

NOTE

MASSACHUSETTS V. EPA'S REGULATORY INTEREST THEORY: A VICTORY FOR THE CLIMATE, NOT PUBLIC LAW PLAINTIFFS

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STANDING doctrine's development is often framed as a struggle between two competing models of adjudication. The private law model views the court's role as the adjudicator of individual rights and conditions access to the court on a party's showing of a discrete injury at the hands of another party. The opposing public law model favors congressional power to create causes of action that confer standing without requiring a showing of differentiated injury, and conceives of the judiciary's role as integral to ensuring executive compliance with the law. Many commentators view Massachusetts v. EPA, a recent Supreme Court decision addressing global climate change, as liberalizing standing doctrine and as a significant victory for the public law model of adjudication.

This Note departs from this commentary by arguing that, on the whole, the standing theory advanced in Massachusetts places the case within the Court's trend towards a more restrictive interpretation of the case-and-controversy requirement. This Note first analyzes the Massachusetts opinion, the history of state standing doctrine, and subsequent judicial treatment of the decision, in order to show that the Court's standing decision is based on a finding of injury to Massachusetts' governing interest: the ability of Massachusetts to regulate a harm that threatens the Commonwealth's territorial integrity. The Note then argues that this "regulatory interest theory" creates a standing regime that may be a variation of the public law model, but one that is potentially highly restrictive of both

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state and individual standing. In fact, the regulatory interest theory may create a standing regime where state attorneys general have monopoly power over public law adjudication, a possibility that threatens both core public and private law model values. This Note concludes that a positivist approach to standing that predicates state and citizen standing on positive statutory enactment provides a relatively straightforward, far more workable approach to the case-and-controversy requirement.

INTRODUCTION

In *Massachusetts v. EPA*, a 5-4 Supreme Court majority recently held that the Environmental Protection Agency (“EPA”) has the statutory authority to promulgate regulations for carbon dioxide emissions and other greenhouse gases that contribute to global climate change, and that the EPA must provide a reasoned explanation for refusing to exercise this authority should it refuse to do so.¹ *Massachusetts* has received attention as the Court’s first case dealing with climate change,² and the Court’s holding is certainly significant as it defines a major new area of responsibility for the EPA. Indeed, President Bush subsequently directed the EPA to implement the decision by developing regulations to improve fuel efficiency and reduce greenhouse gas emissions from automobiles.³

The case’s larger significance, at least for legal doctrine, may relate to the threshold issue of standing: whether the plaintiffs had the ability to challenge regulatory inaction pertaining to one of the most diffuse environmental problems imaginable, global climate

¹ 127 S. Ct. 1438, 1462–63 (2007). After deciding that plaintiffs had standing under Article III to challenge the EPA’s denial of rulemaking petition, *id.* at 1452–58, the Court went on to hold: (1) that the EPA possesses authority under the Clean Air Act (“CAA”) to regulate new motor vehicle carbon dioxide emissions, *id.* at 1459–62; and (2) that the EPA failed to provide a “reasoned explanation” for its conclusion that it would not regulate such emissions even if it possessed the authority to do so, *id.* at 1463.

² See, e.g., Linda Greenhouse, Justices Say E.P.A. Has Power to Act on Harmful Gases, *N.Y. Times*, Apr. 3, 2007, at A1.

³ See Exec. Order No. 13,342, 72 Fed. Reg. 27,717 (May 14, 2007) (directing the EPA to cooperate with the Department of Transportation and the Department of Energy before taking any action to address the problem of greenhouse gas emissions from motor vehicles); see also Steven Mufson & Michael A. Fletcher, Bush Calls for Cuts in Vehicle Emissions, *Wash. Post*, May 15, 2007, at D1.

change.⁴ Standing doctrine is rooted in Article III's mandate that a court be presented with a "case or controversy" before it exercises its judicial power. To establish standing in an Article III court, modern standing doctrine, as set forth in *Lujan v. Defenders of Wildlife*, requires a plaintiff to show: (1) he has "suffered an injury in fact" that is "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁵

Chief Justice Roberts, with whom Justices Scalia, Thomas, and Alito joined in dissent, is far from alone in believing that *Massachusetts* departs from established standing doctrine.⁶ Commentators generally read *Massachusetts* to relax *Lujan*'s standing requirements and thereby depart from the private law model of adjudication,⁷ which views the court's role as the adjudicator of in-

⁴ *Massachusetts*, 127 S. Ct. at 1446 (noting that before the Court could reach the merits it had to decide the question of whether the plaintiffs had Article III standing). For commentary addressing the Court's standing doctrine in *Massachusetts*, see Jonathan H. Adler, Warming Up to Climate Change Litigation, 93 Va. L. Rev. In Brief 63, 63–69 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>; Jonathan Z. Cannon, The Significance of *Massachusetts v. EPA*, 93 Va. L. Rev. In Brief 53, 57–58 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/cannon.pdf>; Ronald A. Cass, *Massachusetts v. EPA*: The Inconvenient Truth About Precedent, 93 Va. L. Rev. In Brief 75, 76–80 (2007); Andrew P. Morriss, Litigating to Regulate: *Massachusetts v. Environmental Protection Agency*, 2006–07 Cato Sup. Ct. Rev. 193, 196–99, 203–05, 207–08 (2007); Michael Sugar, *Massachusetts v. Environmental Protection Agency*, 31 Harv. Envtl. L. Rev. 531, 536–44 (2007). See generally Dru Stevenson, Special Solicitude for State Standing: *Massachusetts v. EPA*, 112 Penn St. L. Rev. 1 (2007); Mark Gabel, Note, Generalized Grievances and Judicial Discretion, 58 Hastings L.J. 1331 (2007).

⁵ 504 U.S. 555, 560–61 (1992) (alteration in original) (citations and quotations omitted).

⁶ See *Massachusetts*, 127 S. Ct. at 1471 (Roberts, C.J., dissenting) (claiming the majority establishes a "new doctrine of state standing"). Commentators have expressed similar concerns. See Adler, *supra* note 4, at 64 ("[T]he Court . . . announce[d] a new rule for state standing in lawsuits brought against the federal government."); Stevenson, *supra* note 4, at 73 ("The Supreme Court created a new standing rule in *Massachusetts v. EPA*.").

⁷ See, e.g., Adler, *supra* note 4, at 66 ("The *Mass. v. EPA* court was not simply 'solicitous' of states. It weakened the traditional requirements for Article III standing as well."); Kimberly N. Brown, What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review, 55 U. Kan. L. Rev. 677, 678 n.11 (2007), ("Writing for the majority [in *Massachusetts*], Justice Stevens appeared to adopt an *Akins*-like theory of

dividual rights and conditions access to the court on a party's showing of a discrete injury at the hands of another party.⁸

Accordingly, private law model advocates have decried the *Massachusetts* decision as "open[ing] the door to many more suits by interest groups . . . dissatisfied with the outcome of the political process" and "open[ing] a one way door toward expanding the role of the federal government."⁹ By contrast, public law model advocates, favoring congressional power to create causes of action that confer standing without requiring a showing of differentiated injury, and conceiving of the judiciary's role as integral to ensuring executive compliance with the law, have applauded the decision as "a landmark victory for environmentalists,"¹⁰ resembling a "*Brown*

justiciability in a generalized grievance context. . . . [This] raises questions as to the future of standing doctrine in public law cases implicating so-called generalized grievances."); Cass, *supra* note 4, at 78 ("[Recent decisions like *Lujan*] brought the [standing] test back from its high-water mark of flexibility. Until this case. *Mass. v. EPA* presents as broad a claim as conceivable, involving harm that is remote, debatable, and—if one gets past those problems—ubiquitous."); Gabel, *supra* note 4, at 1365 (suggesting that *Massachusetts* rejects the ban against generalized grievances); Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 2007 Sup. Ct. Rev. 111, 134 ("[W]hile the majority's discussion of standing plausibly can be interpreted as relying on a special rule of standing for states, it is better understood as holding that the state would have standing without the need for any special rule . . ."). Percival reads the decision to "expressly reject[] the notion that standing cannot be premised on harm that is widely shared . . ." *Id.* at 149. But see Sugar, *supra* note 4, at 542 ("The creation and use of the concept of 'special solicitude' in a situation where a non-sovereign entity would be entitled to standing implies that the standing requirements for private plaintiffs have been heightened.").

⁸ For a more detailed summary of the public and private law models, see *infra* notes 18–25 and accompanying text; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282–84, 1290–91 (1976) (describing the public law model and contrasting the "traditional" private law model); Hudson P. Henry, *A Shift in Citizen Suit Standing Doctrine: Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 28 Ecology L.Q. 233, 240–41 (2001) (discussing the public and private law models).

⁹ Morriss, *supra* note 4, at 208; see also Adler, *supra* note 4, at 66 ("The *Mass. v. EPA* court was not simply 'solicitous' of states. It weakened the traditional requirements for Article III standing as well."); Cass, *supra* note 4, at 78 ("[Recent standing] decisions . . . brought the [standing] test back from its high-water mark of flexibility. Until this case.").

¹⁰ Percival, *supra* note 7, at 158.

v. Board of Education for the environment,”¹¹ and as “a breathtaking result for [the] greens.”¹²

While the Stevens majority may have strategically injected ambiguity into the *Massachusetts* standing decision in order to sway Justice Kennedy’s swing vote,¹³ this Note will argue that *Massachusetts* on the whole does not champion the public law model of adjudication. Many commentators underestimate the relevance of the plaintiff’s status as a sovereign state rather than a private individual, and misconstrue the injury upon which the Court based *Massachusetts*’ standing.¹⁴ This Note will analyze the *Massachusetts* opinion, the history of state standing doctrine, and subsequent judicial treatment of the decision in order to demonstrate that the Court’s standing decision is based primarily on a finding of injury

¹¹ Cannon, *supra* note 4, at 62 (“I am not suggesting this is *Brown v. Board of Education* for the environment, but it may be as close as we will come.”).

¹² Richard Lazarus, *A Breathtaking Result for Greens*, 24 *Envtl. F.* 12, 12 (2007). A victory for the public law adjudication model means a victory for environmental standing because under the public law model citizens have greater access to the courts to ensure agency adherence to environmental laws regardless of a showing of particularized injury-in-fact, causation, and redressability. Professor Cannon notes this connection between environmental standing and the public law model:

Environmentalism is associated with certain values—values that emphasize acting collectively for the common good and fitting harmoniously into the natural and social environment. . . .

. . . Supreme Court Justices who have shown sympathy for this worldview . . . tend to favor liberal access to the courts. . . . [Other justices] place[] judicial restraint [against the claims of environmentalists].

Cannon, *supra* note 4, at 55–56. Professor Nichol notes that the issue of widely shared interests is common to all public law actions: “Because public actions [aimed at altering governmental behavior] often seek systemic rather than localized changes, the interests asserted also can be described as general and non-distinct. The causation and redressability standards hit directly at the predictive and probabilistic nature of the public action.” Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 *Duke L.J.* 1141, 1167 (1993).

¹³ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 *Sup. Ct. Rev.* 51, 67–72.

¹⁴ See, e.g., Adler, *supra* note 4, at 67 (“*Massachusetts*’ injury—or at least the only injury considered by the majority—is its claim of present and future sea level rise exacerbated by human contributions to the greenhouse effect.”); Percival, *supra* note 7, at 134 (“Justice Stevens’s majority opinion . . . explain[s] in completely conventional terms why *Massachusetts* meets every element of traditional standing doctrine: injury, causation, and redressability. . . . Thus, while the majority’s discussion of standing plausibly can be interpreted as relying on a special rule of standing for states, it is better understood as holding that the state would have standing without the need for any special rule . . .”).

to Massachusetts' governing interest: the ability of Massachusetts to regulate harms that demonstrably threaten the Commonwealth, in this case its territorial integrity. This "regulatory interest theory" for state standing places *Massachusetts* within the Court's general trend towards a more restrictive interpretation of the case-and-controversy requirement.¹⁵ In fact, by encouraging a state monopoly over public law litigation, the Court's regulatory interest theory carries significant consequences for both the public and private law model values.

Part I of this Note will evaluate each of three theories that could explain the Court's standing decision in *Massachusetts*, and it will conclude that the Court primarily bases standing on the EPA's infringement of Massachusetts' regulatory interest rather than solely on a generalized climate-change-connected grievance or on statutory conferral of a procedural interest.

Part II will first situate this regulatory interest standing theory in the tug-of-war between private and public law models of adjudication, and will conclude that *Massachusetts* represents a net loss for public law model advocates. The decision limits the ability of state and private plaintiffs to base standing on generalized grievances or statutorily-conferred procedural rights, and thus significantly constrains public law adjudication.

Part II will then analyze the implications of a state monopoly over public law litigation. By conflating private interest with sovereign power, *Massachusetts* creates a system where both public and private rights, statutory and constitutional, are far from inviolable, but instead may in many cases be conditional on the ability of citizens to convince their state attorneys general that a lawsuit is in the best interests of the state as a whole, or in the best interest of a state attorney general's chances for reelection. Though *Massachusetts* may represent a net loss for the public law model, by equating public power with private right, the decision is not a victory for the private rights model either, at least as far as the model values an autonomy-enhancing distinction between private rights and public

¹⁵ See, e.g., Henry, *supra* note 8, at 237–38 (“Despite the apparent incoherence of the Supreme Court’s standing doctrine, cases from the past decade, in fact, reveal a distinguishable pattern . . . [They demonstrate] a narrowing of standing requirements to bar many citizen suits . . .”).

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power and emphasizes the judicial role as safeguarding the rights of minorities rather than the majority.

This Note will conclude in Part III that the state's role in protecting citizens' rights in the federal system should not consist in bringing lawsuits to vindicate rights that belong to citizens. Both the state monopoly model and the restrictive injury-in-fact model of state and citizen standing are unpredictable and generally unworkable. A positivist standing inquiry that predicates both state and citizen standing on explicit statutory conferral would provide a more workable standing doctrine that would further core public and private law values.

I. THEORIES OF STATE STANDING IN *MASSACHUSETTS V. EPA*

Massachusetts v. EPA does not present a precise and unambiguous opinion, especially with respect to the Court's rationale for finding standing. The opinion could be interpreted to endorse at least three standing theories: (1) an injury-in-fact approach that bases standing on a finding of particularized harm to Massachusetts' coastline; (2) a statutory interest approach that bases standing on explicit congressional conferral; and (3) a regulatory interest approach that bases state standing on federal inaction in a regulatory field where states have relinquished power to the federal government, and where the federal inaction threatens to diminish the state's territorial integrity. This Part analyzes these standing theories in turn and concludes that the Court primarily based its standing decision on the regulatory interest theory in giving "special solicitude" to states.¹⁶

The two opposing adjudication models inform each of the three standing theories that are discernible in *Massachusetts*, and it is therefore worthwhile to describe these models in greater detail up front. The first approach is a private law model that limits the judicial role to resolution of disputes between private parties about private rights—disputes that are bipolar, retrospective, party-controlled, and self-contained.¹⁷ This model employs a generalized grievances doctrine that excludes claims that appear insufficiently discrete and individualized, and similarly rejects statutory standing

¹⁶ *Massachusetts*, 127 S. Ct. at 1455.

¹⁷ Chayes, *supra* note 8, at 1282–83.

that empowers private litigants to engage in enforcement-like activity without sufficient injury. Under the private law model, states also are restricted to litigating private, individualized rights. Underlying this model's restrictive approach to standing is a belief that liberalized standing encroaches on the political branches by increasing the scope of issues that can be litigated as well as the occasions for judicial intervention.¹⁸

The opposing public law model, conversely, would empower Congress to create causes of action that confer standing on particular plaintiffs without requiring a showing of differentiated injury.¹⁹ Under this model, individuals can sue to vindicate shared and attenuated interests, including constitutional duties, statutory policies, and generalized grievances.²⁰ Similarly, under the public law model, states can sue to vindicate the generalized interests of their citizens or their own governing interests (such as the ability to regulate greenhouse gas emissions) rather than only to vindicate traditional private rights.²¹ Underlying this model's liberal approach to standing is a view of the judiciary's role in the separation of powers as integral to ensuring executive compliance with the law.²² The two models inform each of the three standing theories that are discernible in *Massachusetts*.

¹⁸ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 892–93 (1983).

¹⁹ This model, as Professor Chayes describes it, “reflects and relates to a regulatory system where . . . arrangements are the product of positive enactment. In such a system, enforcement . . . is necessarily implementation of regulatory policy.” Chayes, *supra* note 8, at 1304.

²⁰ Chayes, *supra* note 8, at 1284, 1304 (describing the dominant characteristic of public law litigation to be that lawsuits are not limited disputes between private parties about private rights but instead are efforts to vindicate constitutional or statutory policies); Kenneth E. Scott, *Two Models of the Civil Process*, 27 *Stan. L. Rev.* 937, 948–49 (1975); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 *Va. L. Rev.* 387, 463–64 (1995) (“[Modern public law litigation] focuses on statutory and constitutional (rather than common-law) violations, on the wrongs of the defendant more than the injury to the plaintiff, and on group rather than individual rights.”).

²¹ See Woolhandler & Collins, *supra* note 20, at 435 & n.189 (“Unlike in the nineteenth century . . . today states can sometimes sue to vindicate some interests in governing and the generalized interests of their citizens.”); Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 *Va. J. Int'l L.* 757, 780–82 (2002).

²² See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601 (1992) (Blackmun, J., dissenting) (“[I am] unable to agree with the plurality’s analysis of redressability, based as it is on its invitation of executive lawlessness . . .”).

A. Injury-in-Fact Approach to State Standing

Applied most prominently in *Lujan v. Defenders of Wildlife*, the leading test for standing to bring suit in federal court turns primarily on whether plaintiffs have suffered a particularized injury.²³ Embracing the private law model of adjudication, this “injury-in-fact” test reflects the belief that courts are constrained to hearing citizens’ individualized complaints, and that so-called “generalized grievances” shared by the public-at-large are not constitutionally cognizable, even if Congress explicitly grants citizens standing to vindicate them. *Lujan* consequently refused to allow standing on Article III grounds, despite an explicit citizen-suit provision granting standing to all “citizens.”²⁴ “Vindicating the *public* interest,” Justice Scalia wrote, “is the function of Congress and the Chief Executive.”²⁵

Most commentators read *Massachusetts* as basing its standing decision on a finding of climate-change-connected property damage to the Commonwealth’s coastline, a widespread injury resulting from a generalized grievance. For example, Professor Cass observed that the majority was less focused on “the fact that petitioners in the case included states such as Massachusetts” than “on the fact that the state itself has suffered (or imminently will suffer) an injury, in this case the erosion of state-owned land due to rising sea levels caused by global warming.”²⁶ Professor Percival

²³ Id. at 560; see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000) (articulating the same test and citing *Lujan*).

²⁴ See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (“The Court’s holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III.”); see also Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich. L. Rev. 163, 164–65 (1992) (citing *Lujan* as prompting “invalidation of an explicit congressional grant of standing to ‘citizens’”). The statutory grant at issue in *Lujan* was the citizen suit provision of the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1) (2000).

²⁵ *Lujan*, 504 U.S. at 576.

²⁶ Cass, *supra* note 4, at 78; see also, e.g., Cannon, *supra* note 4, at 57 (“Justice Stevens fashions an extended chain of causation, which looks something like the following: Domestic motor vehicles emit greenhouse gases. Increased world greenhouse gas emissions have led to a heightened greenhouse effect, which has led to a global temperature rise, which has led to sea level rise, which has led to loss of Massachusetts’ coastline. EPA’s failure to regulate greenhouse gas emissions from automobiles contributes to this loss. A correction of that failure will moderate the loss. Hence injury, causation, and redressability were all satisfied.”).

similarly argued that the Stevens majority premised standing on conventional standing doctrine.²⁷ This view of the Court's approach to Massachusetts' injury-in-fact finds some fairly explicit support in the majority's standing analysis, at least when supporting excerpts are read in isolation rather than the context of the larger opinion. Situating Massachusetts as a landowner, the Court noted, "rising seas have already begun to swallow Massachusetts' coastal land. . . . Because the Commonwealth 'owns a substantial portion of the state's coastal property,' . . . it has alleged a particularized injury in its capacity as a landowner."²⁸

This focus on a particularized injury as a basis for standing is far from extraordinary. In fact, it would seem that Massachusetts has standing under the *Lujan* test as traditionally applied.²⁹ The particularized injury of coastal erosion is caused by the rising sea level, which is reasonably traceable to global warming, which is partially caused by vehicle emissions that are regulable by the EPA. This injury-in-fact is redressable because EPA regulation would decrease the greenhouse gas emissions rate and thus curb global warming and slow the rising of the sea level.³⁰

What is extraordinary, then, is the Court's rooting of its standing decision in Massachusetts' "special solicitude" as a state,³¹ despite the fact that asserting its own interest as landowner would appear

²⁷ Percival, *supra* note 7, at 134 ("Justice Stevens's majority opinion . . . explain[s] in completely conventional terms why Massachusetts meets every element of traditional standing doctrine: injury, causation, and redressability. . . . Thus, while the majority's discussion of standing plausibly can be interpreted as relying on a special rule of standing for states, it is better understood as holding that the state would have standing without the need for any special rule . . .").

²⁸ *Massachusetts*, 127 S. Ct. at 1456 (citations omitted).

²⁹ See Cannon, *supra* note 4, at 57 (arguing Justice Stevens majority opinion in *Massachusetts* satisfied all three elements of the standing test because the Court was willing to consider "systemic injuries" as legitimate bases for standing); Percival, *supra* note 7, at 134.

³⁰ *Massachusetts*, 127 S. Ct. at 1458 ("In sum . . . the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.").

³¹ *Id.* at 1454–55 ("Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

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to satisfy the injury-in-fact test, which does not seem to call for special solicitude or to differentiate states from private litigants. Yet the Court clearly distinguishes standing for Massachusetts from standing for private citizens, suggesting that private coastal landowners, unlike sovereign landowners, would lack standing under the *Massachusetts* standing test:

Only one of the petitioners needs to have standing to permit us to consider the petition for review. . . . We stress here, as did Judge Tatel below, the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.

Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.³²

Massachusetts' long list of co-parties and their constituent members undoubtedly included private landowners with similar interests in protecting their real estate from climate-change-connected sea level change.³³ The Court would not have needed to reach the state standing issue if private standing were enough, as "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review."³⁴

Further, climate-change-connected erosion of state-owned coastal land is no more concrete, distinct, or imminent than erosion of citizen-owned coastal property. In fact, the majority cites *Georgia v.*

³² Id. at 1453–54.

³³ The Petitioners included the Commonwealth of Massachusetts; the states of California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; the local governments of the District of Columbia, American Samoa, New York City, and Baltimore; and private organizations including the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group. Id. at 1446 nn.2–4.

³⁴ Id. at 1453; see also id. at 1466 (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.").

Tennessee Copper Co.,³⁵ which supports the contrary idea that a state suing in its capacity as a state must meet a higher standing bar than a state suing in its capacity as an individual party.³⁶ As Chief Justice Roberts notes in dissent,

[f]ar from being a substitute for Article III injury, *parens 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.*’ . . . [A] State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.³⁷

Chief Justice Roberts appears to misinterpret the majority’s standing decision as being based on Massachusetts’ capacity to sue *parens patriae*, meaning in a representative capacity on behalf of its injured citizens. In contrast, the majority bases Massachusetts’ standing on the Commonwealth’s own regulatory and territorial injuries, not on those of its citizens.³⁸ Nonetheless, as the Chief Justice notes, *parens patriae* cases do suggest that Massachusetts would in fact have to meet a higher bar in order to establish stand-

³⁵ 206 U.S. 230 (1907).

³⁶ See, e.g., Sugar, *supra* note 4, at 541–42 (“*Tennessee Copper* only held that a state’s quasi-sovereign interests were sufficient to meet damage thresholds for original jurisdiction. . . . Nowhere did the Court state that a quasi-sovereign interest entitled a state to special solicitude in standing analysis.”); see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) (“At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.”); Thomas W. Merrill, Global Warming as a Public Nuisance, 30 Colum. J. Envtl. L. 293, 304 (2005) (“The Court’s leading decision on *parens patriae* standing [*Snapp*] seems to assume that such [*parens patriae* public nuisance] suits [in federal court] are subject to ordinary rules of standing, cautioning that such suits ‘must be sufficiently concrete to create an actual controversy between the State and the defendant’ and must ‘survive the standing requirements of Article III.’”); Woolhandler & Collins, *supra* note 20, at 415–16 (“But the fact that sovereignty was at issue in the boundary cases was never seen by the early Court as weighing in favor of the Court’s jurisdiction over such cases. Rather, it entertained these cases in part because they resembled traditional property claims that the Court could decide according to ordinary principles of law and equity, even though the cases also implicated sovereignty issues.”); *id.* at 415–16 nn.99–100 (collecting cases).

³⁷ *Massachusetts*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting) (citations omitted).

³⁸ Cf. Colo. ex rel. Suthers v. Gonzales, No. 07-cv-00478, 2007 WL 2788603, at *6 (D. Colo. Sept. 21, 2007) (noting that the *Massachusetts* standing decision was based on Massachusetts’ direct interest as a state, not on *parens patriae* theory).

ing to sue based solely on its own capacity as landowner or on behalf of its citizens who own coastal land.³⁹

Thus, contrary to many commentators' views, precedent regarding state standing and the majority's repeated emphasis on Massachusetts' unique status as a state litigant indicate that the majority does not embrace an injury-in-fact theory that bases standing on a finding of a generalized, climate-change-connected injury to the Commonwealth's coastline. Instead of allowing standing to address a generalized grievance, the Court's standing theory is rooted more deeply in Massachusetts' unique status as a quasi-sovereign state.

B. Statutory Interest Approach to State Standing

Statutory standing is an alternative theory, rooted in the public law adjudication model, that the *Massachusetts* Court may have employed in finding standing.⁴⁰ The extent to which Congress can statutorily create standing to sue has been at the heart of the debate between the public and private law standing models. Justice Scalia framed this issue as "whether the public interest . . . in agencies' observance of a particular, statutorily prescribed procedure[] can be converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue."⁴¹

At first glance, there appears to be significant textual evidence that *Massachusetts* answers this question affirmatively. The major-

³⁹ See Woolhandler & Collins, *supra* note 20, at 511–12 (discussing *parens patriae* standing in the context of the Court's original jurisdiction). Professors Woolhandler and Collins note:

Indeed, in some cases the Court has required states suing as *parens patriae* to show such an interest independent of its citizens', although that independent interest often seems attenuated. Where a state has an independent legally protected interest, there is arguably no harm in allowing a state to sue additionally as *parens patriae*. Such standing is analogous to that of private parties who have individually suffered harms suing as representatives of a class. *Id.* (citing *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (allowing state standing as consumer and as *parens patriae* to protect its citizens from substantial economic injury)); see also *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262–65 (1972) (allowing, for claim of injunctive relief, state standing under antitrust laws in both proprietary capacity and as *parens patriae* for injuries suffered in its capacity as a consumer of goods and services).

⁴⁰ Professor Cass, for example, reads *Massachusetts* as relying primarily on this statutory standing theory, but disputes the accuracy of the Court's analysis. Cass, *supra* note 4, at 79–80.

⁴¹ *Lujan v. Defenders of Wildlife*, 504 U.S. at 576–77 (citation omitted).

ity opinion frequently cites Justice Kennedy's concurrence in *Lujan*, which embraces statutory standing theory:

Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. 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.⁴²

The Court, however, does not go on to base its standing decision on congressional authorization. Instead, the Court holds that while this authorization enables Massachusetts to show standing "without meeting all the normal standards for redressability and immediacy," a plaintiff with a procedural right would still have to sustain an independent, "concrete and particularized injury."⁴³ As a showing of a particularized injury-in-fact is the core of the traditional standing inquiry, the citizen suit provision alone is therefore insignificant to the decision, at best liberalizing only the redressability and immediacy requirements. Thus, the Court does not rely on statutory standing, but instead affirms *Lujan's* requirement of a particularized injury-in-fact as a constitutional minimum, regardless of congressionally-conferred procedural rights.

In fact, Clean Air Act ("CAA") Section 7607(b), the judicial review provision cited by the Court, does not even mention states, much less afford states special rights or status, further undercutting the plausibility of a statutory standing theory. Section 7607(b) states in relevant part: "A petition for review of action of the Administrator in promulgating any . . . standard under section 7521 of this title . . . or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia."⁴⁴ This law treats public and private litigants identically. Given this equal treatment, the Court's emphasis on the importance of Massachusetts' status as a quasi-

⁴² *Massachusetts*, 127 S. Ct. at 1453 (internal citations and quotation marks omitted).

⁴³ *Id.* (quoting *Lujan*, 504 U.S. at 572 n.7).

⁴⁴ 42 U.S.C. § 7607(b) (2000).

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sovereign suggests that establishing standing requires more than congressional authorization.

Additionally, Section 7607(b) is merely a jurisdictional provision; it does not create a new cause of action. The Section does not provide any procedural right, and surely none that could be claimed to have been violated by the EPA's refusal to regulate carbon dioxide. The citizen suit provision of the CAA, Section 7604(b), provides a statutory cause of action for citizens, not states.⁴⁵ Chief Justice Roberts noted in dissent that Congress knew how to show a "special solicitude" for state interests under the CAA, as it did in Section 7426 when it explicitly authorized state petitions seeking greater protection from interstate pollution sources.⁴⁶ Section 7607(b), in contrast, does not grant statutory standing, but instead only indicates to which court litigants must go if they wish to challenge particular EPA decisions. While the right of review could be said to come instead from the Administrative Procedure Act's general provision for judicial review of agency action, that provision conditions standing on either the existence of a direct legal right or another law's grant of a right to contest a particular decision. Neither right exists here. Thus, *Massachusetts* cannot be explained by a theory of statutory standing either, but must be rooted in Massachusetts' status as a quasi-sovereign state and the EPA's impairment of its regulatory interest.

C. Regulatory Interest Approach to State Standing

Even though the Court sent mixed signals regarding its standing theory in *Massachusetts* and likely intentionally injected ambiguities into its holding, commentators have too quickly brushed aside the Court's central focus on Massachusetts' status as a state possessing "quasi-sovereign interests."⁴⁷ The Court repeatedly stresses

⁴⁵ 42 U.S.C. § 7604(b)(1)(B) (2000).

⁴⁶ *Massachusetts*, 127 S. Ct. at 1464–65 (Roberts, C.J., dissenting) ("The reader might think from this unfortunate phrasing that Congress said something about the rights of States in this particular provision of the statute. Congress knows how to do that when it wants to, see, e.g., § 7426(b) (affording States the right to petition EPA to directly regulate certain sources of pollution), but it has done nothing of the sort here." (citing 42 U.S.C. § 7426(b) (2000))).

⁴⁷ See, e.g., Cannon, *supra* note 4, at 57 ("There are several things going on in Justice Stevens's standing analysis, including special solicitude for Massachusetts' standing as a sovereign State, but I want to focus here on the Court's assessment of Massa-

“the special position and interest of Massachusetts” as “a sovereign State.”⁴⁸ Indeed, the Court roots its standing decision in Massachusetts’ status as a state: “Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”⁴⁹ Lack of regard for the case as a state standing decision may be explained by the Court’s numerous departures from a focus on Massachusetts’ sovereign interests to a focus on the Commonwealth’s status as landowner,⁵⁰ and by the fact that the meaning of “quasi-sovereign interests” is not made entirely clear.⁵¹

An analysis of the majority opinion reveals quasi-sovereign interests to be interests held by states in their exercise of regulatory power over matters touching the states.⁵² The Court holds that harm to Massachusetts’ quasi-sovereign interests constitutes injury-in-fact sufficient for Article III purposes: a state has standing to

chusetts’ standing under the standard three-part test.”); Cass, *supra* note 4, at 78 (noting that the Court did not focus heavily on “the fact that petitioners in the case included states such as Massachusetts”); Percival, *supra* note 7, at 134 (“Thus, while the majority’s discussion of standing plausibly can be interpreted as relying on a special rule of standing for states, it is better understood as holding that the state would have standing without the need for any special rule . . .”); Sugar, *supra* note 4, at 538 (“The Court went on to evaluate Massachusetts’ claim under the traditional factors of injury, causation, and redressability.”).

⁴⁸ *Massachusetts*, 127 S. Ct. at 1454.

⁴⁹ *Id.* at 1454–55; see also *supra* notes 28–29 and accompanying text.

⁵⁰ See *supra* notes 26–28 and accompanying text.

⁵¹ See *Massachusetts*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) (“It is not at all clear how the Court’s ‘special solicitude’ for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.”). In response to Chief Justice Robert’s accusation that the majority misreads precedent and “devis[es] a new doctrine of state standing,” *id.* at 1455 n.17, the majority does, by reference to an academic text, define quasi-sovereign interests as including “public or governmental interests that concern the state as a whole,” *id.* (citing Richard Fallon et al., *The Federal Courts and the Federal System* 290 (5th ed. 2003)). This description sheds little light on the term, but may suggest that the “governmental interests” need not necessarily relate to regulating territorial sovereignty, but instead may relate to any matters affecting “the state as a whole.”

⁵² As elaborated below, subsequent judicial treatment of the decision has focused directly on *Massachusetts*’ understanding of “quasi-sovereign interests.” See, e.g., *California v. Gen. Motors*, No. C06-05755, 2007 WL 2726871, at *11 (N.D. Cal. Sept. 17, 2007) (“First, in finding that the plaintiffs had standing, the Supreme Court relied upon the notion that certain constitutional principles of sovereignty afford the States ‘special solitude’ to seek judicial review of decisions by federal regulatory agencies because the States have ‘surrendered’ to the federal government their right to engage in certain forms of regulations.”).

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challenge agency regulatory inaction in regulatory fields where the state would be interested in regulating a harm if it were not precluded from doing so by the federal system. An addendum to this central standing requirement of *Massachusetts*, which could explain the Court's additional focus on territorial loss, may be that the harm left unaddressed by agency inaction also must touch the state in a concrete way, such as by injuring or threatening injury to the state's territorial integrity or natural resources.⁵³ This section shows that the "regulatory interest theory" derives further support from discussion during oral argument, the historical development of state standing, and *Massachusetts*' subsequent treatment by lower courts.

The regulatory interest theory finds textual support in the *Massachusetts* opinion. The majority attributes Massachusetts' quasi-sovereign interest to three concerns related to the Commonwealth's dependence on the federal government to protect the states, particularly in areas that states cannot govern.⁵⁴ First, as the Court notes, states cannot directly force other states to reduce greenhouse gas emissions or other interstate externalities. "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions," but must appeal to the federal government to resolve such problems.⁵⁵ Second, the Constitution bars a state from "negotiat[ing] an emissions treaty with China or India," two of the largest greenhouse gas contributors.⁵⁶ Third, states may be preempted from enforcing their own regulations addressing carbon emissions within the state.⁵⁷ States may be preempted from regulat-

⁵³ In reviewing the historical transformation of state standing, Professors Woolhandler and Collins describe the origins of this regulatory interest theory for standing, under which unjustified constraint of states' rights to govern came to be regarded as a particularized sort of injury. Woolhandler & Collins, *supra* note 20, at 456 ("Implicit in this transformation was the recognition that a government's interests in exercising its regulatory or protective powers had a status comparable to that of common-law claims of right."); see also *infra* notes 67–71 and accompanying text.

⁵⁴ *Massachusetts*, 127 S. Ct. at 1454.

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *id.* at 1448–49 (discussing the history surrounding legislation and international efforts addressing global warming, and noting that the United States opted not to sign the Kyoto Protocol because the two other greatest polluters were not required to reduce their pollution levels).

⁵⁷ *Id.* at 1454 ("[I]n some circumstances the exercise of [states'] police powers to reduce in-state motor-vehicle emissions might well be pre-empted.").

ing fields that Congress has occupied, even to supplement existing federal regulations.⁵⁸ Recognizing that these three sovereign regulatory interests are now lodged in the federal government, the Court concludes that federal inaction with respect to harms that states might have regulated absent federal power causes a particularized injury-in-fact to Massachusetts.⁵⁹

The regulatory interest theory for state standing was also suggested during oral argument. Justice Kennedy first proposed the concept that states should have “special” standing, at least when challenging a federal agency’s refusal to promulgate regulations in a field where states may face preemption problems. Addressing Massachusetts Attorney General Milkey, he asked, “[D]o you have some special standing as a state . . . ?”⁶⁰ Mr. Milkey directed the Court to *West Virginia v. EPA*,⁶¹ where, he said, the District of Columbia Circuit granted standing based on a state’s unique stance as a litigant.⁶² Justice Ginsburg later asked if he was suggesting a claim of discrete standing for sovereign states confronted by preemption problems:

Mr. Milkey, does it make a difference that you’re not representing a group of law students, but a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn’t exercising it? *I thought you had a discrete claim based on the sovereignty of States and*

⁵⁸ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (describing field preemption as a doctrine preventing state regulation where federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”).

⁵⁹ *Massachusetts*, 127 S. Ct. at 1455 (“[I]t is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”). As stated, there appears to be an additional requirement, beyond injury to a state’s regulatory interest, that the federal agency’s failure to regulate must threaten a more concrete injury to the state, such as territorial loss.

⁶⁰ Transcript of Oral Argument at 14, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 3431932.

⁶¹ 362 F.3d 861, 868 (2004).

⁶² Transcript of Oral Argument, *supra* note 60, at 14–15; see *infra* notes 67–73 and accompanying text for a discussion of *West Virginia v. EPA*.

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*their inability to regulate dependent on the law Congress passed that gives that authority to the EPA.*⁶³

Mr. Milkey agreed.⁶⁴ Justice Scalia then interjected: “You have standing whenever a Federal law preempts State action? You can complain about the implementation of that law because it has preempted your State action? Is that the basis of standing you’re alleging?”⁶⁵ As suggested by Justice Ginsburg and later revealed by Justice Stevens’ majority opinion, the *Massachusetts* majority’s answer to Scalia’s question was “yes”—Massachusetts had standing based on a discrete claim of harm to the Commonwealth’s regulatory interests, at least where those regulatory interests relate to an underlying problem, unaddressed by the federal government, which threatens the Commonwealth’s territorial integrity.⁶⁶

Despite Chief Justice Robert’s claims to the contrary,⁶⁷ this regulatory interest theory also finds support in precedent, though the majority’s citation of such support is very limited. For example, neither the majority nor the dissent cites *West Virginia v. EPA*, a case referenced by Attorney General Milkey during oral argument.⁶⁸ In *West Virginia*, two states petitioned for review of EPA requirements compelling all states to revise state implementation plans (“SIPs”) under the CAA so as to reduce nitrogen oxide (“NOx”) emissions, and the EPA similarly contended that the states lacked standing to challenge its regulatory action.⁶⁹ The D.C. Circuit disagreed with the EPA, holding that the states should have standing because the regulatory framework effectively prevented the states from making their own laws to address NOx emissions.⁷⁰

⁶³ Transcript of Oral Argument, *supra* note 60, at 16–17 (emphasis added).

⁶⁴ *Id.* at 17 (“[Y]ou are correct that we are saying that provides us also an independent source of our standing.”).

⁶⁵ *Id.*

⁶⁶ Again, it is unclear if special solicitude is available only where the unregulated harm injures a state’s territorial integrity, or whether the harm need only injure some concrete state interest independent from and additional to its interest in governing.

⁶⁷ *Massachusetts*, 127 S. Ct. at 1471 (Roberts, C.J., dissenting).

⁶⁸ Transcript of Oral Argument, *supra* note 60, at 15.

⁶⁹ 362 F.3d at 864–65, 868.

⁷⁰ *Id.* at 868 (“[L]ower growth factors leading to lower emissions budgets causes injury to the states as states. EPA’s own brief belies its argument, as it states that ‘[u]nder the NOx SIP Call, states have the option of participating in [a] cap and trade program or obtaining the reductions through other mechanisms.’ This injury is sufficient to confer standing.”).

The case is distinguishable from *Massachusetts* on several grounds: *West Virginia* involves proactive command-and-control regulation by the EPA rather than a refusal to regulate, and the harm in *West Virginia* is not caused by increased pollution, but by a disproportionate compliance burden placed on particular states. Nonetheless, as Attorney General Milkey implied, *West Virginia* can be read to base the states' standing on the concept that federal regulatory action (EPA NOx regulations passed pursuant to the CAA) had preempted the states from regulating NOx emissions in such a way as to not disproportionately impact the states' economies.

More importantly, this interpretation of *West Virginia* is in line with twentieth-century state standing doctrine, which evolved to recognize a state's regulatory interest as sufficient to generate standing.⁷¹ Historically, state standing jurisprudence required states to establish standing based on common law types of interest:

[S]tates' standing to initiate suits in the federal courts during the nineteenth century was limited to cases where the state had a common law interest—for example, a claim for payment of a debt [A] state could not sue the federal government or its officers to claim that the federal government had trespassed on the state's rights to govern.⁷²

Gradually, however, state standing “transition[ed] from a jurisprudence grounded in common law to one based on relative regulatory power.”⁷³

In *Missouri v. Holland*, a state sought to enjoin a federal game warden from enforcing federal legislation implementing a treaty that protected migratory birds, illustrating the latter regulatory interest theory for standing. The *Missouri* Court deemphasized property rights as the basis for standing, stating that it was enough that the case was “a reasonable and proper means to assert the al-

⁷¹ See Merrill, *supra* note 36, at 293–306 (detailing the history of state standing in the interstate pollution context). For a comprehensive treatment of the history of state standing, see generally Woolhandler & Collins, *supra* note 20. On the parallel historical roots of citizen standing doctrine, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *Cornell L. Rev.* 393, 472–77 (1996). See generally Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689 (2004).

⁷² Woolhandler, *supra* note 21, at 763.

⁷³ Woolhandler & Collins, *supra* note 20, at 454.

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leged quasi sovereign rights of a State.”⁷⁴ Discussing the *Missouri* case, Professors Woolhandler and Collins note, “the state’s claim of ownership was treated by the Court as a metaphor for the state’s police power to regulate the killing and sale of the birds by individuals within its borders.”⁷⁵ The state’s standing was based on infringement of its regulatory interest: its interest in its ability to regulate matters that touch the state. Thus, the historical shift in state standing from a common law, private right oriented theory to a regulatory interest theory, as exemplified by *Missouri*, provides further, though unreferenced, support for the majority’s regulatory-interest-focused standing analysis in *Massachusetts*.

Finally, and perhaps most importantly, lower court decisions issued after *Massachusetts* that have cited the case on standing matters generally have read the case as having employed a regulatory interest theory for standing. One of the most extensive analyses of *Massachusetts*’ standing theory to date was undertaken in *California v. General Motors*, where California sought damages against various automakers for contributing to the public nuisance of global warming.⁷⁶ The court read *Massachusetts*’ standing to have been grounded in a regulatory interest theory:

The underpinnings of the Supreme Court’s rationale in *Massachusetts* only reinforce this Court’s conclusion that Plaintiff’s current tort claim would require this Court to make the precise initial carbon dioxide policy determinations that should be made by the political branches Because the States have “surrendered” to the federal government their right to engage in certain forms of regulations and therefore may have standing in certain circumstances to challenge those regulations, and because new automobile carbon dioxide emissions are such a regulation expressly left to the federal government, a resolution of this case would thrust this Court beyond the bounds of justiciability.⁷⁷

⁷⁴ Id. at 455 (quoting *Missouri v. Holland*, 252 U.S. 416, 431 (1920)); see also *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (relying not on state’s interest as a landowner but on its quasi-sovereign standing to regulate resources regardless of private ownership).

⁷⁵ Woolhandler & Collins, *supra* note 20, at 455.

⁷⁶ No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007).

⁷⁷ Id. at *12.

The court went on to reiterate, that “[u]nderpinning the Supreme Court’s standing analysis [in *Massachusetts*] is the concept that the authority to regulate carbon dioxide lies with the federal government, and more specifically with the EPA as set forth in the CAA.”⁷⁸ Thus, the court in *General Motors* understood the *Massachusetts* standing decision to be rooted in a theory of harm to state regulatory interest and not a generalized grievance or statutory rights. The court drew upon this understanding to refuse on justiciability grounds to decide the People of California’s common law public nuisance claim.⁷⁹ A refusal to hear a plaintiff’s case on non-justiciability grounds parallels that rationale for a refusal to hear a plaintiff’s case based on standing doctrine. Both doctrines are driven by a concern that deciding the issues would overstep the federal judiciary’s Article III bounds. The *General Motors* case thus suggests that *Massachusetts* stands for the idea that a federal court is prevented from hearing a global warming case that is based solely on physical, nuisance-like injury to the plaintiff, but may be capable of deciding a case based on injury to a state’s regulatory interest.

In *Colorado ex rel. Suthers v. Gonzalez*, the District Court of Colorado distinguished *Massachusetts*, emphasizing that the State of Colorado brought the action solely on behalf of Colorado’s citizens, and not as a state with discrete quasi-sovereign interests:

I conclude that the State of Colorado does not have standing to bring this action on behalf of its citizens. Although it is arguably the State of Colorado itself, rather than its citizens, whose rights and interests are implicated by the Government’s alleged violation of the Invasion Clause . . . and by any costs the State would incur fulfilling the Government’s responsibilities under the HSA and the IRTPA, this action has been brought solely on behalf of . . . Colorado’s citizens. *Compare Massachusetts* Any direct interest that the State of Colorado may have in the outcome of this case itself therefore cannot be used to establish standing⁸⁰

⁷⁸ Id. at *11.

⁷⁹ Id. at *11–12.

⁸⁰ No. 07-cv-00478, 2007 WL 2788603, at *7 (D. Colo. Sept. 21, 2007).

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Thus, according to *Colorado*, the interests of private citizens, and even the interests of states suing on behalf of the interests of its citizens, are distinct and inferior to states' regulatory interest under *Massachusetts* standing doctrine.

A recent Federal Circuit Court of Appeals case, *Canadian Lumber Trade Alliance v. United States*, rejected Canada's argument that *Massachusetts* was based on a statutory standing theory.⁸¹ Relying on *Massachusetts*, the Canadian government argued "that Congress has granted Canada a 'procedural right' to standing . . . under which Canada has standing to enforce section 408 of the [North American Free Trade Agreement Implementation Act]."⁸² Canada claimed that it was "injured by the denial of its statutorily granted rights" and that injury was enough to establish standing under *Massachusetts*.⁸³ The Federal Circuit, however, read *Massachusetts* to be more restrictive of standing:

However, the Supreme Court in *EPA* stressed that the result in that case depended heavily on "the special position and interest of Massachusetts," and explained that "States are not normal litigants for the purposes of invoking federal jurisdiction." . . .

When a State enters the Union, it surrenders certain sovereign prerogatives. . . .

The Government of Canada is not fairly analogous to a State of the Union in this analysis. Although Canada surely made concessions to the United States in negotiating the NAFTA treaty, Canada has not truly surrendered any sovereign prerogatives, such as the ability to negotiate a resolution of this dispute with the United States or the ability to defend itself. Therefore the Government of Canada is not entitled to "special solicitude in [the] standing analysis," as was given to Massachusetts.⁸⁴

Thus, the Federal Circuit in *Canadian Lumber* also interpreted the *Massachusetts* standing decision as not based on statutory standing theory but instead tied closely to preemption concerns and the

⁸¹ 517 F.3d 1319, 1336–37 (Fed. Cir. 2008).

⁸² *Id.*

⁸³ *Id.* at 1336.

⁸⁴ *Id.* at 1337 (citations omitted).

regulatory interests of states. This regulatory interest theory significantly constrains even a sovereign's standing to sue based on a statutory interest.

Only one case to date has cited *Massachusetts* for liberalizing standing doctrine. In *Sierra Club v. Department of Transportation*, the Supreme Court of Hawai'i held the plaintiffs had standing to sue under the Hawai'i Environmental Policy Act based on both traditional injury-in-fact and statutory standing theories.⁸⁵ In doing so, without discussion, the court cited to *Massachusetts*, stating: "The procedural standing doctrine was recently reaffirmed by the United States Supreme Court in *Massachusetts*."⁸⁶ This interpretation of *Massachusetts*, however, is cursory, against the weight of other interpretation, and issued by a state court to which the limitations of Article III do not even apply.

Far from furthering a public law model of adjudication that would allow broad citizen access to the courts in order to address generalized grievances and statutory policies, most courts have found that *Massachusetts* predicates standing to sue in federal courts on discrete harm to a regulatory interest held only by the fifty states. As the next Part elaborates, the *Massachusetts* decision thus creates a standing regime that may be a variation of the public law model, but one that is potentially highly restrictive of both state and individual standing.

II. IMPLICATIONS OF A REGULATORY INTEREST APPROACH TO STANDING ON PUBLIC AND PRIVATE LAW MODELS OF ADJUDICATION

As argued in Part I, by basing standing on the regulatory interest theory, the Court gave greater standing rights to states than to private citizens. It was indeed "of considerable relevance that the party seeking review here [was] a sovereign State and not . . . a private individual."⁸⁷ This Part analyzes the effects of the Court's regulatory interest theory on state and citizen standing. This Part first argues that *Massachusetts* constrains standing for both state and private plaintiffs by reinvigorating the ban on pure statutory

⁸⁵ 167 P.3d 292, 312–13 (Haw. 2007).

⁸⁶ *Id.* at 315.

⁸⁷ *Massachusetts*, 127 S. Ct. at 1454.

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standing and limiting standing to vindicate generalized grievances. While *Massachusetts* appears to reject a complete ban on standing for claims based on generalized grievances or alleged executive violation of statutory policy, the decision limits the types of generalized grievances that plaintiffs can vindicate and the types and number of plaintiffs eligible to do so. Specifically, to sue based on a generalized grievance, *Massachusetts* demands that a plaintiff show both particularized injury and impairment of regulatory power. Accordingly, *Massachusetts* is far from a victory for the public right model of adjudication, but instead represents a retreat from the recent embrace of the private law model in post-*Lujan* cases such as *Federal Election Committee v. Akins*⁸⁸ and *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.⁸⁹ Moreover, *Massachusetts* may create a standing regime where state attorneys general have monopoly power over public law adjudication. This new adjudicative model carries with it policy implications that undermine both core public and private law adjudication model values.

A. *Massachusetts Limits State and Citizen Standing to Vindicate Generalized Grievances and Statutorily Created Rights*

While *Massachusetts* may be said to liberalize standing in a narrow sense by allowing states to vindicate their governing, or as I phrase it, “regulatory” interests,⁹⁰ on the whole, the decision limits the ability of both state and private plaintiffs to sue in federal court to address public interests in remedying systemic harms and ensuring executive compliance with duly passed law.

If the majority had based its standing decision on a finding of a private rights type of injury-in-fact to *Massachusetts*—such as

⁸⁸ 524 U.S. 11, 19–26 (1998) (holding that an individual could sue for a violation of federal law pursuant to a statute that created a general right to access certain information).

⁸⁹ 528 U.S. 167, 180–87 (2000) (finding that an environmental group had standing to bring a citizen action against a wastewater treatment facility for noncompliance with the limits set by the facility’s National Pollutant Discharge Elimination System permit).

⁹⁰ The regulatory interest theory, conceiving of a particularized type of injury-in-fact to states’ regulatory interest, can thus provide states standing in instances where individuals would lack it. For example, states may establish standing for suits based on generalized grievances including environmental degradation or executive refusal, in contravention of guiding statutory policy, to promulgate regulations.

based on the Commonwealth's interest as a landowner in its coastal property—then the decision would indeed represent a victory for the public rights model. Such an approach would severely weaken the private law model's ban on generalized grievances, as it would base Massachusetts' standing on a "systemic injury" shared by all coastal landowners, and perhaps by all people with a demonstrable interest, recreational or otherwise, in coastal lands and climatic stability.⁹¹ Similarly, this generalized grievance theory would dramatically loosen the private law model's restrictive approaches to causation and redressability. The theory would allow standing despite an extended causation chain linking loss of coastline to failure to regulate greenhouse gases, and despite the questionable likelihood that correction of the EPA's failure to regulate would moderate this loss.⁹²

An understanding of *Massachusetts* as based on a generalized grievance theory would also severely weaken the private law model's limitations on the ability of plaintiffs to vindicate public policies and statutory and constitutional rights. Statutory standing to vindicate public policies can similarly be characterized as predicated standing on a systemic rather than localized type of harm to a generalized, non-discrete interest. Additionally, the remedial effects of a suit designed to alter future governmental behavior may be uncertain and speculative.⁹³ *Massachusetts* would suggest that the systemic nature of statutory interests and the speculative nature of their redressability should not bar standing.

Similarly, if the majority had embraced a pure statutory approach to standing, predicated *Massachusetts*' standing solely on harm to its procedural rights under the CAA, the decision would indeed represent a victory for the public rights model. The extent to which Congress can legislate standing to sue has been at the heart of the struggle between the two models. If *Massachusetts*'

⁹¹ Reading *Massachusetts* as being based on such "a claim of systemic injury," Professor Cannon concludes that the Court embraced an "ecological model" that allows standing to vindicate "effects that could not easily be quantified and might even be quite small within the context of the system as a whole." Cannon, *supra* note 4, at 55, 57.

⁹² See *Massachusetts*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting) (criticizing the majority's opinion as "recall[ing] the previous high-water mark of diluted standing requirements").

⁹³ See Nichol, *supra* note 12, at 1167.

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standing were predicated on statutory standing theory, the decision would embrace a view that the public at large should play an important role in enforcing federal laws and regulations, and the judiciary, accordingly, should play an active role in policing executive adherence to duly passed federal laws. Under this theory, statutory interests would be sufficient to provide standing, even where those statutory interests relate to as generalized a problem as global climate change or executive adherence to the law.

But, as shown in Part I, the *Massachusetts* Court did not embrace either of these views. Indeed, with an air of disapproval, the majority distinguished *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,⁹⁴ a case that did embrace a liberal view of standing that allowed a group of law students to sue to vindicate a generalized grievance that depended on an elaborate chain of causation.⁹⁵ Distinguishing *SCRAP*, *Massachusetts* instead embraced a theory of standing that allows states to vindicate generalized, public interests (here, EPA adherence to the CAA's statutory policy allegedly requiring the EPA to promulgate greenhouse gas regulations) based on federal impingement of their regulatory interests (here, the CAA's preemption of state regulation), and only given a showing of an associated, concrete harm (here, climate-change-connected coastal erosion) reasonably traceable to the refusal to regulate.

The Court's failure to predicate standing on a theory of generalized grievance or statutory right may represent an especially large blow to the public law model because the *Massachusetts* standing decision appears to retreat from a post-*Lujan* line of cases that cabin *Lujan*'s private law model approach to standing. In *Federal Election Committee v. Akins*, the Court granted Akins and other voters standing to sue the FEC for dismissing their complaint con-

⁹⁴ 412 U.S. 669, 683–90 (1973) (holding that a student group had standing to challenge the decision of the Interstate Commerce Commission to allow the railroads to surcharge all freight transported because the surcharge discouraged recycling, incentivizing manufacturers to use non-recycled goods derived in part from the recreational lands that the students enjoyed).

⁹⁵ *Massachusetts*, 127 S. Ct. at 1458 n.24. Dismissing Chief Justice Roberts's analogy of the majority's opinion in *Massachusetts* to *SCRAP*, the Court asserted, "It is . . . quite wrong to analogize the legal claim advanced by Massachusetts and the other public and private entities who challenge EPA's parsimonious construction of the Clean Air Act to a mere 'lawyer's game.'" *Id.*

cerning an organization's failure to report campaign contribution data under the Federal Election Campaign Act.⁹⁶ Rather than following the *Lujan* limitation on the availability of citizen suits, the majority focused on whether an alleged injury is within the zone of interests Congress intended the statute to protect.⁹⁷ The *Akins* Court thus clearly pushed back on the private law model values embraced by *Lujan*, recognizing that Congress has the authority to statutorily declare which concrete harms courts must accept for standing purposes.⁹⁸

Then, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the Court relaxed the injury-in-fact requirement, carving away at *Lujan*'s ban on generalized grievances by allowing standing to vindicate a generalized grievance.⁹⁹ As one commentator noted:

Laidlaw signals a continuation of the Court's discomfort with Justice Scalia's purely private law model of litigation. The *Laidlaw* decision, coupled with the Court's earlier holding in *Akins*, nudges the Court's treatment of citizen suit standing substantially closer to the public law model. The Court significantly relaxed its injury-in-fact requirement by shifting the inquiry from an exclusive focus on the plaintiff to a more open examination of the plaintiff's relationship with the environment.¹⁰⁰

Thus, a line of post-*Lujan* cases embraced the public law model, allowing citizens standing based on statutory right, lifting a strict ban

⁹⁶ 524 U.S. 11, 16–26 (1998) (addressing a violation of 2 U.S.C. § 441, which governs disclosure of certain contributions under FECA).

⁹⁷ *Id.* at 19–20.

⁹⁸ For supporting analyses of *Akins*, see Brown, *supra* note 7, at 680, 690 (“*Akins* shifted the injury-in-fact paradigm from the facts relating to plaintiff to the statutory creation of injury The *Akins* approach to congressional power to define justiciability stands in stark contrast with that reflected in *Lujan*.”); Henry, *supra* note 8, at 239–40 (“The Court’s decision in [*Akins*] signaled a significant shift in the way it viewed citizen standing.”); Cass R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, 147 U. Pa. L. Rev. 613, 616–18 (1999).

⁹⁹ 528 U.S. 167, 180–88 (2000).

¹⁰⁰ Henry, *supra* note 8, at 247 (citations omitted). For an additional supporting analysis, see Daniel A. Farber, Environmental Litigation after *Laidlaw*, 30 *Envtl. L. Rep.* 10,516, at 10,522 (2000) (arguing the trend of narrowing standing requirements represented by *Lujan* has recently been offset by a relaxation of those requirements).

on Article III courts' adjudication of generalized grievances, and diluting causation and redressability requirements.

Rather than continuing this trend, *Massachusetts* predicates standing not on statutory right or generalized grievance, but on harm to a state's regulatory interest resulting from the federal government's failure to act in a regulatory field where it preempts states and where that failure also causes the state a more concrete harm, such as coastal erosion. By resorting to this standing theory as the "ticket" into federal court, the *Massachusetts* decision limits the overall ability of both state and private plaintiffs to use the adjudicative process to address generalized grievances and ensure executive adherence to duly passed federal laws.

Under the Court's regulatory interest theory, a state can vindicate public interests where federal inaction (that may amount to an abuse of statutory discretion) impinges on the state's ability to regulate harms that threaten concrete injury such as coastal erosion. But the ability of a state to do so under this standing theory may be severely limited. Future courts could easily distinguish *Massachusetts* on the grounds that, unlike *Massachusetts*, the regulatory field at issue has not been preempted because states have alternative routes to protect their "quasi-sovereign prerogatives." Alternatively, future courts could distinguish *Massachusetts* on the grounds that the regulatory regime at issue, unlike that at issue in *Massachusetts*, fully excludes state involvement. Indeed, at issue in *Massachusetts* was the CAA, which creates a fairly unusual relationship between states and the federal government, mandating a high degree of "cooperative federalism," including significant state participation in the creation of SIPs to meet the National Ambient Air Quality Standards for listed air pollutants.¹⁰¹

Thus, while the *Massachusetts* standing regime may possess public adjudication model characteristics, as states may in some circumstances have standing to vindicate public interests, the regime's restrictions represent a significant net loss to the abilities of both state and private plaintiffs to do so.

¹⁰¹ See 42 U.S.C. § 7410(a)(1) (2000). The idea that Massachusetts' entitlement to standing based on its regulatory interests may be linked to its special participatory role under the CAA was alluded to during oral arguments. See *supra* notes 60–66 and accompanying text.

*B. Implications of State Monopoly Power Over Public Law
Litigation*

Again, a possible response may be that any ruling that allows standing for new plaintiffs could arguably expand judicial power, because more plaintiffs can file cases and more judicial review will occur; in this way *Massachusetts* furthers public law model values. The previous Section argued that *Massachusetts* limits standing for both private *and state* plaintiffs, resulting in a net loss of judicial review. This Section argues that a state monopoly over public law litigation is not a net gain for the public law model. Indeed, the state monopoly model also undermines core private law model values.

Some commentators have argued that state monopoly over public interest litigation carries significant advantages.¹⁰² First, suits by state attorneys general may better protect the public interest of state residents than citizen suits by private individuals, because state suits can represent a broader range of interests and secure broader relief.¹⁰³ Second, consolidating public interest litigation into the hands of state attorneys general may reduce the transaction costs of litigation, as it generally costs less for a state attorney general to file one lawsuit than for scattered private individuals to file multiple suits.¹⁰⁴ Third, such a system would politicize the state attorney general position, requiring attorneys general to respond to a broad range of constituents in selecting public interests to vindicate in federal court.¹⁰⁵ This political competition might have positive impacts by improving the quality of candidates and, more generally, could help the public to focus on important public interests.

But state monopoly over public law litigation also carries weighty disadvantages. First, politicization of the attorney general

¹⁰² Professor Stevenson, while not arguing that *Massachusetts* restricts public law litigation, argues that the decision may give “states favored status when bringing suits against federal administrative agencies.” Stevenson, *supra* note 4, at 73–74. Stevenson discusses some effects special solicitude may have on the position of state attorney general. *Id.* at 37–51. For a defense of state-run public interest litigation, see Comment, State Standing to Challenge Federal Administrative Action: A Re-examination of the *Parens Patriae* Doctrine, 125 U. Pa. L. Rev. 1069, 1071 (1977).

¹⁰³ Comment, *supra* note 102, at 1103–09 (comparing *parens patriae* suits with class action suits and arguing that *parens patriae* suits have several advantages).

¹⁰⁴ See *id.* at 1105–06.

¹⁰⁵ See Stevenson, *supra* note 4, at 12, 40–42.

position will not necessarily serve the greater public interest or lead to the vindication of public laws. At least in the forty-three states where attorney general is an elected position, attorneys general will be incentivized to file lawsuits for political reasons that do not necessarily best serve the public interest.¹⁰⁶ Second, claimed efficiency-enhancing economies of scale enabled by the state monopoly model may be undermined by the fact that would-be plaintiffs will have to expend time and money to convince their state attorney general that a lawsuit is in the state's (and the attorney general's) best interest. Third, the state monopoly model may be institutionally unworkable. Lawsuits often last for many years and outlast the term of a particular attorney general; a change in administration could mean an immediate change in the public interest law docket. Fifty attorneys general are also unlikely to have the resources to effectively vindicate public laws and police the federal administrative state.

The result is systematic politicization of standing that injects the very political considerations into the adjudicative process that the private law model so decries, though the resultant politicization is generated by politicians.¹⁰⁷ Furthermore, insofar as the private law model stresses that the judicial role should be confined to vindication of minority interests,¹⁰⁸ the model is undermined by a system that systematically ignores the interests of unorganized, political minorities, and instead chooses to vindicate organized interests, either those of the majority or other powerful minorities, because they have more political capital to entice an elected attorney general.

¹⁰⁶ Cass, *supra* note 4, at 78–79 (“State attorneys general are political figures with political agendas and political aspirations. Their litigation decisions often reflect their political interests, most of all when the litigation involves not an individual criminal suspect but a fundamental challenge to the federal government’s environmental policy.”).

¹⁰⁷ Professor Cass accordingly remarks, “It should come as no surprise that eleven of the twelve attorneys general suing in *Mass. v. EPA* were Democrats while the administration whose policies they challenged was Republican,” and notes that “states are less likely than private litigants to assert concrete interests in litigation.” *Id.* at 78–79.

¹⁰⁸ See, e.g., Scalia, *supra* note 18, at 894 (“[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*.”).

Public law model values could also be undermined under the state monopoly system because state attorneys general could be captured by special interest groups, transforming their roles from exclusive champions of public interest to powerful tools of special interests.¹⁰⁹ Similarly, many federal laws, such as the CAA and the Endangered Species Act, are the product of hard-fought efforts to assemble unorganized, diffuse, but majoritarian interests into an ordered voice capable of being heard and heeded on Capitol Hill. Under the state monopoly model, without judicial cognizance of citizen suit provisions allowing individuals standing to sue under such laws, every appeal to the federal judiciary to do so will require these majoritarian but unorganized interests to again muster the political pressure necessary for state attorneys generals to take heed. While climate change may attract enough organized interest and media attention for an attorney general to take heed, an agency's failure to abide by procedural protections under the Endangered Species Act as applied to an endangered toad, for example, may not be worth the attention of an attorney general because litigation will not translate to enough votes to make efforts worthwhile.

By equating public power with a sovereign right, the regulatory interest theory for state standing also threatens to undermine core private rights.¹¹⁰ Analyzing the historical transformation of state standing from a common law based system to a sovereign-interest-oriented system, Professors Woolhandler and Collins argue that:

Distinguishing the rights of individuals from the powers of the majority reinforced the idea that a claim based on a fundamental individual right should not be overcome by a simple claim of general utility, or at least should require an affirmative showing

¹⁰⁹ Professor Stevenson similarly predicts more “lobbyist efforts focused on these national policy issues . . . at the state AG’s office.” Stevenson, *supra* note 4, at 42; see also, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. Econ. & Org.* 167, 169 (1990) (discussing the theory that special interests can “capture” regulatory agencies).

¹¹⁰ See Woolhandler & Collins, *supra* note 20, at 395 (“[M]ajoritarian interests in exercising power [came to be] considered to be the rough equivalents of individualized common-law claims of right, at least insofar as standing was concerned.”). Professors Woolhandler and Collins go on to chronicle the “reconceptualization of a government’s interest in exercising power for the benefit of its citizens into the equivalent of a claim of right in these governmental standing cases.” *Id.* at 459.

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of a heightened governmental interest before it could be overcome. Recognizing a right in government to exercise power tends to equalize power and right. The early Court, by keeping these interests separate, enhanced the citizen's ability to challenge governmental action.¹¹¹

Professor Dworkin similarly argues that “[t]he existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will.”¹¹² The regulatory interest theory bases standing on an understanding of a particularized governmental “right” to regulate, and this understanding may threaten to drown out opposing private rights, even where those private rights rest on unambiguous statutory and constitutional text.¹¹³

III. THE ALTERNATIVE, POSITIVIST STANDING MODEL

So far, my criticism has left unanswered the question of what alternative standing model would be better. First, without conducting an exhaustive review of all laws with citizen suit provisions, it would seem that such provisions generally are included in laws such as the CAA (as in *Massachusetts*), the Endangered Species Act (as in *Lujan*), the Clean Water Act (as in *Laidlaw*), and the Federal Election Campaign Act (as in *Akins*). These citizen suit provisions arise where an unorganized but majoritarian political interest is able to organize, if only for a moment, to pressure political actors to protect their interests statutorily, or where there is concern that ongoing protection of these interests under the law will be systematically under-vindicated by the Executive. In these cases, citizen suit provisions enable vindication of the laws without necessitating the same feat of coordination that brought them about. Diffuse individual citizens who are injured within the meaning of the statute are able to seek redress in federal courts, no matter how generalized their grievance may appear and regardless of

¹¹¹ Id. at 445–46 (citations omitted).

¹¹² Ronald Dworkin, *Taking Rights Seriously* 194 (1977).

¹¹³ See Woolhandler & Collins, *supra* note 20, at 459 (“The established norm of the liberty of individuals to act according to their own wills, free from government regulation, therefore had to compete with the norm of liberty of government to act according to the will of majorities, free from individual claims of right.”).

whether an injury is apparent independent from executive non-compliance with the law.

A positivist approach to standing that predicates state and citizen standing on positive statutory enactment provides a relatively straightforward, workable system that ensures vindication of such unorganized interests.¹¹⁴ This doctrine limits value-laden judicial discretion to determine which interests can be vindicated and which cannot, increases executive adherence to duly passed laws, and forces Congress to be explicit in writing laws and delegating regulatory power to agencies. Thus, under the CAA's citizen suit provision, Section 7604(a), any citizen could sue in federal court to vindicate an alleged agency failure to perform the nondiscretionary duty of regulating greenhouse gas emissions.¹¹⁵ A citizen's right to do so should depend on the language of an act passed by Congress and signed by the Executive, not on the vagaries of judges' opinions as to whether this interest amounts to "a case or controversy," or on the political will of state attorneys general.

CONCLUSION

Distinctions between public and private interests, between generalized and particularized grievances, and between private rights and public power are difficult to define and defend. But these distinctions lie at the core of current standing doctrine and are used daily to define who can seek redress in federal court and for what issues. By relying on a regulatory interest theory for standing, *Massachusetts* restricts the number of plaintiffs with standing as well as the types of issues that can be heard. The decision, however, does emphasize that some party, at least, should have standing to question the legality of governmental actions (or inactions) and to address generalized grievances. Quoting Justice Stewart's opinion in *SCRAP* at length, the *Massachusetts* Court emphasizes that "[t]o

¹¹⁴ This version of the public law standing model flows from Professor Sunstein's statutorily protected interest model. See Sunstein, *supra* note 24, at 229–31.

¹¹⁵ The citizen suit provision enables a citizen—without mention of states—to “commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any [nondiscretionary] act or duty . . .” 42 U.S.C. § 7604(a) (2000). The dimensions of judicial review applicable under § 7604(a) are further specified in § 7607(b). See *supra* notes 42–45 and accompanying text.

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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. We cannot accept that conclusion.”¹¹⁶

Unfortunately, in *Massachusetts*, the Court appears to have anointed state attorneys general as the inquisitors, and constrained their inquisitional power. This public monopoly model of public law litigation is likely to prove to be an unworkable system that will result in the systematic under-vindication of unorganized public and private rights and the over-vindication of organized public and private rights.

¹¹⁶ *Massachusetts*, 127 S. Ct. at 1458 n.24 (quoting *SCRAP*, 412 U.S. at 688) (emphasis omitted).