146</sup> *Parens Patriae*, BLACK'S LAW DICTIONARY (5th ed. 1979).

<sup>147</sup> See *Louisiana v. Texas*, 176 U.S. 1 (1900).

<sup>148</sup> *Id.*

<sup>149</sup> See *id.* at 19.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 22–23.

<sup>154</sup> *Id.* at 22.

This recognition of a state's authority to vindicate the rights of its citizens through the *parens patriae* authority can be traced to the English common law, which recognized a right held by the King to represent those who might be perceived as not being able to represent themselves.<sup>155</sup> These functions were ultimately assumed by the states after the formation of the United States. The authority has shifted to reach beyond the power to simply stand in for those less able to represent themselves and has been extended to the authority to represent all of a state's citizens.<sup>156</sup>

Several years after *Louisiana*, the Court again made a distinction between cases in which a state could invoke the original jurisdiction of the Supreme Court and those in which it could not, but expanded the contours of the *parens patriae* authority by recognizing a "quasi-sovereign" interest in protecting the environment of a state. In *Georgia v. Tennessee Copper Co.*, the Court noted that the case had been "argued largely as if it were one between two private parties," although it was not a case of that nature.<sup>157</sup> Indeed, as the Court found, "[t]he very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here."<sup>158</sup> The State owned "very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small."<sup>159</sup> Instead, the case was one in which the State was suing over an "injury to it in its capacity of quasi-sovereign" and "[i]n 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."<sup>160</sup>

This apparent reticence to blend *parens patriae*—admittedly third-party standing—with the Court's original jurisdiction seems to evaporate completely by the late 1940s. During this time, the Court

---

<sup>155</sup> See *Hawai'i v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (describing tradition of the *parens patriae* power deriving from the English common law where the king had the "power as guardian of persons under legal disabilities to act for themselves").

<sup>156</sup> See, e.g., Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. L. REV. 193, 197 (1970–1971) (describing origins of the *parens patriae* power); Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1078–79 (1977) (same).

<sup>157</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

elided the state's capacity to sue in its own right, invoking the original jurisdiction of the Court, with its capacity to sue to prevent harms on behalf of its citizens.<sup>161</sup> In *Georgia v. Pennsylvania Railroad Co.*, the Court found that Georgia "as a representative of the public" was complaining about a wrong, which, it was alleged, "limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States."<sup>162</sup> Because of this, the Court found that these were "matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."<sup>163</sup> That interest, the Court would go on to say, was "not remote," it was "immediate."<sup>164</sup> If the Court were to deny Georgia "as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the statute of minor or conventional controversies."<sup>165</sup> The Court concluded that there was "no warrant for such a restriction."<sup>166</sup>

Just as the Court vacillated between whether or not it should recognize a state's ability to bring an action before the Supreme Court sitting as a court of original jurisdiction when it was asserting third-party standing or first-party standing, it also appears to have placed less emphasis on requiring that states allege harms to their own, direct interests (as landowners and direct participants in the economy), as opposed to invoking more general harms, such as harms to the environment.<sup>167</sup> That is, in these cases, invoking both *parens patriae* standing and the right to pursue claims before the Supreme Court sitting in its original jurisdiction, states stressed—and the Court recognized—harms that can be characterized as violations of public rights as opposed to those that threatened mere private and proprietary interests. Indeed, in *Georgia v. Tennessee Copper Co.*, while recognizing that the state of Georgia suffered direct harm to its proprietary interests, this harm was of much less importance to the Court: "The alleged damage to the state as a private owner is merely a

---

<sup>161</sup> See *supra* text accompanying notes 145–55.

<sup>162</sup> *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 451 (1945).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (emphasis added).

<sup>166</sup> *Id.*

<sup>167</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads.”<sup>168</sup>

This “makeweight” language appears elsewhere as well, indicating the Court did not feel such private law allegations were necessary when a case of clear public law import was before it. Indeed, in *Georgia v. Pennsylvania Railroad Co.*, the Court recognized that the State, in its proprietary capacity, would face injury by the anticompetitive behavior of the defendants because it was “the owner of a railroad and as the owner and operator of various public institutions” within the State.<sup>169</sup> But such injuries were far less important to the Court given what can only be described as the public law nature of the lawsuit; the Court described the important place of its original jurisdiction in the constitutional scheme and the nature of the harm at stake in the action as follows:

as in [*Georgia v. Tennessee Copper*], we treat the injury to the State as proprietor merely as a “makeweight.” The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative.<sup>170</sup>

More recently, in a case not invoking the Supreme Court’s original jurisdiction, the Court had a chance to describe the scope of a state’s *parens patriae* authority. In *Alfred L. Snapp & Son v. Puerto Rico*, the Commonwealth of Puerto Rico brought an action against Virginia-based apple growers for discriminating against Puerto Rican seasonal workers in favor of foreign workers.<sup>171</sup> The Court articulated three types of harms that a state could typically allege: first, harm to proprietary interests, like the right to payment on a debt, to collect tolls, or damage to property held by the state.<sup>172</sup> Second, harm to its

---

<sup>168</sup> *Id.*

<sup>169</sup> *Pa. R.R. Co.*, 324 U.S. at 447.

<sup>170</sup> *Id.* at 450 (footnote omitted) (citations omitted).

<sup>171</sup> *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S.592, 597–600 (1982).

<sup>172</sup> *See, e.g., Pa. R.R. Co.*, 324 U.S. at 447–52 (recognizing right of state to bring *parens patriae* action to challenge harms to quasi-sovereign interests in the health and welfare of the general economy and citizens of the state and noting that harms to state in its proprietary interest, though present and cognizable, were a mere “makeweight”) (citation omitted). *But cf. Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262–66 (1972)

“sovereign interests,” which, the Court explained, were “easily identified.”<sup>173</sup> These include “the exercise of sovereign power over individuals and entities within the relevant jurisdiction, [which] involves the power to create and enforce a legal code, both civil and criminal . . . .”<sup>174</sup> Finally, the third type of harm includes “the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.”<sup>175</sup>

The apple growers challenged the Commonwealth’s standing to bring an action on *parens patriae* grounds. They alleged that this suit involved quasi-sovereign interests: those not considered proprietary or sovereign. That would lead the Court to identify a third type of harm to a state right or interest: the “quasi-sovereign” interest.<sup>176</sup> After reviewing instances in which courts recognized state standing to assert such quasi-sovereign interests, the Court’s majority opinion summarized these holdings, expressing its understanding that the contours of the *parens patriae* power to assert such quasi-sovereign interests are expressed in precedents, if not easily or succinctly described.<sup>177</sup> In order to bring such an action, “the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest.”<sup>178</sup> These interests fall into “two general categories”: a quasi-sovereign interest “in the health and well-being—both physical and economic—of its residents in general” and “a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”<sup>179</sup>

In assessing the harms Puerto Rico alleged on behalf of its citizens, the Court noted that the defendants argued that just a small number of jobs—787—were at stake. Nevertheless, the Court thought this characterization of the harm Puerto Rico was trying to vindicate was too narrow: that what was really at issue was the fact that the commonwealth’s pursuit of its citizens’ interests went beyond the mere “economic and commercial.”<sup>180</sup> The Court recognized a “state

---

(holding state of Hawai’i could only sue to vindicate its own proprietary interests in an antitrust action).

<sup>173</sup> *Alfred*, 458 U.S. at 601.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 601–10 (discussing quasi-sovereign interests).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 607.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 609.

interest in securing residents from the harmful effects of discrimination.”<sup>181</sup> Indeed, noting the Court’s “experience with the political, social, and moral damage of discrimination,” it could not fail to “recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.”<sup>182</sup> Thus, even though fewer than 800 Puerto Rican workers were directly impacted by the policies of the Virginia apple growers involved in the lawsuit, the commonwealth’s interest in protecting its workers against the “political, social, and moral” effects of discrimination, in addition to its economic consequences, was sufficient to give it *parens patriae* standing in the action.<sup>183</sup>

Despite the broad grant to states to pursue *parens patriae* actions, it is not without limitation. The most important limitation for this discussion is that states may not bring such actions against the federal government to vindicate the federal rights of their citizens. In such cases, the power is much more circumscribed. The leading case on this issue is the Court’s opinion in the consolidated cases *Commonwealth v. Mellon* and *Frothingham v. Mellon*, where the Court rejected a suit by the state of Massachusetts and a resident thereof to annul a statutory program designed to promote childhood and maternal health by spending federal tax dollars and enlisting states in the administration of the program.<sup>184</sup> The challengers—the state, suing in its *parens patriae* capacity and invoking the original jurisdiction of the Court, and a taxpayer—sought to enjoin the administration of the program under the theory that it constituted an inappropriate encroachment on state authority to address the health and wellbeing of its citizens.<sup>185</sup> With respect to the *parens patriae* power of the states, the Court found that it did not extend to actions against the federal government to enforce federal rights.<sup>186</sup> “[T]he citizens of Massachusetts are also citizens of the United States,” the Court found.<sup>187</sup> Thus, “a State, as *parens patriae*,” may not “institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”<sup>188</sup> States have no “duty or power to

---

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 609–10.

<sup>184</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 478–80 (1923).

<sup>185</sup> *Id.* For a description of the *Frothingham* case, see JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 279 (1989).

<sup>186</sup> *Mellon*, 262 U.S. at 485–86.

<sup>187</sup> *Id.* at 485 (emphasis added).

<sup>188</sup> *Id.*

enforce their rights in respect of their relations with the Federal Government.”<sup>189</sup> Instead, “[i]n that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.”<sup>190</sup>

Beyond the mere issue of the scope of the states’ *parens patriae* power, the Court also laid the groundwork for the standing doctrine more broadly, beyond cases in which states serve as plaintiffs. The Court required that in order to invoke judicial intervention, at least in actions to challenge the constitutionality of a federal statute, a plaintiff must establish what can only be described as a distinct injury by virtue of the action challenged. The party seeking relief from the courts must be able to show not just that the statute challenged was unconstitutional but also that the plaintiff had “sustained or is immediately in danger of sustaining some direct injury” flowing from that violation “and not merely that he suffers in some indefinite way in common with people generally.”<sup>191</sup>

The bar against states suing the federal government under their *parens patriae* authority is not complete, however, as courts have permitted states to bring suits in several settings. The most prevalent setting, which largely exposes many of the functions of the modern federal government—sprawling, bureaucratic, corporatized—to suit by state actors, is that courts have recognized the ability of states to bring *parens patriae* actions against federal *agencies* for violation of federal *law*. Representative of this type of action is *Abrams v. Heckler*.<sup>192</sup> There, New York State’s Attorney General and its Insurance Commissioner brought a declaratory judgment action on behalf of the state of New York in its *parens patriae* capacity to declare that the Secretary of the U.S. Department of Health and Human Services (HHS) exceeded her statutory authority when she promulgated a rule that would have increased auto insurance premiums for Medicare recipients in New York State. That rule would no longer permit insurance carriers under state law to allow such recipients to have Medicare pay for injuries sustained in auto accidents before the insurer became liable to pay for them. The plaintiffs alleged that the HHS rule was contrary to the federal statute

---

<sup>189</sup> *Id.* at 486.

<sup>190</sup> *Id.* (emphasis added) (citation omitted).

<sup>191</sup> *Id.* at 488.

<sup>192</sup> *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984).

governing the interplay between medical insurance and auto insurance.<sup>193</sup> They also alleged that the State was harmed directly and in its own capacity because the rule would make it more difficult for State officials to carry out their responsibilities. The rule, it was alleged, “interfere[d] with [the plaintiffs’] ability to discharge their obligation to protect the interests of New York’s elderly and disabled car owners.”<sup>194</sup> The *Abrams* court ultimately found New York state officials could sue both as representatives of the state as *parens patriae* and for the direct harm to the state officials because the HHS rule would make their ability to carry out their official obligations more difficult.<sup>195</sup>

Similarly, the Ninth Circuit found that the Washington Utilities and Transportation Commission (WUTC), a Washington state agency charged with overseeing rates for telecommunications providers and companies from other sectors, could bring an action against the Federal Communications Commission (FCC). There, WUTC claimed that an FCC order would adversely impact telecommunications rates for consumers and make it more difficult for the WUTC to protect consumer interests.<sup>196</sup> The FCC’s order, it was alleged, contravened Congress’s will because it violated both the Communications Act of 1934<sup>197</sup> and the National Environmental Policy Act.<sup>198</sup> As in *Abrams*, the court of appeals found both that the state agency had standing in its own right, to remedy its own injury, and that the agency could sue the federal government on behalf of the people of the state of Washington, invoking the *parens patriae* power.<sup>199</sup> There, with respect to the state agency’s own interest, the court found that the plaintiff satisfied the injury-in-fact requirement of *Data Processing* “because the alleged interference with WUTC’s ability to discharge its obligation to protect the interests of Washington telephone users gives specificity and concreteness to the controversy and assures its presentation with adversarial vigor.”<sup>200</sup> Furthermore, in terms of the agency’s ability to bring the action under the state’s *parens patriae* authority, the court found that “[a] substantial portion of

---

<sup>193</sup> *Id.* at 1157.

<sup>194</sup> *Id.* at 1161.

<sup>195</sup> *Id.* at 1161–62.

<sup>196</sup> *Wash. Utils. & Transp. Comm’n v. FCC*, 513 F.2d 1142, 1146–47 (9th Cir. 1975).

<sup>197</sup> 47 U.S.C. § 214 (2012).

<sup>198</sup> 42 U.S.C. § 4321 (2012).

<sup>199</sup> *Wash. Utils. & Transp. Comm’n*, 513 F.2d at 1151–53.

<sup>200</sup> *Id.* at 1149.

Washington’s citizens would be affected by an increase in intrastate telephone rates . . . [and] increased rates for intrastate telephone service would inhibit communication vital to the economic and social well-being of the community as a whole.”<sup>201</sup> For these reasons, the state agency was authorized to bring an action on its own behalf, and on behalf of the citizens of the state as *parens patriae*, against the FCC.<sup>202</sup>

As this discussion attempts to show, courts have long recognized the authority of states to bring *parens patriae* actions alleging a range of harms, from what might be characterized as private ones to very public ones. Indeed, the Supreme Court appears to have expressed a preference for allegations of public harms in many state-initiated lawsuits, sometimes characterizing state injuries as “makeweight” arguments to establish what can only be described as state standing to sue. At the same time that courts have taken an expansive view of state authority to commence *parens patriae* actions, or even to sue in their own right, courts have also limited, with some exceptions, the power of the states to commence *parens patriae* actions against the federal government. While courts have developed some exceptions to the *Mellon* bar on states suing the federal government when asserting their *parens patriae* authority, in 2007, the Supreme Court weighed in on this issue quite dramatically. In that case, in the climate change arena, the Court appears to have expanded the instances in which states may sue the federal government and articulated an approach to the injury-in-fact requirement for state plaintiffs that possibly shifted the standing landscape for such public litigants. It is to that decision that I now turn.

---

<sup>201</sup> *Id.* at 1152.

<sup>202</sup> The court in *WUTC* found that other barriers to state actions against the federal government under the *parens patriae* authority were not present. As the opinion explains:

The original jurisdiction of the Supreme Court is not invoked, and the availability of a remedy need not be restricted by the necessity of husbanding that court’s limited resources. Since no state is sued, there is no threat of circumvention of the Eleventh Amendment. Since no damages are sought, there is no risk of duplicating recoveries. Since no absent persons will be barred from a remedy otherwise available if this petition is entertained, the proceeding is not subject to criticism as a substitute for a class action without its safeguards.

*Id.* at 1152–53 (footnote omitted) (citations omitted). *But cf.* *Md. People’s Counsel v. Fed. Energy Regulatory Comm’n*, 760 F.2d 318, 322 (D.C. Cir. 1985) (Scalia, J., opinion) (holding Congress has the authority to abrogate *Mellon* and authorize state standing to sue in *parens patriae* capacity to vindicate the interests of their citizens, even against the federal government).

## IV

*MASSACHUSETTS V. EPA*

The landmark decision in *Massachusetts v. EPA* has proved to be a watershed in not just climate change litigation and environmental policy, but also with respect to its holding related to state standing to sue the federal government. It has inspired conservative state governments and officials to sue the Obama administration, and now has empowered more progressive leaders to commence actions against the Trump administration.<sup>203</sup> The decision is a bit of a muddle, however, particularly as it relates to some of the Court's reasoning justifying its ultimate holding that the state of Massachusetts had standing to bring an action to direct the EPA to take certain regulatory steps regarding greenhouse gas emissions. In this Part, I will describe in detail not just the Court's majority opinion, with a particular emphasis on its injury-in-fact analysis with respect to standing and its ruling regarding the state's authority to sue the federal government, but also the dissent. The issue on which both camps seem to agree, despite the wide gulf that exists between them otherwise, is that the state of Massachusetts's argument that it was suffering a harm to its proprietary injury—that is, injury to its interests as a landowner—would be sufficient, in theory, to satisfy the injury-in-fact component of the standing analysis. This Part will then explore some of the potential ramifications of the Court's holding.

*A. The Majority Opinion**1. Background*

In *Massachusetts v. EPA*, the state of Massachusetts, other states, municipalities, and nonprofit organizations all sued the EPA to determine whether the Clean Air Act (CAA) compelled the agency to take into account and assess the impact of greenhouse gas emissions on the environment.<sup>204</sup> The plaintiffs in *Massachusetts v. EPA* asked the Court to “answer two questions” regarding the CAA: “whether EPA has statutory authority to regulate greenhouse gas emissions from new motor vehicles—and if so, whether its stated reasons for refusing to do so are consistent with the statute.”<sup>205</sup> Under the CAA,

---

<sup>203</sup> See *infra* Part V.

<sup>204</sup> *Massachusetts v. EPA*, 549 U.S. 497, 504 (2007).

<sup>205</sup> *Id.* at 505.

the EPA has the authority to regulate “air pollutants.”<sup>206</sup> The plaintiffs sought review of the fact that the EPA had chosen not to make a determination as to whether greenhouse gases were air pollutants, despite requests by several of the plaintiffs that the EPA do so.<sup>207</sup> The State plaintiffs, including the state of Massachusetts, asserted their right to bring the action in their capacity as *parens patriae*, but also because they were landowners affected by rising sea levels as a result of global warming.<sup>208</sup>

## 2. *Injury in Fact*

The majority opinion, by Justice Stevens, noted that the type of suit in question was authorized by the CAA. That is, the CAA permits a suit challenging the EPA’s failure to issue regulations regarding a particular pollutant.<sup>209</sup> The majority opinion quoted Justice Kennedy’s concurring opinion in *Lujan* at length, which referenced the broad power of Congress to confer standing for harm to a statutory or procedural interest.<sup>210</sup> This harm would arise because the EPA failed to take an administration action that the plaintiffs alleged the statute required them to take:

“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. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” We will not, therefore, “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”<sup>211</sup>

At the same time, the *Massachusetts v. EPA* majority did not ignore the *Lujan* standing elements.<sup>212</sup> It pointed out that

a litigant to whom Congress has “accorded a procedural right to protect his concrete interests”—here, the right to challenge agency action unlawfully withheld—“can assert that right without meeting all the normal standards for redressability and immediacy[.]” When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the

---

<sup>206</sup> *Id.* at 528 (citing 42 U.S.C. § 7521(a)(1) (2006)).

<sup>207</sup> *Id.* at 514.

<sup>208</sup> *Id.* at 518–22.

<sup>209</sup> *Id.* at 516.

<sup>210</sup> *Id.* at 516–17 (citations omitted).

<sup>211</sup> *Id.* (citations omitted) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

<sup>212</sup> *Id.* at 517 (citing *Lujan*, 504 U.S. at 560–61).

injury-causing party to reconsider the decision that allegedly harmed the litigant.<sup>213</sup>

Critical to the discussion of the state of Massachusetts's standing in the case, the majority found that the State met the injury-in-fact component of the standing inquiry at least in part because it owned "a substantial portion of the state's coastal property."<sup>214</sup> As a result, it had "alleged a particularized injury in its capacity as a landowner."<sup>215</sup>

The Court noted what it considered to be the "special position and interest of Massachusetts" as well as the "considerable relevance" to the standing discussion when a party bringing the action was a sovereign state.<sup>216</sup> Because of this, such a party is entitled to "special solicitude" in the standing analysis.<sup>217</sup> The majority found that, in suits such as the one before the Court, a state can have an "independent interest 'in all the earth and air within its domain.'"<sup>218</sup> This can lead a plaintiff like the state of Massachusetts to have a "well-founded desire to preserve its sovereign territory," and that desire would "support[] federal jurisdiction."<sup>219</sup>

At the same time, the Court went on to point out that Massachusetts owned "a great deal" of the coastline affected by the rising sea levels accompanying unregulated greenhouse gas emissions.<sup>220</sup> That fact, the Court held, "only reinforces the conclusion that [the State's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."<sup>221</sup>

---

<sup>213</sup> *Id.* at 517–18 (citations omitted) (first quoting *Lujan*, 504 U.S. at 572 n.7; then citing 42 U.S.C. § 7607(b)(1) (2006)).

<sup>214</sup> *Id.* at 522.

<sup>215</sup> *Id.* Although mostly beyond the scope of this Article, the Court found that the plaintiffs also met the causation and redressability components of the standing inquiry: a "reduction in domestic emissions [of greenhouse gases]" as a result of EPA action spurred by court intervention "would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 526. For an argument that courts should relax the standing requirements when states sue the federal government to "protect the health, welfare, or natural resources of their citizens," see Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1775 (2008).

<sup>216</sup> *Massachusetts*, 549 U.S. at 518.

<sup>217</sup> *Id.* at 520.

<sup>218</sup> *Id.* at 519 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

<sup>219</sup> *Id.* (alteration in original).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 519.

The Court ultimately concluded that it was “clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process.”<sup>222</sup> The Court did not, however, tease out whether it was the quasi-sovereign interests or the proprietary interests—individually or in combination—that gave rise to the finding that Massachusetts, at least, had standing. One could argue that the sovereign interests alone were sufficient and the proprietary interests merely reinforced the fact that the State had standing. Nevertheless, it would appear that the Court was asserting that the proprietary interests might be unnecessary given the quasi-sovereign interests. But, unlike in *Tennessee Copper*, where Justice Holmes stated that state proprietary interests were not at stake,<sup>223</sup> the Court’s recognition of Massachusetts’s proprietary interests would seem to suggest that even if the quasi-sovereign interests were not enough to satisfy the standing requirement, those proprietary interests would be. And this would appear to be the conclusion of the *Massachusetts* dissent, which I will take up shortly.

### 3. State Standing to Sue the Federal Government

At the invitation of the dissenters, the majority opinion also addressed the issue of state standing to sue the federal government and drew some of the distinctions outlined in the case law on this

---

<sup>222</sup> *Id.* at 521. The idea that at least the state of Massachusetts suffered a concrete injury as a result of the violation of a statutory right likely gives rise to the Court’s use of this language. For a discussion of procedural harms giving rise to standing, see Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 176 (2006) (discussing procedural injury cases). The Supreme Court also recognized procedural injuries. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”). Even Justice Scalia’s opinion in *Lujan* recognizes the viability of a plaintiff’s standing to sue for procedural harm as long as there is still a concrete injury flowing from that harm:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

*Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

<sup>223</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–40 (1907).

issue described above. The Court invoked its prior decision in *Georgia v. Pennsylvania R.R. Co.*,<sup>224</sup> to highlight the 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).”<sup>225</sup> The Court went on to point out that “Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.”<sup>226</sup> Although it appears that the Court was referring to a state suing in its *parens patriae* capacity, it also discussed whether the state was suing in a third-party role, as *parens patriae* standing is often viewed, or asserting “its rights” under federal law. And if it was the state’s own rights, what rights were at issue? Was it the quasi-sovereign rights to the land and air of the jurisdiction or those proprietary rights the Court also recognized? The Court appeared to assert that it was talking about the latter when it concluded the discussion of *parens patriae* standing against the federal government by citing the 1995 decision of *Nebraska v. Wyoming*,<sup>227</sup> which, in turn, cited *Tennessee Copper*, and permitted a state cross-claim against the federal government to assert quasi-sovereign interests in the “earth and air.”<sup>228</sup>

Based on this brief discussion of the issue of a state government’s right to sue the federal government under its *parens patriae* authority, buried in a footnote in the majority opinion, the Court made two distinctions. In identifying the first, it explained that there is a difference between seeking to shield citizens from the operation of federal law, which is what *Mellon* would appear to prohibit, and to vindicate federal statutory rights when the federal government violates them, which *Massachusetts* would appear to permit. Despite the first distinction that seems to point out that states can sue to protect against violation of federal law by the federal government (on whose behalf it is unclear), the second distinction sets forth that the rights at issue in that vindication are not those of a state’s citizens but, rather, the rights of the state itself. Indeed, the Court pointed out that the state of Massachusetts did not dispute whether the CAA applied to its citizens.<sup>229</sup> Rather, the State sought to “assert *its rights* under the

---

<sup>224</sup> *Georgia v. Penn. R.R. Co.*, 324 U.S. 439 (1945).

<sup>225</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007).

<sup>226</sup> *Id.*

<sup>227</sup> *Nebraska v. Wyoming*, 515 U.S. 1 (1995).

<sup>228</sup> *Id.* at 20 (citations omitted).

<sup>229</sup> *Massachusetts*, 549 U.S. at 520 n.17.

Act.”<sup>230</sup> While the Court went on to say that the interests at stake are the quasi-sovereign interests in earth and air, it portrayed those not in terms of the health of the citizens of the State but, rather, as interests of the State itself. Thus, the Court recognized the right of the state to bring an action against the federal government by asserting the state’s own *parens patriae* authority. This appears true even though it is not exactly clear that it is this authority that the Court relied on when it recognized the plaintiff-state’s standing to sue.<sup>231</sup> The interests that the state of Massachusetts pursued were “its rights” as opposed to the rights of its citizens. But which rights were at stake: the quasi-sovereign interests or the proprietary interests? The Court stated that the *parens patriae* power is available to the state to sue the federal government to pursue its own rights—not those of third persons. But the *parens patriae* authority is often portrayed as a vehicle for the vindication of third-party rights. By framing the interests at stake for determining whether a state could sue the federal government in its *parens patriae* capacity as those of the state itself, and not those of its citizens, the Court appears to have expanded the traditional role of the *parens patriae* authority when it allowed the state of Massachusetts to exercise it against the EPA under the CAA.<sup>232</sup>

### *B. The Dissent*

Chief Justice Roberts wrote one of two dissenting opinions, with Justices Alito, Scalia, and Thomas joining, addressing the standing

---

<sup>230</sup> *Id.* (emphasis added).

<sup>231</sup> *Id.* at 520–22.

<sup>232</sup> Although it is mostly beyond the scope of this Article, the Court’s majority opinion, in addition to recognizing the plaintiffs’ arguments with respect to injury in fact, also recognized that the harms alleged were caused by the EPA’s inaction, and court intervention would assist in redressing the harms, even though there was a somewhat attenuated chain of intervening actors and events separating the harm alleged from the defendant and any remedy the court would devise. Nevertheless, the Court found that the plaintiffs satisfied the second and third components of the standing analysis. As the Court held,

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 EPA’s denial of their rulemaking petition.

*Id.* at 526.

issue.<sup>233</sup> The Chief Justice’s dissenting opinion discusses three issues of disagreement with the majority opinion. First, it disputes the notion that states, as litigants, deserve any special treatment in the standing analysis.<sup>234</sup> Second, it argues against the ability of states to sue the federal government under a *parens patriae* theory.<sup>235</sup> Third, it appears to accept that a state’s proprietary interests could give rise to a finding of a viable injury-in-fact for the purposes of the standing inquiry but argues that even an allegation of viable proprietary interests must be supported by allegations that the injury is distinct and particularized.<sup>236</sup> Furthermore, looking beyond the injury-in-fact component of the inquiry, the Roberts dissent argued that other aspects of that analysis, namely causation and redressability, were wanting. I will describe each of these positions in turn.

First, the Roberts dissent takes issue with the notion that states should enjoy “special solicitude” when it comes to standing. “Relaxing Article III standing requirements because asserted injuries are pressed by a State,” the Chief Justice argues, “has no basis in our jurisprudence, and support for any such ‘special solicitude’ is conspicuously absent from the Court’s opinion.”<sup>237</sup> Indeed, when a state is suing in its *parens patriae* capacity, the Chief Justice states, it is not just that the Article III requirements are not relaxed, but, rather, such actions “raise an additional hurdle.”<sup>238</sup> That is, a state seeking to sue as *parens patriae* must articulate a “‘quasi-sovereign interest,’ ‘*apart* from the interests of particular private parties.’”<sup>239</sup> For these dissenting justices, “[f]ocusing on Massachusetts’s interests as quasi-sovereign makes the required showing here harder, not easier.”<sup>240</sup>

The Chief Justice’s opinion goes on to point out that the majority opinion, as described above, seems to blur the difference between whatever quasi-sovereign interest the states may possess and press and those they might hold in their proprietary capacity. “The Court asserts that Massachusetts is entitled to ‘special solicitude’ due to its

---

<sup>233</sup> *Id.* at 535 (Roberts, C.J., dissenting). A second dissenting opinion, written by Justice Scalia and joined by the Roberts’ opinion dissenters, addresses the merits of the plaintiffs’ claims and is beyond the scope of this Article. *Id.* at 549 (Scalia, J., dissenting).

<sup>234</sup> *Id.* at 536–37 (Roberts, C.J., dissenting).

<sup>235</sup> *Id.* at 538–40.

<sup>236</sup> *Id.* at 540–42.

<sup>237</sup> *Id.* at 536.

<sup>238</sup> *Id.* at 538.

<sup>239</sup> *Id.* (emphasis in original) (quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

<sup>240</sup> *Id.*

‘quasi-sovereign interests,’” the dissent argues, “but then applies our Article III standing test to the asserted injury of the Commonwealth’s loss of coastal property.”<sup>241</sup> Furthermore, the Chief Justice’s dissent refused to recognize such proprietary interests as quasi-sovereign in nature.<sup>242</sup> Another way to think of the dissenters’ position, perhaps, is that the State, by asserting proprietary interests, is not standing in the shoes of someone else when asserting such interests; rather, it is, as the dissent points out, “likely to have the same interests as other similarly situated proprietors.”<sup>243</sup> In other words, these are private, and not public, harms the State is asserting. The dissent further notes that the majority’s reliance on a state’s supposed special status is an “implicit concession that the petitioners cannot establish standing on traditional terms.”<sup>244</sup>

The Chief Justice’s second argument is that a state cannot sue the federal government utilizing the *parens patriae* approach.<sup>245</sup> Citing *Mellon*, the dissenting opinion asserts that, with respect to “the protection of [a state’s] citizens, it is no part of its duty or power to enforce their rights in respect of their relationship with the Federal government.”<sup>246</sup> In such cases, “it is the United States, and not the State, which represents them.”<sup>247</sup>

Finally, and perhaps most important for this discussion, the Chief Justice’s dissent appears to recognize the proprietary interests of the state—not the quasi-sovereign interests—as potentially giving rise to standing for the state of Massachusetts, but finds the particular allegations contained in the pleadings and supporting documentation submitted in the record as failing to set forth a “particularized” injury that is “distinct from its impact on ‘the public at large.’”<sup>248</sup>

Just as the early history of litigation in the federal courts includes individuals bringing suits on behalf of others, one of the ways in which the dissent goes astray here is its failure to recognize that public entities have long brought lawsuits for actions involving the public at large. The primary example of this is the nuisance action.

---

<sup>241</sup> *Id.* at 539 (quoting majority opinion).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (quoting *Snapp*, 458 U.S. at 601).

<sup>244</sup> *Id.* at 540.

<sup>245</sup> *Id.* at 538–40.

<sup>246</sup> *Id.* at 539.

<sup>247</sup> *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)).

<sup>248</sup> *Id.* at 541 (citations omitted).

The ability to bring such actions is said to be of “ancient origin.”<sup>249</sup> In a classic treatise on equity jurisprudence, early nineteenth-century Supreme Court Justice Joseph Story noted that the authority can be traced as far back as the reign of Queen Elizabeth,<sup>250</sup> and a case from 1535 that recognized the ability of the Crown to punish public nuisances.<sup>251</sup> Courts have long acknowledged the ability of governmental bodies to bring nuisance actions to enjoin public—that is, general—nuisances.<sup>252</sup> States are the quintessential public body, recognized as enjoying the power to commence cases in equity to enjoin public nuisances.<sup>253</sup> Indeed, the notion that a public nuisance action would require a public entity to prove a private harm is anathema to the whole concept of the public nuisance action.<sup>254</sup>

---

<sup>249</sup> *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 162 (Ill. 1982).

<sup>250</sup> See 2 JOSEPH STORY, EQUITY JURISPRUDENCE §§ 921–24 (1886); see also RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST. 1979) (“In its inception a public, or common, nuisance was an infringement of the rights of the Crown . . . . By the time of Edward III the principle had been extended to the invasion of rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town.”).

<sup>251</sup> Y.B. MICH. 27 HEN. 8, f. 27, pl. 10 (1535), reprinted in C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949):

It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the Leet and there he has his redress, because it is a common nuisance to all the King’s lieges . . . .

*Id.* For a discussion of the “anonymous” case, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 790–96 (2001); see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 90, at 646 (5th ed. 1984).

<sup>252</sup> See RESTATEMENT (SECOND) OF TORTS § 821C(2) (AM. LAW INST. 1979) (“In order to maintain a proceeding to enjoin to abate a public nuisance, one must . . . (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter . . . .”); DAN B. DOBBS, THE LAW OF TORTS § 467, at 1335 (2000) (“In the absence of a statute allowing citizens to enforce the public’s rights, those rights are normally enforced only by public authorities.”) (footnote omitted).

<sup>253</sup> See *Alfred L. Snapp & Son v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 603–05 (1982) (listing state actions involving suits to enjoin public nuisances); see also JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES § 437, at 630–31 (1906) (outlining the power of states to bring nuisance actions).

<sup>254</sup> DOBBS, *supra* note 252. As I have argued elsewhere:

According to black letter law, when the appropriate governmental body is seeking relief from a public nuisance, it need not plead and prove special injury; rather, harm to the community is all it must show. With such public nuisance cases, then, the “private-law model” of standing—one that embraces the notion of individualized injury—is inconsistent with what courts have been doing with these cases for centuries.

Apart from this distinction between wide public harms and discrete and particularized injuries, the Chief Justice’s dissent scrutinizes the plaintiffs’ filing to conclude that “aside from a single conclusory statement, there is nothing in petitioners’ 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th-century global sea level increases.”<sup>255</sup> The dissent goes on to characterize the allegation as “pure conjecture.”<sup>256</sup> But nowhere does the dissent argue that the alleged harm to the proprietary interests of the state of Massachusetts is not the type of harm that could give rise to its standing to sue the federal government if, in fact, the State could establish that such injury was discrete and particularized: that it could point to specific tracts of land that would be harmed by global climate change.<sup>257</sup>

The dissent seems to argue that the problem is not with the injury itself—loss of land—but to the fact that the impacts of global warming are to “humanity at large.”<sup>258</sup> But all of humanity does not own land, let alone coastal land. Indeed, the dissent goes on to say that “[i]f petitioners’ particularized injury is loss of coastal land, it is also that injury that must be ‘actual or imminent, not conjectural or hypothetical.’”<sup>259</sup> In other words, the problem the dissent identifies with the proprietary interests at stake is not with the injury but, rather, whether the injury is experienced by society at large and if it is redressable by court intervention. With respect to this propriety interest, such an interest would appear to be acceptable for standing purposes, as an injury in fact, provided it meets the other components of the standing inquiry—not just that it is distinct and particularized but that it is caused by the defendants and redressable by the court.<sup>260</sup> By taking the public law element out of the case—by eliminating the *parens patriae* component of Massachusetts’s claims—as the dissent would do, what is left is a private harm, an assault on private interests that the public at large must not also experience. Thus, the State could

---

Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7, 42 (2010).

<sup>255</sup> *Massachusetts v. EPA*, 549 U.S. 497, 542 (2007) (Roberts, C.J., dissenting).

<sup>256</sup> *Id.*

<sup>257</sup> Similarly, the dissent also goes on to argue that these harms do not satisfy the causation or redressability requirements of the traditional standing inquiry because both are too attenuated. *See id.* at 542–46.

<sup>258</sup> *Id.* at 541 (citation omitted).

<sup>259</sup> *Id.* (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>260</sup> *Id.*

proceed as a private litigant if it could show that *this* injury, the injury to the land the State owns in its proprietary capacity, satisfies the elements of standing. Unlike the public law arguments over quasi-sovereign interests, the nature of the injury itself would seem to qualify as an injury in fact for the Chief Justice.

### C. *The Ramifications of Massachusetts v. EPA*

The approach to state standing embraced by the majority in *Massachusetts v. EPA* can have, and likely is having, an impact on both climate change litigation and cases in which states are parties. Even the dissenters, who tend to espouse a private law vision of standing, seem to recognize that a harm to a proprietary interest— injury to land a state owns—could serve as a viable injury in fact in the standing inquiry, regardless of the nature of the suit—public or private. As I will point out, if the record of state suits following *Massachusetts* is any indication of the effect this view of standing is having on public plaintiffs, such plaintiffs have come to characterize the injuries at stake in their lawsuits against the federal government in this way. Indeed, the Supreme Court’s approach to traceability and redressability in standing doctrine would seem to be manifestations of important shifts in the standing jurisprudence. It is in the Court’s approach to injury-in-fact, particularly as it relates to states’ ability to sue generally and their ability to sue the federal government in particular, where the opinion may have its most lasting impact. Because of these aspects of the Court’s holding, the decision has potentially broad implications for public law litigation as well as federal-state relations precisely at a time when states are taking aggressive stances in the courts opposing federal law and policy. The next Part explores this new frontier of state standing, even as it comes into focus.

## V

### STATE STANDING IN LITIGATION AFTER *MASSACHUSETTS v. EPA*: PUBLIC LAW LITIGATION THROUGH PRIVATE INJURIES

In the wake of *Massachusetts v. EPA*, states have been emboldened to bring actions to attempt to address not just climate change but a host of other issues, sometimes invoking the “special solicitude” to be afforded the states in such actions. However, as the following discussion shows, often states have eschewed the traditional *parens patriae* arguments for something more akin to the private law harms

recognized by the Court in *Massachusetts v. EPA*, and that harken back to the narrow approach to the injury-in-fact component espoused by the Court in *Lujan*. In fact, it would appear that the more state litigants hew to a narrow path and articulate a harm to their own interests, particularly proprietary interests, they have greater success when pursuing major public law litigation while claiming very private law harms. It is to these cases that I now turn.

#### A. *Challenges to Federal Authority to Regulate Firearms*

While partisan actions by the states may have taken on a new sense of urgency for some during the presidency of Barack Obama and have heightened for others since the election of Donald Trump, efforts by states to rein in federal government authority did not begin merely as a response to these administrations. In the early 2000s, the state of Wyoming brought an action to permit it to enforce its own legislation in the face of a federal legislative scheme for the regulation of firearms.<sup>261</sup> Federal law prohibits individuals who have been convicted of even a misdemeanor crime of intimate partner violence from owning a firearm that has been a subject of interstate commerce.<sup>262</sup> The ban does not apply to convictions that have been expunged or set aside, however.<sup>263</sup> Wyoming passed a statute that would permit an individual subject to the ban to apply for a court order to seal his or her conviction, which, the Wyoming legislature had hoped, would exempt the individual from the federal ban.<sup>264</sup> The federal government's position was that this procedure would not meet the criteria for an exemption from the federal ban and informed state authorities that it would have to conform its legislation to federal requirements or the U.S. Bureau of Alcohol, Tobacco and Firearms would require all federally licensed gun sellers in the state to conduct background checks of everyone in the state with a concealed carry permit.<sup>265</sup> The State filed suit against the federal government for declaratory and injunctive relief.<sup>266</sup> The district court found the State had standing but dismissed the suit, siding with the federal

---

<sup>261</sup> Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1240–41 (10th Cir. 2008).

<sup>262</sup> 18 U.S.C. § 922(d)(9) (2012).

<sup>263</sup> 18 U.S.C. § 921(a)(33)(B)(ii) (2012).

<sup>264</sup> Wyoming, 539 F.3d at 1239–40.

<sup>265</sup> *Id.* at 1240.

<sup>266</sup> *Id.* at 1240–41.

government that the statute did not meet the requirements of the federal law, and the State appealed.<sup>267</sup>

Turning to the standing issue first, the Tenth Circuit Court of Appeals, citing *Massachusetts v. EPA*, noted that states “constitute a special class of plaintiffs for federal jurisdiction purposes.”<sup>268</sup> Quoting *Alfred L. Snapp & Son*, the court of appeals found that “[s]tates have a legally protected sovereign interest in ‘the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a legal code.’”<sup>269</sup> Thus, the harm that the State alleged it suffered at the hand of the federal government was a “sovereign interest” in the enforcement of its legal code;<sup>270</sup> in other words, this was not a *parens patriae* action to vindicate the rights of its citizens.

Rather, the court found that the state of Wyoming suffered a concrete injury in fact to its own interests, as a state, and did not need any form of third-party interest to satisfy the injury-in-fact test, nor did the court of appeals find any other aspects of the standing inquiry as wanting, ruling that the State could meet the traceability/causation and redressability requirement, while also facing no prudential limitations.<sup>271</sup> Further, the court found that the State was within the zone of interest of the relevant statute because the federal law in question “grants states significant latitude to determine the applicability of the [Gun Control] Act by relying on state law, in part, to determine the classes of individuals that may not possess a firearm.”<sup>272</sup> As a result, although the court ultimately rejected the State’s arguments on the merits, and the state statute was incompatible with the controlling federal law, the court found that the State had standing to challenge it nonetheless, alleging harms to its own interests rather than those of its citizens.<sup>273</sup>

---

<sup>267</sup> *Id.* at 1241.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1242 (alteration in original) (quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1242–44.

<sup>272</sup> *Id.* at 1243.

<sup>273</sup> *Id.* at 1242–43, 1249.

### B. State Challenges to the Affordable Care Act

After passage of the Patient Protection and Affordable Care Act (ACA),<sup>274</sup> litigants of all stripes—private individuals, employers, and states—all lined up to challenge the enforcement of the law.<sup>275</sup> While many cases did not involve an inquiry into the standing of states to challenge the ACA, one case that did involve that issue was *Virginia ex rel. Cuccinelli v. Sebelius*.<sup>276</sup> In that case, the state of Virginia challenged the enforcement of the Act on the grounds that one of its provisions, the so-called “individual mandate” which requires individuals otherwise not covered by health insurance to purchase such insurance or face a financial penalty, conflicted with a newly enacted state law, the Virginia Health Care Freedom Act (VHCFA) that purported to exempt Virginians from this requirement.<sup>277</sup> After succeeding at the district court level, with a finding that the State had standing and the individual mandate was unconstitutional, the State found itself litigating in the Fourth Circuit Court of Appeals, where the court rejected the State’s standing argument. Noting that the State failed to allege that the federal statute imposed any “obligations on Virginia that, in other cases, have provided a state standing to challenge a federal statute,”<sup>278</sup> the court of appeals, also citing *Alfred L. Snapp and Co.* as the Tenth Circuit had, described the State’s standing argument as follows:

---

<sup>274</sup> Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>275</sup> The U.S. Department of Justice has maintained a list of the dozens of cases that have been filed challenging the ACA. See *Defending the Affordable Care Act*, U.S. DEP’T OF JUSTICE ARCHIVES, <https://www.justice.gov/archives/healthcare> (last visited Feb. 28, 2017). Representative litigation includes the following: *King v. Burwell*, 135 S. Ct. 2480 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.C. Cir. 2016); *Johnson v. U.S. Office of Personnel Mgmt.*, 783 F.3d 655 (7th Cir. 2015); *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), *reh’g en banc granted, vacated*, 2014 U.S. App. LEXIS 17099 (D.C. Cir. 2014), *appeal dismissed*, 2015 U.S. App. LEXIS 16286 (D.C. Cir. 2015).

<sup>276</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

<sup>277</sup> *Id.* at 266–67. The state of Florida and many other states also joined an action challenging the constitutionality of the ACA, but, because the court found nonstate plaintiffs had standing, the issue of state standing was not adjudicated. *Florida v. United States Dep’t of HHS*, 648 F.3d 1235, 1243–44 (11th Cir. 2011), *aff’d in part and rev’d in part*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (without reaching the issue of state standing).

<sup>278</sup> *Sebelius*, 656 F.3d at 268. The court found that the individual mandate did not “directly burden Virginia,” did not “commandeer Virginia’s enforcement officials,” and did not “threaten Virginia’s sovereign territory.” *Id.* (citations omitted).

What Virginia maintains is that it has standing to challenge the individual mandate solely because of the asserted conflict between that federal statute and the VHCFA. A state possesses an interest in its “exercise of sovereign power over individuals and entities within the relevant jurisdiction,” which “involves the power to create and enforce a legal code.” A federal statute that hinders a state’s exercise of this sovereign power to “create and enforce a legal code” at least arguably inflicts an injury sufficient to provide a state standing to challenge the federal statute.<sup>279</sup>

For the court, however, the Virginia statute at issue was really a “smokescreen” for an assault on the constitutionality of the statute on behalf of the citizens of Virginia, and such an assault would run afoul of the prohibition on suits seeking to vindicate such citizens’ interests against the federal government.<sup>280</sup> Citing *Massachusetts v. Mellon*, the Fourth Circuit found that the State’s action was really one to shield its citizens from the application of federal law.<sup>281</sup> The court found that states have no role in doing so, as the authority to protect citizens as *parens patriae* rests with the federal government: “When a state brings a suit seeking to protect individuals from a federal statute, it usurps this sovereign prerogative of the federal government and threatens the ‘general supremacy of federal law.’”<sup>282</sup> For the court, Virginia’s approach to standing would open the floodgates of states resisting federal government action: “[I]f we were to adopt Virginia’s standing theory, each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state’s power to litigate in federal court.”<sup>283</sup> The court ultimately found the State’s standing argument unavailing, mostly because it failed to allege a cognizable stake in the litigation—it had failed to allege a viable injury in fact to its own interests.<sup>284</sup> The court found that the “presence of the VHCFA neither lessens the threat to federalism posed by this sort of

---

<sup>279</sup> *Id.* (citations omitted).

<sup>280</sup> *Id.* at 269. The court described the “question presented” as follows:

whether the purported conflict between the individual mandate and the VHCFA actually inflicts a sovereign injury on Virginia. If it does, then Virginia may well possess standing to challenge the individual mandate. But if the VHCFA serves merely as a smokescreen for Virginia’s attempted vindication of its *citizens’* interests, then settled precedent bars this action.

*Id.*

<sup>281</sup> *Id.* at 269–72.

<sup>282</sup> *Id.* at 269 (citation omitted).

<sup>283</sup> *Id.* at 272.

<sup>284</sup> *Id.* at 270–71.

lawsuit nor provides Virginia any countervailing interest in asserting the rights of its citizens.”<sup>285</sup> It criticized the State for, in a sense, manufacturing the lawsuit.<sup>286</sup> “[T]he action of a state legislature,” it held “cannot render an improper state *parens patriae* lawsuit less invasive of federal sovereignty . . . Nor does a state acquire some special stake in the relationship between its citizens and the federal government merely by memorializing its litigation position in a statute.”<sup>287</sup>

At this point, it is useful to compare state litigation that was successful in establishing state standing to Virginia’s failure to establish standing to sue in order to challenge the ACA because it was unable to articulate a harm to its own interests. In a case that did not proceed past the district court level in substance, *Oklahoma ex rel. Pruitt v. Burwell*, the state of Oklahoma alleged that in its position as an employer it would be subject to a penalty for not offering all of its employees insurance in accordance with the ACA employer mandate and would incur costs associated with complying with the law.<sup>288</sup> In this case, the court found that Oklahoma had alleged facts sufficient to establish an injury in fact for the purposes of the standing inquiry.<sup>289</sup> There was no talk of *parens patriae* standing or the state standing in the shoes of its citizens, however. Rather, it was harm to the proprietary interests of the state, as an employer, that gave rise to its standing.<sup>290</sup> Unlike the arguably quasi-sovereign allegations in *Virginia* in that State’s challenge to the ACA, Oklahoma’s proprietary injuries were entirely consistent with the private law litigation model, even where such actions involved very public law litigation, as *Oklahoma* did.<sup>291</sup>

### C. Challenges to Obama Administration’s Overtime Rules

Late in President Obama’s second term, new U.S. Department of Labor (DOL) regulations were set to take effect that would raise the

---

<sup>285</sup> *Id.* at 271.

<sup>286</sup> *Id.* at 272.

<sup>287</sup> *Id.* at 271 (citations omitted).

<sup>288</sup> *Oklahoma ex rel. Pruitt v. Burwell*, 51 F.Supp.3d 1080, 1086–87 (E.D. Okla. 2014).

<sup>289</sup> *Id.* at 1084–85.

<sup>290</sup> *Id.* at 1086.

<sup>291</sup> See *Indiana v. IRS*, 38 F.Supp.3d 1003, 1009–10 (S.D. Ind. 2014) (holding state as employer suffered injury in fact to its proprietary interests under the ACA because there was a risk that some state employees would seek coverage under the act and the state would incur costs of \$167 per month per employee).

compensation threshold for employees who would be exempt from overtime rules based on the nature of their work tasks, that is, the rule made it harder to claim certain workers were “white collar” and thus exempt from overtime rules based on their work activities and their salary level.<sup>292</sup> The state of Nevada, and twenty other states, sought an injunction to prevent these provisions from going into effect.<sup>293</sup> The States’ main argument for standing was that they were employers and, as employers, the States would have to pay their employees overtime because some portion of their workforce would fall out of exemption from the overtime provisions of the Fair Labor Standards Act.<sup>294</sup> While the complaint’s preliminary statement speaks in lofty language, highlighting the alleged consequences of the federal government’s actions for core federalism principles,<sup>295</sup> the actual alleged harm to the states is fairly straightforward, and proprietary in nature. This juxtaposition of public law aims against private law harms underscores the trend, apparent in these state-initiated lawsuits, that states are invoking private law harms as a means of achieving public law ends.

The private law nature of the proprietary injuries the plaintiffs are alleged to face as a result of the rule is manifest in, for example, the state of Nevada’s allegation that it is “subject to the new overtime rule because it is an employer that pays a salary less than \$913 per week to

---

<sup>292</sup> See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (to be codified 29 C.F.R. pt. 541).

<sup>293</sup> See *Nevada v. U.S. Dep’t of Labor*, 218 F.Supp.3d 520 (E.D. Tex. 2016).

<sup>294</sup> Complaint for Declaratory and Injunctive Relief ¶¶ 62–77, *Nevada v. U.S. Dep’t of Labor*, 218 F.Supp.3d 520 (E.D. Tex. 2016) (No. 4:16-CV-00731).

<sup>295</sup> The complaint reads as follows:

The threat to the States’ budgets and, consequently, the system of federalism, is palpable. By committing an ever-increasing amount of *State* funds to paying State employee salaries or overtime, the Federal Executive can unilaterally deplete State resources, forcing the States to adopt or acquiesce to federal policies, instead of implementing State policies and priorities. Without a limiting principle (and DOL has recognized none) the Federal Executive could deliberately exhaust State budgets simply through the enforcement of the overtime rule. But even aside from that possibility, there is no question that the new rule, by forcing many State and local governments to shift resources from other important priorities to increased payroll for certain employees, will effectively impose the Federal Executive’s policy wishes on State and local governments. The Constitution is designed to prohibit the Federal Executive’s ability to dragoon and, ultimately, reduce the States to mere vassals of federal prerogative.

*Id.* at 4.

certain of its employees working in a bona fide [exempt] capacity.”<sup>296</sup> Similar allegations were made for the other twenty state plaintiffs.<sup>297</sup> The complaint also contained a list of consequences from the DOL rule, most of them having to do with the states having to either spend more state funds to comply with the provisions or cut back on other state services to do so.<sup>298</sup> Representative of this allegation is the one proffered for Arkansas:

The state of Arkansas will likely be required to reclassify many salaried [exempt] employees as hourly employees and limit those employees’ hours to avoid the payment of overtime. Limiting and shifting workloads to avoid additional overtime liability is likely to result in the reduction of services or delays in the provision of those services.<sup>299</sup>

The district court in Texas found that the States established standing based on these allegations, finding that the States “face imminent monetary loss that is traceable to the Department’s Final Rule.”<sup>300</sup> The DOL did not even contest the plaintiffs’ standing. The case is now on appeal.<sup>301</sup>

#### *D. Challenges to President Obama’s Immigration Actions*

In 2012, the Obama administration announced plans to undertake a new approach toward some young undocumented immigrants. Under the “Deferred Action for Childhood Arrivals” program (DACA), the Department of Homeland Security (DHS) would essentially grant a temporary legal status to certain undocumented youth.<sup>302</sup> In 2014, the agency introduced a new initiative, “Deferred Action for Parents of Americans” (DAPA), for certain undocumented adults as well.<sup>303</sup>

<sup>296</sup> *Id.* ¶ 1.

<sup>297</sup> *Id.* ¶¶ 1–21.

<sup>298</sup> *Id.* ¶¶ 62–77.

<sup>299</sup> *Id.* ¶ 68.

<sup>300</sup> *Nevada v. U.S. Dep’t of Labor*, 218 F.Supp.3d 520, 526 (E.D. Tex. 2016).

<sup>301</sup> Wage and Hour Division, *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern District of Texas*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/overtime/final2016/litigation.htm> (last visited Nov. 12, 2017).

<sup>302</sup> For an explanation of the DACA program, see Alvin Chang, *DACA, the Immigration Program Trump Wants to End, Explained in One Simple Cartoon*, VOX (Sept. 5, 2017, 10:50 AM), <https://www.vox.com/policy-and-politics/2017/9/5/16228664/daca-explained-one-simple-cartoon>.

<sup>303</sup> For a description of the DAPA program, see *Frequently Asked Questions: The Obama Administration’s DAPA and Expanded DACA Programs*, NAT’L IMMIGRATION L. CTR. (Mar. 2, 2015), <https://www.nilc.org/issues/immigration-reform-and-executive-actions/dapa-and-expanded-daca-programs/>.

Through both programs, once immigrants received coverage under them, if they were of a lawful age to drive, they could apply for a driver's license from state authorities if their status made them eligible under state law. The state of Texas claimed that DAPA would force them to issue driver's licenses to those eligible for the program and joined twenty-five other states in suing to prevent the implementation of that program.<sup>304</sup>

The lead plaintiff, citing *Massachusetts v. EPA*, invoked the special solicitude afforded the states in the standing inquiry and blended traditional economic injury with quasi-sovereign interests in making its arguments in favor of standing.<sup>305</sup> Evidence presented to the district court tended to show that "Texas would lose at least \$130.89 on each license it issues to a DAPA beneficiary," a figure that was not disputed by the federal government.<sup>306</sup> The Fifth Circuit found that "[i]t is well established that a financial loss generally constitutes an injury, so Texas is likely to meet its burden," of establishing injury in fact.<sup>307</sup> The federal government contested this argument, saying first, that the State would not be compelled to issue any licenses, and second, it could offset any cost to the State by raising application fees.<sup>308</sup> The court found that the State risked an equal protection challenge should it deny DAPA eligible applicants drivers' licenses and went on to recognize a "sovereign interest in 'the power to create and enforce a legal code.'"<sup>309</sup> The Fifth Circuit invoked language from the Supreme Court's decision in *Alfred L. Snapp & Son*, in which the Supreme Court identified at least two sovereign interests as "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which includes "the power to create and enforce a legal code, both civil and criminal" as well as "the demand for recognition from other sovereigns" which "most frequently . . . involves the maintenance and recognition of borders."<sup>310</sup>

Citing the Fourth Circuit's decision in *Virginia ex rel. Cuccinelli v. Sebelius*<sup>311</sup> described above, the Fifth Circuit found that "a state has

---

<sup>304</sup> *Texas v. United States*, 787 F.3d 733, 743–45 (5th Cir. 2015).

<sup>305</sup> *Id.* at 751–52.

<sup>306</sup> *Id.* at 748.

<sup>307</sup> *Id.* (footnote omitted).

<sup>308</sup> *Id.* at 748–49.

<sup>309</sup> *Id.* at 749 (quoting *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999)).

<sup>310</sup> *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

<sup>311</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

standing based on a conflict between federal and state law if ‘the state statute at issue regulate[s] behavior or provide[s] for the administration of a state program’ . . . but not if ‘it simply purports to immunize [state] citizens from federal law.’”<sup>312</sup> Recognizing that the State’s claim was different in the case before it from the *Virginia* case, the Fifth Circuit found that “Texas’s forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing.”<sup>313</sup> It ultimately characterized the harm in question as a “quasi-sovereign interest” which the court described as “not being forced to choose between incurring costs and changing its driver’s license regime.”<sup>314</sup> As a result, the State was “entitled to the same ‘special solicitude’ as was Massachusetts” in *Massachusetts v. EPA*.<sup>315</sup>

Even though President Obama is out of office, these executive branch initiatives are still the subject of tension between the federal government and the states. On September 5, 2017, the Trump administration announced its plans to phase out the DACA program, suggesting that Congress should take up the issue and pass legislation to address the plight of immigrant youth that would have been eligible for the program.<sup>316</sup> One of the reasons given for rolling back the program was a threat that the administration was going to be sued by a collection of conservative states.<sup>317</sup> Once the announcement that the administration would roll back the program, a group of liberal states filed suit for that action.<sup>318</sup> The state of New York is the lead plaintiff in the suit.<sup>319</sup> As is typical of the standing allegations of the different

---

<sup>312</sup> *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) (alterations in original) (quoting *Sebelius*, 656 F.3d at 269, 270).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 752.

<sup>315</sup> *Id.* The Fifth Circuit went on to find that the federal government caused the harm Texas alleged and that relief in the action would redress that harm. *Id.* at 751–54.

<sup>316</sup> Jordan Fabian, *Trump Defends Decision to End DACA, Urges Congress to Act*, HILL (Sept. 5, 2017, 12:29 PM), <http://thehill.com/homenews/administration/349222-trump-defends-decision-to-end-daca-urges-congress-to-act>.

<sup>317</sup> Dara Lind, *A Group of Republican Attorneys General Is Picking a Fight with Trump on Immigration: Not for the Reasons You Might Think*, VOX (June 30, 2017, 9:11 AM), <https://www.vox.com/policy-and-politics/2017/6/29/15895458/trump-daca-dreamers-immigration>.

<sup>318</sup> Complaint for Declaratory and Injunctive Relief at 1, *New York, v. Trump* No. 17-cv-05228 (E.D.N.Y. Sept. 6, 2017).

<sup>319</sup> *Id.*

states in the complaint, the state of New York alleges harm to its proprietary interests, including the loss of financial investment in training DACA-eligible employees and educating DACA-eligible students enrolled at public universities throughout the state.<sup>320</sup>

*E. Challenges to President Trump's Executive Order on Travel from Certain Predominantly Muslim Countries*

On January 27, 2017, President Trump issued an Executive Order that strictly limited travel from seven predominantly Muslim countries.<sup>321</sup> In separate actions, the Order was challenged by private litigants affected by the travel ban as well as the states of Washington and Minnesota together.<sup>322</sup> In the States' actions, the district court issued a sweeping temporary restraining order (TRO) halting enforcement of the travel ban,<sup>323</sup> which was quickly appealed by the Department of Justice to the Ninth Circuit.<sup>324</sup> After a high-profile oral argument on an emergency stay of the district court order, which was broadcast live over the internet, the Ninth Circuit panel converted the TRO to a preliminary injunction and refused to lift the prohibition on the Order's enforcement.<sup>325</sup> In its decision on the stay, and at the invitation of the Justice Department, the Ninth Circuit reviewed the state of Washington's standing arguments and found that "the Executive Order causes a concrete and particularized injury to [the plaintiffs'] public universities, which the parties do not dispute are branches of the States under state law."<sup>326</sup> It went on to describe the alleged harms as follows:

---

<sup>320</sup> *Id.* ¶¶ 16–20.

<sup>321</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>322</sup> *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

<sup>323</sup> Temporary Restraining Order, *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (No. C17-0141JLR).

<sup>324</sup> *Washington v. Trump*, 691 F.App'x 834 (9th Cir. 2017).

<sup>325</sup> *Trump*, 847 F.3d at 1156.

<sup>326</sup> *Id.* at 1159. The parties submitted supplemental briefs on the standing issue. The following is an excerpt from that supplemental brief on the issue, which cited portions of the record extensively, although to enhance readability, those references are omitted:

Here, the harms to Washington's proprietary interests are significant and wide-ranging.

First, Washington will lose significant tax revenue because of the Order. Washington receives substantial sales tax revenue every year from travelers from the countries impacted by the Order's travel ban. Washington also stands to lose tax revenue from Washington businesses harmed by the Order, as well as revenue from legal, non-citizen residents who are being prevented from returning to their homes and jobs. Losing these tax revenues is a real, tangible, and immediate

[T]he States allege that the teaching and research missions of their universities are harmed by the Executive Order's effect on their faculty and students who are nationals of the seven affected countries. These students and faculty cannot travel for research, academic collaboration, or for personal reasons, and their families abroad cannot visit. Some have been stranded outside the country, unable to return to the universities at all. The schools cannot consider attractive student candidates and cannot hire faculty from the seven affected countries, which they have done in the past.<sup>327</sup>

The court opinion at this point appears to muddle the question of whether it is recognizing these harms as direct harms experienced by the universities as arms of the state or whether those universities are asserting the third-party interests of their students. On one hand, the court recognized that the policy harmed the universities' educational missions and that the state of Washington had experienced financial injury because it paid fees to allow foreign interns to travel to the country to study.<sup>328</sup> The state of Washington "incurred the costs of visa applications for those interns and will lose its investment if they are not admitted."<sup>329</sup> And the schools "have a mission of 'global

---

harm, even putting aside the Order's longer-term consequences for Washington's economy.

Washington also operates several world-class public universities that are suffering adverse impacts from the Order. Several hundred faculty, staff, and students at state higher education institutions are here on visas from the listed countries, while others are long-term permanent residents from the affected countries. The order has stranded a member of the WSU faculty overseas, and will prevent a member of the UW faculty from serving as the keynote speaker at a conference overseas. Both universities have expended significant resources to sponsor scholars from the affected countries to perform research and teaching, and the Order will prevent several of those individuals from coming to the universities or staying there. Students and faculty from the listed countries will be prevented from participating in planned travel outside the country to conduct research and attend conferences. These harms to faculty, staff, and students damage the universities' missions and reduce their attractiveness to international students.

In sum, these (and other) direct impacts cement the injury-in-fact required for proprietary standing. Far from being speculative, these impacts are occurring *now*. Indeed, the impacts shown here likely understate the State's proprietary harm, as they reflect only what the State has been able to document in three business days since the Order was issued.

Plaintiff State of Wash.'s Supplemental Brief Regarding Standing at 2–3, *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 1 2017) (footnotes omitted) (citations omitted).

<sup>327</sup> *Trump*, 847 F.3d at 1159.

<sup>328</sup> *Id.* at 1159–60.

<sup>329</sup> *Id.* at 1160.

engagement' and rely on such visiting students, scholars, and faculty to advance their educational goals."<sup>330</sup>

On the other hand, the Ninth Circuit identified at least some of these harms as more in the nature of third-party injuries, advanced by the public universities on behalf of their students, citing a series of Supreme Court and Ninth Circuit precedents that permit standing by organizations on behalf of their members, as well as by educational institutions in the assertion of their students' rights.<sup>331</sup>

Since the Ninth Circuit found these harms to the states as conferring standing on them to proceed in the action, it chose not to reach the States' other arguments with respect to standing—namely that they could sue in their *parens patriae* capacity:

The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.<sup>332</sup>

As this litigation has progressed, the Ninth Circuit Court of Appeals entertained an effort, initiated by a member of the court, to consider rehearing the matter *en banc*. While the court rejected the effort, several judges dissented from the decision not to reconsider the case. The dissent by Judge Bea took on the issue of standing to sue squarely, recognizing that the States alleged an injury—proprietary in

---

<sup>330</sup> *Id.* Arguments such as these are consistent with the Supreme Court's holding in *Havens Realty Corp. v. Coleman*, in which an association's harm to its own mission was recognized as establishing sufficient injury in fact. The Court found as follows:

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.

*Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (footnote omitted) (citation omitted).

<sup>331</sup> See *Trump*, 847 F.3d at 1160 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (standing of educational institution on behalf of its students); *Craig v. Boren*, 429 U.S. 190, 195–96 (1976) (standing of vendors seeking to prevent restriction of their market)).

<sup>332</sup> *Trump*, 847 F.3d at 1161 n.5.

nature—that would give them standing to sue, even while criticizing the three-judge panel’s decision on standing on other grounds.<sup>333</sup>

Even as this Article is being written, the litigation to challenge President Trump’s immigration policies is evolving. Indeed, the Ninth Circuit lawsuit was voluntarily dismissed in light of recent developments in the policies at the center of the suit,<sup>334</sup> while new litigation has commenced to challenge the newest iteration of the immigration order.<sup>335</sup> Soon after the Trump administration issued its second executive order on travel from six predominantly Muslim countries.<sup>336</sup> The state of Hawai’i filed an action to hold the application of this new ban.<sup>337</sup> While the state of Hawai’i both alleged harms to its proprietary interests and sought to proceed on a *parens patriae* basis, the trial court ruled only on the proprietary interests in issuing its order staying application of the travel ban, finding standing based on the loss of tuition revenue at the State’s public universities and the loss of revenue from tourism from the affected countries.<sup>338</sup> Finding standing based on these harms alone, the trial court found it did not need to reach the question of *parens patriae* standing.<sup>339</sup> Upon review in the Ninth Circuit, the court affirmed not just the standing of a family member of someone seeking to enter the United States, but also that of the state of Hawai’i, recognizing the harm to the State’s proprietary interest due to the losses it suffered at its universities because of the Order.<sup>340</sup> In late

---

<sup>333</sup> *Washington v. Trump*, 858 F.3d 1168, 1185 n.2 (9th Cir. 2017) (denying rehearing en banc) (Bea, J., dissenting) (“I agree with the panel that the States have alleged proprietary harms to their public universities sufficient to establish Article III standing.”).

<sup>334</sup> *See* Order of Dismissal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. Mar. 8, 2017) (No.17-35105).

<sup>335</sup> *See* Second Amended Complaint for Declaratory and Injunctive Relief, *Hawai’i v. Trump*, No. 1:17-cv-00050 (D. Haw. Mar. 8, 2017).

<sup>336</sup> Those six countries were Iran, Syria, Libya, Somalia, Yemen, and Sudan. Iraq was removed from the original list. In late September, the Trump administration issued a new travel ban, restricting travel from these six countries, but also adding certain restrictions affecting travel from the following additional countries: North Korea, Chad, and Venezuela. Laura Jarrett & Sophie Tatum, *Trump Administration Announces New Travel Restrictions*, CNN (Sept. 25, 2017, 5:15 PM), <http://www.cnn.com/2017/09/24/politics/trump-travel-restrictions/index.html>.

<sup>337</sup> *Hawai’i v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017).

<sup>338</sup> *Id.* at 1128–31.

<sup>339</sup> *Id.* at 1128.

<sup>340</sup> The Ninth Circuit also acknowledged a secondary argument relating to Hawai’i’s standing: that it faced harm to its sovereign interests in carrying out its refugee settlement policies. *Hawai’i v. Trump*, 859 F.3d 741, 762–66 (9th Cir. 2017), *cert. granted and consolidated sub nom.*, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

June 2017, the Supreme Court consolidated the cases that had worked their way up through both the Ninth and Fourth Circuits, granting the Trump administration's request to assess not just the merits of those lower courts' rulings, but also the standing determination with respect to the individual as well as the states.<sup>341</sup>

As these cases worked their way through the courts, the approach of both the state of Washington and the state of Minnesota, and, now the state of Hawai'i before the Supreme Court, to allege a range of harms, including so-called private law harms, is consistent with the contemporary approach that many state litigants take—emphasizing harms experienced by the states themselves, rather than those they wish to vindicate through their *parens patriae* authority.<sup>342</sup>

As the preceding discussion shows, state governments made strategic decisions with respect to lawsuits against the federal government and the harm they alleged in them. From the state of Wyoming's action to attempt to circumvent federal firearms control legislation, several states' attempts to avoid application of aspects of the ACA and President Obama's overtime rules, to various states' efforts to halt the actions of two different U.S. presidents as they attempted to undertake actions related to immigration enforcement and policy, states are generally choosing not to assert some special status as litigants or some special solicitude from the federal courts. Rather, states are most successful in establishing standing to sue to challenge federal actions and authority where they allege the direct harms they suffer, including harms to their proprietary interests.<sup>343</sup> As such, states are positioning themselves as private litigants, not necessarily the public litigants that the types of cases they are prosecuting would suggest they represent. Indeed, the more successful states—like Texas in the DAPA/DACA case, Oklahoma in the ACA case and, to date, the states of Washington, Minnesota, and Hawai'i in

---

<sup>341</sup> *Int'l Refugee Assistance Project*, 137 S. Ct. at 2086.

<sup>342</sup> See, e.g., *Hawai'i*, 241 F.Supp.3d at 1128–31. As this Article goes to print, the Ninth Circuit has issued its most recent decision with respect to the current version of the Travel Ban and that decision is being appealed to the Supreme Court. See *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, -- S. Ct. --, 2018 WL 324357 (Jan. 19, 2018). The question of the state's standing to sue, which was found sufficient by the Court of Appeals based on the state's quasi-sovereign interests, has not been certified for review by the Court. See, *id.* at 682.

<sup>343</sup> For an argument that states should enjoy *parens patriae* standing to sue the federal government to protect the “continued enforceability” of state law, even against the federal government, see Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 898 (2016).

the Trump Executive Order litigation—appear to have pursued a range of harms in advancing their claims. The cases where courts recognized the standing of these states as litigants have been those in which the states alleged some direct harm, primarily direct harm to some proprietary interest.<sup>344</sup> This is consistent with the Court’s view of the state of Massachusetts’s arguments in *Massachusetts v. EPA*, where the Court recognized that the State, as a landowner, threatened with potential injury to that interest, was likely to enjoy a historically privileged status as a litigant, and a very private one at that, despite the fact that the suit was about as emblematic of public law litigation as there could be.<sup>345</sup>

If recent trends hold, states will only feel more empowered to bring cases against the federal government, despite *Mellon*’s limits on the right of states to pursue *parens patriae* actions against the federal government, and despite the narrow view of injury in fact espoused by the Court in *Lujan*. Indeed, it would appear that the more states are able to characterize the harms they suffer as consistent with that traditional class of private harms long recognized by the courts, the more likely it is that these very public plaintiffs will be able to continue to pursue their claims and play a critical role in policing the contours of federalism itself.<sup>346</sup> It is to this final issue that I turn next.

## VI

### PUBLIC LAW LITIGATION, STATE STANDING, AND FEDERALISM

In his work, *David and Goliath: Underdogs, Misfits, and the Art of Battling Giants*, Malcolm Gladwell posits that we often perceive asymmetries of power and strength wrong: “Giants are not what we think they are,” he says.<sup>347</sup> Rather, “[t]he same qualities that appear to give them strength are often the sources of great weakness.”<sup>348</sup>

---

<sup>344</sup> See, e.g., *Texas v. United States*, 787 F.3d 733, 748–52 (2015) (recognizing direct financial harm to state of Texas when it might be required to issue new driver’s license to otherwise undocumented individuals).

<sup>345</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

<sup>346</sup> The notion that states might allege that they suffered harms akin to a private law litigant is analogous to the arguments, posed by some, that state governments should enjoy free speech rights under the First Amendment, just as a private citizen would. For a discussion of state First Amendment rights, see, for example, Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *BROOK. L. REV.* 1277, 1295–1301 (2004).

<sup>347</sup> MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* 6 (2013).

<sup>348</sup> *Id.*

Whether it is the Biblical David fighting the giant Philistine Goliath, Laurence of Arabia using Bedouin cavalry to fight Ottoman tanks and machine guns in World War I, or civil rights advocates drawing out the ugly violence of local government law enforcement officials, in Gladwell's telling of these stories, the underdogs often have the upper hand in the end. They can turn the perceived assets of their adversaries into deficits. Bulk and armaments make a fighter less mobile. Fixed fortifications are easier to surround.

We may see these same dynamics play out in the arena of public law litigation. Efforts to minimize the effectiveness of public law litigation have included giving litigants greater access to the courts to those litigants we perceive as best able to characterize their injuries as discrete, individualized, private, and personalized—as opposed to being more public in nature. State actors have been undaunted by this approach, however. They have proceeded to commence very public law litigation, while characterizing the harm they have suffered as consisting of injuries to their proprietary, almost private, interests—choosing the prosaic over the poetic and the banal over the inventive and inspired.

It is possible that the Supreme Court's procedural jurisprudence over the last twenty-five years, beginning with *Lujan*, reveals a skepticism for the role of the courts in policing public law disputes. Yet, the formalism of contemporary standing jurisprudence appears to offer states a role to play in enforcing federal rights, even against the federal government and in those cases that are easily classified as public law litigation.

Returning to the notion of standing as self-determination, such self-determination is meaningless if a party suffering some harm is unable to vindicate his or her own rights at all by virtue of a new jurisprudence, which makes it more difficult to assert rights through the federal courts more generally. If the courthouse doors are closed to private parties asserting private rights through new, transubstantive procedural barriers to litigation—like more stringent pleading requirements, a narrowing of the class action mechanism, or the aggressive enforcement of arbitration clauses, for example—so-called third-parties are necessary to vindicate important rights when first parties are not available, and state litigants are free of some of these restrictions. Furthermore, they might have the resources to prepare and prosecute cases to overcome other procedural barriers in ways

that private litigants cannot.<sup>349</sup> Yet the bar to third-party standing might otherwise block the way of such litigants.

By asserting first-party interests, however, states find that they can overcome the standing barrier. They advance an interest they may share with their “first party” constituents in challenging a particular government practice, even when there might be such other litigants who may appear to have a greater stake in the litigation. The formalism of standing doctrine does not create a *hierarchy* of injuries or interests; however, it does require *some* cognizable interest to that party.<sup>350</sup> What this means is that the attack on federal policies can emanate from states that have some stake in the outcome, even when others might have one that is more significant.

In this way, instead of bringing actions on behalf of their citizens against the federal government, states are beginning to stress that they too are the *objects* of federal actions that might violate federal law or the U.S. Constitution. That is, they suffer direct and particularized harm of the type that a more traditional litigant might allege. As such, these states are invoking traditional “injuries in fact” consistent with the formalistic view of harm embraced in current jurisprudence in order to satisfy the standing requirement. Indeed, these state litigants are alleging harms to their direct interests, like damages they will suffer as landowners or the harm to the mission of the educational institutions that are arms of the state.<sup>351</sup> Instead of finding that the formalistic view of standing prohibits their suits, states are embracing a formalistic view of their own injuries to establish standing on traditional grounds, as objects of the federal government’s actions, as opposed to subordinate players in a federal system when there are certain federal rights at stake. As a result, the formalistic view of standing is actually making state standing to sue more expansive.

Rather than narrowing the scope of state standing in actions against the federal government when the states attempt to assert their *parens patriae* authority—despite the “special solicitude” states are supposed to enjoy—states find that coming into court as a common litigant

---

<sup>349</sup> On the “backlash” against private actors vindicating important rights that manifested itself in the form of procedural barriers to litigation, see Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304–05 (2013).

<sup>350</sup> *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (requiring a “cognizable” interest to the party before the court in order for that party to have standing to bring the action).

<sup>351</sup> *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1129–31 (D. Haw. 2017).

pleading traditional harms, they establish standing to sue in a manner consistent with even the narrowest vision of Article III standing. In these ways, they espouse a very public law approach to litigation by bringing actions against the federal government to vindicate important rights while simultaneously conceptualizing the harms they are suffering in very private law terms. They have chosen to rely on injuries that are more akin to traditional common law injuries, like direct injuries to the states' own economic interests or their own property rights, as opposed to those one might characterize as political or philosophical. As a result, states find fertile ground to establish standing, stressing these more traditional, private law harms, even as they pursue very public law claims.

Over the same period that courts appeared to narrow the ability of litigants to bring public law litigation, a parallel debate has emerged regarding the relationship between the states and the federal government—perceiving the relationship as sometimes antagonistic and sometimes cooperative. At all times, though, it would appear that this relationship is partisan. The fact that states—different states with different political perspectives—utilize the courts to challenge the actions of the executive branch, depending on which party is in power, only emphasizes the partisan and public law nature of these actions. This sort of “partisan federalism,” as it has been described, “involves political actors’ use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic.”<sup>352</sup> As a result, litigation in the courts, pursued by states seeking to vindicate sweeping constitutional claims—but alleging formal, almost trivial harms—has become, to borrow the Prussian military strategist Clausewitz’s take on war—“politics by other means.”<sup>353</sup>

---

<sup>352</sup> Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

<sup>353</sup> CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832). While this martial analogy may not seem apt, remember the words of the Supreme Court in some of the early *patria* cases, where the Court acknowledged that litigation between the states was a by-product of their surrender of a degree of their sovereignty to join the union of states that formed the United States, and the right to sue, at least each other and other citizens, was offered as a substitute for resolving disputes between the states on the battlefield. *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450 (1945) (“The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative.”).

The nineteenth-century French aristocrat Alexis de Tocqueville wrote that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”<sup>354</sup> States are pursuing the resolution of political disputes in the federal courts and are simultaneously helping to shape federalism. Debates about the value and purposes of “Our Federalism”<sup>355</sup> highlight the role that the states play in the federal system. Debates are places where states can experiment with policy and can cooperate with the federal government in shaping and carrying out national policies on a state level. But, the framers of the Constitution also had another role in mind for the states, which states fulfill as they bring litigation to pursue politics by other means. The states are positioning themselves as protectors of liberty and defenders of the Constitution. Whether it is so-called “red” states fighting implementation of the Obama administration’s signature social program, the ACA, or “blue” states challenging President Trump’s immigration policies. Such phenomena appropriately spur debates about the proper role of the states in defending federal rights in the federal system, and these debates possess a greater salience as the courts have become arenas for such partisan politics to play out.

Writing for the majority of the Court in *Gregory v. Ashcroft*, Justice O’Connor described some of the “advantages” of federalism.<sup>356</sup> The federal government and the states serve as “joint sovereigns,” which includes “assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society[,] . . . increase[ing] opportunity for citizen involvement in democratic processes[,] . . . allow[ing] for more innovation and experimentation in government[,] and . . . mak[ing] government more responsive by putting the States in competition for a mobile citizenry.”<sup>357</sup>

But, Justice O’Connor stressed that the “principal benefit of the federalist system” is it serves as a “check on abuses of government power.”<sup>358</sup> Her majority opinion would add

---

<sup>354</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000).

<sup>355</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>356</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>357</sup> *Id.* As Heather Gerken explained, “Federalism is thought to promote choice, competition, experimentation, and the diffusion of power.” Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552 (2012).

<sup>358</sup> *Gregory*, 501 U.S. at 458.

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.<sup>359</sup>

O'Connor cited the following passage from Madison's *Federalist 51*, which highlights the "double security" the citizenry enjoys from this joint sovereignty:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between 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.<sup>360</sup>

Erwin Chemerinsky elaborated on the values federalism is supposed to promote, including enhancing liberty, "effectively meeting society's needs," efficiency, civic participation, community empowerment, and "economic gains."<sup>361</sup> The concept of "federalism as empowerment" is the notion that having multiple levels of government can afford greater civil protection. Therefore, "[i]f one level of government fails to require cleanup of nuclear wastes or to protect women from violence, another can step in."<sup>362</sup> Thus, having many levels of government means "there are multiple power centers capable of act[ion]."<sup>363</sup> Federal and state courts should both "be available to protect constitutional rights."<sup>364</sup> The legislatures at all levels of government should also "have the authority to deal with social problems, such as unsafe nuclear wastes, guns near schools, and criminals owning firearms."<sup>365</sup>

---

<sup>359</sup> *Id.*; see also *Printz v. United States*, 521 U.S. 898, 921 (1997) (division of powers between federal government and the states designed to ensure protection of liberty); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380 (1985) (citing the freedom from government "tyranny" as "perhaps the most frequently mentioned function" of federalism).

<sup>360</sup> *Gregory*, 501 U.S. at 459 (quoting THE FEDERALIST NO. 51 (James Madison)).

<sup>361</sup> Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1790 (2006).

<sup>362</sup> *Id.* at 1766.

<sup>363</sup> *Id.* at 1766–67.

<sup>364</sup> *Id.* at 1767.

<sup>365</sup> *Id.*

This vision of courts and legislatures preserving and protecting rights and liberties leaves out the critical role that dueling federal and state executive branches play in the ongoing debate over the proper scope and contours of federal and public law litigation. State attorneys general and governors have been the primary actors fencing with the federal government in the courts, regardless of the political party in the White House. Some would prefer not to see such disputes resolved in the courts in this way.<sup>366</sup> As Rick Hills argued, however, restrictive views of federalism, where political safeguards are enough to police the boundaries of federal and state power, are “not really theories of federalism at all but theories of judicial review . . . .”<sup>367</sup> It is in the courts where the checks and balances of federalism ultimately play out in many respects. As Ernest Young explains, “it may be that the vitality of political and institutional checks ultimately depends on the enforcement of certain substantive constraints on federal power.”<sup>368</sup> And, in many instances, the locus of enforcement of those constraints, it turns out, is going to be the courts in many instances, meaning public law litigation will be the vehicle for such disputes.

That is not to say that state challenges to federal government actions are the ideal vehicle for a rich dialogue over the legality of government behavior. The stories that states tell are very different from those of individual plaintiffs. Compare the alleged injuries of the states of Hawai’i, Washington, Minnesota, i.e., that their universities’ students will not be able to travel and their universities’ educational

---

<sup>366</sup> See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 180–84 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For critiques of that strain of federalism that looks to the political processes, and not the courts, to police the contours of federalism itself, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001), and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

<sup>367</sup> Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 821 (1998).

<sup>368</sup> Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1368 (2001). He continues, “although scholarly wars over constitutional interpretation in the past several decades have yielded other rationales for judicial review in other contexts, enforcement of the basic political rules of the road remains one of the most persuasive justifications for the institution.” *Id.* at 1373.

missions will be harmed, to those of an individual stopped at a U.S. airport who risked his life serving as an interpreter in Iraq for U.S. ground troops.<sup>369</sup> Which is more salient, which calls out for judicial intervention, and which places the alleged illegal activity in higher relief?

Furthermore, in its 1962 decision, *Baker v. Carr*, the Supreme Court highlighted one of the justifications for standing doctrine as follows:

A federal court cannot “pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.” Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.<sup>370</sup>

Does the reliance of state litigants on so-called “makeweight,” proprietary harms run contrary to this requirement? In other words, does asking state litigants to allege proprietary harms distract courts from addressing other, core harms—like harms to *parens patriae* interests, an imbalance in power between the federal and state governments, or constitutional injuries—that might justify greater attention from the courts? Standing doctrine does not only ask that plaintiffs allege a concrete, traditional injury to their own interests but, also that those plaintiffs bring injuries to the courts that present “concrete adverseness.”<sup>371</sup> Such adverseness in constitutional disputes is often less a product of plaintiffs articulating common law-type injuries and more likely a result of their identifying issues that raise important constitutional questions. Moreover, there are often parties aligned on all sides of those issues with strong stakes in the outcome. This is typically the case regardless of whether such stakes resemble the type of injury for which an action existed in common law at the birth of the republic.

Similarly, given the harms that states allege, would the remedies states seek in order to rectify those harms present themselves as trivial, like Justice Blackmun’s critique of the majority holding in

---

<sup>369</sup> Nicholas Kulish, *Iraqi Immigrant, Caught in a Trump Policy Tangle, is Allowed to Stay*, N.Y. TIMES, Jan. 29, 2017, at A18.

<sup>370</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962) (citation omitted).

<sup>371</sup> *Id.*

*Lujan*? That is, when a state brings a legal broadside against a wide-ranging federal program, yet articulates an injury that appears as inconsequential compared to the challenged constitutional violation, are the remedies available to the courts in such situations up to the task of addressing those constitutional violations that might lie at the heart of the dispute? Can a court address such constitutional violations when they appear, at times, in cases where the injury alleged is one that is common in a dispute between neighbors, or typically resolved on “Judge Judy”? Unfortunately, the limitations imposed upon public law litigation, developed over the years, may leave states little room to allege more meaningful injuries. Therefore, perceived harms to proprietary interests are the means by which the states can challenge federal government practices in the courts. Thus, we are left with litigation that is less than what it could be. But we should not let a demand for the perfect prevent adjudication of the good. Without these states taking action, some of the federal practices that are alleged to violate statutory and constitutional law may have never been challenged in the courts.<sup>372</sup>

Federal courts should remain open for the vindication of federal rights. Limiting state standing, or any litigant’s standing to cases in which that litigant is able to allege some form of traditional, common law harm runs the risk of distorting the public law litigation process to focus it on those harms that are likely not the most serious of the those generated by the defendant’s challenged conduct. If concrete adverseness means anything, it should be that what is really at stake in a dispute is what a court should seek to adjudicate, not some ancillary or satellite issue. However, given the current state of standing doctrine, to vindicate a right through the courts, a litigant is forced to offer allegations that describe the harm he or she faces in ways that are more likely to overcome standing doctrine. That litigant must allege an injury in fact to traditional interests. State litigants appear able to present their injuries as those that are consistent with this approach to standing, use the courts as platforms on which to challenge federal government action, and serve as a counterweight to federal power.

---

<sup>372</sup> This fear is similar to the fear that the tendency toward more private—as opposed to public—adjudication, through Alternative Dispute Resolution (ADR) and private arbitration, limits the role of the judiciary and prevents public adjudication of disputes. On the value of public, as opposed to private, adjudication see, for example, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of The Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1836–38 (2014).

However, the risks remain that a narrow approach to the harms plaintiffs seek to vindicate may ultimately limit the power of the courts to adjudicate those rights under robust conditions that allow for a full and fair hearing of the underlying rights and constitutional issues. And yet, it is the very creation of such an appropriate forum for the adjudication of rights that is one of the goals of standing doctrine in the first place.

Another shortcoming of this private law approach to standing in the public law arena is that there is a risk that a focus on a narrow class of harms might hamstring the courts in the range of potential remedies that they might have at their disposal due to the need to match those remedies to the specific harms alleged. In other words, courts cannot issue sweeping orders to rectify constitutional injuries if they have not been asked to rectify such injuries by the parties before them. What if, in response to the state of Texas's claims that it faced the loss of \$130 for each DAPA recipient who filed for a driver's license (with no indication that any particular DAPA recipient had actually sought to do so), the court simply ordered the federal government to reimburse Texas for each recipient who sought a license? What if, in the travel ban litigation, the federal government is simply ordered to allow any student of the University of Hawai'i who might otherwise be subject to the ban to enter the state and enroll in classes while leaving the order intact? Regardless of one's political affiliation, such limited remedies, which might naturally flow from the harms alleged by these states in these different contexts, would clearly leave much to be desired.

Nevertheless, the latticework of federalism—which creates both horizontal and vertical divisions within and among the federal and state governments—creates room for tensions and oppositional forces to engage in a constant dialogue and struggle across these divisions. Further, it allows a discourse on the liberty of the citizens framed by the backdrop of constitutional protections across federalism's platform. Put another way, federalism itself provides a “durable and robust scaffolding for partisan conflict.”<sup>373</sup> If the last decade of state-initiated lawsuits against the federal government is any guide, the foundation of that platform appears to be the courts, through public law litigation commenced by states against the federal government. Although courts have sought to restrain the ability of litigants to pursue public law claims through doctrines such as standing, states

---

<sup>373</sup> Bulman-Pozen, *supra* note 352, at 1081.

appear to have found a way to bring very public law claims, even against the federal government. In order to do so, states have alleged private law harms while pursuing public law ends. Narrowed procedural doctrines have not just failed to prevent such litigation; they have shown the path forward for such disputes to proceed in the courts. By doing so, they have opened up a new battleground along federalism's frontier.

#### CONCLUSION

Justice Brandeis famously called the states laboratories of democracy.<sup>374</sup> But practically a century and a half before Brandeis, in *Federalist* 28, Alexander Hamilton envisioned a very different role for the states:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make the use of the other as the instrument of redress.<sup>375</sup>

By taking positions at times adverse to the federal government in the courts through public law litigation, regardless of the administration or political party in power, states can serve as political and constitutional counterweights when they perceive that the federal government is threatening their interests and those of their constituents. They do this by bringing very public law litigation and making sweeping allegations of unconstitutional behavior of the federal government. States appear able to pursue such claims through the federal courts, even when the courts have expressed a reluctance to recognize state authority to sue in a representational capacity and when standing doctrine more generally appears less willing to recognize public harms. By characterizing the harms they allege as those that resemble what a private litigant might assert, however, states appear to have found an approach to vindicating public law interests dressed down in the raiment of private law harms. By doing so, their claims appear to have faced courts more receptive to such harms and more willing to entertaining such suits. Whether this

---

<sup>374</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

<sup>375</sup> THE FEDERALIST NO. 28 (Alexander Hamilton).

approach generates the type of concrete adverseness the standing doctrine is supposed to surface and brings to light the true nature of the harms at stake that deserve attention by the courts, remains to be seen.