

From *Georgia v. Tennessee Copper* to *Massachusetts v. EPA: Parens Patriae* Standing for State Global-Warming Plaintiffs

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INTRODUCTION

Our planet is warming, and human activity is to blame. Burning fossil fuels like coal for electricity and using oil to power our cars emits greenhouse gases such as carbon dioxide (CO₂) into the atmosphere, where they trap heat that then warms the planet.¹ Agriculture contributes significant amounts of CO₂ and other pollution to the problem.² The Intergovernmental Panel on Climate Change, the world's foremost scientific body on climate change, recently issued its strongest statement to date: global warming is "unequivocal," and increases in temperature—even of the last twelve years rank among the twelve warmest on record—widespread melting of ice and snow, and rising sea levels demonstrate that it is already occurring.³

Despite growing public and media attention to global warming and a flurry of recent legislative activity,⁴ neither Congress nor the Executive branch has advanced binding controls on global-warming pollution. In this absence of action by the political branches, advocates have turned to the courts. Nearly twenty global-warming cases in a variety of flavors now sit on the dockets of federal and state courts,⁵ including suits against private industry brought under the federal common law doctrine of public nuisance⁶ and statutory cases alleging that federal agencies are violating federal laws by failing to take global warming into account.⁷ States have played a lead role in many of these cases.

Global-warming litigation, including that led by states, has encountered justiciability roadblocks, with opponents arguing for a variety of reasons that global warming is a problem whose solution is best left to the political branches. The Supreme Court took up the principal justiciability barrier—standing to sue—in its recent opinion in *Massachusetts v. Environmental Protection Agency*.⁸

1. James Hansen, *Defusing the Global Warming Time Bomb*, SCI. AM., Mar. 2004, at 71.

2. HENNING STEINFELD ET AL., LIVESTOCK, ENV'T & DEV. [LEAD] INITIATIVE, LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS XXI (2006), available at http://www.virtualcentre.org/en/library/key_pub/longshad/a0701e/A0701E00.pdf. The Food and Agriculture Organization (FAO) of the United Nations describes how conversion of land to create pastures and grow food for livestock releases CO₂, and how manure and other aspects of the livestock production process emit large quantities of methane and nitrous oxide.

3. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 1, 5 (S. Solomon et al. eds., 2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf.

4. See, e.g., Ann C. Mulkeen, *Capitol Hill Pledges Climate Change Laws*, DENV. POST, Jan. 1, 2007, at A01.

5. See generally JUSTIN R. PIDOT, GEORGETOWN ENVTL. LAW & POLICY INST., GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES (2006) (enumerating and describing pending global warming litigation).

6. See *infra* notes 19–20.

7. See, e.g., *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 910, 920 (N.D. Cal. 2007) (alleging that the Overseas Private Investment Corporation and Export-Import Bank are violating the National Environmental Policy Act by failing to assess the global-warming impacts of their investments).

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

The Court held that Massachusetts had standing to challenge the EPA's refusal to regulate global-warming pollution from motor vehicles, stating that states deserve a "special solicitude" when it comes to establishing standing.⁹ The Court rested this conclusion on *Georgia v. Tennessee Copper*,¹⁰ a turn-of-the-twentieth-century case that held that Georgia could invoke the Supreme Court's original jurisdiction to protect a quasi-sovereign interest in the health and well-being of its citizens. But immediately after stating that a lower standing threshold applied to Massachusetts in its capacity as quasi-sovereign, the Court went on to discuss an injury—the loss of state-owned coastal property—that was not quasi-sovereign at all, and proceeded to analyze the claim using the same conventional standing analysis that applies to private litigants and that the Court had just indicated should not apply.

Environmental groups and other private litigants likely will cheer the Court's curious standing analysis, which suggests that loss of property due to global warming—an injury that could impact state and private litigants alike—fits neatly within a conventional standing test. But states—and lower federal courts facing state plaintiffs whose injuries differ from Massachusetts's—may be left wondering exactly what the basis is for the "special solicitude" to which the Court held states are entitled, and may struggle to apply the Court's less-than-clear reasoning. This Note argues that states *can* establish standing under a standard distinct from the conventional test the Court employed, and spells out the basis on which they can do so: by asserting an independent, quasi-sovereign interest in the well-being of their citizens under the doctrine of *parens patriae*.

Parens patriae is an old doctrine. Rooted in English law, it later arose in early-twentieth-century American environmental cases, such as *Tennessee Copper*, brought under the Supreme Court's original jurisdiction by states seeking to enjoin pollution from outside their borders.¹¹ States suing in their capacity as *parens patriae* do so on behalf of their citizens' well-being, and this Note argues that in so doing they can establish standing in global-warming litigation. This Note further argues that *Massachusetts v. Mellon*,¹² a 1923 case that held that states cannot sue the federal government in their capacity as *parens patriae*, should not bar states from establishing *parens patriae* standing when suing federal agencies, such as EPA, for failing to enforce the law.

Part I will summarize global-warming litigation and describe how standing has been a roadblock to its justiciability. Part II will summarize *Massachusetts v. EPA* and attempt to parse the Court's standing analysis. Section III.A will describe the lineage of *parens patriae* standing and argue that early-twentieth-century public-nuisance actions brought under the Court's original jurisdiction provide a historical basis for *parens patriae* standing in today's global-warming

9. *Id.* at 1454–55.

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

11. *See infra* section III.A.

12. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

litigation. Section III.B will argue that global warming implicates precisely the type of quasi-sovereign interest that gives rise to *parens patriae* standing, distinct from the proprietary interest that the Court analyzed in *Massachusetts v. EPA*. Part IV will respond to the separation-of-powers and federalism arguments that critics have levied against the *Massachusetts v. EPA* majority opinion. Section IV.A will argue that *parens patriae* provides an *alternate* means of satisfying Article III's case or controversy requirement, separate from the conventional three-prong standing test that applies to private litigants. Section IV.B will demonstrate how states may assert *parens patriae* standing in global-warming suits despite *Massachusetts v. Mellon*.

I. GLOBAL WARMING IN THE COURTS

A. STATES AS LITIGANTS

Scientists predict severe environmental and public-health impacts from unchecked global warming. Melting ice sheets will cause sea levels to rise, putting low-lying coastal areas at risk.¹³ Warmer temperatures will fuel forest fires and drought¹⁴ while exacerbating other natural disasters such as hurricanes.¹⁵ Diminished air quality and the spread of infectious diseases will threaten human health.¹⁶ Facing inaction from the Executive and Legislative branches, advocates have turned to the Judiciary in an effort to combat these impacts.

States have played a lead role in many of these cases, turning to the courts out of the same frustration at the lack of federal action that has motivated public-interest groups to sue.¹⁷ Some of the most high-profile global-warming suits to date have featured states as plaintiffs. Massachusetts played the lead role in *Massachusetts v. EPA*, joining California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington in successfully arguing that EPA violated the Clean Air Act by declining to regulate greenhouse-gas emissions from motor vehicles.¹⁸ In *Connecticut v. American Electric Power Co.*, Connecticut, along with California, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, is seeking injunctive relief from electric utility companies under the common law doctrine

13. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 7, 12 (S. Solomon et al. eds., 2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf [hereinafter IPCC, WORKING GROUP II REPORT].

14. See *id.* at 11–12.

15. See P.J. Webster et al., *Changes in Tropical Cyclone Number, Duration and Intensity in a Warming Environment*, 309 SCIENCE 1844, 1846 (2005).

16. See IPCC, WORKING GROUP II REPORT, *supra* note 13, at 12.

17. For the perspective of then-California Attorney General Bill Lockyer, see Nick Bunkley, *California Sues 6 Automakers Over Global Warming*, N.Y. TIMES, Sept. 21, 2006, at 2 (“Vehicle emissions are the single most rapidly growing source of the carbon emissions contributing to global warming, yet the federal government and automakers have refused to act.” (quoting Bill Lockyer)).

18. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007).

of public nuisance and are appealing the dismissal of their case on political-question grounds to the Court of Appeals for the Second Circuit.¹⁹ California filed a similar nuisance suit against automakers, seeking money damages.²⁰ Most recently, California and fifteen other states sued EPA when the agency denied their attempts to implement state legislation curbing global-warming emissions from motor vehicles.²¹ And given the federal government's continued failure to advance binding emissions controls, additional suits by states are likely to follow.

B. THE STANDING ROADBLOCK

Global-warming litigation, including that led by states, has encountered a variety of justiciability roadblocks. Opponents have argued that given the global scale of the problem and the complex, international nature of the needed solutions, tackling global warming should be left to Congress and the Executive. Perhaps the most common justiciability denominator shared by all global-warming cases to date is standing to sue. Not surprisingly then, the Court's holding in *Massachusetts v. EPA* that Massachusetts had standing made waves whose ripple effect will impact all other pending global-warming suits.

Article III of the Constitution limits the reach of the federal judicial power to "cases and controversies,"²² ensuring that courts do not assert jurisdiction over matters more properly left to the political branches. To present a justiciable case or controversy, a plaintiff must demonstrate that he has sufficient stake in a particular dispute by establishing standing.²³ In *Lujan v. Defenders of Wildlife*,²⁴ one of its seminal environmental and standing cases, the Court articulated and refined the three-prong test that a plaintiff must meet to satisfy the Article III requirement. First, he or she must have suffered an injury-in-fact, which must be concrete, particularized, and actual or imminent. Second, the injury must be fairly traceable to the challenged conduct. And finally, the plaintiff must seek relief that is likely to redress the injury he or she alleges.²⁵

Opponents of global-warming litigation have argued that plaintiffs cannot meet this test because global warming's injury is inherently widespread and its chain of causation attenuated.²⁶ Indeed, if the sheer magnitude of global warm-

19. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

20. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *2 (N.D. Cal. Sept. 17, 2007).

21. See Margot Roosevelt, *Lawsuit Targets EPA's Refusal*, L.A. TIMES, Jan. 3, 2008, at B1.

22. U.S. CONST. art. III, § 2.

23. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government. The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines.")

24. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

25. *Id.* at 560-61.

26. See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 295-97 (2005) for a summary of common standing arguments.

ing's predicted impact has motivated litigants to sue, it is paradoxically the expansive scope of the problem which has given rise to standing challenges. Opponents have argued that any injury from global warming is too attenuated and widely shared for any particular plaintiff to satisfy the directive that it be particularized, actual, or imminent. Similarly, they argue that because the causes of global warming are just that—global—litigants challenging discrete activities that contribute only a portion of overall global-warming pollution cannot satisfy the causation or redressability prongs.²⁷

State and private plaintiffs alike have faced these arguments. But regardless of whether a private litigant could establish standing under the conventional, three-prong analysis—and *Massachusetts v. EPA* suggests it is possible—some proponents of state-led global-warming litigation have argued that state litigants need not meet the same standing test as private citizens.²⁸ In *Massachusetts v. EPA*, the Court appeared to agree.

II. *MASSACHUSETTS v. EPA*: THE STANDING ANALYSIS

In 1998, EPA General Counsel Jonathan Cannon concluded in a legal opinion that the Clean Air Act authorized EPA to regulate CO₂.²⁹ The following year, nineteen environmental organizations petitioned EPA to exercise this authority and regulate greenhouse-gas pollution from motor vehicles. EPA denied the petition in 2003, reversing the Clinton-era legal opinion, concluding that the agency lacked authority to regulate CO₂ and stating that even if it possessed the authority, it would not use it.³⁰

Environmental groups joined Massachusetts, eleven other states, and three cities and took EPA to court over its refusal to regulate global-warming pollution. The Court of Appeals for the D.C. Circuit denied their petition for review in an inelegant, two-to-one decision that contained three very different opinions on petitioners' standing.³¹ Judge Randolph assumed without holding that petitioners had standing, and then concluded on the merits that EPA properly declined to regulate.³² Judge Sentelle concurred in the judgment but wrote that petitioners lacked standing, arguing that the injury from global warming is too widespread to constitute an Article III injury-in-fact.³³ Finally, Judge Tatel dissented, writing that petitioners had properly demonstrated standing and that EPA erred

27. See, e.g., Brief of Robert Bork et al. as Amici Curiae Supporting Respondents, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

28. See *infra* section IV.A.

29. Memorandum from Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, *EPA's Authority To Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998), reprinted in Joint Appendix at 46, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

30. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (notice of denial of petition for rulemaking).

31. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

32. *Id.* at 56.

33. *Id.* at 59 (Sentelle, J., dissenting in part and concurring in the judgment).

in declining to regulate.³⁴ The Supreme Court then granted Massachusetts's petition for certiorari, with the standing question front and center.³⁵

At oral argument, Justice Kennedy asked petitioners if they had a special basis for standing, then hinted that the best precedent to support such a claim was *Georgia v. Tennessee Copper*, an early and quintessential *parens patriae* action that none of the parties had mentioned in their briefs.³⁶ In later holding that Massachusetts had standing, the Court took its cue from Justice Kennedy, on whose vote observers believed the standing decision would turn.³⁷ The majority suggested that the standing requirements for Massachusetts should be relaxed for two reasons, then proceeded to analyze the state's asserted injury under the conventional injury-causation-redressability framework it had just argued should not apply.

The Court first invoked Kennedy's concurring opinion in *Lujan*, which departed from the majority in that case by suggesting that 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."³⁸ The Court noted that Congress in the Clean Air Act authorized challenges to EPA action like the one at issue, and explained that a litigant to whom Congress has given such a procedural right can establish standing "without meeting all the normal standards for redressability and immediacy"³⁹—that a case or controversy exists if there is some *possibility* that the requested relief will redress his injury.⁴⁰ In so doing, the Court appeared to formulate a new redressability standard specifically for litigants with statutorily vested procedural rights—one that set a lower bar than the *Lujan* majority's "likely to be redressed" test.⁴¹

The Court then expounded on the special role of state litigants, citing *Tennessee Copper*—the exact case that Justice Kennedy had raised at oral argument. It began by noting that "well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction," then likened Massachusetts's desire to preserve its sovereign territory to the quasi-sovereign interests at stake in that

34. *Id.* at 61 (Tatel, J., dissenting).

35. See Editorial, *Climate in the Court; The Justices Take Up Global Warming*, WASH. POST, Nov. 26, 2006, at B6.

36. Transcript of Oral Argument at 15, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); see also *Massachusetts v. EPA*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting) ("Petitioners never cited *Tennessee Copper* in their briefs before this Court or the D.C. Circuit.").

37. See Linda Greenhouse, *Justices' First Brush with Global Warming*, N.Y. TIMES, Nov. 30, 2006, at A23 ("By the end of the argument there appeared a strong likelihood that the court would divide 5 to 4 on the standing question, with Justice Anthony M. Kennedy holding the deciding vote.").

38. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also *id.* at 578–89 (Kennedy, J., concurring).

39. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (quoting Justice Kennedy's *Lujan* concurrence).

40. *Id.*

41. *Lujan*, 504 U.S. at 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (internal citation and quotation marks omitted).

turn-of-the-twentieth-century case.⁴² Finally, the Court concluded that a combination of the procedural right to judicial review created by the Clean Air Act and the state's interest in protecting its quasi-sovereign interests entitled Massachusetts to "special solicitude in our standing analysis."⁴³

In a peculiar twist, the Court then proceeded to analyze the case under precisely the conventional injury-causation-redressability test it had just suggested Massachusetts did not need to meet. In noting that the "harms associated with climate change are serious and well recognized,"⁴⁴ the Court cited standing affidavits that, among other things, alleged that rising sea levels threaten Massachusetts's coast. And because the state owns a large portion of its coastal property, the Court held that it had alleged a particularized injury in its capacity as landowner⁴⁵—a proprietary interest distinct from the type of quasi-sovereign ones the *Tennessee Copper* Court recognized as a basis for *parens patriae* standing. The Court went on to conclude that because motor-vehicle emissions "make a meaningful contribution" to global-warming pollution they satisfy the causation prong of the standing inquiry.⁴⁶ Finally, the Court held that even though regulation of motor-vehicle emissions would not by itself halt global warming, the resulting reduction in domestic global-warming pollution would sufficiently lessen the risk of harm to Massachusetts to establish redressability.⁴⁷ The Court then proceeded to the merits, holding that EPA has authority to regulate CO₂ emissions from new motor vehicles⁴⁸ and that its refusal to do so was arbitrary and capricious.⁴⁹

In a strongly worded dissent, Chief Justice Roberts argued that the Court should have dismissed the case as non-justiciable and criticized the majority's standing analysis. He contended that tackling global warming should be left to the political branches, invoking *Lujan* in arguing that "[t]his Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."⁵⁰ The Chief Justice disputed the majority's conclusion that states deserve a lower standing threshold in their capacity as *parens patriae*, criticizing their reliance on *Tennessee Copper* for two reasons. First, he argued that the early-twentieth-century case did not distinguish between state and private litigants for standing purposes. And second, he noted that the 1923 case *Massachusetts v. Mellon* casts doubt on the ability of a state to sue the federal government—

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

43. *Id.* at 1455.

44. *Id.* at 1456.

45. *Id.*

46. *Id.* at 1457–58.

47. *Id.* at 1458.

48. *Id.* at 1462.

49. *Id.* at 1463.

50. *Id.* at 1464 (Roberts, C.J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)).

including agencies such as EPA—in its *parens patriae* capacity.⁵¹ Chief Justice Roberts then chastised the majority for holding that a lower standing threshold applied to Massachusetts, but nonetheless analyzing the state’s claim under a conventional standing framework. And when it came to that three-prong test, Roberts argued that to the extent loss of coastal land was the particularized injury at stake, Massachusetts could not establish causation and redressability because the action it challenged and the remedy it sought were too discrete to make a significant contribution to or reduction in global-warming pollution.⁵²

In sum, the Court both suggested that some combination of the statutorily conferred right of judicial review under the Clean Air Act and the special role of states combined to lower the standing threshold for states, while holding that the loss of state-owned coastal property amounted to a conventional injury-in-fact to Massachusetts in its capacity as landowner. While the Court’s ultimate holding was correct, Chief Justice Roberts was right in one key respect: support for the “special solicitude” owed to state litigants was lacking in the majority’s analysis.⁵³ To the extent the majority’s standing conclusion turned on a conventional injury-causation-redressability analysis, it will be cheered by environmental groups and other private litigants seeking to establish standing in future lawsuits. But the muddled, all-things-to-all-people analysis may leave state litigants and lower federal courts scratching their heads.⁵⁴ Can an interior state who will not suffer the same loss of coastal property as Massachusetts still establish standing in a capacity other than landowner? Can a state suing under the common law theory of public nuisance still establish standing in the absence of a statutorily conferred procedural right to sue? What, exactly, is the basis of a state’s special standing?

III. FROM *TENNESSEE COPPER* TO *MASSACHUSETTS V. EPA*: POLLUTION, *PARENS PATRIAE*, AND STATE STANDING

The doctrine of *parens patriae* provides states with the special basis for standing to which the *Massachusetts v. EPA* Court alluded but on which it failed to elaborate. The doctrine appeared in early transboundary pollution cases brought under the Supreme Court’s original jurisdiction, including *Tennessee*

51. *Id.* at 1465–66 (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

52. *Id.* at 1469 (“In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners’ alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.”). Redressability is even more problematic. *Id.*

53. *Id.* at 1464.

54. See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *36–37 (N.D. Cal. Sept. 17, 2007). The District Court for the Northern District of California’s recent opinion dismissing California’s public-nuisance suit as a political question demonstrates the difficulty courts will have in interpreting *Massachusetts v. EPA*’s standing analysis. The court held that California’s claim was non-justiciable because, unlike Massachusetts, the state was not suing pursuant to a statute. *Id.* While this holding arguably draws the wrong conclusions from *Massachusetts v. EPA* and conflates standing with the separate political-question doctrine, it is not a surprising outcome given the *Massachusetts v. EPA* Court’s murky standing analysis.

Copper, which serve as an historical analogue to today's global-warming litigation.⁵⁵ States establish *parens patriae* standing when suing to vindicate a quasi-sovereign interest: an interest in the health and well-being of their citizens, independent from any direct interest in the state's property and one that the citizens could not vindicate on their own. In the years since *Tennessee Copper*, courts have articulated a range of criteria that suffice when a state seeks to assert such a quasi-sovereign interest—criteria that global-warming litigation clearly implicates.⁵⁶

A. PROTECTING THE PUBLIC HEALTH AND WELFARE: THE ORIGIN AND EXPANSION OF
PARENS PATRIAE

Parens patriae literally means “parent of the country” and refers to a state's role as guardian and its sovereign right to protect its citizens.⁵⁷ *Parens patriae* originated as an English common law doctrine which allowed the Crown to assert the rights of subjects who were incapacitated, such as children or the mentally ill, or who lacked a legally cognizable injury. Traditionally, the doctrine thus enabled the government to protect the rights of its legally dependent citizens.⁵⁸

American courts adopted the English doctrine, transferring it to the sovereign states.⁵⁹ Over time, they expanded its traditional application by embracing a more-far-reaching conception of the state's sovereign role as guardian. The principal way in which courts applied this newly expansive vision of *parens patriae* was by allowing states to not only sue on behalf of helpless individuals, but to more broadly protect the general health and welfare of their citizens.⁶⁰ The Supreme Court first acknowledged the broadened doctrine in *Louisiana v. Texas*, a 1900 case that recognized Louisiana's right to “present[] herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens.”⁶¹ On the heels of this decision, the Court considered numerous, turn-of-the-twentieth-century *parens patriae* suits brought under its grant of original jurisdiction by states seeking to halt cross-border pollution from others.⁶² These transboundary pollution suits were at the forefront of the doctrine's expansion into actions brought to safeguard the general health and welfare.

In *Tennessee Copper*, Georgia brought an original suit in the Supreme Court attempting to enjoin pollution from the defendant company's copper works.

55. See *infra* section III.A.

56. See *infra* section III.B.

57. See Amelia C. Waller, *State Standing in Police Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 873 (1982).

58. See *id.* at 875; see also Comment, *State Standing To Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1072 (1977).

59. See Comment, *supra* note 58, at 1072.

60. See Waller, *supra* note 57, at 874–75.

61. Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 684 (1998) (quoting *Louisiana v. Texas*, 176 U.S. 1, 19 (1900)).

62. See *infra* notes 63–70.

While suggesting that private parties lacked standing to bring the same suit,⁶³ the Court held that Georgia, in its capacity as quasi-sovereign, had an independent interest in “all the earth and air within its domain”—and suggested that there should be more latitude for a state suing in this capacity to maintain its suit than for a private plaintiff.⁶⁴ The Court expounded on the special role of states in our federal system as a reason why they deserved this latitude. Among other factors, Justice Holmes noted that because states in joining the Union surrendered the right to use force against one another to abate public nuisances, the only alternative at their disposal to combat pollution was an original action in the Court.⁶⁵

Even in early *parens patriae* cases where the Court ultimately dismissed a claim on the merits for lack of sufficient evidence, it upheld a state’s right to bring the suit in the first place. In *Missouri v. Illinois*, Missouri brought an original suit in the Supreme Court alleging that plans to reverse the flow of the Chicago River would increase pollution in St. Louis.⁶⁶ After reviewing its previous original-jurisdiction actions related to state boundaries or property, the Court noted that its original jurisdiction extended more broadly to cases in which the health and welfare of a state’s citizens were in question.⁶⁷ Although the Court dismissed Missouri’s claims on the merits five years later, holding that it had not presented sufficient evidence to prove its allegations,⁶⁸ its earlier conclusion that the suit was justiciable remained intact. The Court reached a similar conclusion when New York sued to enjoin New Jersey’s sewage authority from discharging waste into New York Bay.⁶⁹ While the Court dismissed the case on the merits, holding—like in *Missouri v. Illinois*—that New York had not presented sufficient evidence to prove its claim, it acknowledged New York’s right to bring the suit in the first place.⁷⁰

These cases serve as a historical analogue to today’s global-warming litigation, bolstering the proposition that a state’s desire to protect its citizens’ health and welfare gives rise to *parens patriae* standing. The defendants may be different—state global-warming plaintiffs generally are suing industries or the federal government, not other states. But the goal of states in today’s litigation is the same as it was in the early 1900s: to protect the general health and welfare of their citizens from the harmful effects of pollution that originates in many cases outside their borders. And just as Georgia’s original-jurisdiction suit in

63. See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“The very elements that would be relied on in a suit between fellow citizens as a ground for equitable relief are wanting here.”).

64. *Id.* at 237–38.

65. See *id.*

66. See *Missouri v. Illinois*, 180 U.S. 208, 212–13 (1901).

67. See *id.* at 241.

68. See *Missouri v. Illinois*, 200 U.S. 496, 526 (1906).

69. See *New York v. New Jersey*, 256 U.S. 296 (1921).

70. See *id.* at 301 (“[T]he right of the state to maintain such a suit . . . is very clear. The health, comfort and prosperity of the people of the state . . . being gravely menaced . . . [suggests that] the state is the proper party to represent and defend such rights . . .”).

Tennessee Copper was its only recourse against pollution from a neighboring state against whom it had given up the right to use force, states seeking to protect their citizens from global warming face a similar lack of options.⁷¹

B. GLOBAL WARMING AND THE CONTEMPORARY *PARENS PATRIAE* DOCTRINE

In the decades since these early-twentieth-century cases, courts have expanded the reach of *parens patriae* beyond the Supreme Court's original jurisdiction and upheld its application to suits filed in state and lower federal courts. The Court also has attempted to set out specific criteria that a state must meet in order to assert *parens patriae* standing—criteria that state global-warming litigants can easily meet.

Under the contemporary doctrine, to establish *parens patriae* standing a state must assert a quasi-sovereign interest, independent from but related to the interests of its citizens.⁷² Quasi-sovereign interests are distinct from sovereign ones, such as a state's interest in maintaining and enforcing a legal code.⁷³ Significantly, they are also distinct from proprietary interests,⁷⁴ such as the loss of state-owned property that formed the basis for the Court's *Massachusetts v. EPA* analysis. This means that state litigants who have not suffered property loss, and thus may not be able to fit within the *Massachusetts v. EPA* Court's conventional standing analysis, may still establish a basis for standing in their *parens patriae* capacity.

While the Court has never articulated the full universe of interests that qualify as quasi-sovereign, it has held that a state's interest in the health and well-being of its residents—both physical and economic—undoubtedly qualifies.⁷⁵ In addition, courts have held that the more widely shared an injury is, the more likely it is to implicate a state's quasi-sovereign interest.⁷⁶ Finally, the Court has suggested that one hallmark of a quasi-sovereign interest is that it implicates a problem that a state would, if it could, address through its lawmaking power.⁷⁷ Global warming plainly fits this bill.

First, global warming implicates states' interest in protecting their citizens' health and environment, harkening back to Justice Holmes's *Tennessee Copper* assertion that “[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . [and] that the forests on

71. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) (noting that “Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, [and] it cannot negotiate an emissions treaty with China or India”).

72. In *Tennessee Copper*, Justice Holmes described a quasi-sovereign interest as one “independent of and behind the titles of its citizens.” *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

73. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982) (describing the difference between sovereign, proprietary, and quasi-sovereign interests).

74. See *id.*

75. See *id.* at 607.

76. See Waller, *supra* note 57, at 879–82.

77. *Snapp*, 458 U.S. at 607.

its mountains . . . should not be further destroyed.”⁷⁸ For example, scientists predict significant public-health impacts in California, which already boasts the nation’s worst air quality. Global warming could cause seventy-five to eighty percent more days with weather conducive to smog formation in Los Angeles and the San Joaquin Valley, increasing the risk of asthma and other respiratory illnesses.⁷⁹ Scientists also predict that “[b]y mid-century, extreme heat events [in major cities] such as Sacramento, Los Angeles, and San Bernadino could cause two to three times more heat-related deaths than occur today.”⁸⁰ In the Great Lakes states, invasive species will become more common, threatening native plant and animal populations—and lower water levels may combine with warmer water to accelerate the accumulation of harmful pollutants such as mercury in fish.⁸¹ These represent a small sample of the public-health and environmental impacts that global warming will have on states—impacts that give rise to a quasi-sovereign interest.

Global warming also implicates the economic well-being of states’ citizens, further illustrating the quasi-sovereign nature of their interest. In Washington, for example, the combined federal and state costs of fighting wildfires may grow by fifty percent, and water-conservation expenditures to offset the decline in Seattle’s water supply due to global warming could exceed eight million dollars by the 2020s.⁸² Sea-level-rise projections could trigger an expensive redesign of seawalls, bridges, and other infrastructure.⁸³ In California, global warming threatens the agriculture and tourism sectors which help power the state’s economy. Dwindling water supply and an increase in pests jeopardize farmers, with California’s wine, dairy, and fruit industries likely to be particularly hard hit.⁸⁴ And declines in the Sierra Nevada snowpack will likely lead to a shorter ski season, while sea-level rise threatens the state’s lucrative coastal economy.⁸⁵

The expansive, statewide reach of these impacts on public health, natural resources and the economy further demonstrates the quasi-sovereign nature of states’ interest in combating global warming. Dating back to its earliest *parens patriae* cases, the Court has characterized quasi-sovereign interests as “independ-

78. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907).

79. See CAL. CLIMATE CHANGE CTR., *OUR CHANGING CLIMATE: ASSESSING THE RISKS TO CALIFORNIA 5* (2006), available at <http://www.energy.ca.gov/2006publications/CEC-500-2006-077/CEC-500-2006-077.PDF>.

80. *Id.*

81. See UNION OF CONCERNED SCIENTISTS & ECOLOGICAL SOC’Y OF AM., EXECUTIVE SUMMARY, *CONFRONTING CLIMATE CHANGE IN THE GREAT LAKES REGION: IMPACTS ON OUR COMMUNITIES AND ECOSYSTEMS 3* (2005), available at <http://www.ucsusa.org/greatlakes/glchallengereport.html>.

82. See WASH. ECON. STEERING COMM. & THE CLIMATE LEADERSHIP INITIATIVE INST. FOR A SUSTAINABLE ENV’T, UNIV. OF OR., *IMPACTS OF CLIMATE CHANGE ON WASHINGTON’S ECONOMY: A PRELIMINARY ASSESSMENT OF RISKS AND OPPORTUNITIES 8* (2006), available at <http://www.ecy.wa.gov/pubs/0701010.pdf>.

83. See *id.*

84. See CAL. CLIMATE CHANGE CTR., *supra* note 79, at 7–9.

85. See *id.* at 7, 13.

dent” from the interests of any particular individual or group of individuals.⁸⁶ The Court has noted that the requirement of an independent interest is designed to protect the Eleventh Amendment—which grants sovereign immunity to states against private lawsuits—from a state who is nominally a party but in actuality is suing on behalf of an individual.⁸⁷ A key factor in determining whether an interest is independent, and thus quasi-sovereign, is whether the injury impacts a substantial portion of a state’s population as opposed to a particular group of individuals.⁸⁸ Global warming, whose impacts will touch multiple sectors of a state’s economy and cause a variety of public-health and environmental impacts, clearly meets that test.

That numerous states have undertaken legislative efforts to combat global warming lends further support to the argument that a quasi-sovereign interest in protecting citizens against global warming exists. In observing that the precise contours of what constitutes a quasi-sovereign interest remain unclear,⁸⁹ the Court noted that an important factor is whether the injury a state seeks to vindicate is one that it would, if it could, attempt to address through its sovereign lawmaking powers.⁹⁰ The past five years have seen a flurry of legislative activity at the state and regional level by states frustrated by the slow pace of federal action. California recently enacted Assembly Bill 32, the Global Warming Solutions Act of 2006, which establishes a statewide, market-based cap on global-warming pollution.⁹¹ California enacted tough legislation capping tailpipe emissions from automobiles, and seventeen other states have adopted, or plan to adopt, the same standards.⁹² Twenty-one states and the District of Columbia have enacted “renewable electricity standards,” requiring that utilities generate a certain percentage of electricity from clean, renewable sources.⁹³ In addition to these state-level legislative initiatives, states have also joined regional pacts such as the Regional Greenhouse Gas Initiative, a

86. See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”).

87. See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (noting that because the Eleventh Amendment’s purpose was to prohibit suits against a state by citizens of another state, a controversy must arise directly between two states—it may not be a controversy in vindication of the grievances of particular individuals).

88. See Comment, *supra* note 58, at 1074.

89. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

90. See *id.* at 607.

91. See Mark Martin, *A Global Warming Moment: Governor Signs Measure Capping Greenhouse Gas Emissions That Could Lead to Big Changes in Industries and Life in Cities*, S.F. CHRON., Sept. 28, 2006, at A1.

92. See Juliet Eilperin, *EPA Chief Denies Calif. Limit on Auto Emissions*, WASH. POST, Dec. 20, 2007, at A1. The Clean Air Act allows California to set its own clean-air standards, which other states may adopt, but requires the state to obtain permission from EPA. EPA recently denied California’s petition to implement its clean-cars legislation, and the state and its allies have responded by suing the agency. See *supra* note 21.

93. See Union of Concerned Scientists, Fact Sheet, Renewable Electricity Standards at Work in the States, Apr. 2007, http://www.ucsusa.org/clean_energy/clean_energy_policies/res-at-work-in-the-states.html.

consortium of seven northeastern states aimed at reducing global warming pollution.⁹⁴

A state's quasi-sovereign interests are distinct from its sovereign and proprietary ones,⁹⁵ and this distinction may prove important for states with injuries different from Massachusetts's loss of coastal property who will argue they are still entitled to the Court's "special solicitude." The *Massachusetts v. EPA* Court conflated proprietary and quasi-sovereign interests: it cited *Tennessee Copper*'s recognition of *parens patriae* standing to vindicate quasi-sovereign interests, but proceeded to focus on the proprietary interest in coastal subsistence that Massachusetts had in its capacity as landowner—a capacity that does not give rise to *parens patriae* standing. Indeed, *Tennessee Copper* itself emphasized that quasi-sovereign—not proprietary—interests form the basis for *parens patriae* standing, noting that while "[t]he state owns very little of the territory alleged to be affected . . . the alleged damage to the state as private owner is merely a makeweight."⁹⁶

The Court's muddled standing analysis in *Massachusetts v. EPA* thus incorrectly suggests that a state must assert an injury to its property in order to benefit from the "special solicitude" owed to states. It further confuses the issue by suggesting that a procedural right to sue helps lower this standing threshold. In reality, a state global-warming plaintiff need not assert a loss of state-owned property, nor need it sue under a statutory cause of action. As long as it properly asserts a quasi-sovereign interest in the health and well-being of its citizens, it will have established standing in its capacity as *parens patriae*.

IV. RESPONDING TO THE CRITICS

Criticizing the majority's *Massachusetts v. EPA* opinion, Chief Justice Roberts argued that *parens patriae* standing supplements but does not take the place of the conventional, three-prong standing analysis, and that state litigants must still meet this test.⁹⁷ He also suggested that the 1923 case *Massachusetts v. Mellon* should have barred the suit.⁹⁸ State global-warming litigants can overcome both arguments.

A. *PARENS PATRIAE*: AN ALTERNATIVE ARTICLE III STANDARD

In likening Massachusetts's claim to the one at stake in *Tennessee Copper* and stating that states deserve a "special solicitude" when it comes to establishing standing, the *Massachusetts v. EPA* Court hinted that *parens patriae* provides a sufficient foundation for state standing, and that states suing in this

94. See Mark Clayton, *One Region's Bid To Slow Global Warming*, CHRISTIAN SCI. MONITOR, Dec. 12, 2005, at 2.

95. See *Snapp*, 458 U.S. at 601–02.

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

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

98. See *id.* at 1466.

capacity need not meet the conventional injury-causation-redressability test that binds private litigants. Contrary to Chief Justice Roberts's contention that *Tennessee Copper* "had nothing to do with Article III standing,"⁹⁹ the similarity of *parens patriae* actions to criminal prosecutions—taken together with the history and development of the Court's modern standing jurisprudence and the very purpose of *parens patriae*—supports the argument that the doctrine provides an *alternative* means to satisfy Article III's case or controversy requirement.

1. Vindicating the Public Interest: *Parens Patriae* Suits as a Civil Analogue to Criminal Prosecutions

The similarity of *parens patriae* suits to criminal prosecutions supports the argument that the doctrine provides states with a basis for standing wholly apart from the three-prong test. Criminal prosecutions brought by the United States are universally considered to be cases within the meaning of Article III.¹⁰⁰ They fall within Article III's ambit even though federal crimes rarely inflict a particularized injury on the government, and even though prosecutors often seek to vindicate the type of generalized grievance to the community that would be insufficient to confer standing on a private litigant.¹⁰¹ Well before Justice Kennedy hinted at oral argument in *Massachusetts v. EPA* that states might have a special basis for standing, Professor Thomas Merrill drew a parallel between criminal prosecutions and *parens patriae* cases, stating that "public nuisance suits brought by government officials are the civil analogue of criminal prosecutions."¹⁰² Government officials in both contexts attempt to vindicate the rights of the general public. And because Article III's judicial power inherently extends to criminal actions brought by the government, Merrill suggested it should also extend to *parens patriae* suits brought by public officials seeking to vindicate public rights—regardless of whether they meet the injury-causation-redressability test.¹⁰³

While Merrill's suggestion may have been prescient, his later conclusion that states suing as *parens patriae* should benefit from a lower standing threshold only when suing in state court¹⁰⁴ is inapposite. Because Article III's standing

99. *Id.* The majority rebuts this contention in a footnote, pointing out that "no less an authority than Hart & Weschler's *The Federal Courts and the Federal System* understands *Tennessee Copper* as a standing decision." *Id.* at 1455 n.17 (majority opinion) (citing R. FALLON, D. MELTZER & D. SHAPIRO, HART & WESCHLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 290 (5th ed. 2003)).

100. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004).

101. See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2248–49 (1999).

102. Merrill, *supra* note 26, at 301. Professor Merrill also notes that many public-nuisance actions target conduct that is also subject to criminal prosecution, such as "poisoning the public water supply." *Id.*

103. See *id.*

104. See *id.* at 304–05.

limitations apply only in federal courts to begin with, Merrill's suggestion that the *parens patriae* doctrine provides an alternate basis for establishing standing makes sense only if states are suing in federal court—not their own.¹⁰⁵ More importantly, restricting states to bringing *parens patriae* suits in their own courts would be out of step with *Tennessee Copper* and its progeny, the very cases that gave rise to the modern *parens patriae* doctrine. Far from confining *parens patriae* suits to a state's own judicial system, these cases expressly allowed states to proceed as *parens patriae* in the United States Supreme Court. And when it comes to global-warming litigation, limiting a lower standing threshold for such suits to state court would render *parens patriae* a doctrine in search of a case; nearly all pending global-warming suits have been filed in federal court,¹⁰⁶ and indeed some may only be filed in a specific federal forum.¹⁰⁷ Nonetheless, the premise that *parens patriae* suits are civil analogues to state criminal prosecutions—in both cases, states seek to vindicate public rights—supports the argument that they inherently meet Article III's case-or-controversy requirement and are not subject to the three-prong standing test.

2. The Court's Evolving Standing Jurisprudence

The origins and evolution of the Court's standing jurisprudence also supports the notion that *parens patriae* provides an alternative means for state litigants to satisfy Article III. The injury-causation-redressability analysis that the *Massachusetts v. EPA* dissent argues should apply to the state is a modern judicial creation that the *Tennessee Copper* Court could not have anticipated several decades earlier.¹⁰⁸ Commentators such as Professor Cass Sunstein have noted that the requirement that litigants meet these three prongs—and the detailed tests for whether or not each has been satisfied (for example, whether an injury is actual or imminent)—did not exist until comparatively recently, and prior to the 1970s the Court focused on whether a cause of action, or legal right, existed when determining whether a litigant presented an Article III controversy.¹⁰⁹ That *Tennessee Copper* and its early *parens patriae* brethren do not analyze standing under the current framework should therefore not be taken as an indication that these cases had nothing to do with Article III.

Other commentators take issue with Sunstein's suggestion that the Court did not "constitutionalize" the requirement of standing until it honed the three-prong test in modern cases culminating with *Lujan*. They argue that while the

105. See Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 *FORDHAM ENVTL. L. REV.* 407, 469 (2005).

106. See *PIDOT*, *supra* note 5, at 17.

107. See, e.g., 42 U.S.C. § 7607(b) (2000) (giving the D.C. Circuit exclusive jurisdiction over certain challenges to EPA action under the Clean Air Act).

108. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *MICH. L. REV.* 163 (1992).

109. See *id.* at 180–82 ("Under the APA, there was considerable continuity with previous law, in the sense that the principal question, for purposes of standing, was whether the law had conferred a cause of action.").

three-prong test may be a recent creation, the underlying standing requirement has always been a part of Article III,¹¹⁰ and the distinction that the early Court drew between justiciability of private and public rights serves as the precursor to modern standing jurisprudence.¹¹¹ Indeed, one of the earliest ways in which the Court sought to limit Article III's grant of jurisdiction, and thus confine the judiciary to its proper sphere, was to make clear that private individuals could not go to federal court to vindicate rights shared by the public at large. In the context of criminal prosecutions, this meant that the government—and not private citizens—was the proper party to bring suit.¹¹² Much as a government official is the proper party to vindicate public rights through a criminal prosecution, a state suing in its capacity as *parens patriae* is the proper party to vindicate public rights of its citizens. As such, the proposition that the Court's standing doctrine originated with the early private/public-rights distinction lends further support to the notion that an Article III case or controversy is established by a state suing to vindicate its quasi-sovereign interests.

That the Court developed its recent standing jurisprudence in the context of private litigants further supports the argument that *parens patriae* provides an alternative foundation for state standing—regardless of whether it is more accurate to view standing as a modern innovation or as an evolution of the early public/private-rights distinction. Nowhere in the Court's recent standing jurisprudence is any suggestion that the injury-causation-redressability test should apply to state litigants.¹¹³ This jurisprudence arcs from permissive standing rules for private litigants articulated in early 1970s cases such as *Sierra Club v. Morton*¹¹⁴ and *United States v. Students Challenging Regulatory Agency Procedures*¹¹⁵ to the more restrictive rules later spelled out in cases culminating with *Lujan*.¹¹⁶ But both the cases that loosened standing requirements and those that later raised their bar involved citizen suits by private plaintiffs and were decided wholly outside the context of suits by states.¹¹⁷ Throughout its evolving standing cases, the Court never squarely held that the standards it was refining should apply to states in *parens patriae* suits.¹¹⁸

At the same time that the Court was refining the three-prong test for private litigants without holding that it applied to states, courts continued to hold that the assertion of a quasi-sovereign interest was a sufficient basis for state

110. See Woolhandler & Nelson, *supra* note 100, at 691.

111. See *id.* at 693.

112. See *id.* at 699.

113. See Merrill, *supra* note 26, at 299.

114. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (expanding the universe of permissible injuries-in-fact to include those to aesthetic values).

115. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689–90 (1973) (holding that respondents had standing despite an attenuated chain of causation).

116. See generally Donald Strong Higley, II, *A Slash-and-Burn Expedition Through the Law of Environmental Standing—Lujan v. Defenders of Wildlife*, 15 CAMPBELL L. REV. 347 (1993).

117. See Merrill, *supra* note 26, at 299.

118. See *id.*

standing. In *Alfred L. Snapp & Son v. Puerto Rico*, the Court attempted to delineate the types of state interests that would qualify as quasi-sovereign, noting that an overly broad formulation “risks being too vague to survive the standing requirements of Art[icle] III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”¹¹⁹ With this Article III requirement in mind, the Court held that while the concreteness of an interest must be analyzed on a case-by-case basis, a state’s interest in the health and well-being of its residents in general—particularly if it alleges an injury to a substantial number of residents—suffices to confer standing.¹²⁰ Similarly, then-Judge Scalia wrote for the Court of Appeals for the D.C. Circuit in *Maryland People’s Counsel v. FERC* that “[a] state’s interest in those aspects of the welfare of its citizens secured and furthered by the government—that is, a state’s so-called ‘quasi-sovereign’ interest—is unquestionably sufficient to confer standing upon the state as *parens patriae*.”¹²¹ Alluding to the three-prong test that the Court had by then begun to hone, Scalia wrote, “It is unquestionable that a state, in its *parens patriae* capacity, does qualify as ‘personally . . . suffer[ing] some actual or threatened injury.’”¹²² In sum, at the same time that the Court refined its three-prong standing test for private litigants without holding that it applied to states, federal courts—including the Supreme Court—continued holding that the assertion of a valid quasi-sovereign interest was sufficient to meet Article III’s case-or-controversy requirement and confer standing on a state in its *parens patriae* capacity. Thus, the proposition embodied in *Tennessee Copper* that states can establish *parens patriae* standing simply by asserting a quasi-sovereign interest should remain intact.

3. The Purpose of *Parens Patriae*

Finally, requiring states suing in their capacity as *parens patriae* to meet the same standing test as private litigants would defeat the very purpose of the doctrine, which is to allow states to vindicate public rights and guard against injuries that might be too widely-shared to support standing for any particular individual. Indeed, key requirements of *parens patriae* standing and the three-prong test for private litigants are the inverse of one another. Professor Karl Coplan notes that a private litigant must allege an injury “particularized” to himself, while *parens patriae* standing must be based on an injury shared by a substantial number of citizens and not particularized at all.¹²³ At the same time, a generalized grievance cannot support standing for a private litigant, while it is precisely this type of widespread harm that gives rise to *parens patriae* stand-

119. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

120. *See id.* at 607.

121. *Md. People’s Counsel v. FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985).

122. *Id.* at 321.

123. *See* Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. & POL’Y F. 183, 211–12 (2001).

ing.¹²⁴ Requiring states suing in their capacity as *parens patriae* to satisfy the same three-prong standard as individuals thus would make little sense. The doctrine of *parens patriae* therefore is better understood as an *alternate* means by which states can establish standing consistent with Article III.

In sum, the Court's early public-nuisance cases—which involved state attempts to combat cross-border pollution similar to that which causes global warming—suggest that assertion of a valid quasi-sovereign interest alone is sufficient to confer standing on state plaintiffs. The similarity between such *parens patriae* suits and criminal prosecutions lends further support to the proposition that they provide an alternate means for states to satisfy Article III's case-or-controversy requirement. The history and evolution of the Court's modern standing jurisprudence provides additional support. And finally, the inverse relationship between *parens patriae* suits and those by private litigants further suggests that the injury-causation-redressability test does not bind state plaintiffs suing in their capacity as *parens patriae*.

B. MASSACHUSETTS V. MELLON AND STATE SUITS AGAINST FEDERAL AGENCIES

State global-warming litigants suing the federal government, as opposed to private industry, face another hurdle: the early-twentieth-century case of *Massachusetts v. Mellon*,¹²⁵ which Chief Justice Roberts argued in his *Massachusetts v. EPA* dissent casts “significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government.”¹²⁶ Perhaps this doubt is why the *Massachusetts v. EPA* majority characterized the state's injury as a direct and proprietary one in its capacity as landowner. But in any event, case law in the years since *Mellon* makes clear that this case should not bar *parens patriae* suits against federal agencies such as EPA.

In *Mellon*, Massachusetts sued to enjoin the Secretary of Treasury from enforcing the Maternity Act of 1921, which conditioned federal appropriations upon a state's compliance with the law's requirements. These requirements related to infant mortality and public health, and Massachusetts argued that they invaded powers traditionally reserved to states. In dismissing the suit for lack of justiciability, the Court held that a state cannot bring a *parens patriae* suit against the federal government, noting that “it is no part of [the state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*.”¹²⁷ At first blush, the Court's decision in *Mellon* appears to foreclose the ability of states to assert *parens patriae* standing when suing a federal agency. But strong arguments can be made that *Mellon*

124. *See id.*

125. *Massachusetts v. Mellon*, 262 U.S. 447 (1923)

126. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting).

127. *Mellon*, 262 U.S. at 486.

should not bar global-warming suits by states against federal agencies. *Mellon* can be distinguished from current global-warming challenges to agency action in two important respects. First, state plaintiffs in today's cases are not challenging the constitutionality of federal laws—they are suing to compel agencies to *enforce* them. Second, states are not seeking to invoke the Supreme Court's original jurisdiction.

1. The Enforcement Distinction

In *Massachusetts v. EPA*, Massachusetts sued a federal agency over its failure to properly implement the Clean Air Act. This distinguishes its suit from the one at issue in *Mellon*, which challenged the very validity of a federal law. As such, the state's suit to enforce the law does not call into question the sensitive issues of federalism that motivated the Court's opinion in *Mellon*. This distinction flows from the growth of the administrative state that occurred well after *Mellon*. Indeed, in the decades since, courts facing *parens patriae* actions have stressed the difference between state suits to enforce federal laws and those seeking to overturn them.

Broadly speaking, one author argues in a comment that the emergence of the modern administrative state—hardly contemplated when the case was decided—may have rendered *Mellon* obsolete.¹²⁸ Among other things, the comment argues that a hallmark of the growth of federal agencies has been an increase in federal-state cooperation on a wide range of issues. States participate in the administration of federal programs and thus have an interest in federal agencies' compliance with the statutes governing the programs. The comment argues that a "state's interest in the proper administration of federal programs in which it plays a role should qualify it for standing under both the *parens patriae* doctrine and administrative law principles of standing."¹²⁹

Moreover, *Mellon* involved a broad constitutional challenge to a federal program, which Massachusetts argued invaded state powers protected by the Tenth Amendment. This constitutional challenge over issues of federalism stands in stark contrast to state suits alleging a more specific injury resulting from an agency's failure to enforce the law, such as *Massachusetts v. EPA*. The *Mellon* Court itself foreshadowed the distinction when it noted that "we are called upon to adjudicate . . . not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government."¹³⁰ The Court continued by emphasizing that Massachusetts was seeking to "institute judicial proceedings to protect citizens of the United States *from the operation of the statutes thereof*."¹³¹ The concerns that motivated *Mellon*'s holding—that states not upset the federal-state balance by challenging the

128. See Comment, *supra* note 58, at 1088.

129. *Id.*

130. *Mellon*, 262 U.S. at 484–85.

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

constitutionality of federal laws, particularly when the challenge itself involves sensitive questions of federalism—are absent in cases such as *Massachusetts v. EPA*. Such cases, where states seek only to enforce federal laws, do not call into question the “abstract questions of political power” which concerned the *Mellon* Court. And if anything, they enhance “the operation of the statutes” of the federal government by seeking to enforce them when the federal government fails to do so.

Post-*Mellon* case law has further exposed this distinction, with a variety of cases upholding *parens patriae* standing for states suing federal agencies in an attempt to enforce federal law—exactly what state litigants in global-warming suits against federal agencies are trying to do.¹³² In the most prominent case to distinguish *Mellon* from state suits aimed at enforcing federal law, the Court of Appeals for the Ninth Circuit held that *Mellon* did not bar Washington’s public utility from challenging a Federal Communications Commission order that would increase in-state telephone rates.¹³³ The court distinguished this case from *Mellon*’s “question of distribution of powers between the State and the national government,” noting that Washington relied on a federal statute and was suing to prevent the FCC from violating it.¹³⁴

The Ninth Circuit later appeared to backtrack from its conclusion in *Washington Utilities*, relying on a footnote in the Supreme Court’s opinion in *Snapp* that reiterated the holding of *Mellon*.¹³⁵ The court rested its opinion on an incorrect characterization of the *Snapp* dicta, which it erroneously characterized as “overruling” *Washington Utilities*. In reality, the *Snapp* dicta merely recapitulated the Court’s *Mellon* holding, and did so in the context of a *parens patriae* suit against a private company—not one that directly addressed whether a state could sue the federal government to enforce a law.¹³⁶ If the *Snapp* dicta did not raise, much less analyze, the distinction between *parens patriae* suits to enforce federal laws and those challenging their validity, it hardly can be said to have overruled the then-familiar proposition for which *Washington Utilities* stood.

That other federal courts have continued in the years since to recognize *parens patriae* standing against federal agencies—notwithstanding the *Snapp* dicta—demonstrates the continued vitality of the distinction between suits to enforce federal laws and those seeking to invalidate them. For example, the Southern District of New York held in *Abrams v. Heckler* that New York had *parens patriae* standing in a suit against the federal Department of Health and

132. See *infra* notes 133–39.

133. See *Wash. Util. & Transp. Comm’n v. FCC*, 513 F.2d 1142, 1152–53 (9th Cir. 1975).

134. *Id.* at 1153 (quoting *Georgia v. Penn. R.R.*, 324 U.S. 439, 445 (1945)).

135. See *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982)).

136. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); see also *Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989) (“It is unclear how broadly this pronouncement is to be taken, for *Alfred L. Snapp* itself did not involve a suit by a state against the federal government.”); *Texas v. Mosbacher*, 783 F. Supp. 308, 316 (S.D. Tex. 1992) (“It is not clear how definitive this assertion [the *Snapp* footnote] is, however.”).

Human Services alleging that a department regulation was inconsistent with the Omnibus Budget Reconciliation Act of 1980.¹³⁷ And in *Kansas ex rel. Hayden v. United States*, the District Court of Kansas held that *Mellon* did not bar Kansas from establishing *parens patriae* standing in a suit seeking to enforce the federal Disaster Relief Act.¹³⁸ The courts in both cases drew a sharp distinction between *Mellon*'s challenge to the validity of a federal statute and the suits to enforce statutes that were at issue.¹³⁹

The *Massachusetts v. EPA* majority itself recognized this distinction in a footnote responding to the Chief Justice's dissent, emphasizing that "Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act."¹⁴⁰ The argument plainly held water with Justice Kennedy, who made a point at oral argument of noting that *Tennessee Copper* argued in favor of petitioners' standing but that "that was pre-Massachusetts versus Mellon"¹⁴¹—then tellingly sided with the majority in its final opinion.

2. The Original-Jurisdiction Distinction

Massachusetts's attempt in *Mellon* to invoke the Supreme Court's original jurisdiction provides a further distinction from today's global-warming litigation, which does not invoke the Court's original jurisdiction. Unlike cases brought under the Court's appellate jurisdiction, those invoking its original jurisdiction force the Court to serve as a fact-finder—a distinction which the Court has noted in expressing concern about overuse of its original jurisdiction. In *Ohio v. Wyantotte Chemicals Corp.*, the Court acknowledged that it had jurisdiction over an original action brought by the state of Ohio, and that an actual controversy existed.¹⁴² However, the Court declined to exercise its jurisdiction, noting that doing so in light of the increasing frequency of disputes between states would bog the Court down. The Court further emphasized that it is ill-equipped to serve as a fact-finder in complex environmental cases under its original jurisdiction, as opposed to settling questions of law under its appellate jurisdiction.¹⁴³ *Parens patriae* cases filed in the lower federal courts do not raise the same concern about the Supreme Court's caseload and expertise, which may counsel stricter limits on cases brought under its original jurisdiction.¹⁴⁴

Furthermore, *parens patriae* suits against federal agencies filed in the lower

137. See *Abrams v. Heckler*, 582 F. Supp. 1155, 1159–61 (S.D.N.Y. 1984).

138. See *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990).

139. See *Abrams*, 582 F. Supp. at 1159 (noting that "[i]n *Mellon*, Massachusetts sought to challenge the constitutionality of a federal statute"); see also *Hayden*, 748 F. Supp. at 802 (noting that "unlike the plaintiffs in *Mellon*, the plaintiff in this case is not challenging the validity of the federal statutes").

140. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 n.17 (2007).

141. Transcript of Oral Argument at 15, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

142. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497–98 (1971).

143. See *id.*

144. See, e.g., *Abrams*, 582 F. Supp. at 1160; see also *Wyandotte Chems.*, 401 U.S. at 497.

federal courts do not pose the same threat to state sovereignty inherent in some original-jurisdiction actions. In *Snapp*, Justice Brennan emphasized that a more “circumspect inquiry may be required” to determine whether a state is asserting a proper quasi-sovereign interest in original-jurisdiction controversies between two states.¹⁴⁵ Brennan wanted to ensure that the Eleventh Amendment’s grant of sovereign immunity was not circumvented by a nominal state plaintiff who in reality sues on behalf of a private party,¹⁴⁶ echoing the cautionary note that the Court sounded decades earlier in *Louisiana v. Texas*.¹⁴⁷ The state-sovereignty concerns that counsel restraint in original-jurisdiction actions are plainly absent from state suits against federal agencies, which do not pose the same threat to state sovereignty that the Eleventh Amendment protects.

CONCLUSION

In holding that state global-warming litigants are entitled to “special solicitude” when it comes to establishing standing, the Court in *Massachusetts v. EPA* appropriately rested its holding on *Tennessee Copper* but reached the right conclusion only after an unclear analysis. It emphasized the existence of a statutorily created cause of action under the Clean Air Act, but in reality no such right is needed in order for states to take advantage of the alternate standing test that *Tennessee Copper* embodied. And while the Court analyzed Massachusetts’s interest in preserving its coastline, a state need not assert any such proprietary interest. This is good news for state global-warming litigants such as Connecticut who are suing under the common law doctrine of public nuisance rather than pursuant to a statute. And it should also benefit state litigants without a distinct proprietary interest like the coastal loss upon which the *Massachusetts v. EPA* Court hung its hat.

Instead, *Tennessee Copper* and its brethren suggest that states need only assert a valid quasi-sovereign interest in protecting the health and welfare of their citizens—which global warming plainly implicates—to establish standing in their capacity as *parens patriae*. Contrary to the Chief Justice’s dissent, this capacity establishes an alternate foundation for meeting Article III’s case-or-controversy requirement, wholly apart from the injury-causation-redressability test that binds private litigants and that the *Massachusetts v. EPA* court employed. And despite the dissent’s argument to the contrary, key distinctions between *Massachusetts v. Mellon* and contemporary litigation against federal agencies enable states to sue the federal government in their *parens patriae* capacity when seeking to enforce federal laws such as the Clean Air Act.

145. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (Brennan, J., concurring).

146. *See id.*

147. *See Louisiana v. Texas*, 176 US 1, 16 (1900).