Special Solicitude for States in the Standing Analysis: A New Type of Federalism

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I. INTRODUCTION

In 1970, the Commonwealth of Massachusetts filed a petition for a writ of mandate against the Secretary of Defense to seek relief for the United States' allegedly unconstitutional involvement in the Vietnam War.[1] If Massachusetts

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1. Massachusetts v. Laird, 400 U.S. 886, 886 (1970) (Douglas, J., dissenting) (denying motion for leave

had succeeded, the results would have been significant: Massachusetts asked the Court to enjoin the Secretary of Defense from increasing troop presence in Vietnam and to exempt Massachusetts citizens from the draft.[2] The Supreme Court denied the petition without an opinion, but Justice Douglas dissented on the ground that Massachusetts satisfied the threshold requirements of standing and justiciability.[3] Justice Douglas argued that standing existed because Massachusetts stood "as *parens patriae* to represent . . . its male citizens being drafted for overseas combat."[4]

This Comment explores the obscure role *parens patriae* plays in the balance of power between the federal government and states' rights.[5] Specifically, it evaluates the circumstances under which states can establish standing as *parens patriae* in a suit against the federal government and the implications of such standing in light of federalism and separation of powers principles.[6]

In *Massachusetts v. Environmental Protection Agency* (EPA),[7] the Court's most recent decision analyzing *parens patriae* standing, the Court made clear that a state's procedural rights and "stake in protecting its quasi-sovereign interests" entitle the state to "special solicitude" in the standing analysis.[8] For Massachusetts,[9] special solicitude in the standing analysis provided added protection for its asserted state interests.[10] Part II of this Comment introduces the doctrine of *parens patriae* in the context of the standing analysis. Part III explains the Court's special solicitude rule in *Massachusetts v. EPA* as a

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to file a bill of complaint).

2. *Id.*

3. *Id.* at 887.

4. *Id.* at 891. The literal meaning of *parens patriae* is "parent of the country." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 590, 600 (1982). A state stands as *parens patriae* when it identifies certain types of injuries to "quasi-sovereign interests." *Id.* at 602 (recognizing a state's quasi-sovereign interest in protecting "the well-being of its populace"); *see also infra* Part II.B.

5. *See* Claudine Columbres, *Targeting Retail Discrimination with* Parens Patriae, 36 COLUM. J.L. & SOC. PROBS. 209, 220 (2003) (explaining that the meaning of *parens patriae* "is murky and its historic credentials are of dubious relevance" (quoting *In re* Gault, 387 U.S. 1, 16 (1967))).

6. *See infra* Part II.C.

7. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438 (2007).

8. *Id.* at 1454-55; *see also* Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN. ST. L. REV. 1, 30 (2007) (quoting a portion of oral arguments in *Massachusetts* where Justice Kennedy interpreted Massachusetts' position to be that, as a state, Massachusetts had "some special standing" because federal law preempted state law). *But see* Leading Cases, *Limits on Agency Discretion*, 121 HARV. L. REV. 415, 425 (2007) [hereinafter *Limits on Agency Discretion*] (noting that the special circumstances of the case, including its political overtones, might not signal a significant change to the standing doctrine).

9. Massachusetts seems to frequently find itself in litigation with the federal government. Coincidentally, this Comment discusses three cases where Massachusetts sued the federal government and the Supreme Court entered into a discussion of the relationship between the federal government and the states. In addition to *Massachusetts v. Laird* and *Massachusetts v. EPA*, the Court was faced with another case involving difficult issues of federalism in *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923), discussed *infra* at note 86 and accompanying text.

10. Stevenson, *supra* note 8, at 9 (explaining the opportunities for "policy-oriented litigation by the state [Attorneys General]").

recognition of the need to protect states from detrimental action or inaction by the federal government. Lastly, Part IV argues that in some circumstances Congress may enact legislation that authorizes *parens patriae* standing for the purpose of ensuring states adequate remedies for legal deficiencies in the administration of the federal government.

II. THE DOCTRINE OF STANDING APPLIED TO STATES

In *Marbury v. Madison*, Chief Justice Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is."[11] This duty of the judicial department, however, is limited by Article III of the Constitution, which confines the power of the federal judiciary to "cases" and "controversies."[12] The confined power of the judiciary preserves the proper role for courts in the federal government.[13] Thus, a separation of powers justification for the doctrine of standing reflects the underlying design of the federal government.[14] This section first provides an overview of Article III standing requirements that aim to preserve the separation of powers. Then, based on the assumption that *Massachusetts v. EPA* expanded the doctrine of standing when the plaintiff is a state,[15] this section argues that recognition of *parens patriae* standing goes beyond the traditional separation of powers justifications for Article III standing and embraces principles of federalism that seek to maintain the proper relationship between the federal government and the states.

A. Article III Cases and Controversies

Constitutional standing is an "irreducible minimum" that a plaintiff must establish to bring suit in federal court.[16] The Article III requirement confining the judicial power to cases and controversies has been interpreted to require a plaintiff to show the following three elements: (1) injury in-fact; (2) causation; and (3) redressability.[17] Because these elements are required by the Constitution, Congress cannot authorize lawsuits where plaintiffs do not satisfy these elements.[18] Despite this limitation on Congressional power, the discussion below

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

12. U.S. CONST. art. III, § 2.

13. Allen v. Wright, 468 U.S. 737, 750 (1984).

14. *Id.* at 752.

15. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1464 (2007) (Roberts, J., dissenting) (criticizing the majority for "chang[ing] the rules"); *see also* Stevenson, *supra* note 8, at 9 (embracing "the new 'special solicitude' rule").

16. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

17. *Id.*

18. *Id.*

illustrates that if Congress does pass a statute, that fact will influence the decision of whether Article III standing exists.[19]

In *Lujan v. Defenders of Wildlife*, the plaintiffs were two individuals who challenged a decision by the Secretary of the Interior (the Secretary) to exempt actions taken by the United States in foreign countries from the requirements set forth in the Endangered Species Act (ESA).[20] The case defined an "injury in-fact" as the "invasion of a legally-protected interest" that is "concrete and particularized" and "actual or imminent."[21] The Court treated causation and redressability as interrelated requirements because, if the plaintiff's injury is "fairly traceable" to the allegedly unlawful conduct and a favorable ruling would redress the plaintiff's injury, there must be some nexus between the cause of the injury and the ability of courts to remedy the harm.[22]

The Court ultimately found that the plaintiffs did not have standing.[23] The plaintiffs could not establish injury in-fact because the injury was not imminent.[24] According to the Court, the "some day" intentions of the plaintiffs to visit the countries affected by the Secretary's decision were insufficient to establish actual or imminent injury.[25] Justice Kennedy's concurring opinion explains that the plaintiffs could have established standing if they had purchased airline tickets or announced a certain date when they would visit the impacted countries.[26]

A plurality of the Court also targeted the inadequacies of the plaintiffs' complaint with respect to causation and redressability.[27] The discussion does not expressly declare that the element of causation failed, but rather states that the plaintiffs' complaint about the nature of the government program created "difficulties" for proving "causation and redressability."[28] In contrast, the Court specifically discussed how the redressability element failed by explaining how a ruling against the Secretary would not necessarily bind individual funding agencies responsible for implementing the policies requested by the plaintiffs.[29]

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19. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

20. *Lujan*, 504 U.S. at 557.

21. *Id.* at 560.

22. *Id.* at 562 (explaining that the plaintiff has the burden of showing government action or inaction that "produce[s] causation and permit[s] redressability of injury").

23. *Id.* at 578.

24. *Id.* at 564.

25. *Id.*

26. *Id*. at 579 (Kennedy, J., concurring).

27. *See id.* at 568 (majority opinion) ("The most obvious problem in the present case is redressability."). This portion of the opinion seemingly ties together the causation and redressability requirements. *Id.* (discussing the difficulties of proof for causation and redressability); *id.* at 571 ("Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated . . . .").

28. *Id.* at 568 (explaining that the challenge to a "generalized level of government action" creates "obvious difficulties insofar as proof of causation or redressability is concerned").

29. *Id.* at 570.

After a discussion of the three elements, the Court held that the plaintiffs did not have standing.[30]

The opinion, however, continued to discuss whether the plaintiffs' claim failed because it stated a "generalized grievance."[31] Justice Scalia defined a "generalized grievance" as a plaintiff claiming "harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."[32] Relying on Justice Marshall's opinion in *Marbury v. Madison*,[33] Justice Scalia explained that the plaintiffs could not assert a claim based on injury to a "*public* interest."[34] Rather, Article III establishes courts for the purpose of deciding "cases and controversies as to claims of infringement of individual rights."[35] To satisfy the requirements of Article III, the plaintiffs needed to show more than injury resulting from lack of regulation.[36]

Under *Lujan*, for suits against the government that seek to vindicate a statutory right, the plaintiff must show "concrete and particularized" injury.[37] Although the plaintiffs in *Lujan* could claim the right to sue based on the citizen-suit provision, a Congressional statute that purported to create a right to sue did not necessarily create injury for purposes of Article III standing.[38] This type of lawsuit created a separation of powers concern because, if the Constitution requires the judiciary to play a limited role in relation to legislative and executive branches, then Congress should not be able to avoid that constitutional requirement by passing a statute that extends the judiciary's Article III jurisdiction.[39]

In 1983, Justice Scalia wrote a law review article, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, which illustrates at least part of the reasoning employed to limit Congress's ability to create standing by enacting a statute.[40] The article's basic premise is that "standing . . . is an essential means of restricting the courts to their assigned role of protecting

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30. *Id.* at 571.

31. *Id.* at 573.

32. *Id.* at 573-75.

33. *Id.* at 576 ("'The province of the court . . . is, solely, to decide on the rights of individuals.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

34. *Id.*

35. *Id.* at 577 (quoting Stark v. Wickard, 321 U.S. 288, 309-10 (1944)).

36. *Id.* at 574-75.

37. *Id.* at 560.

38. *Id.* at 578.

39. *See* Mark Gabel, *Generalized Grievances and Judicial Discretion*, 58 HASTINGS L.J. 1331, 1343-47 (2007) (suggesting that, despite the Court confusing the issue of whether the generalized concept was prudential or constitutional, this reasoning implies that generalized grievances were a constitutional concern); *see also id.* at 1357 (explaining Justice Scalia's opposition to judicial review of generalized grievances because they transfer power vested in a "majoritarian branch to an unelected, nonmajoritarian one").

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

minority rather than majority interests . . . ."[41] From that premise, he argued that "not *all* 'concrete injury' indirectly following from governmental action or inaction would be capable of supporting a congressional conferral of standing."[42] Instead, the judicial role should be limited to protecting minority groups and the democratic process should protect the rights of majority groups.[43] The reasoning in *Lujan* parallels the distinction between individualized and public rights.[44] Under *Lujan*, "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive."[45] Thus the democratic process—not the judiciary—provides the requisite protection for the public interest.[46]

The separation of powers arguments that counseled against standing in *Lujan* were not as strong in *Federal Election Commission v. Akins*.[47] In *Akins*, the plaintiffs requested the Federal Elections Committee (FEC) to order the American Israel Public Affairs Committee (AIPAC) to disclose information that would qualify AIPAC as a "political committee" under the Federal Election Campaign Act (FECA).[48] Under FECA, certain groups must register as "political committees" for the purposes of tracking financial contributions, complying with disclosure requirements, and, generally, to prevent "actual or perceived corruption of the political process."[49] After the FEC dismissed the plaintiffs' request, the plaintiffs brought their claim under a statute similar to the one in *Lujan*.[50] However, the Court distinguished *Akins* from the claim in *Lujan* that the government merely needed to comply with statutory obligations.[51] In *Akins*, the plaintiffs could identify concrete injury because they claimed "informational injury" that directly affected voting rights.[52] *Akins*, therefore, established that

41. *Id.* at 895.

42. *Id.*

43. *Id.* at 896.

44. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992).

45. *Id.* at 576; *see also* Martin Kellner, *Congressional Grants of Standing in Administrative Law and Judicial Review: Proposing a New Standing Doctrine from a Delegation Prospective*, 30 HAMLINE L. REV. 315, 322 (2007) (explaining that the proper role for the court in the separation of powers is to protect individual rights).

46. *Id.*

47. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 29-30 (1998) (Scalia, J., dissenting) (explaining that allowing a plaintiff to establish standing to compel an executive agency to comply with the law would reduce the powers of the President and expand the powers of the Judiciary); *see also* Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 688 n.67 (2007) (citing sources that discuss how *Akins* departed from *Lujan*).

48. *Akins*, 524 U.S. at 15-16.

49. *Id.* at 14.

50. *Cf. id.* at 19 ("'[*A*]*ny party* aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal." (quoting 2 U.S.C. § 437g(a)(8)(A)) (emphasis added)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-72 (1992) ("'[*A*]*ny person* may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.'" (quoting 16 U.S.C. § 1540(g)) (emphasis added)).

51. *Akins*, 524 U.S. at 24-25.

52. *Id.*

Congress may confer standing by statute if the injury at issue is sufficiently concrete and specific, such as injury to a "basic . . . political right[]."[53]

Akins impacts the separation of powers in the federal government because it empowers the judiciary to resolve disputes between individuals asserting widely shared harm and regulatory agencies allegedly responsible for that harm.[54] But, relitigation of the issues presented in *Akins* casts some doubt on its meaning and any detriment it might have had on *Lujan*'s strong language supporting limited review of federal agency action.[55] For instance, subsequent challenges to FEC actions similar to the one in *Akins* required lengthy litigation to determine standing.[56] Additionally, some courts have applied *Akins* narrowly by relying on the fact that the plaintiffs in that case claimed injury to the fundamental right to vote.[57] On the other hand, some courts have applied *Akins* broadly by simply concluding that a statutory violation necessarily confers standing.[58]

In the end, however, *Akins* established that Congress may confer standing on plaintiffs by identifying harm to sufficiently concrete interests, an injury which creates standing for judicial review of actions taken by the federal government.[59] *Lujan* still protects actions taken by the executive branch, but action taken by executive agencies cannot create injury sufficient to establish standing without a showing that the plaintiff suffered concrete harm (e.g., the possibility that a plane ticket owned by the plaintiff would become valueless).[60] *Akins* thus created a standard whereby courts must determine whether a widely shared harm is "sufficiently concrete."[61] With citizen-suits seeking to compel enforcement by federal agencies, *Akins* provides a "more forgiving" framework[62] for plaintiffs seeking to establish standing and compel an executive agency to carry out "public values."[63] As a result, the view that the judiciary should not involve itself in cases or controversies that could be resolved through the democratic process[64] did not prevail when the widely shared public interests were coextensive with an individual's sufficiently concrete interests.[65]

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53. *Id.* at 24 (explaining that injury in-fact exists where the injury "is concrete, though widely shared").

54. Gabel, *supra* note 39, at 1357.

55. *See* Brown, *supra* note 47, at 698-701 ("[*Akins*] is at risk of becoming a dead letter, as are the gains to standing law that its groundbreaking analysis appeared to foreshadow.").

56. *Id.* at 695 (citing examples where the FEC made losing arguments to district courts that plaintiffs lacked standing where *Akins* made clear that plaintiffs should have had standing).

57. *Id.* at 697 n.118 (citing Heartwood, Inc. v. U.S. Forest Serv., 2001 WL 1699203 (W.D. Mich. Dec. 3, 2001) and Atl. States Legal Found. v. Babbit, 140 F. Supp. 2d 185 (N.D.N.Y. 2001)).

58. *Id.* at 697 n.119 (citing Bloom v. Nat'l Lab. Rel. Bd., 153 F.3d 844 (8th Cir. 1998)).

59. Fed. Elections Comm'n v. Akins, 524 U.S. 11, 24 (1998).

60. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992); Brown, *supra* note 47, at 707.

61. *Akins*, 524 U.S. at 24.

62. Brown, *supra* note 47, at 729.

63. Gabel, *supra* note 39, at 1365.

64. *Lujan*, 504 U.S. at 577.

65. Gabel, *supra* note 39, at 1357.

B. State Standing Under Article III

1. Standing as Parens Patriae

States are unique litigants because they have "quasi-sovereign" interests derived from their status as governing bodies with responsibility to protect their citizens.[66] These interests provide the basis for state standing under the doctrine of *parens patriae*.[67] *Parens patriae* developed under the common law in cases where a state sought to represent the interests of citizens who could not represent themselves;[68] but the theory developed to allow states seeking to intervene as *parens patriae* for the far-reaching purpose of protecting "the well-being of [the] populace."[69]

Quasi-sovereign interests can resemble the widely shared harms that are insufficient to make up a constitutional case or controversy. Under *Lujan* and *Akins*, the allegation of a widely shared harm does not create injury in-fact unless Congress created a statutory right that protects a sufficiently concrete interest.[70] Quasi-sovereign interests extend to such areas as the general health and well-being of its residents, the rightful status as a state within the federal system, and injuries to a "'sufficiently substantial' segment" of the state's population.[71] These interests do not compare to the concreteness required by the Court in *Lujan*, where the plaintiff would have needed plane tickets to establish sufficient injury in-fact.[72] Nevertheless, a state can still establish standing as *parens patriae* by asserting injury to quasi-sovereign interests.[73] Like *Akins*, the doctrine provides opportunities for a plaintiff to establish standing based on widely shared harm.[74] Instead of injury to a statutorily created right that is sufficiently concrete, there must be sufficient injury to a quasi-sovereign interest.[75]

Colorado v. Gonzales[76] represents a scenario where injury to quasi-sovereign interests was insufficient to establish standing. In that case, Colorado sought a writ of mandamus to force the Attorney General and the Department of Homeland Security to "prepare and implement a comprehensive plan to secure

66. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 590, 600-02 (1982).

67. *Id.*

68. *Id.* (for example, those suffering from mental incapacities).

69. *Id.* at 602.

70. *See supra* notes 52-53 and accompanying text.

71. Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1852 (2000) (summarizing the decision in *Snapp*).

72. Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).

73. Ratliff, *supra* note 71, at 1853.

74. *Id.*

75. *Id.*

76. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *1 (D. Colo. Sept. 21, 2007).

the nation's borders."[77] Colorado asserted its quasi-sovereign interest as *parens patriae* to protect its citizens "against invasion by . . . international terrorists."[78] The district court held that Colorado failed to establish injury in-fact because the "general and speculative fear of future terrorist[] acts" was not particularized.[79] Additionally, since vulnerability to a terrorist attack was not directly caused by the absence of such a plan, the court held the causation to be speculative.[80] Furthermore, the plaintiff could not establish redressability because, although a favorable decision might make future terrorist attacks less likely, the court found the likelihood too speculative.[81] Accordingly, the alleged inaction by the federal government in this policy area did not sufficiently impact Colorado's quasi-sovereign interest in the well-being of its citizenry.[82]

Gonzales, much like *Laird*, where Massachusetts challenged the validity of the Vietnam War, demonstrates one of the key limitations of *Akins*, which relied on the violation of a statutorily created right to establish standing.[83] When Colorado and Massachusetts claimed broadly stated interests, even though they were described as quasi-sovereign interests, the interests were not concrete rights arising from a statute.[84] Therefore, in the areas of foreign policy or immigration policy, where no statutory right existed, the states could not establish standing as *parens patriae* and were forced to seek relief through the political process.[85]

Another limitation on states suing the federal government as *parens patriae* is that the state must show that the state—not the federal government—should be acting as *parens patriae*.[86] When the issue in dispute is the enforcement of individual rights with respect to the operation of a federal statute, "it is the [federal government], and not the state, which represents [individuals] as *parens patriae*."[87] In *Massachusetts v. Mellon*, Massachusetts challenged enforcement of the Maternity Act, which established a bureau that would disburse funds based on compliance with provisions of the statute aiming to protect the health and reduce mortality rates of mothers and infants.[88] Massachusetts claimed that the statute exceeded Congress's powers and invaded states' sovereign rights.[89] The Court rejected the argument that Massachusetts could bring the action as *parens*

77. *Id.*
78. *Id.* at *3.
79. *Id.*
80. *Id.* at *4.
81. *Id.* at **4-5.
82. *Id.* at *5.
83. Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998).
84. *Id.* at 24.
85. *See id.* (explaining that widely shared harm sometimes does result in finding that a plaintiff cannot establish standing).
86. Massachusetts v. Mellon, 262 U.S. 447, 486 (1923).
87. *Id.*
88. *Id.* at 479.
89. *Id.*

patriae because Massachusetts residents are also citizens of the United States, and when the issue is protection from actions taken by the federal government, it is the federal government that acts as *parens patriae*.[90] Although the Court qualified its holding by stating that they did "not go so far as to say that a state may never intervene by suit to protect its citizens from enforcement of unconstitutional acts by Congress," it was clear that the state could not do so in that case.[91] Again, the case led to a result where the state's inability to bring a *legal* challenge to the federal government's authority because the state's quasi-sovereign interests were not impacted when the federal government maintained exclusive authority over the issue.[92] Therefore, despite the seemingly broad scope of *parens patriae* standing, the doctrine does not permit standing in all circumstances; rather, it limits the application of the doctrine to cases where the injury is sufficiently concrete[93] and where it is not the federal government that should be acting as *parens patriae*.[94]

2. Massachusetts v. EPA*: The New Special Solicitude Rule*

In 2007, the Court addressed the scope of *parens patriae* standing in *Massachusetts v. EPA*.[95] The case grew out of a dispute between the EPA and a group of organizations that petitioned the EPA to adopt rules to regulate greenhouse gas emissions from new automobiles.[96] The dispute developed into a battle between several states and the federal government over delicate questions about the standing doctrine.[97]

The EPA argued that the petitioners could not establish standing because they were asserting injury resulting from widespread harm inflicted by the emission of greenhouse gases.[98] Because the emission of greenhouse gases causes widespread harm, the EPA believed that the petitioners could not establish

90. *Id.* at 486.

91. *Id.* at 485.

92. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) (requiring plaintiffs to rely on the political process for resolution of their complaints against the federal government).

93. Ratliff, *supra* note 71, at 1853.

94. *Mellon*, 262 U.S. at 486; *see also infra* notes 132-35 and accompanying text.

95. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438 (2007).

96. *Id.* at 1449.

97. *Id.* at 1446 n.2 (the states that joined the petition included "California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington"). Several other parties joined the petition. *See id.* 1446 nn.3-4 (listing as petitioners the "District of Columbia, American Samoa, New York City, and Baltimore;" non-governmental organizations joining the petition included 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").

98. *Id.* at 1453.

a "personal stake" in the outcome of the case.[99] Since only one party needed standing, the Court focused on Massachusetts, and noted the "considerable relevance" of its status as a sovereign state.[100]

Massachusetts' status as a sovereign state was relevant because the interest it sought to protect in this case was the "well-found[] desire to preserve its sovereign territory."[101] The Court relied on *Georgia v. Tennessee Copper Co.*,[102] where the state of Georgia filed suit to enjoin a copper factory located in Tennessee from "discharging noxious gas" into Georgia territory.[103] While this case distinguished states from individual litigants for the purpose of determining an appropriate remedy, it impacted the analysis in *Massachusetts v. EPA* because it identified an interest that states hold "in all the earth and air within its domain."[104]

In *Massachusetts v. EPA*, the Court strongly suggested that this interest by itself satisfied the Article III standing requirement that litigants identify a "concrete and particularized" interest.[105] After recognizing Massachusetts' "special solicitude" in the standing analysis, the Court considered Massachusetts' ownership of a significant amount of land that might be affected by greenhouse gas emissions as merely *supporting* the conclusion that the state's "stake in the outcome of [the] case [was] sufficiently concrete . . . ."[106] In doing so, the Court recognized a need for mechanisms to ensure accountability at the federal level in an era where administrative agencies wield a considerable amount of power.[107] Because "sovereign prerogatives" of the state are "lodged in the Federal Government," the Court held that Massachusetts was entitled to "special solicitude" in the standing analysis.[108] When a state surrenders those prerogatives, it "might" be preempted from relying on its own sovereign power to address a particular problem.[109] As a result, the federal government is obligated to "protect Massachusetts" and other states by following legislative mandates.[110] Under these circumstances, a state is entitled to "special solicitude in [the] standing analysis."[111]

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99. *Id.*

100. *Id.* at 1454.

101. *Id.*

102. 206 U.S. 230 (1907).

103. *Id.* at 236.

104. *Massachusetts v. EPA*, 127 S. Ct. at 1454 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

105. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

106. *Massachusetts v. EPA*, 127 S. Ct. at 1454-55 (emphasis added).

107. *See id.* (noting the impact of the "administrative state" on relations between the state and federal governments).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

Part of the oral arguments before the Court clarify this concept. During oral argument Justice Scalia asked counsel for Massachusetts: "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 your standing allegation?"[112] Counsel for Massachusetts agreed with this characterization of the theory.[113] Based on the Court's opinion, and the discussion at oral argument, when a state tries to establish standing as *parens patriae* solely on injury to quasi-sovereign interests, preemption is a necessary element, or at the least a primary factor, in determining whether the interest is sufficiently concrete.[114]

Massachusetts v. EPA parallels *Akins* in two ways. First, both cases illustrate that standing may exist where the injury is widely shared but still sufficiently concrete.[115] Second, both cases recognize that the standing doctrine furthers an interest in maintaining accountability of the executive branch of the federal government[116] because each case allows for "judicial enforcement of the public values embedded in . . . statutes."[117] Unlike *Lujan*, these decisions illustrate a willingness by the Court to allow plaintiffs the opportunity to compel the federal government to carry out legislative mandates.[118]

These similarities could be considered responses to the growth of Presidential power exercised through executive agencies.[119] The increased influence of executive agencies contributes to the ongoing concern over the potential concentration of unchecked power in the executive branch.[120] The "public values" approach to standing in *Akins* and a state's special solicitude approach under *Massachusetts v. EPA* allow greater questioning of actions taken by executive agencies because in both cases the legal standard for establishing a protected interest is less demanding.[121] In both cases, the legally protected interest can be widely shared, a result that does not comport with Justice Scalia's

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112. Stevenson, *supra* note 8, at 31 (quoting Transcript of Oral Argument at 16-17, Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438 (2007) (No. 05-1120)).

113. *Id.*

114. *See id.* at 8 (explaining how states are "somewhat helpless and vulnerable" after they surrendered rights to be part of the Union).

115. Fed. Election Comm'n v. Akins, 524 U.S. 11, 15-16 (1998); *see also* Gabel, *supra* note 39, at 1365 (explaining that *Massachusetts v. EPA* "explicitly reaffirms" the holding in *Akins* that widely shared harms can still satisfy the injury in-fact requirement).

116. Gabel, *supra* note 39, at 1365.

117. *Id.* at 1353.

118. *See id.* (explaining how *Akins* "provides a forum for aggressive judicial enforcement of the public values embedded in . . . statutes").

119. *See* Massachusetts. v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1455 (2007) (noting that the EPA's "refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts"); *see also Akins*, 524 U.S. at 29 (explaining how courts can take advantage of agency expertise in certain policy areas and how courts can rely on agency decisions).

120. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124-25 (1994).

121. Gabel, *supra* note 39, at 1353.

perception of the Judiciary's intended function of protecting minority interests.[122] Accordingly, the widely shared harm is not remedied through the democratic process of electing the executive and legislative branches, but rather through the judiciary's role in determining the proper construction of a congressional statute.[123]

3. Criticisms and Limitations of the Special Solicitude Standard

Chief Justice Roberts' dissenting opinion in *Massachusetts v. EPA* criticized the recognition of states' "special solicitude" in the standing analysis.[124] First, the Chief Justice argued that the petitioners' claim was a generalized grievance because "the very concept of global warming seems inconsistent with [the] particularization requirement."[125] This point rests on a central purpose of the standing requirement: "[T]o decide concrete cases—not to serve as a convenient forum for policy debates."[126] By finding standing in this case, the Court created a forum for twelve states and a host of other parties to force the federal government to take action on the problem of global warming.[127]

Chief Justice Roberts' second criticism of the majority opinion focused on the doctrine of *parens patriae*.[128] The majority opinion treated a state suing as *parens patriae* as having separate and distinct quasi-sovereign interests that deserve special solicitude in the standing analysis.[129] However, the dissent argued that the doctrine of *parens patriae* required the state to identify a concrete and particularized interest of a private litigant in addition to the quasi-sovereign interest.[130] Thus, according to the dissent, a state cannot assert rights as *parens patriae* until it shows that its citizens meet the standing requirements.[131]

Finally, the Chief Justice faulted the majority for accepting the notion that a state can sue the federal government as *parens patriae*.[132] He cited *Massachusetts v. Mellon*[133] for the proposition that a state cannot enforce its rights against the federal government in this fashion because, when dealing with the federal government, "it is the United States that represents [the people]."[134] The dissenting opinion, therefore, favors reliance on the federal government, as

122. Scalia, *supra* note 40, at 896.
123. *Massachusetts. v. EPA*, 127 S. Ct. at 1453.
124. *Id.* at 1463.
125. *Id.* at 1467.
126. *Id.* at 1471.
127. *Id.* at 1446; *see also supra* note 97 and accompanying text.
128. *Massachusetts v. EPA*, 127 S. Ct. at 1465.
129. *Id.* at 1454.
130. *Id.* at 1465.
131. *Id.*
132. *Id.* at 1466.
133. Massachusetts v. Mellon, 262 U.S. 447 (1923).
134. *Massachusetts v. EPA*, 127 S. Ct. at 1466.

opposed to the states, to curb the emissions of greenhouse gases according to the existing statutory framework.[135]

The limited nature of the holding in *Massachusetts v. EPA* mitigates the impact of the decision.[136] Federalism concerns about the ability of states to sue the federal government can be somewhat tempered by focusing on the possibility that a state trying to establish *parens patriae* standing might still face some difficulty.[137] The discussion preceding the traditional standing analysis suggests that the holding in *Massachusetts* is limited to cases where there is a procedural right and a sufficient stake in protecting quasi-sovereign interests.[138] The procedural right turns on the interpretation of the statute in question.[139] The more difficult question, and the one which drew most of the Court's attention before proceeding with the traditional standing analysis, focused on the idea that "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives."[140] As mentioned above, the Court's discussion in this regard suggests that federal preemption must exist before the special solicitude rule applies.[141]

Therefore, although *Massachusetts v. EPA* signals an expansion of the standing doctrine, the ability of states to act as *parens patriae* is still limited.[142] The standing doctrine still maintains a separation of powers function because it limits the ability of states to compel regulatory action to cases where the state has a sufficient stake in protecting its quasi-sovereign interests.[143] The democratic process still plays a large part in ensuring the accountability of the President in carrying out federal law,[144] but the decision identified a unique injury to states when federal preemption prevents states from protecting their quasi-sovereign interests.[145] As a result, the Article III standing question, generally a separation of powers issue, required serious consideration of the proper relationship between the states and the federal government, and represented a crossroads of separation of powers and federalism principles.[146]

III. SPECIAL SOLICITUDE FRAMED AS AN ISSUE OF STATES' RIGHTS

If the EPA's refusal to regulate greenhouse gases went unchallenged, then Massachusetts and all other states may have been unable to enact their own

135. *Id.* at 1463.
136. *Limits on Agency Discretion*, *supra* note 8, at 425.
137. *Id.*
138. *Massachusetts v. EPA*, 127 S. Ct. at 1454-55.
139. *See id.* at 1454 (citing the statute for the proposition that Congress recognized a procedural right).
140. *Id.*
141. *See supra* notes 107-14 and accompanying text.
142. *Limits on Agency Discretion*, *supra* note 8, at 425.
143. *Massachusetts v. EPA*, 127 S. Ct. at 1454-55.
144. Brown, *supra* note 47, at 702.
145. *Massachusetts v. EPA*, 127 S. Ct. at 1454.
146. *See id.* at 1455 n.17 (the majority opinion's response to the Chief Justice's dissent).

regulation because the Clean Air Act preempted state action.[147] At the same time, when challenged to enact regulations on greenhouse gas emissions, the federal government responded by claiming it did not have the necessary statutory authority.[148] The result is a situation where the individual citizen might believe that neither the state nor the federal government can take action, even though a court might reach a contrary conclusion when evaluating of the statutory language.[149] If Massachusetts did not have standing, then an individual citizen would be unclear whether the state or federal government was responsible for inaction because the state of the law would remain unclear. However, by reaching a decision on the merits, the Court interpreted the legislation to determine whether the federal government in fact should be taking some form of action.[150] This section argues that *Massachusetts v. EPA* parallels decisions by the Court that interpret the Tenth Amendment as prohibiting the federal government from commandeering the sovereign authority of states. The recognition of states' special solicitude in the standing analysis, however, serves the fundamentally different purpose of allowing states to seek judicial review that will force the federal government to take action in accordance with statutory obligations.

A. An Overly Restrictive Standing Doctrine Impacts States' Quasi-Sovereign Interests and Strengthens Presidential Power

In *Massachusetts v. EPA*, the plaintiffs "call[ed] global warming 'the most pressing environmental challenge of our time.'"[151] The case was not about states' rights to address the problem of global warming under the Tenth Amendment, but it did illustrate a state's right under Article III to challenge the construction of a federal statute that had a similar effect.[152]

Under *New York v. United States*,[153] a federal statute may be unconstitutional if it "would 'commandeer' state governments."[154] At issue in *New York* were the Low-Level Radio-Active Waste Policy Amendments of 1985.[155] The amendments provided "incentives" for states to arrange for the responsible

147. *See supra* notes 107-11 and accompanying text; *Massachusetts v. EPA*, 127 S. Ct. at 1454 (explaining that a state's participation in the federal government may lead to preemption).

148. *Massachusetts v. EPA*, 127 S. Ct. at 1450.

149. *See, e.g.*, *id.* at 1459. After finding standing, the Court concluded that the Clean Air Act provided the EPA with requisite authority to regulate the emission of greenhouse gases. *Id.*

150. *Massachusetts v. EPA*, 127 S. Ct. at 1453 ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.").

151. *See id.* at 1446.

152. *See id.* at 1454.

153. 505 U.S. 144 (1992).

154. *Id.* at 177-80.

155. *Id.* at 149.

disposal of radioactive waste.[156] One incentive, called "the take title provision," required states to regulate the disposal of waste or, in the alternative, take title and possession of all radioactive waste within their borders and assume liability for damages suffered by waste generators resulting from the state's failure to promptly comply.[157] The Court held that this provision violated the structure of the federal government because it "commandeered" state governments by "mandating state regulation" to carry out federal policy.[158]

The question of standing in *Massachusetts* is immediately distinguishable because the state did not seek to invalidate a federal statute, but rather sought to force the government to adopt regulations for the emission of greenhouse gases.[159] However, when looking at the extent of federal regulation, which may preempt state action, the decision by the federal government to leave certain actions unregulated can affect the ability of a state government to exercise sovereign powers.[160] The most direct example of the federal government preventing a state from taking regulatory action occurs when federal law preempts state law.[161] In *New York*, the Court stated that when federal law preempts state law, the federal government is clearly accountable to the electorate for that action.[162] An accountability problem arises, however, where the federal government commandeers states to regulate because the federal government may insulate itself from public scrutiny behind the state program.[163]

The Court in *New York* may have overestimated the certainty of accountability where federal law preempts state law. The discussion below illustrates a situation where the federal government can avoid accountability where preemption exists and the executive denies the authority to take regulatory action.

On the merits of the dispute in *Massachusetts v. EPA*, the EPA claimed that it lacked authority to regulate new vehicle emissions under 42 U.S.C. § 7521(a)(1)[164] because carbon dioxide was not an air pollutant within the meaning of the statute.[165] But, the EPA could only be held accountable for that interpretation if a court could review the case on the merits, which was the precise goal of the plaintiffs' challenge to the denial of their rulemaking

156. *Id.* at 152-53.

157. *Id.* at 153-54.

158. *Id.* at 175, 180.

159. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1446 (2007).

160. *See* Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 67-69 (2007) (noting the federal government's assumption of a "dominant role in national policy-making").

161. *Id.* at 69 (noting that the federal government also by creating "various incentives and penalties for state action or inaction, including conditional preemption and conditional funding").

162. *New York*, 505 U.S. at 168-69.

163. *Id.*

164. 42 U.S.C. § 7521(a)(1) (2000).

165. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1459 (2007).

petition.[166] Contrary to the Court's argument in *New York*, relying on the democratic process to enforce public values would not necessarily ensure accountability: so long as the President and the EPA claimed they lacked authority to adopt regulations, the impetus would be on Congress or the states to take action, despite the fact that the Court ultimately concluded that the President and the EPA were wrong.[167] If the President's and EPA's claims went unchallenged, the Court would not have held that the executive branch failed to follow a legislative mandate, and thereby would have allowed the President and the EPA to avoid a statutory obligation while pinning the blame on the lack of legislative authority.[168]

The decision fulfilled the judiciary's contemplated constitutional role to interpret the law.[169] By reaching a decision on the merits, the Court could determine whether the federal government was responsible for the inaction, and the individual citizen would know whether it was the federal or state government that should be held accountable for the lack of regulation.[170] The result is consistent with the standing doctrine's purpose of maintaining a proper balance in the separation of powers; the Court was not interfering with the duty of the President to execute the law but rather determining the duties of the President when exercising power through executive agencies.[171] The situation is different from recognizing states' rights under the Tenth Amendment because a narrow interpretation of the standing doctrine does not result in the federal government avoiding accountability by "commandeering" the state.[172] Rather, the executive branch avoids public scrutiny by claiming that it does not have statutory authority, thus blaming Congress for failing to pass appropriate legislation.[173] Additionally, because the state is preempted from taking action, the state has little or no recourse to protect its quasi-sovereign interests.[174]

B. Protecting Quasi-Sovereign Interests Responds to the Need for Adequate

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166. *Id.* at 1446 (noting that the petitioners alleged that the EPA "abdicated its responsibility under the Clean Air Act").

167. *Id.* at 1459 (concluding that the Clean Air Act provides the EPA with the necessary authority to adopt regulations with "little trouble").

168. *Id.* at 1460.

169. *Id.* at 1453.

170. *See id.* (stating that federal courts are supposed to determine the meaning of statutes).

171. *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (emphasizing that the standing doctrine maintains the President's constitutional role to execute the law).

172. New York v. United States, 505 U.S. 144, 180 (1992).

173. *See Massachusetts v. EPA*, 127 S. Ct. at 1472 (Scalia, J., dissenting) (arguing that the majority was wrong because Congress did not specifically require the Administrator to issue regulations).

174. Stevenson, *supra* note 8, at 8 ("The states voluntarily joined the Union, Stevens observes, and surrendered the rights they would otherwise have had in each of these three domains (threatening force against contiguous neighbors, consummating treaties with other countries, and even passing their own laws and regulations) in order to participate in the greater Nation. Without these powers, the states are somewhat helpless and vulnerable, unless the federal government affords commensurate protections in return." (footnote omitted)).

Checks on Presidential Power

A model of government that relies heavily on Presidential control over executive agencies creates circumstances where the development of the standing doctrine influences accountability of the executive branch.[175] Presidential influence carried out through executive agencies can improve federal regulatory action.[176] This explains the trend in governance since the New Deal for Congress to delegate certain functions, sometimes deemed "lawmaking," to the executive branch.[177] Delegating broad power to the President can be justified in terms of accountability because the President, as a democratically elected official of a nationwide elector, will be held accountable as a political representative.[178] Presidential control over executive agencies can also be justified by practical concerns or interests in efficiency because the President, as a single individual who does not have to gain the consent of other legislators, might be better suited than the legislature to carry out government policy.[179] Indeed, the framers contemplated this separation of power by vesting executive power in the President[180] and charging him or her with the duty to "take Care that the Laws be faithfully executed."[181] The Constitution, however, only grants the President executive power under the assumption that other branches of the government will provide adequate checks against the concentration of power.[182]

Broad delegation of authority to the President to carry out government policy presents the risk of concentrating power in a single branch.[183] This risk is illustrated by the separation of powers theory set forth by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[184] which introduced the principle that Presidential power is at its "maximum" when Congress provides

175. *See* Greene, *supra* note 120, at 124 (noting the acceptance that Presidential control over executive agencies is constitutional, and asking whether this warrants corresponding structural responses to check that control).

176. *Limits on Agency Discretion*, *supra* note 8, at 420-21.

177. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677-83 (describing the ascendance of administrative agencies, their influence over policymaking, judicial responses to the rise of such influence, and renewed problems of agency authority that resulted from allegations of "unlawful and abusive exercise of administrative power" and the failure to carry out legislative mandates).

178. *Limits on Agency Discretion*, *supra* note 8, at 421 n.60.

179. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 865-66 (1984) ("[I]t is entirely appropriate for . . . the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved . . . ."); *see also* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (explaining also the benefits for efficiency).

180. U.S. Const. art. II, § 1, cl. 1.

181. *Id*. § 3.

182. *See* Greene, *supra* note 120, at 125 (suggesting a problem of excessive administrative power in light of an "under-enforced nondelegation doctrine").

183. *Id.* at 124.

184. 343 U.S. 579 (1952).

express or implied authority to the President.[185] Increased Presidential control creates the risk that a decision by the President over an issue related to a state's quasi-sovereign interest will violate the rule of law.[186]

Furthermore, in *Chevron v. Natural Resources Defense Council*,[187] the Supreme Court's ruling insulated executive agency decisions from extensive judicial review.[188] Under *Chevron*, if Congressional intent is clear, then an executive agency is constrained by that intent and "must give effect to the unambiguously expressed intent of Congress."[189] Where Congressional intent is not clear, the agency must formulate a "permissible construction of the statute."[190] So long as the agency satisfies this burden, the construction will be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[191] Because the federal government assumes this power, the states are forced to rely on the actions taken by the federal government for the general health and welfare of their citizens.[192]

When Presidential power is at its highest and courts must defer to agency decisions, the courts must still ensure that the exercise of Presidential power does not intrude on other constitutionally protected interests.[193] The prohibition on the federal government commandeering state legislatures and the recognition of states' special solicitude in the standing analysis both illustrate a concern that state governments will suffer consequences when it is the federal government that should be held accountable.[194] Thus, despite the traditional function that the standing analysis serves in the maintenance of the separation of powers, *Massachusetts* illustrates a situation where the standing analysis also maintains the proper balance of power between the federal government and the states.

IV. CONGRESSIONALLY AUTHORIZED STATE-SUIT PROVISIONS

In *Lujan* and *Akins*, the plaintiffs brought suit under broadly phrased citizen-suit provisions.[195] *Akins*' holding that a statutory right creates standing if the alleged injury is sufficiently concrete demonstrates that Congress can authorize

185. *Id.* at 635-36 (Jackson, J., concurring).

186. *See* Verkuil, *supra* note 179, at 318 (explaining that broad and vague grants of Presidential authority, which maximize Presidential power, can also result in Presidential determinations that violate the rule of law).

187. 467 U.S. 837 (1984).

188. *Id.* at 866.

189. *Id.* at 842-43.

190. *Id.* at 843.

191. *Id.* at 844.

192. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1454 (2007).

193. *See* New York v. United States, 505 U.S. 144, 156 (1992) ("Congress exercises its conferred powers subject to limitations contained in the Constitution.").

194. *Id.* at 168-69; *Massachusetts v. EPA*, 127 S. Ct. at 1454.

195. *See supra* note 50 and accompanying text.

standing.[196] This section argues that *Massachusetts v. EPA* allows Congress to make a policy judgment about whether it should authorize standing for cases relating to states' quasi-sovereign interests for the purpose of checking the concentration of governmental power in the executive branch and protecting states' quasi-sovereign interests. To evaluate the advantages and disadvantages of a "state-suit" provision, the possibility is explored in the context of two policy realms: immigration law and national emergency response.

A. Utilization of State Standing Provisions

1. Immigration Policy and the Department of Homeland Security

Congressionally authorized state standing would be appropriate where states can identify strong quasi-sovereign interests.[197] In *Gonzales*, the district court stated that the health and well-being of Colorado residents created a quasi-sovereign interest susceptible to injury by the failure of the federal government to adopt immigration policies to prevent future terrorist attacks.[198] However, because Colorado could point to no statute or constitutional authority that recognized a right to secure that interest in the courts, the district court distinguished the case from *Massachusetts v. EPA*.[199]

Illegal immigration impacts a number of state interests that trigger the states' police powers, such as traffic, healthcare, and education.[200] Since states' quasi-sovereign interests parallel states' authority under the police power,[201] the impact of immigration on states could form the basis for congressionally authorized state standing.[202] As mentioned above, the interest in protecting states' rights applies primarily where federal law preempts state law,[203] which is generally the case in immigration policy, established at the federal level by the Department of Homeland Security (DHS).[204] Although states use their police power to regulate areas impacted by immigration,[205] the doctrine of preemption prevents states

196. Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998).

197. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *6 (D. Colo. Sept. 21, 2007).

198. *Id.*

199. *Id.*

200. *See* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 990 (discussing the relations between the federal government and states in the area of immigration policy).

201. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1454 (2007).

202. *Id.*

203. *See supra* notes 107-11 and accompanying text.

204. Manheim, *supra* note 200, at 945-46; 6 U.S.C. §§ 111-12 (West 2008) (establishing a Department of Homeland Security, with a Secretary appointed by the President). "The issuance of regulations by the Secretary shall be governed by the provisions of chapter 5 of Title 5 . . . ." *Id.* § 112(e). "*A person* suffering legal wrong . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (2000) (emphasis added).

205. Manheim, *supra* note 200, at 989-91 (explaining that states may enact regulations beyond

from enacting laws that conflict with federal immigration policy, despite the possibility that federal policy could significantly affect states' quasi-sovereign interests.[206]

If the statutory scheme for immigration included a provision authorizing state standing in limited circumstances where quasi-sovereign interests are impacted, Congress would create a remedy for states that believed the DHS was failing to follow a legislative mandate.[207] Additionally, the unavailability of judicial review would not frustrate Congressional intent in cases where the DHS did not follow a legislative mandate.[208]

Permitting state standing provides advantages over a policy that relies on individual plaintiffs. A statute authorizing individuals to bring suit based on injury from illegal immigration is less likely to identify a sufficient concrete interest necessary to satisfy the constitutional standing requirement.[209] For example, a common complaint against illegal immigration is the financial burden on taxpayers resulting from the provision of social services to illegal immigrants.[210] A statute authorizing an individual to sue the DHS for failing to comply with a legislative mandate regarding the regulation of illegal immigration might counsel against a finding of injury in-fact because the injury is widely shared among the general population when each individual could claim injury from the burden on social services.[211] In the case of an individual plaintiff, a court applying *Akins* might not find a concrete injury because the harm caused by illegal immigration does not involve informational injury to voting rights from the withholding of information by the federal government.[212] Moreover, a court that regularly interprets *Akins* as applying merely to voting rights would not find that other impacts of illegal immigration create sufficient injury to establish injury in-fact.[213] Additionally, given the difficult regulation of illegal immigration, it is improbable that an individual plaintiff could establish redress

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restrictions of federal law to pursue legitimate state interests).

206. *See id.* (explaining that the bounds of the police power would permit regulation of immigration absent the doctrine of preemption).

207. *Massachusetts v. EPA*, 127 S. Ct. at 1454 (noting the requirement of a congressionally authorized procedural right).

208. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *1, *6 (D. Colo. Sept. 21, 2007) (holding that a state could not establish standing based on general concerns about the consequences of illegal immigration without Congressional authorization for standing).

209. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

210. Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y. L.J. (Jan. 3, 1995), *available at* http://www.ssbb.com/article1.html (on file with the *McGeorge Law Review*).

211. Gabel, *supra* note 39, at 1362 ("Justice Breyer noted that the widely shared nature of an injury 'counsel[s] against . . . interpreting a statute as conferring standing.' This suggests that the widely-shared factor is still independently relevant . . . ." (quoting *Akins*, 524 U.S. at 24)).

212. Brown, *supra* note 47, at 697-98.

213. *Id.* at 697.

because illegal immigration is also a product of the independent conduct of third parties.[214]

In contrast, the broad scope of states' quasi-sovereign interests makes it more likely that a federal statute authorizing state standing would protect an injury sufficiently concrete to satisfy the constitutional standing requirements.[215] A state's quasi-sovereign interests in this scenario might apply because the interest in the general health and well-being of its residents or an impact on "a 'sufficiently substantial' segment of its population" would include the impact of illegal immigration on issues like increased traffic, under-funded schools, and the costs of healthcare.[216] Similarly, in *Massachusetts v. EPA*, the Court suggested that quasi-sovereign interests extend to the interest in protecting "all the earth and air within its domain."[217]

Of course, the impact on those interests "must be sufficiently concrete" to satisfy the Article III standing requirement.[218] *Massachusetts v. EPA* suggested, however, that federal preemption results in a concrete impact on quasi-sovereign interests because the state can no longer exercise its sovereign authority.[219] Since federal immigration law generally preempts state law, it is likely that a state could establish standing to force the federal government to take regulatory action in accordance with statutory enactments. [220]

The decision in *Gonzales* supports this point.[221] That case recognized Colorado's quasi-sovereign interest,[222] but the district court relied on *Massachusetts v. Mellon* in holding that a state cannot establish standing merely for the purpose of shielding its citizens from the operation of a federal statute.[223] Because Congress did not recognize a right to challenge the action by the federal government, Colorado could not stand as *parens patriae* in relation with the federal government.[224] A statute recognizing such a right would make it more likely that Colorado or other states could establish standing when bringing suit to challenge the federal government's action in this policy realm.[225]

Additionally, *Massachusetts v. EPA* relaxed the causation and redressability requirements as a result of a state's special solicitude by requiring only an

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214. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992).

215. Manheim, *supra* note 200, at 942 (explaining the impact that illegal immigration poses to states).

216. Ratliff, *supra* note 71, at 1853.

217. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1455 n.17 (2007).

218. Ratliff, *supra* note 71, at 1853.

219. *Massachusetts v. EPA*, 127 S. Ct. at 1454.

220. Manheim, *supra* note 200, at 944-47.

221. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *6 (D. Colo. Sept. 21, 2007).

222. *Id.*

223. *Id.*

224. *Id.* at *7.

225. *Id.*

"incremental" improvement in the problem.[226] Although states' quasi-sovereign interests would be affected by the movement of third-persons across the borders, *Massachusetts* held that redressability existed in forcing the EPA to regulate greenhouse gas emissions even though other countries like China and India contributed heavily to the problem of global warming.[227] Thus, when evaluating causation and redressability, the problem of third-party actors would not necessarily prevent a state from establishing standing.

One advantage of a statute authorizing state standing, as opposed to individual citizen-suits, is that the latter poses the risk of opening the door to overwhelming litigation that ultimately creates overly burdensome restraints on the exercise of executive power.[228] However, where a statute authorizes lawsuits by states, the pool of litigants is not as large as it would be if the statute authorizes any person to bring suit.[229] And, because the statute would basically authorize state attorneys general to sue the federal government, other obligations[230] and political pressures[231] would limit the utilization of state standing. On the other hand, political pressures could have the opposite effect—forcing litigation for solely national political purposes rather than strictly protecting a state's quasi-sovereign interests.[232]

One disadvantage of authorizing state standing is the potential clash between the judiciary and the executive branches.[233] Expanding the role of the judiciary into regulatory actions taken by the executive branch would be problematic if the executive branch intended to disregard a judicial order. For example, in *Massachusetts v. EPA*, the result of the litigation forced the EPA to decide how to regulate greenhouse gases, but it did not call for a specific course of action.[234] When the EPA makes its ultimate determination on what course of action to take, a court reviewing the decision will defer to the agency's decision.[235] Still, recognizing standing forces a decision on the merits and helps ensure that the

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226. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1457 (2007).

227. *Id.* at 1458.

228. Scalia, *supra* note 40, at 896 (explaining that too much involvement by the courts undermines the political process and improvidently imposes a minority political prejudice over the majority).

229. *See, e.g.*, 42 U.S.C. § 7543(b) (2000) (authorizing the EPA administrator to waive application of the Clean Air Act for *states* under certain circumstances).

230. *See, e.g.*, CAL. GOV'T CODE § 12511 (West 2005) (with some exceptions, charging the California Attorney General with responsibility for "*all* legal matters which the State is interested" (emphasis added)).

231. Stevenson, *supra* note 8, at 9 (explaining that *Massachusetts* "really creates special solicitude for state Attorneys General"). Also, according to Professor Stevenson, voters elect state attorneys general in forty-three states. *Id.* at 10.

232. *Id.* at 43 (describing "[t]he new [Attorney General] as an agent of change").

233. *See* Kellner, *supra* note 45, at 338 (citing one of the main purposes of the standing doctrine "is to avoid a clash between courts and Presidential administration").

234. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1463 (2007) (holding on the merits that the EPA only needed to offer a reason for not regulating greenhouse gases because the statute prevented the agency from acting in an arbitrary or capricious manner).

235. *Id.* at 1459 (citing Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) for the principle that the decision will be afforded judicial deference).

President and executive agencies follow legislative mandates in policy realms where state action is preempted.[236]

As a form of Congressional delegation, the authorization of state standing would allow Congress to make policy judgments about these or any other advantages or disadvantages.[237] The significance of *Massachusetts v. EPA*, therefore, might be that Congress has the option to create standing in cases where it believes states should be able to challenge agency action at the federal level.[238] If Congress wants to limit the power of a federal agency, or the level of control a President may exercise through an agency, then Congress can make a policy judgment in the form of delegation that allows courts to determine what legislative duties the agency should follow.[239]

2. *National Emergency Response and the Federal Emergency Management Agency*

Another example where a federal statute might authorize a provision that creates standing is in the area of national emergency response.[240] The Federal Emergency Management Agency (FEMA), a department within DHS, is responsible for "reduc[ing] the loss of life and property and protect[ing] the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters . . . ."[241] The Administrator, a Presidential appointee,[242] is responsible for coordinating with state and local governments that retain significant control over emergency response systems.[243] Thus, federal law does not necessarily preempt state law in this policy area.[244]

The fact that federal law does not preempt state law distinguishes the scenario from *Massachusetts v. EPA*. This distinction might determine whether a state can establish a sufficiently concrete injury to a quasi-sovereign interest.[245] Since much of the Court's reasoning relied on the consequences of preemption, the absence of preemption might be dispositive and the state would not be able to

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236. *See supra* Part III.

237. *See* Kellner, *supra* note 45, at 342-44 (explaining how Congress delegates power to the courts by authorizing jurisdiction over certain cases and the policymaking decisions that go into the authorizing statutes).

238. *Id.*

239. *Id.*

240. *See* Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN'S J. LEGAL COMMENT. 527, 528-29 (2007) (describing a news conference where Secretary of the Department of Homeland Security, Michael Chertoff, discussed the inadequacies of the federal response to Hurricane Katrina).

241. 6 U.S.C. § 313(b)(1) (West 2008).

242. *Id.* § 313(c)(1).

243. *See id.* § 314(a)(5) (requiring FEMA to coordinate with state and local governments).

244. Griffin, *supra* note 240, at 528-29 (explaining how federal policy makes local decision makers primarily responsible for emergency response).

245. *See supra* notes 107-11 and accompanying text.

establish standing.[246] However, because the Court does not expressly make the presence of preemption a requirement, a consideration of the quasi-sovereign interests and a state's special solicitude in the standing analysis might still prompt a court to find standing.[247]

The federal government's failure to follow legislative mandates related to national emergency response would impact quasi-sovereign interests in the well-being of its populace. For example, Hurricane Katrina exposed the failures of FEMA in carrying out its responsibility owed to state and local governments when those lower tiers of government became overwhelmed.[248] Similar to *Massachusetts v. EPA* where federal inaction impacted states' abilities to protect the health and welfare of their populations, the federal government's failure to adopt a policy with proper precautionary measures for hurricane threats impacted state interests in planning for a disastrous hurricane.[249] In this scenario, the failure of the federal government to regulate might create standing to sue if the "dispute turn[ed] on the proper construction of a congressional statute."[250]

Furthermore, this statute would apply to a policy area where the separation of powers does not call for strong deference to the executive branch.[251] Unlike foreign affairs, the need for coordination between the states and the federal government is greater in the area of emergency response.[252] The statutory framework for FEMA requires coordination with state and local governments,[253] and thus the federal government does not need absolute discretion and autonomy.[254] Accordingly, Justice Scalia's argument in *Lujan*, that an expansive standing doctrine infringes on the essential role of the executive branch, does not weigh heavily against providing greater enforcement mechanisms that ensure compliance with legislative mandates.[255] The separation of powers concerns that counsel against intrusion by the courts into the duties of the executive branch do not apply in this scenario.[256] To the contrary, a court would have a proper role in assessing a state's allegation of the federal government's failure to follow a legislative mandate that affects the safety and welfare of the state's residents.[257]

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246. *Id.*

247. *Id.*

248. Griffin, *supra* note 240, at 532.

249. *See id.* at 528-29 (explaining the inadequacies of the National Response Plan).

250. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1453 (2007)

251. *Compare* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (emphasizing need for Presidential control), *with* Griffin, *supra* note 240, at 530-31 (describing the inadequacies of the coordination efforts by local, state, and federal government actors).

252. Griffin, *supra* note 240, at 530-31.

253. 6 U.S.C. § 314(a)(5) (West 2008).

254. *Cf. Curtiss-Wright Corp*., 299 U.S. at 319.

255. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

256. *Id.*

257. Griffin, *supra* note 240, at 530-31.

Policy justifications also support Congressional authorization of standing in the emergency response context. First, the lack of regulatory responsibilities the federal government assumed prior to Hurricane Katrina[258] was likely immune to judicial oversight because an individual, organization, or local government would not be able to satisfy the constitutional requirements of standing. A legal challenge requesting that the government take action would have to come before a deadly hurricane hit,[259] but the injury in-fact requirements force the plaintiff to show an actual or imminent threat.[260] As was the case in *Massachusetts*, where Congressional intent signaled an effort to be proactive about a potential threat,[261] a major purpose of FEMA is to "buil[d] a comprehensive national incident management system with Federal, State, and local government[s] . . . to *respond* to such attacks and disasters."[262] The planning necessary to develop such a response needs to take place far in advance of the actual attacks or disasters.[263] Second, it would be difficult for a plaintiff to establish that the federal government's inaction would cause the injury and redress the plaintiff's concern. More regulation by the federal government could be an inadequate response for an unimaginable natural disaster such as Hurricane Katrina.[264] Therefore, although the statutory scheme does not preempt state action, the potential consequences of federal inaction could prompt Congress to authorize standing. And, under *Massachusetts*, a state's "special solicitude" in the standing analysis might persuade a court that preemption is not absolutely necessary to conclude that quasi-sovereign interests are sufficiently impacted.[265]

B. Considerations Limiting the Use of Congressionally Authorized State Standing

Federal preemption of state law for the regulation of greenhouse gas emissions played an essential role in *Massachusetts v. EPA*. Without federal regulation, neither states nor the federal government would take action.[266] Absent federal preemption of state law, it is unclear the state of Massachusetts would have satisfied the injury in-fact requirement under *parens patriae* because the

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258. *Id.* at 529.

259. *Id.* at 538 ("The kind of coordination that had to occur to avoid the Katrina disaster requires long-term planning before the event . . . . The process of coordinating governments can take years.").

260. *Lujan*, 504 U.S. at 561.

261. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1448 (2007) (explaining that for global warming, "[a] wait-and-see policy may mean waiting until it is too late")

262. 6 U.S.C. § 314(a)(5) (West 2008) (emphasis added).

263. Griffin, *supra* note 240, at 538.

264. *Id.*

265. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *6 (D. Colo. Sept. 21, 2007) (noting that *Massachusetts v. EPA* relied on a statutory right and dismissing Colorado's complaint for the absence of such a right).

266. *Massachusetts v. EPA*, 127 S. Ct. at 1454 (2007); *see also* Stevenson, *supra* note 8, at 30.

state legislature could have enacted its own regulations to protect its quasi-sovereign interests.[267] Therefore, state standing provisions may be most useful to address concerns related to the protection of quasi-sovereign interests where federal law preempts state law.[268]

In some areas of the law, it is unlikely that such provisions would be enacted because they would not be desirable from a policy perspective,[269] nor would they be useful in a practical sense because of other limitations on judicial power.[270] Perhaps this limitation is best illustrated in the area of foreign affairs, a policy realm that demands "caution and unity of design."[271] The Constitution preempts states from engaging in foreign affairs by explicitly granting the President certain powers in this policy area.[272] Lawsuits filed by states regarding foreign affairs would involve the courts in issues that would surely frustrate the ability of the President to exercise the foreign affairs powers.[273]

Furthermore, a statute authorizing state standing in the area of foreign affairs might not even protect a state's interests as *parens patriae*, because a state plaintiff would have to show that Presidential action in foreign affairs affected the state's quasi-sovereign interests.[274] In *Massachusetts v. EPA*, the EPA regulation involved environmental law, an area of regulation traditionally subject to the police power of state and local governments.[275] When the federal government preempts state regulatory action, "sovereign prerogatives are . . . lodged in the Federal Government."[276] However, in the realm of foreign affairs, the Constitution severely limits state participation.[277] A state's interest in

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267. *Massachusetts v. EPA*, 127 S. Ct. at 1454.

268. *See supra* Part III.

269. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (noting that an expansive standing doctrine "would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department' . . . and to become 'virtually continuing monitors of the wisdom and soundness of Executive action'" (quoting Allen v. Wright, 468 U.S. 737, 760 (1984))).

270. *See generally* Goldwater v. Carter, 444 U.S. 996 (1979) (after plaintiff-legislators established standing to challenge President Carter's unilateral withdrawal of a treaty, ordering dismissal of the complaint on grounds that the suit involved a non-justiciable political question).

271. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

272. *Id.* For another case that illustrates the point involves Massachusetts in a procedural posture different from the ones presented in this Comment, see *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 (2000) (invalidating a Massachusetts law that imposed sanctions on Burma, now Myanmar, because it imposed on the President's control over foreign diplomacy).

273. *See* William Alan Shirley, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COL. L. REV. 1808, 1817 (1985) (discussing the difficulty of challenging the War Powers Resolution because of the standing *and* political question doctrines). *Cf. Curtiss-Wright Corp*., 299 U.S. at 319 (explaining that Congressional interference with the President's foreign affairs power would frustrate the Constitutional design in this policy realm).

274. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1454 (2007).

275. *See id.* at 1454-55 (explaining that the scope of a state's police powers is an indicator of whether a subject is within a state's quasi-sovereign interest).

276. *Id.* at 1454.

277. *Curtiss-Wright Corp*., 299 U.S. at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation . . . . 'The president is the sole organ of the nation in its external relations, and its

enforcing legislative mandates in foreign affairs is most likely insufficiently concrete because of the limited scope of states' quasi-sovereign interest.[278] A federal statute authorizing lawsuits by states acting as *parens patriae* would likely raise several policy concerns, as well as doubts about its constitutionality.[279]

Congress is more likely to find other policy realms more appropriate for authorization of state standing, especially where exclusive Presidential control is not as desirable.[280] With the example of emergency response, where coordination is a desirable goal, the separation of powers principles that protect the executive functions of the President do not weigh as heavily against involvement by the judiciary.[281] If *Massachusetts v. EPA* gives Congress the option of authorizing state standing, then Congress can make a policy judgment about the appropriate role of the courts and determine whether state standing would be desirable.[282]

V. CONCLUSION

The new "special solicitude" standard presents an opportunity for states to demand regulation from the federal government.[283] This new opportunity does not go too far because it merely continues the regular practice of utilizing courts to interpret federal statutes to determine the legal obligations of the federal government—*Massachusetts v. EPA* restates the axiomatic notion that the proper role of the judiciary is "to say what the law is."[284] But, this role can be utilized by Congress in an attempt to rein in misguided policymakers in federal agencies, or politically motivated Presidents that do not want to follow pre-existing legislative mandates.[285] The examples in this Comment explore some of the possibilities and issues that Congress may consider, but a statute authorizing *parens patriae*

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sole representative with foreign nations.'").

278. Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998); *see also Curtiss-Wright Corp*., 299 U.S. at 316. *But see* Massachusetts v. Laird, 400 U.S. 886, 886 (1970) (Douglas, J., dissenting) (arguing that a state should have standing in this context based on its interest in protecting the lives of its citizens).

279. Gabel, *supra* note 39, at 1365-66.

280. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *7 (D. Colo. Sept. 21, 2007) (explaining how the plaintiffs could not point to Congressional recognition of a state's right to challenge immigration policy).

281. Griffin, *supra* note 240, at 529.

282. One more issue Congress might also take into consideration, although perhaps this may be a more remote consideration, would be the value of authorizing standing when a change in Presidents might result in a desired change in policy. *See* Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, WASH. POST, Nov. 9, 2008, at A16 (on file with the *McGeorge Law Review*) (explaining that President-elect Obama quickly planned for overturning many of President Bush's regulatory policies, including the refusal to grant California permission to regulate greenhouse gas emissions from automobiles).

283. Stevenson, *supra* note 8, at 17 ("Giving fifty political entities a say in whether new regulations are necessary would logically lead to more regulations overall.").

284. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1453 (2007).

285. *See* Stewart, *supra* note 177, at 1682 (suggesting other methods of controlling agency failure).

standing could also come from the political lobbying of state officials who are most likely in a better position to evaluate where a state's quasi-sovereign interests are most heavily impacted.[286]

The purpose of allowing standing would have to be consistent with the proper role of the courts.[287] The doctrine of standing still serves an important function in maintaining the separation of powers between the three branches of government because the democratic process may be a more appropriate way to ensure accountability of the President and Congress. [288] Ultimately, the President, Congress, or individual appointees of various federal agencies will be responsible for the prosecution of a war,[289] the failure to regulate greenhouse gas emissions,[290] the continuing challenge to manage illegal immigration,[291] or the response to a national emergency such as Hurricane Katrina.[292] *Massachusetts v. EPA* illustrates how a narrow standing doctrine could potentially undermine this political process by allowing the President or executive agencies to avoid their legal obligations. States' special solicitude in the standing analysis allows courts to protect the harm caused to individual citizens when the federal government refuses or fails to take necessary action and states cannot act because of their subordinate position in a government system based on federalism.

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286. *See* Stevenson, *supra* note 8, at 38-39 (explaining how the Attorney General position has turned into "the People's Lawyer").

287. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

288. Kellner, *supra* note 45, at 344-46 (explaining that the political questions are reserved for the executive and legislative branches, which are controlled by the political process).

289. Massachusetts v. Laird, 400 U.S. 886 (1970).

290. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438 (2007).

291. Colorado v. Gonzales, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603, at *1 (D. Colo. Sept. 21, 2007).

292. *See generally* Griffin, *supra* note 240.