

Giving States More to Stand On: Why Special Solitude Should Not Be Necessary

*Christie Henke**

In Massachusetts v. EPA, the United States Supreme Court attempted to relax the standing requirements for states that are suing the federal government. The decision is based on a new and confusing rule that a state should be given special consideration—or “special solicitude”—when courts consider whether it has standing to sue the federal government. The majority relied on the parens patriae doctrine, which gives a state the right to sue on behalf of its citizens to protect its quasi-sovereign interests—such as “the health and comfort of its inhabitants” and the “earth and air in its domain.” This Note argues that states should have the right to sue the federal government on behalf of their citizens, and that the Court should extend the parens patriae doctrine to permit this kind of lawsuit.

Introduction.....	386
I. States Are Not Allowed to Sue the Federal Government On Behalf of Their Citizens.....	387
A. Standing Generally	387
B. <i>Parens Patriae</i> Standing	388
1. State Standing	388
2. Suits against the Federal Government	390
II. <i>Massachusetts v. EPA</i> Provides Special Solitude For States Suing the Federal Government	391
A. Background.....	391
B. The Majority Opinion Uses <i>Parens Patriae</i> Reasoning to Relax Standing Requirements for States.....	392

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* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2009; B.A., University of California, Davis, 2001. I am greatly indebted to Professors Robert Infelise and Anne Joseph O’Connell for their informed guidance and insight, and I would like to thank Courtney Covington, Nathan Matthews, Alice Bodnar and Monica Voicu for their skilled editorial advice. I am also grateful for the counseling and continuous support of Patrick Vosburg.

C. The Dissent	393
D. The Confusion.....	394
III. <i>Parens Patriae</i> Should Be Extended to Allow States to Sue the Federal Government	395
A. States Should Be Allowed to Sue the Federal Government for Regulatory Inaction When Their Quasi-Sovereign Interests Are at Stake.....	395
1. States Have No Recourse If Denied the Right to Sue.....	396
a. States Are Often Preempted from Regulating Environmental Harms within Their Boundaries	396
b. States Are Unable to Regulate Activities of Their Neighbors.....	398
2. Limitations on Challenging Agency Inaction Warrants Expansion of <i>Parens Patriae</i> Standing Doctrine	399
B. State Lawsuits against the Federal Government Will Not Interfere with the Goals of Standing Doctrine	400
1. <i>Parens Patriae</i> Doctrine Limits Standing to Meet Article III Requirements	400
2. <i>Parens Patriae</i> Actions against the Federal Government Would Not Undermine Separation of Powers.....	402
Conclusion	402

INTRODUCTION

In *Massachusetts v. EPA*, the United States Supreme Court attempted to relax the standing requirements for states that are suing the federal government. Relying on a single case, it held that a state suing on behalf of the interests of its citizens deserves “special solicitude” when applying the three-prong standing test of injury, causation, and redressability.¹ While the new rule is explicit in the Court’s decision, the impact it actually had on the question of whether Massachusetts had standing remains unclear, because the Court went on to hold that the State met the traditional standing requirements.² This ambiguity, in turn, leaves courts with little guidance on when and how to apply special solicitude to states in future cases.

It is not difficult to imagine why the Court would want to relax the requirements for a state that sues the federal government, particularly in a case like *Massachusetts v. EPA*. Courts have made it nearly impossible for anyone, including states, to sue federal agencies for their failure to fulfill statutory mandates.³ States are in a perfect position to challenge federal agency action (and inaction) because they often have the most to lose when the executive

1. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454–55 (2007).

2. *Id.* at 1455–58.

3. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2005); *see also infra* Part III.A.2.

branch has failed to enforce a statute. States are often precluded from regulating, or at least limited in their ability to regulate, when Congress has created a federal regulatory scheme to manage a problem.⁴ Even if states can regulate within their boundaries, they have no power to regulate their neighboring states. This proves especially problematic with environmental harms, which are often widespread and transboundary. States are also ideal litigators of environmental harms because the widespread nature of the harms might result in an individual citizen having less incentive or no standing to sue. Furthermore, separation of powers concerns are misplaced in the context of existing statutory mandates for federal agency action to protect the health and well-being of all citizens.

This Note argues that states should have the right to sue the federal government on behalf of their citizens, and that the ambiguity of the special solicitude given in *Massachusetts v. EPA* does not do enough to protect this right. Part I discusses the historical bases for a state's ability to sue other states and private parties on behalf of its citizens, but not the federal government. Part II discusses the impact of *Massachusetts v. EPA* on standing doctrine. Finally, Part III argues that a state's ability to sue in the interest of its citizens at large should be expanded beyond the holding of *Massachusetts v. EPA* to allow suits against the federal government, especially under environmental statutes.

I. STATES ARE NOT ALLOWED TO SUE THE FEDERAL GOVERNMENT ON BEHALF OF THEIR CITIZENS

A. *Standing Generally*

Federal court jurisdiction is limited to "Cases" or "Controversies" under Article III of the Constitution.⁵ To satisfy Article III, a plaintiff must show that she has suffered an "injury in fact," that the injury was caused by the conduct complained of, and that the injury is fairly redressable by the remedy sought.⁶ While the injury must be personally suffered by the plaintiff, standing cannot be denied because many people suffer the same injury.⁷ But, outside of Establishment Clause violations, a plaintiff may not sue solely as a citizen

4. Here, Massachusetts has limited authority to regulate the emissions of new cars. Clean Air Act § 209(a), 42 U.S.C. § 7543 (2006); *see also infra* Part III.A.1.

5. U.S. CONST. art. III § 2; *Massachusetts v. EPA*, 127 S. Ct. at 1452; *Baker v. Carr*, 369 U.S. 186, 204 (1962) (holding that standing requires a plaintiff to allege "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"); *see also* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

6. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* Fletcher, *supra* note 5, at 222.

7. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687–88 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

taxpayer concerned with having the government follow the law.⁸ “Injuries” are not limited to economic harms; environmental harms are recognized as sufficient to confer standing to litigants.⁹

Limitations on standing fulfill several goals. They ensure both sides fully present their case by requiring that the people before the court have an actual stake in the outcome of the litigation. By requiring a concrete factual context that is connected to the legal questions involved, the court can understand the consequences of its decision.¹⁰ Standing limitations also serve as a mechanism of separation of powers under the Constitution by preventing courts from acting in areas only appropriate for the legislative or executive branches.¹¹ Further, these limitations serve judicial economy by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.¹²

B. *Parens Patriae Standing*

1. *State Standing*

States have long been allowed to sue to protect their own proprietary interests. In cases involving injury to state-owned property and tax revenue, for example, states are treated as traditional litigants, without special consideration.¹³ When such concrete interests are at stake, the regular standing analysis generally applies, regardless of who the state is suing.¹⁴

Under the *parens patriae* doctrine, a state also has the right to sue on behalf of its citizens to protect its quasi-sovereign interests—those sovereign interests states relinquished upon joining the United States, such as “the health and comfort of its inhabitants”¹⁵ and the “earth and air in its domain.”¹⁶ The

8. *Defenders of Wildlife*, 504 U.S. 555; see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION 89 (4th ed. 2003).

9. *SCRAP*, 412 U.S. at 686; *Morton*, 405 U.S. at 738.

10. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

11. *Id.* at 1470; see also *Defenders of Wildlife*, 504 U.S. at 559–60.

12. See, e.g., *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

13. *Wyoming v. Oklahoma*, 502 U.S. 437, 448–49 (1992) (dispute about tax revenue); *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (economic interference); *California v. United States*, 180 F.2d 596, 600 (9th Cir. 1950) (holding that California had the right to intervene in suit as absolute owner of water in dispute).

14. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (holding that a state has standing to sue where a lower emissions budget injures the state in its proprietary interests by making State Implementation Plans more onerous); *California v. United States*, 180 F.2d at 600 (allowing California to intervene in a case against the United States because the state was the absolute owner of the water); cf. *Wyoming v. Oklahoma*, 502 U.S. at 448 (recognizing that “Courts of Appeals have denied standing to States where the claim was that actions taken by United States Government agencies had injured a State’s economy and thereby caused a decline in *general* tax revenues,” but that those cases did not involve injury to *specific* tax revenues). *Wyoming v. Oklahoma* revolved around an Oklahoma statute that deprived Wyoming of tax revenue, and did not specifically deal with the question of whether the state could sue the federal government for depriving it of *specific* tax revenues.

15. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

parens patriae doctrine was established in the early twentieth century by a line of cases dealing with public nuisance. In the seminal case, *Missouri v. Illinois*, the Supreme Court held that Missouri had standing to sue Illinois for the dumping of sewage into a canal that drained into the Mississippi River, poisoning Missouri's water supply and injuring its land.¹⁷ In *Georgia v. Tennessee Copper Co.*, the Court extended the doctrine to allow states to sue private entities in *parens patriae*.¹⁸ In that case, Georgia sued to enjoin copper companies in Tennessee from discharging noxious gas into Georgia's territory.¹⁹ Justice Holmes asserted that because Georgia was suing in its quasi-sovereign capacity, it had a legitimate interest "independent of and behind the titles of its citizens, in all the earth and air within its domain."²⁰

In both of these cases, the Court analogized the state to an independent sovereign that, prior to joining the United States, could seek resolution of its interests by negotiation with other states or, in that failing, by force.²¹ Thus *parens patriae* standing originated to recognize the individual states' quasi-sovereign interests—those interests that were surrendered to join the United States.²²

More recently, the Court applied the *parens patriae* doctrine to a suit brought by the Commonwealth of Puerto Rico, which sued apple growers in Virginia for discrimination against the Puerto Rican workforce and the corresponding injury to Puerto Rico's economy.²³ Instead of hiring foreign laborers, federal law required employers to recruit domestic nonlocal workers when the local workforce was inadequate.²⁴ The Department of Labor established an interstate clearance system to implement the program.²⁵ After job openings were transmitted via the clearance system to Puerto Rico for the apple harvest in Virginia, over one thousand Puerto Rican workers were recruited by the Department to fill the jobs.²⁶ The defendant growers refused to employ the Puerto Rican workers that arrived, and the remaining workers were told to cancel their flights.²⁷ In an 8–1 opinion, the Court held that Puerto Rico had standing to sue in *parens patriae*, in spite of the small number of individuals directly involved.²⁸ In order for a state to have standing, the Court

16. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

17. 180 U.S. 208.

18. 206 U.S. 230 (1907). Literally, *parens patriae* means "parent of his or her country." BLACK'S LAW DICTIONARY 911 (7th ed. 2000)

19. *Tennessee Copper*, 206 U.S. at 236.

20. *Id.* at 237.

21. *Id.* at 237–38; *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

22. *Georgia v. Tenn. Copper*, 206 U.S. 230, 237 (1907); *see also Missouri v. Illinois*, 180 U.S. at 241.

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

24. *Id.* at 594–96.

25. *Id.* at 594–95.

26. *Id.* at 597.

27. *Id.*

28. *Id.* at 608–09.

held, the interest must be quasi-sovereign—either in the well-being of its residents in general, or in securing the observance of its rightful status within the federal system.²⁹ While the traditional standing requirements need not be met, the interest must be “sufficiently concrete to create an actual controversy between the state and defendant” in order to satisfy Article III of the Constitution.³⁰ And in that case, the interest of Puerto Rico in preventing discrimination against its residents was a quasi-sovereign interest concrete enough to confer standing.³¹

2. *Suits against the Federal Government*

In tension with the otherwise broad ability of states to sue to protect their citizens, states are not allowed to sue the federal government in *parens patriae*.³² This limitation, first raised in *Massachusetts v. Mellon*, is based on the premise that

it is no part of [the states'] duty or power to enforce their [citizens'] rights in respect of their relations with the Federal Government. In 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 the latter, they must look for such protective measures as flow from that status.³³

In that case, Massachusetts brought a suit against the Secretary of the Treasury, arguing that a federal aid program for pregnant women was unconstitutional because it fell outside the scope of Congress's Article I powers and thus violated the Tenth Amendment.³⁴ A unanimous Court held that Massachusetts lacked standing because it only raised “abstract questions of political power, of sovereignty, of government.”³⁵ The Court emphasized that the state and its citizens had not suffered a particularized injury and that thus any remedy must be sought via the political process.³⁶

The Court left open the application of its rule, declaring that it was not going “so far as to say that a State may *never* intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress.”³⁷ However, recent opinions have eliminated this possibility by definitively asserting that states can never sue the federal government in *parens*

29. *Id.* at 607.

30. *Id.* at 602.

31. *Id.* at 608–09.

32. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923).

33. *Mellon*, 262 U.S. at 485–86.

34. *Id.* at 478–79.

35. *Id.* at 485.

36. *Id.*

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

patriae.³⁸ Thus, *Mellon* and its progeny have severely restricted states' ability to enforce their citizens' rights against federal government action or inaction.³⁹

II. MASSACHUSETTS V. EPA PROVIDES SPECIAL SOLICITUDE FOR STATES SUING THE FEDERAL GOVERNMENT

A. Background

The Clean Air Act (the Act) requires the Administrator of the Environmental Protection Agency (EPA) to regulate emissions that cause air pollution when it is "reasonably anticipated to endanger public health."⁴⁰ Environmental groups petitioned the EPA for a rulemaking, arguing that the statute requires the agency to promulgate regulations addressing greenhouse gas emissions.⁴¹ The agency denied the petition, holding that the Act did not authorize the EPA to regulate greenhouse gas emissions in new cars, and that even if the statute authorized regulation, it was against public policy for it to promulgate rules in the area.⁴²

The environmental groups, joined by several states including Massachusetts, sought review of the EPA order in the D.C. Circuit Court of Appeals.⁴³ The agency argued that the plaintiffs lacked standing to sue because they failed to satisfy the three elements of standing: injury in fact, redressability, and causation.⁴⁴ In the agency's view, the connection between emissions and the plaintiff's injury was too speculative, and the remedy "depend[ed] on predictions . . . [which would require] an elaborate sequence of events involving choices by non-federal actors, including foreign governments."⁴⁵ Even if the plaintiffs did have standing, the agency argued that its action deserved deference from the Court; the agency's conclusion that the Act did not authorize it to regulate greenhouse gas emissions was reasonable, and the Administrator retained discretion to choose not to regulate emissions under the statute.⁴⁶

38. See generally *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); see also, e.g., *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 338 n.7 (1st Cir. 2000); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *Wyoming v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Iowa v. Block*, 771 F.2d 347 (8th Cir. 1985); *Pennsylvania v. Kleppe*, 533 F.2d 668, 678–81 (D.C. Cir. 1976).

39. For cases enforcing the rule see, for example, cases cited *supra* note 38.

40. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006); *Massachusetts v. EPA*, 127 S. Ct. 1438, 1447 (2007).

41. *Massachusetts v. EPA*, 127 S. Ct. at 1449.

42. *Id.* at 1450–51.

43. *Id.* at 1451.

44. Brief for Respondent at 7, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120); see also *Massachusetts v. EPA*, 127 S. Ct. at 1453.

45. Brief for Respondent, *supra* note 44, at 7.

46. *Id.* at 7–8.

Massachusetts argued, without reference to its quasi-sovereign interest, that it satisfied the standing inquiry because it suffered injury to state-owned coastal property.⁴⁷ Further, the EPA's failure to regulate contributed to the injury—the remedy sought, though only an incremental step, would nevertheless reduce the risk of future injury from climate change.⁴⁸ Plaintiffs went on to argue that the EPA, by not regulating greenhouse gas emissions, had failed to fulfill its duty under the Act of regulating emissions that endanger public health.⁴⁹

B. The Majority Opinion Uses Parens Patriae Reasoning to Relax Standing Requirements for States

Without directly holding that a state can sue the federal government on behalf of its citizens, the Court held that Massachusetts deserves “special solicitude” in the regular standing analysis because it asserted “quasi-sovereign” interests.⁵⁰ Massachusetts had an interest not only in the property it owned, but also in “all the earth and air in its domain”—a classic quasi-sovereign interest in *parens patriae* doctrine—and thus should be afforded special consideration when applying the standing inquiry.⁵¹ Relying on *Georgia v. Tennessee Copper Co.*, Justice Stevens reasoned that a state had a legitimate interest in preserving its sovereign territory, and that it should not be denied the ability to protect that interest because it surrendered its sovereignty to the federal government.⁵² States are preempted from regulating in-state car emissions, and are unable to force neighboring states to reduce greenhouse gas emissions; they have given up these rights to join the United States.⁵³ Further, under the act the EPA was tasked with protecting Massachusetts and all other states from air pollutants that endanger public health.⁵⁴

In a footnote, the Court distinguished *Mellon*'s limitation on the ability of a state to sue the federal government for its quasi-sovereign interests.⁵⁵ Relying on *Georgia v. Pennsylvania Railroad Co.*, a case that the federal government was not a party to, Justice Stevens argued that *Mellon* prohibits a state from suing the government to protect its citizens from the operation of a federal statute (in *Mellon*, the operation of the welfare program), but not from suing to assert its rights under federal law.⁵⁶ Thus, *Mellon* did not apply to Massachusetts because the state was asserting the rights of its citizens created

47. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007).

48. *Id.* at 1457–58.

49. *Id.* at 1449.

50. *Id.* at 1454–55.

51. *Id.*

52. *Id.* at 1454.

53. *Id.*

54. *Id.*

55. *Id.* at 1455 n.17.

56. *Id.*

by a federal statute, and not to prevent the enforcement of the statute against its citizens.⁵⁷

Once it established that Massachusetts deserved special solicitude, the Court made short work of the remaining standing analysis, holding that Massachusetts has standing to sue the EPA.⁵⁸ The state's loss of coastal property from rising sea levels satisfied the injury in fact requirement, the chain of causation was not too attenuated, and regulation of greenhouse gas emissions could redress this injury.⁵⁹ The majority went on to hold that the Clean Air Act unambiguously authorizes the EPA to regulate greenhouse gas emissions.⁶⁰ Further, the Court cabined the Administrator's discretion by requiring that his reasoning for not regulating emissions be based on the standards provided in the statute.⁶¹ Here, the agency must regulate greenhouse gas emissions if it finds that the "air pollution may reasonably be anticipated to endanger public health or welfare," or it must provide a reasonable explanation for why it cannot or will not exercise its discretion.⁶²

C. *The Dissent*

Chief Justice Roberts argued that the majority had no basis for relaxing the standing requirements for Massachusetts, and that even if special solicitude were appropriate for states asserting quasi-sovereign interests, this was not such a case.⁶³ First, he argued *parens patriae* standing does not relieve a state from having to meet the ordinary standing requirements—a state asserting a quasi-sovereign interest must still prove that its citizens meet the causation and redressability requirements to have standing.⁶⁴ According to the Chief Justice, the majority found no support for the proposition that Massachusetts should receive special consideration because it suffered injury to quasi-sovereign interests.⁶⁵

Even if special solicitude would have provided the state with standing, Chief Justice Roberts continued, Massachusetts articulated a traditionally nonsovereign interest in the litigation at hand—the loss of state-owned

57. *Id.*

58. *Id.* at 1455–58.

59. *Id.*

60. *Id.* at 1459–60.

61. *Id.* at 1462 ("The agency's reason for inaction must conform with the authorizing statute.").

62. *Id.*

63. *Id.* at 1464 (Roberts, C.J., dissenting). Chief Justice Roberts was joined by Justices Scalia, Thomas, and Alito. Justice Scalia wrote separately to discuss the merits of the claim, but did not discuss the standing question addressed by Roberts. He argued that the Administrator of the EPA retains discretion to decide when to regulate, and thus that the agency's interpretation of the Clean Air Act is reasonable and deserves deference. *Id.* at 1471–78 (Scalia, J. dissenting).

64. *Id.* at 1465–66 (Roberts, C.J., dissenting).

65. *Id.* at 1464.

property.⁶⁶ Further, the state should not be allowed to sue the federal government based on its quasi-sovereign interest under the *Mellon* rule.⁶⁷

Applying the traditional standing analysis, Chief Justice Roberts concluded that the plaintiffs lacked standing because global warming presents a causal chain that is too attenuated to satisfy the requirements of injury in fact, causation, and redressibility.⁶⁸ Further, Roberts stated that the plaintiffs' assertion of impending sea rise from rising global temperatures was itself scientifically questionable, not to mention the tenuous link between the failure of the EPA to regulate greenhouse gas emissions and global warming.⁶⁹

D. *The Confusion*

The *Massachusetts v. EPA* decision leaves unclear how the "special solicitude" given to Massachusetts actually impacted the standing analysis within the decision. After justifying his assertion that a state deserves special consideration in applying the three-prong test, Justice Stevens proceeded to argue that the state had met the traditional standing requirements: "[w]ith the [state's special solicitude] in mind, it is clear that petitioners . . . have satisfied the most demanding standards of the adversarial process."⁷⁰ But if Massachusetts could meet "the most demanding standards" of standing, why does the state need special solicitude? The majority asserted that the harms associated with climate change are serious and well recognized, that the emission of greenhouse gases causes global warming, and thus that EPA's refusal to regulate contributed to Massachusetts' injury.⁷¹ The majority applied the standing analysis without mention of the quasi-sovereign interests deemed important enough earlier in the opinion to supply special consideration.⁷² Indeed, the majority relied on Massachusetts' loss of state-owned coastal property—an interest that is not quasi-sovereign for the purposes of *parens patriae* standing—as the injury sufficient to confer standing.⁷³ No mention was made of an element of standing that Massachusetts had not met, or for which the state needed special solicitude.⁷⁴ This leaves two major questions

66. *Id.* at 1466.

67. *Id.*

68. *Id.* at 1467–69.

69. *Id.* at 1467–70.

70. *Id.* at 1455 (majority opinion); see also Bradford C. 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 (2008) (discussing the ambiguity as to whether the majority applied a special standing analysis or whether Massachusetts had met the standard analysis); Michael Sugar, Note, *Massachusetts v. EPA*, 31 HARV. ENVTL. L. REV. 531, 541 (2007). *But see* First Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 196 (2007) (arguing that the Court applies a much less restrictive standing test, and that Massachusetts's harm was small and remote).

71. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455–57 (2007).

72. *See id.*

73. *Id.* at 1456.

74. *See id.* at 1455–57.

unaddressed: What impact should special solicitude have in a standing analysis when the state has not otherwise met the standing requirements? And, are states allowed to sue the federal government based purely on their quasi-sovereign interests?

In the short time since the opinion, lower courts have already struggled in applying the special solicitude standard. One has proceeded with the standard standing analysis, and mentioned special solicitude only as an afterthought supporting standing.⁷⁵ Another has read *Massachusetts v. EPA* narrowly, allowing special solicitude for states only when the action is based on a procedural right provided by the underlying statute.⁷⁶ Still another has used the *Massachusetts v. EPA* decision to bolster the argument that states are not allowed to regulate because they have “surrendered to the federal government their right to engage in certain forms of regulation.”⁷⁷

III. *PARENS PATRIAE* SHOULD BE EXTENDED TO ALLOW STATES TO SUE THE FEDERAL GOVERNMENT

It remains unclear how *Massachusetts v. EPA* will impact the ability of states to sue the federal government for their quasi-sovereign interests, or how the standing analysis will differ when “special solicitude” applies. Instead of applying this nebulous doctrine to allow states in some situations to sue the federal government, I propose the Court should altogether remove the prohibition on states suing the federal government in *parens patriae*. This Note makes the case that states should be able sue the federal government for regulatory inaction when their quasi-sovereign interests are at stake. Allowing states to sue the federal government in *parens patriae* will not interfere with the goals of a limited standing doctrine.

A. *States Should Be Allowed to Sue the Federal Government for Regulatory Inaction When Their Quasi-Sovereign Interests Are at Stake*

The alignment of facts and law in *Massachusetts v. EPA* made it the prime case to expand *parens patriae* doctrine to allow states to sue the federal government. While not explicitly alleged, Massachusetts had sincere and substantial quasi-sovereign interests in the prevention of global warming and therefore in EPA regulation of new car emissions. More than only the loss of state-owned coastal property, unregulated emission of greenhouse gases threatens to harm all the land and air within the state’s boundary, not to

75. Nat’l Ass’n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007).

76. Colorado *ex rel.* John Suthers v. Gonzales, 558 F. Supp. 2d 1158 (D. Colo. 2007). In that case, the court held that *Mellon*—not *Massachusetts v. EPA*—applied because the cause of action was not based on a right created by Congress to challenge the actions the government had taken, even though Colorado clearly had a quasi-sovereign interest. Accordingly, the state was not allowed to sue the federal government in *parens patriae*. *Id.* at 1165.

77. California v. Gen. Motors Corp., 2007 U.S. Dist. Lexis 68547, at *32 (N.D. Cal., Sept. 17, 2007) (quoting *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454–55).

mention its citizens' health and well being.⁷⁸ The interest in this case is strikingly similar to *Georgia v. Tennessee Copper Co.*, the seminal *parens patriae* case, in which Georgia successfully sought an injunction from air pollution originating outside its boundaries.⁷⁹ This quasi-sovereign interest, on its own, should be sufficient to justify extending *parens patriae* standing against the federal government. However, the case for allowing this kind of suit is further supported by several other factors.

1. States Have No Recourse If Denied the Right to Sue

A state should be allowed to sue the federal government to enforce its rights under federal law when the state would otherwise be without remedy. Here, if Massachusetts was unable to sue the EPA for its failure in protecting the state's environment, the state would have no other recourse.

a. States Are Often Preempted from Regulating Environmental Harms within Their Boundaries

In many environmental and resource management regulatory schemes, Congress reserves a role for the federal government.⁸⁰ While Congress often allows and encourages state involvement in environmental regulation, the statutes can also preempt state regulation. Federal preemption of state environmental law serves many environmental purposes, such as reducing negative externalities.⁸¹ One way federal preemption reduces environmental harms across state boundaries is through uniform minimum standards, providing a floor of allowed environmental harms.⁸² Uniform minimum standards are commonplace in federal environmental statutory schemes. The EPA's regulation of stationary source emissions under the Clean Air Act is an example, where states cannot adopt more strict emission standards than the standards set by the EPA.⁸³ Similarly, the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) ensure states set standards as stringent

78. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454–56 (2007).

79. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

80. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 256 (2000); see also, e.g., Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas*, 10 ENERGY L.J. 277 (1989). While regulation of utility companies was traditionally viewed as a state power, the Federal Energy Regulatory Commission (FERC) was created to regulate utilities in their interstate aspect. Lindh, *supra*, at 277. Similar to many environmental issues, "the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect is often significant enough that uncontrolled regulation by the States can patently interfere with the broader national interest." *Id.*

81. Weiland, *supra* note 80, at 240. Negative externalities exist when an entity does not bear all of the costs of its activities. *Id.* at 239–40. Other purposes served by federal preemption include overcoming a state's capacity to manage the problem and ensuring that varied interests are represented in the political process. *Id.* at 240–41.

82. *Id.* at 241–42.

83. Clean Air Act, 42 U.S.C. § 7416 (2006).

as the federal standards for water pollution and waste disposal, respectively.⁸⁴ These nondiscretionary minimum standards protect the environment by preventing a “race to the bottom by establishing a floor below which states . . . may not fall.”⁸⁵

While it provides environmental benefits, federal preemption is not without costs. By prohibiting state regulation, Congress limits a state’s ability to protect its quasi-sovereign interest in its citizens’ health and welfare according to its own unique set of issues and priorities. In *Massachusetts v. EPA*, states were effectively preempted from addressing the harm caused by auto emissions. In principle, the Clean Air Act allows states to regulate emissions more stringently than the EPA, if they first get agency approval.⁸⁶ However, the EPA denied that it had the authority to regulate tailpipe emissions from cars under the Act, yet no state had succeeded in obtaining an exemption prior to the *Massachusetts v. EPA* decision.⁸⁷ *Massachusetts v. EPA* did not solve this situation. Indeed, shortly after the decision was issued, the EPA reopened several states’ petitions to set standards for automobile emissions of greenhouse gases and denied them all.⁸⁸

Even though states surrendered some rights to regulate by participating in the federal system,⁸⁹ they should still be able to assert their rights to the environmental protection provided by the Clean Air Act—a federal law designed to protect all of the states’ environment. Congress tasked the EPA with protecting the environment, and its failure to do so harms the states’ quasi-sovereign interest in “all the earth and air in its domain.”⁹⁰ Unless allowed to sue federal agencies for the enforcement of the federal statute, states are left without remedy for this injury.

When Congress requires an agency to regulate air pollution, and limits the states’ ability to regulate, the agency’s obligation to regulate is even more critical, because only it can do so. Under such a regulatory scheme, states

84. Clean Water Act, 33 U.S.C. § 1370 (2006); Resource Conservation and Recovery Act, 42 U.S.C. § 6929 (2006); see also Weiland, *supra* note 80, at 256–57.

85. Weiland, *supra* note 80, at 256.

86. Clean Air Act § 209(a), 42 U.S.C. § 7543 (2006); see also Danielle F. Fern, *The Crafting of the Low-Emission Vehicle Program: A Private Contract Theory of Public Rulemaking*, 16 UCLA J. ENVTL. L. & POL’Y 227, 231–32 (1998).

87. Samantha Young, *EPA Revives California’s Request to Set Tough Emission Standards*, S.F. GATE, Apr. 3, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/04/03/financial/f143606D74.DTL&hw=supreme+court+car+emissions&sn=010&sc=627>.

88. Julia Eliperin, *EPA Chief Denies Calif. Limit on Auto Emissions*, WASHINGTONPOST.COM, Dec. 20, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902012.html>.

89. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

90. See *Tennessee Copper*, 206 U.S. 230.

should retain the right to challenge an agency that has failed in its statutory duty to protect them because they are precluded from protecting themselves.⁹¹

b. States Are Unable to Regulate Activities of Their Neighbors

Even if a state were able to regulate emissions of greenhouse gases within its boundaries, it would still be unable to regulate the activities of neighboring states. This is a pronounced problem in the environmental context, because environmental harms are often transboundary. It is no surprise that the *parens patriae* doctrine developed out of concern for a state's ability to manage this exact kind of harm.⁹² Indeed, the series of public nuisance cases discussed above involved harms, such as dumping sewage into a canal and emitting noxious gases into the air, that are now managed by federal agencies under environmental statutes.⁹³

States have sacrificed their sovereignty to participate in the federal system,⁹⁴ and as a result, they are unable to negotiate treaties with neighboring states.⁹⁵ The remaining remedy, assuming the state has no right to sue the federal government in *parens patriae*, or a limited right to under *Massachusetts v. EPA*'s special solicitude doctrine, is secession.

The widespread and transboundary effect of activities impacting the environment bolsters the need for adequate federal regulation. A patchwork of regulation will do little to mitigate the harms of pollution to the environment or over-use of a natural resource.⁹⁶ Acknowledging this reality, Congress has

91. Admittedly, sorting out when a federal statute preempts state regulation is a daunting task. Weiland, *supra* note 80, at 237–39, 249–55; see also Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805 (1998) (discussing the conflict between the common law presumption against federal preemption and *Chevron* deference to agency interpretations of ambiguous statutes). Congress may expressly preempt a statute, but also may imply preemption. Weiland, *supra* note 80, at 252–53. For example, Congress expressly prohibits state requirements related to pesticide labeling or packaging under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(v)(b) (2006). Implied preemption is more difficult for a court to determine, and reasonable judges may come to different conclusions regarding congressional intent to preempt state law. Weiland, *supra* note 80, at 255. There are two kinds of implied preemption: conflict and field preemption. Conflict preemption is more easily determined; it is implied when compliance with both federal and state law is impossible. Field preemption is more obtuse, and is implied when Congress intends to occupy a given regulatory field. It may also be implied from a pervasive scheme of federal regulation. *Id.* at 254–55. But this difficulty should not preclude states from asserting their rights for the protection of their quasi-sovereign interests.

92. See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901). See generally CHEMERINSKY, *supra* note 8, at 89.

93. See generally *Tennessee Copper*, 206 U.S. 230; *Missouri v. Illinois*, 180 U.S. 208.

94. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007).

95. *Id.*; see also *Tennessee Copper*, 206 U.S. at 239 (discussing Georgia's inability to take direct action to maintain her sovereignty and to preserve the life, health and comfort of her citizens).

96. There is a fair amount of controversy about whether federal regulation and preemption effectively protects the environment. See Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945 (2006). But uniform federal regulation, while not alone the answer to protecting the environment, serves several important goals that should not be abandoned. The uniform minimum standards discussed *infra*, Part III.A.1.a., are a good

designed and adopted laws with the necessary and basic environmental safeguards to protect the nation's environment.⁹⁷ Citizens are harmed most when the federal agencies tasked with enforcing these statutes fail. If individual states are unable to ensure the enforcement of federal statutes outside of their boundaries, their citizens' health and welfare are put at risk because that pollution in most cases cannot easily be contained. There is no fence a state can build to block pollution from entering its air and waterways. States should be able to bring actions on behalf of their harmed citizens to enforce these minimal protections created by federal statute.

2. *Limitations on Challenging Agency Inaction Warrants Expansion of Parens Patriae Standing Doctrine*

Allowing states to bring lawsuits against the federal government is especially important in light of the current difficulty of challenging agency inaction. An agency's failure to fulfill its statutory duty by not regulating has the potential to seriously injure a state's quasi-sovereign interests. For instance, an agency decision not to regulate a given pollutant is likely to harm a state's interest in "all the earth and air in its domain."

In general, the reviewability of an agency's inaction is governed by the Administrative Procedure Act (APA). On its face, the APA makes no clear distinction between the reviewability of an agency's action versus its inaction.⁹⁸ Nevertheless, courts have interpreted two provisions of the APA as limiting review of agency inaction.⁹⁹ Under section 701(a)(2), agency actions (and failures to act) are not judicially reviewable if they are "committed to agency discretion by law." This section has been applied by the Supreme Court in several instances to create a presumption against judicial review of agency inaction, most notably in suits challenging an agency's failure to exercise its enforcement powers.¹⁰⁰ This presumption against reviewing enforcement decisions, while not implicated in *Massachusetts v. EPA*,¹⁰¹ severely limits the ability to challenge an agency's failure to act under its governing statute.

example of a legitimate purpose of federal regulation. Also, state and local governments may not have sufficient resources to manage, nor jurisdiction to resolve some environmental problems.

97. See discussion *infra*, Part III.A.1.a.

98. The APA includes "failure to act" in the definition of "final agency action." 5 U.S.C. § 551(13) (2006); see also Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction Under the Administrative Procedure Act*, 60 ADMIN. L. REV. 1, 4-5 (2008).

99. Biber, *supra* note 98, at 4-5.

100. Heckler v. Chaney, 470 U.S. 821 (1985) (creating a presumption against judicial review of agency decisions not-to-enforce that can be overcome by the organic statute expressly authorizing judicial review of such decisions); see also Lincoln v. Vigil, 582 U.S. 182 (1993); Webster v. Doe, 486 U.S. 592 (1988).

101. Massachusetts was challenging the EPA's response to a petition for rulemaking, and thus was challenging the agency's final action (not inaction). But one can imagine a situation where Massachusetts challenges the EPA's "inaction"—for instance, if the EPA had not responded to or had unreasonably delayed its response to the petition. This distinction between "action" and "inaction" is

Courts have also applied section 706(1) of the APA to limit the reviewability of agency inaction.¹⁰² In *Norton v. Southern Utah Wilderness Alliance*, environmental groups challenged the Bureau of Land Management's failure to protect federal lands from harm caused by off-road vehicle use.¹⁰³ Because requiring the agency to act would result in "undue judicial interference" in agency discretion, the court held that it could not force an agency to act unless the "agency failed to take a *discrete* agency action that it is *required to take*."¹⁰⁴ While it is unclear what actions are reviewable under this standard, a statutory deadline for mandatory action increases the chances the agency inaction will be reviewed under section 706(1).¹⁰⁵

These limitations on the ability to sue an agency that has shirked its statutory responsibilities justify an expansion of *parens patriae* standing for states. Representative suits against the federal government can counterbalance this limitation because it allows for increased review of an agency's failures when a collective interest is at stake. In contrast, the special solicitude standard articulated in *Massachusetts v. EPA* does not definitively allow for the necessary vindication of collective rights created by federal statutes.

B. State Lawsuits against the Federal Government Will Not Interfere with the Goals of Standing Doctrine

1. Parens Patriae Doctrine Limits Standing to Meet Article III Requirements

A primary goal of current standing doctrine is to ensure parties have an actual stake in the outcome of the litigation.¹⁰⁶ Demonstrating an actual remediable injury is the traditional mechanism used to restrict courts from hearing cases where plaintiffs have only a "professed stake in the outcome."¹⁰⁷ This ensures that courts will hear cases with "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."¹⁰⁸ An extension of *parens patriae* standing to states suing the federal government will not undermine this goal.

also confusing to the courts, which have inconsistently applied the distinction under the APA sections 706(1) and 706(2). Biber, *supra* note 98, at 6–7.

102. See, e.g., *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004); see also Tova Wolking, Note, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 *ECOLOGY L.Q.* 1067 (2007).

103. *SUWA*, 542 U.S. at 64.

104. *Id.*

105. See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U. PA. L. REV.* 923, 952 (2008) ("Deadlines stand out as one of the few areas where courts will compel agencies to act despite multiple demands on their resources.").

106. See discussion of standing generally, *supra* Part I.A.

107. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

108. *Id.* (internal quotation omitted).

While *parens patriae* standing does not require a state to have a direct injury in the same sense as a private party, the state must assert an injury to a special kind of interest—a quasi-sovereign interest.¹⁰⁹ In *Alfred L. Snapp*, the Court defined two categories of quasi-sovereign interests where a state qualifies for *parens patriae* standing—the interest in the health and well-being of its residents in general and the interest in not being discriminatorily denied its rightful status within the federal system.¹¹⁰ Under the first category, there is no definitive proportion of citizens whose health or well-being must be adversely impacted, but it must be more than an identifiable subgroup of the citizens, and indirect injuries must be considered.¹¹¹ An indicator of when a state should have standing under the first category of interests is “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”¹¹² Under the second category, a state has *parens patriae* standing when it is seeking to ensure that “its residents are not excluded from the benefits that are to flow from participation in the federal system.”¹¹³ Federal statutes creating benefits and preventing hardships in turn create legitimate state interests in assuring that the benefits of the federal system are not denied to its residents.¹¹⁴

These two distinct categories of interests limit causes of action brought by states to ones that are “actual controversies” under Article III of the Constitution. The state must still assert these narrow interests to sue in *parens patriae*, whether suing a private party, another state, or the federal government. With these limitations in place, allowing states to sue the federal government in *parens patriae* will not result in courts being faced with cases that are too speculative to resolve.

Some courts have also suggested that the interests represented by the state must be “concrete” enough so that its citizens would have standing in court to protect the interest themselves.¹¹⁵ Indeed, the dissent in *Massachusetts v. EPA*

109. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Chief Justice Roberts argued that *parens patriae* standing requires that the state meet the traditional standing requirements, plus assert a quasi-sovereign interest. “[P]arens patriae actions raise an additional hurdle for a state litigant: the articulation of a quasi-sovereign interest apart from the interests of particular private parties.” *Massachusetts v. EPA*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting). But in *Alfred L. Snapp*, the Court asserted that the state must show a special kind of injury to its residents—one that impacts more than just an identifiable group, not that the state must meet all the traditional standing elements in addition to asserting a quasi-sovereign interest. 458 U.S. at 607.

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

111. *Id.*

112. *Id.*

113. *Id.* at 607–08.

114. *Id.*

115. *Md. People’s Counsel v. Fed. Energy Regulatory Comm’n*, 760 F.2d 318, 322 (D.C. Cir. 1985); *Barnes v. Kline*, 759 F.2d 21, 26–27 (D.C. Cir. 1984) (interpreting the *Mellon* rule narrowly, and in dictum stating that states can sue the federal government if an “invasion of [the] state’s power had occurred”). In *Barnes*, the dissent argued that a state can sue in *parens patriae* only if its citizens have satisfied the injury in fact requirement of Article III of the Constitution. 759 F.2d at 50 n.8 (Bork, J., dissenting).

argues that a state's citizens must meet all three standing elements—in addition to the state asserting a sufficient quasi-sovereign interest—for a state to qualify for *parens patriae* standing.¹¹⁶ But the case law does not suggest such an arduous requirement. To the contrary, the purpose of allowing *parens patriae* suits is to vindicate the collective rights of the citizens of the state suing—and each of the individual citizens might not meet the rigorous standing requirements by themselves.¹¹⁷ The quasi-sovereign interest test under *Alfred L. Snapp* ensures that the interest asserted by the state meets the requirements of a “case or controversy” under the Constitution.

2. *Parens Patriae Actions against the Federal Government Would Not Undermine Separation of Powers*

Standing doctrine also exists to prevent the judiciary from usurping the policy-making functions of the popularly elected branches.¹¹⁸ Indeed, the dissent in *Massachusetts v. EPA* argued that the grievance at issue was best addressed by the legislative or executive branches, not the judicial branch.¹¹⁹ Chief Justice Roberts argues that global warming is exactly the kind of injury that does not provide standing, because it may impact “nearly everyone on the planet,” and thus should be managed by the elected branches.¹²⁰ Similarly, Professor Andrew P. Morriss argues that “the Court encouraged interest groups to seek to obtain from the courts what they could not from agencies or Congress . . . giving . . . interest groups that favor increased regulation . . . a second chance on those occasions when they lose in the political process.”¹²¹ The majority responded to these arguments in a footnote: “[S]tanding is not to be denied simply because many people suffer the same injury ‘To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.’”¹²²

The majority's response—that generalized grievances can confer standing—is compelling. Allowing a state, on behalf of the generalized interests of its residents, to sue the federal government for its failure to enforce a federal statute does not threaten separation of powers in the way the dissent

116. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1465–66 (2007) (Roberts, C.J., dissenting)

117. Perhaps class action requirements under the Federal Rules of Civil Procedure can offer guidance on *parens patriae* standing doctrine. With citizens as the “class” and the state as the “representative,” one could argue that a state would need to comply with Rule 23's requirements that (1) the class be so numerous as to make joinder impractical, (2) class members share a common issue being litigated, (3) the representative party has a typical claim, and (4) the representative is adequate.

118. Fletcher, *supra* note 5, at 222; *see also* discussion *supra*, Part I.A.

119. *Massachusetts v. EPA*, 127 S. Ct. at 1464 (Roberts, C.J., dissenting).

120. *Id.* at 1463–64.

121. Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. Environmental Protection Agency*, 2006–07 CATO SUPREME CT. REV. 193, 193–94.

122. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1458 n.24 (2007) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687–88 (1973) (emphasis removed)).

argued. Indeed, the enforcement of federal statute is exactly the kind of quasi-sovereign interest that *parens patriae* doctrine is supposed to protect. A state is allowed to sue when it seeks observance of the terms under which it participates in the federal system, particularly when a state attempts to ensure that the benefits created by federal statute accrue to its residents.¹²³

Where a state sues to require an agency to enforce a federal statute, there is no encroachment on the legislative branches because Congress has already expressed its will.¹²⁴ Unlike the situation described by Professor Morriss, the political process has resulted in tasking an agency with the duty to enforce a statute.¹²⁵ When the agency fails its duty, any harmed party, including a state representing its injured residents, should be able to challenge the failure. In many circumstances the state in its representative capacity will be better equipped than any individual to present the full controversy before the court. When the harms are indirect or too small to any particular individual, but large when considered collectively (as is often the case in the environmental context), a state is in a better position to present the quasi-sovereign interest in its entirety to the court for resolution.

States' ability to sue the federal government in *parens patriae* will not only benefit those states and "interest groups that favor increased regulation."¹²⁶ States that have a legitimate quasi-sovereign interest in an agency's action (not just inaction) under the test articulated above should be able to challenge the agency. If an agency has gone *beyond* its statutory authority, a state that has an injured quasi-sovereign interest should be able to sue that agency in *parens patriae* no less than a state harmed by an agency's failure to act.

CONCLUSION

The legacy of *Massachusetts v. EPA* may be that it is the first time the Court acknowledged climate change as an injury sufficient to confer standing.¹²⁷ Or perhaps it will ignite federal action on greenhouse gas emissions. Indeed, the EPA has announced that it will take comment on whether greenhouse gas emissions endanger the public health or welfare.¹²⁸ And, the coalition of states that litigated *Massachusetts v. EPA* filed a new

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

124. See *Md. People's Counsel v. Fed. Energy Regulatory Comm'n*, 760 F.2d 318, 321 (D.C. Cir. 1985) (holding that Congress can confer *parens patriae* standing to states against the federal government, and that such a statute does not threaten separation of powers because Congress retains the power to confer or withhold standing).

125. Morriss, *supra* note 121, at 193–94.

126. *Id.*

127. Even after discussing special solicitude, the Court seems to hold that Massachusetts met the ordinary standing inquiry. *Massachusetts v. EPA*, 127 S. Ct. at 1455–58.

128. EPA Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44,353–44,520 (July 30, 2008); see also EPA Climate Change Website, <http://www.epa.gov/climatechange/anpr.html> (last visited Sept. 26, 2008).

lawsuit to compel EPA to make such an endangerment finding.¹²⁹ But this decision will likely result in confusion as courts attempt to resolve whether (1) a state deserves special solicitude under *Massachusetts v. EPA*, (2) whether particular interests qualify as “quasi-sovereign,” and (3) whether states are allowed to sue the federal government. Undoubtedly, the Supreme Court’s work is not yet complete. Instead of continuing to refine the confusing, difficult-to-apply “special solicitude” it created in *Massachusetts v. EPA*, the Court should discard the entire *Mellon* rule preventing states from suing the federal government in *parens patriae*.

129. News Release, California Attorney General, Brown Takes EPA To Court For Ignoring Supreme Court Mandate (Apr. 2, 2008), available at <http://ag.ca.gov/newsalerts/release.php?id=1540>.

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