

# STATE STANDING: WATERING DOWN ARTICLE III WITH SPECIAL SOLICITUDE

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## I. INTRODUCTION

The death of Justice Antonin Scalia, together with the subsequent refusal of Congress to vote on President Obama's Supreme Court Justice nominee,<sup>1</sup> kept many states and legal scholars in a state of uncertainty: does a state plaintiff have special standing requirements when it brings claims against the federal government to federal court, and if so, when do these special requirements apply? If the Supreme Court had its ninth vote at the time, it likely would have answered this question in *United States v. Texas*.<sup>2</sup> In that case, Texas successfully persuaded a federal district court to issue a nationwide injunction on President Obama's program that gave permission to millions of undocumented immigrants to stay and work in the United States.<sup>3</sup> Aside from the controversial immigration issues at stake, states and legal commentators hoped to receive an answer about Article III standing

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1. See Adam Edelman, *Senate Republicans Say They Will Refuse All Action on Any Obama Nominee to Replace Supreme Court Justice Antonin Scalia*, NYDAILYNEWS, <http://www.nydailynews.com/news/politics/republicans-won-action-obama-court-pick-article-1.2541705> (last updated Feb. 24, 2016, 12:28 AM). Fourteen months later, Neil Gorsuch was confirmed by the Senate ending the longest Supreme Court vacancy since 1872. Lawrence Hurley & Andrew Chung, *In Big Win for Trump, Senate Approves His Conservative Court Pick*, REUTERS (Apr. 7, 2017, 3:05 AM), <https://www.reuters.com/article/us-usa-court-gorsuch/in-big-win-for-trump-senate-approves-his-conservative-court-pick-idUSKBN1791GR>.

2. 86 F. Supp. 3d 591 (S.D.Tex.), *aff'd*, 809 F. 3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); see Ernest Young, *Symposium: United States v. Texas and The Future of State-Federal Litigation*, SCOTUSBLOG (June 24, 2016, 9:27 AM), <http://www.scotusblog.com/2016/06/symposium-united-states-v-texas-and-the-future-of-state-federal-litigation/>.

3. See Amanda Frost, *Symposium: Second Thoughts on Standing*, SCOTUSBLOG (June 24, 2016, 7:28 AM), <http://www.scotusblog.com/2016/06/symposium-second-thoughts-on-standing/>. Another more recent case involving similar questions of state standing discussed in this Note is *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). The Ninth Circuit concluded that the state plaintiff, Washington, had made a sufficient showing of standing at the preliminary stage of the proceedings, but the court did not conclusively answer whether special solicitude was or should be a part of the state standing analysis. See *id.* at 1158-59. Although *Washington v. Trump* will not be discussed further in this Note, the same argument against "special solicitude" applies.

requirements for state petitioners, specifically.<sup>4</sup> Texas's claim against the Department of Homeland Security ("DHS") was the first of its kind because it involved an indirect injury from DHS's policy; Texas would be required to pay for driver licenses, by its own state law, to the individuals DHS gave permission to work in the United States.<sup>5</sup> This case was a critical opportunity for the Supreme Court to clarify standing requirements for state plaintiffs.<sup>6</sup> Unfortunately, the Supreme Court did not resolve the question of state standing. On June 23, 2016, the Supreme Court affirmed the Fifth Circuit's decision by an equally divided Court without an opinion.<sup>7</sup>

Article III of the United States Constitution authorizes federal courts to hear "cases and controversies."<sup>8</sup> In seeking to comply with this clause, the Court developed what is now known as standing doctrine.<sup>9</sup> The Court's jurisprudence on standing emphasizes the doctrine's fundamental purpose of limiting federal courts,<sup>10</sup> an unelected branch of government, to only deciding cases where a petitioner has a concrete and particularized injury.<sup>11</sup> The Court's development of standing doctrine, including the injury-in-fact requirement,<sup>12</sup> may have been a part of a general effort to roll back the federal

4. See Frost, *supra* note 3; Young, *supra* note 2; see also Jessica Bulman-Pozen, *SYMPOSIUM: Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1745 (2017) ("the meaning and durability of such solicitude remain unsettled").

5. See Frost, *supra* note 3; Young, *supra* note 2. For a discussion on what an injury is, versus an indirect injury, see *infra* Section II.B.

6. See Frost, *supra* note 3; Young, *supra* note 2.

7. 136 S. Ct. 2271 (2016). An equally divided Court signals that there was no majority, and thus, no opinion to help define the boundaries of state standing requirements. It is not entirely clear that the majority on the Court agreed that Texas had standing; this is one of the questions the Court was set to answer. There is at least one case in the federal courts that speculates that Texas did have standing. See *Pennsylvania v. Trump*, No. CV 17-4540, 2017 WL 6398465, at \*18-19 (E.D. Pa. Dec. 15, 2017) (stating that "if the Supreme Court were equally divided on whether Texas had standing to enjoin DAPA, it would have remanded that issue to the Fifth Circuit. The Supreme Court did not and instead affirmed the Fifth Circuit. It therefore follows logically that a majority of the Supreme Court decided that Texas had standing to pursue its APA claim.").

8. U.S. CONST. art. III, § 2, cl. 1.

9. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 624 (2004).

10. Federal courts are courts of limited jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution. . . . In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.")

11. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993); Frost, *supra* note 3.

12. See *infra* Part II for a discussion on standing doctrine and the injury-in-fact requirement.

centralization of the New Deal Era.<sup>13</sup> The underlying principles of standing are to protect our federal system of separation of powers and to ensure that the parties have a real stake in the controversy. As the Court stated in *Lujan v. Defenders of Wildlife*:

Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In *The Federalist* No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and . . . more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." *The Federalist* No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)—is the doctrine of standing.<sup>14</sup>

The first question a federal court must answer in every case is whether the plaintiff in question has "standing" to have a federal court hear the petitioner's claim.<sup>15</sup> The standing inquiry requires a court to look, most importantly, at the nature of the injury and determine whether it can exercise judicial review.<sup>16</sup>

Standing requirements for state plaintiffs did not involve a different analytical framework from non-state plaintiffs, nor was there much uncertainty about a state's standing requirements, until the Supreme Court's decision in *Massachusetts v. EPA*.<sup>17</sup> In that case, Massachusetts alleged that it was injured as a result of the Environmental Protection Agency's ("EPA")

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13. See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 557 (2012) [hereinafter Elliott, *Standing Lessons*].

14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60; see also Staudt, *supra* note 9, at 624.

15. See Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 218-19 (2016) [hereinafter Mank, *Prudential Standing*].

16. See Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1372 (2012).

17. *Massachusetts v. EPA*, 549 U.S. 497 (2007); see Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1, 20 (2007); Dr. Saby Ghoshray, *Massachusetts v. EPA: Is the Promise of Regulation Much Ado About Nothing? Deconstructing States Special Solicitude Against an Evolving Jurisprudence*, 15 WIDENER L. REV. 447, 469 (2010).

refusal to regulate greenhouse gas emissions.<sup>18</sup> The injury Massachusetts alleged was the loss of coastline property caused by global warming, and global warming was increasing because of the EPA's inaction.<sup>19</sup> One of the most questioned lines in the Court's standing analysis stated that Massachusetts had standing to sue the EPA because it was "entitled to *special solicitude*."<sup>20</sup>

"Special solicitude" had never before been used in a standing analysis for state plaintiffs.<sup>21</sup> Subsequently, the Southern District of Texas and the Fifth Circuit embraced this ill-defined "special solicitude" phrase to justify Texas's Article III standing.<sup>22</sup> *Massachusetts v. EPA* opened the possibility of special standing treatment for state petitioners; we can expect states to use this as an opportunity to allege injuries traditionally not recognized and gain standing.<sup>23</sup> This "special solicitude" is particularly implicated in cases that involve controversial political debates because individual plaintiffs do not have special standing requirements and cannot meet the injury-in-fact requirement.<sup>24</sup> Thus, states will use their "special-ness" to bring these political debates in cases against federal government agencies, especially executive agencies, to federal court.<sup>25</sup>

This Note argues that "special solicitude" for state plaintiffs is inconsistent with principles of Article III standing; special solicitude improperly lowers standing requirements for state petitioners and allows states to bring national political debates to the courts, thereby undermining fundamental principles of separation of powers generally. First, special solicitude is incompatible with the Supreme Court's recent standing jurisprudence that defines an irreducible constitutional minimum;

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18. *Massachusetts*, 549 U.S. at 521.

19. *See id.*

20. *Id.* at 520 (emphasis added).

21. *See* Stevenson, *supra* note 17, at 20; Ghoshray, *supra* note 17, at 469.

22. *Texas v. United States*, 86 F. Supp. 3d 591, 635-36 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Other cases since *Texas*, have also discussed special solicitude and gave credit to the phrase without fully explaining whether or not special solicitude was necessary or how to use it. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Pennsylvania v. Trump*, No. CV 17-4540, 2017 WL 6398465, at \*20 (E.D. Pa. Dec. 15, 2017).

23. *See* Frost, *supra* note 3.

24. *See* Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 683-84 (2016).

25. *See* Frost, *supra* note 3; *Washington*, 847 F.3d 1151; *Pennsylvania*, 2017 WL 6398465.

specifically, generalized grievances<sup>26</sup> are now<sup>27</sup> a constitutional prohibition, not prudential,<sup>28</sup> and special solicitude permits states to allege generalized grievances. Second, despite scholars' attempts to justify special solicitude as an extension of the doctrine of *parens patriae*,<sup>29</sup> special solicitude cannot be an extension of *parens patriae* because the Court has consistently refused to use the doctrine against the federal government. *Parens patriae* would have to be fundamentally changed for special solicitude to be a new rule extending it. *Parens patriae* does not undermine separation of powers principles, whereas special solicitude does. Third, creating a new doctrine to facilitate state standing to monitor executive administrative agencies is unnecessary and unwise because it creates more problems than it cures. If Congress wants more accountability for executive agencies, it can create "special-ness" by creating procedural rights for states<sup>30</sup> or joint administration programs.<sup>31</sup> Special solicitude threatens to stretch Article III standing doctrine beyond anything permitted in the past, entangling an unelected court into deciding political debates between Congress and the executive branch that should instead be resolved through the political process.

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26. See Mank, *Prudential Standing*, *supra* note 15, at 217 (generalized grievances are alleged harms that affect a large number of citizens and are not different in any way from the other affected citizens).

27. See *infra* Section II.C (discussing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the primary case that indicates that generalized grievances are constitutionally barred and not merely a prudential consideration).

28. See Mank, *Prudential Standing*, *supra* note 15, at 220 (prudential standards are judicially self-imposed restraints that are not constitutional in nature and permit judicial discretion); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 890 (1983) (constitutional requirements must be met in all cases, they cannot be eliminated by Congress and do not permit judicial discretion).

29. *Parens patriae* loosely means "parent of the country." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982); Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799 n.12 (2009) (states use *parens patriae* doctrine to bring actions to federal courts on behalf of their citizens in their quasi-sovereign capacity).

30. See Christopher T. Burt, *Procedural Injury Standing after Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 283 (1995) (Congress can create a procedural right by including provisions in statutes indicating when a person, or in this case a state, can bring a claim alleging a violation of the statute).

31. See Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1771 (2008) [hereinafter Mank, *New Standing Test for States*]. See *infra* Section IV.B for a discussion on joint administration as a way to support standing. Joint administration would involve situations where a state and the federal government share regulatory responsibilities. *Id.*

## II. AN IRREDUCIBLE CONSTITUTIONAL MINIMUM

Article III standing doctrine has evolved significantly since the 1920s, when the doctrine first appeared.<sup>32</sup> The bar against generalized grievances has evolved from merely being a prudential standard into a constitutional mandate.<sup>33</sup> Constitutional standing requirements, simply put, require that a plaintiff lay out facts showing (1) an injury-in-fact; (2) the defendant caused the injury; and (3) the injury can be redressed by a court.<sup>34</sup> These basic elements are constitutional requirements that cannot be waived or discarded by any court. In contrast, prudential standards are judicially self-imposed and judges may exercise their discretion in applying them.<sup>35</sup> The Court developed prudential standards to limit the role of the judiciary for other compelling reasons.<sup>36</sup> Cases that raise sensitive political questions, involve a plaintiff raising a third person's rights, and require that a person is within the zone of interests of a statute are among the most well-known prudential standards.<sup>37</sup> The Court also previously identified claims that involved mere generalized grievances as a prudential standard,<sup>38</sup> current doctrine however, bars claims for generalized grievances by constitutional mandate.<sup>39</sup>

Injury-in-fact is a rigid constitutional requirement that requires an injury to be concrete and particularized, whereas generalized grievances are neither concrete nor particularized. Injury-in-fact<sup>40</sup> has become an *irreducible* constitutional minimum such that the Court has expressly refused to allow generalized grievances even if statutes contain citizen provisions,<sup>41</sup> which arguably give plaintiffs a statutory right to bring a claim to court.

Special solicitude is thus inconsistent with today's standing doctrine. It allows state petitioners into court based solely on generalized grievances.<sup>42</sup>

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32. See Stevenson & Eckhart, *supra* note 16, at 1371.

33. See John S. Haddock, *Articulating a Rational Connection Requirement in Article III Standing*, 66 STAN. L. REV. 1423, 1438-39 (2014).

34. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 198-99 (1992).

35. See Mank, *Prudential Standing*, *supra* note 15, at 222.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *infra* Part II.

40. See *infra* Section II.B. This Note does not discuss whether injury-in-fact is an appropriate standard to assess injuries related to standing. This Note simply argues that because the Court has established injury-in-fact as a requirement and has refused to lower the injury-in-fact requirement, it should not be lowered for states under the guise of "special solicitude."

41. See Sunstein, *supra* note 34, at 193 (citizen provisions are provisions in statutes that state "any person" can file a suit to enforce the statute).

42. See Frost, *supra* note 3.

This watered down standing framework for states is contrary to the primary principles of standing: to preserve the judiciary from becoming entangled in political debates and to preserve separation of powers.

### A. *The Origins of Standing Doctrine*

Standing doctrine began as a flexible set of guidelines. The Constitution does not explicitly state that a plaintiff must meet standing requirements; rather, the courts inferred standing requirements from the “cases and controversies” clause in the Constitution.<sup>43</sup> In one case, the Court merely stated that “the gist” of standing doctrine was to ensure an adversarial process.<sup>44</sup> The first significant developments of standing doctrine began during the New Deal Era.<sup>45</sup> During that time, Congress delegated unprecedented authority to administrative agencies, and as Professor Sunstein notes, this was the “rise of the regulatory state.”<sup>46</sup> Standing doctrine may have been an effort by the Court to create a barrier to prevent plaintiffs from challenging administrative action, thus allowing agencies to freely implement their goals without judicial review.<sup>47</sup> Others argue that standing doctrine emerged during the New Deal to preserve judicial efficiency in light of the administrative age, not to insulate administrative agencies.<sup>48</sup> Regardless of which camp is correct, it is reasonable to say that standing requirements served the purpose of curbing the number of litigants in federal courts.

At first, standing doctrine required only that a litigant allege an injury (not yet injury-in-fact),<sup>49</sup> causation, and that the injury be redressable by the courts.<sup>50</sup> The Court defined “injury”, at a minimum, as a litigant falling

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43. See Mank, *Prudential Standing*, *supra* note 15, at 218.

44. See Elliott, *Standing Lessons*, *supra* note 13, at 557 (discussing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

45. See Stevenson & Eckhart, *supra* note 16, at 1372; Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 124 (2011); see also Sunstein, *supra* note 34, at 169 (“In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 — that is, in the past seven years. Of those 117, 71, or over two thirds, of the discussions occurred after 1980 — that is, in just over a decade. Of those 117, 109, or nearly all, of the discussions occurred since 1965.”).

46. Sunstein, *supra* note 34, at 179.

47. See Stevenson & Eckhart, *supra* note 16, at 1372; Sunstein, *supra* note 34, at 179; Andrew F. Hessick, *Standing, Injury-in-fact, and Private Rights*, 93 CORNELL L. REV. 275, 291 (2008).

48. See Stevenson & Eckhart, *supra* note 16, at 1372; Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 616 (2010).

49. See *infra* Section II.B for a discussion of injury-in-fact.

50. See Sunstein, *supra* note 34, at 198-99.

within the zone of interests of a statute.<sup>51</sup> Beginning in the 1980s, the Supreme Court began to expand standing doctrine, making it harder to show standing, a move that many saw as turning back the federal centralization of the New Deal Era.<sup>52</sup> In particular, standing doctrine became a significant doctrinal development under the direction of Justice Scalia. Justice Scalia is known, among other things, for his view that prudential standards are inconsistent with the Constitution because judges would have too much discretion in a standing analysis. He insisted that all standing requirements rest on constitutional principles.<sup>53</sup> These changes in standing doctrine began to solidify standing requirements as constitutionally based, removing prudential standards.

The fundamental principle of standing doctrine was to guarantee separation of powers.<sup>54</sup> As the Court emphasized more recently, separation of powers is essential to preserve the integrity and authority of the judiciary.<sup>55</sup> In *Clapper v. Amnesty International USA*, Justice Alito affirmed:

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches . . . In keeping with the purpose of this doctrine, “[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>56</sup>

Thus, any new doctrinal development of standing doctrine, including “special solicitude” as a new standing framework for states challenging executive action, must be especially rigorous. Special solicitude reframes the question of standing and risks overreaching by Courts undermining separation of powers principles.

### *B. The Rise of Injury-in-Fact*

Injury-in-fact appeared in the Court’s standing analysis for the first time in 1970 in the case *Ass’n of Data Processing Service Organizations v.*

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51. See Sundquist, *supra* note 45, at 124.

52. See Elliott, *Standing Lessons*, *supra* note 13, at 557.

53. See Scalia, *supra* note 28, at 890; Mank, *Prudential Standing*, *supra* note 15, at 215.

54. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-222 (1974); Valley Forge Christian Coll. v. Ams United for Separation of Church and State, Inc., 454 U.S. 464, 471-74 (1982); Hessick, *supra* note 47, at 296; Mank, *Prudential Standing*, *supra* note 15, at 219 (discussing the separation of powers principles in *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006)).

55. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

56. *Id.*



*Camp*.<sup>57</sup> Since then, this requirement has become the most nuanced prong of standing analysis and the most difficult, conceptually and factually, for courts to apply.<sup>58</sup> Despite its recent appearance in the Court's opinions, injury-in-fact, as opposed to the simpler "injury" that was required in *Ass'n of Data Processing Service Organizations*, has become the "hard floor" in the standing analysis and cannot be removed, even by statute.<sup>59</sup> A plaintiff must make out injury-in-fact by showing that the alleged injury is concrete and particularized.<sup>60</sup> An injury is concrete if it is "real and immediate . . . not conjectural or abstract,"<sup>61</sup> "de facto," and "certainly impending."<sup>62</sup> The plaintiff's injury-in-fact must be particularized by a showing that the injury is personal to the plaintiff and not a general allegation.<sup>63</sup>

Cases that have not met the injury-in-fact requirement are good illustrations of the significance that the requirement has in today's standing doctrine. For example, in *City of Los Angeles v. Lyons*, the Court denied standing to a plaintiff seeking an injunction on the City of Los Angeles's police department, barring them from using chokeholds.<sup>64</sup> Although the plaintiff had been choked by the police, the Court determined that he did not have standing because he could not show that he would have "another encounter with the police . . . [and] that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter."<sup>65</sup>

Similarly, in *Clapper v. Amnesty International*, the plaintiffs lacked standing because "objective reasonable likelihood" was not enough to meet injury-in-fact.<sup>66</sup> In *Clapper*, the plaintiffs alleged that there was an objectively reasonable likelihood that their attorney-client communications would be intercepted under the enacted Foreign Intelligence Surveillance Act.<sup>67</sup> The plaintiffs alleged present injury because of the costly measures they had to take to prevent interception of their communications; this was

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57. 397 U.S. 150, 152 (1970); see Sundquist, *supra* note 45, at 125.

58. See Sundquist, *supra* note 45, at 124.

59. See *infra* Section II.C for a discussion on Congress's attempt to ensure standing by citizen suit provisions in statutes.

60. See Sundquist, *supra* note 45, at 128.

61. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

62. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 n.2 (1992).

63. *Spokeo*, 136 S. Ct. at 1552. See *infra* Section II.C for a further discussion on a particularized injury.

64. See *Lyons*, 461 U.S. at 98, 100.

65. *Id.* at 105-06.

66. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013).

67. *Id.* at 1143.

insufficient to show standing.<sup>68</sup> Also, “self-inflicted” injuries, costs and burdens incurred based on fear of surveillance, were not sufficient.<sup>69</sup> In *Lyons* and *Clapper* the plaintiffs could not meet the injury-in-fact requirement even if in *Lyons*, the plaintiff had *already been harmed* and in *Clapper*, the plaintiffs had present costs and likely future injury. The rigid constitutional requirement of injury-in-fact must be met.

Given the high bar of the more recent injury-in-fact requirement, as opposed to mere injury in the 1970s, generalized grievances are now constitutionally barred. In 2004, the Court still described generalized grievances as falling under the prudential standards, not a constitutional mandate.<sup>70</sup> The Court’s more recent decision in *Spokeo, Inc. v. Robins*<sup>71</sup> demonstrates that the Court has accepted that generalized grievances are no longer a mere prudential bar.<sup>72</sup> This development is appropriate because generalized grievances by definition cannot be concrete and particularized. As was indicated by the Court’s more recent language, constitutional standing analysis bars generalized grievances; generalized grievances do not fall under discretionary prudential standards.

### C. Congress Stands Up to Standing Doctrine

Congress reacted to the more difficult to meet injury-in-fact requirement by adding language to statutes that “any person” could bring a suit to federal court to enforce the statute, also known as citizen suit provisions.<sup>73</sup> The issue then became whether Congress could create an injury-in-fact by using citizen suit provisions. The Court answered this question in the negative.<sup>74</sup> In *Lujan v. Defenders of Wildlife*, members of a wildlife organization sued under the Endangered Species Act to invalidate a policy by the Secretary of the

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68. *Id.*

69. *Id.* at 1415-17. *Clapper* involved an Amendment to the Foreign Intelligence Surveillance Act that plaintiffs alleged would likely result in their confidential attorney-client communications to be intercepted, as a result of this likelihood, plaintiffs were incurring many costs to protect their clients. *Id.*

70. See Mank, *Prudential Standing*, *supra* note 15, at 220 (“[W]e have explained that prudential standing encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.’”) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

71. 136 S. Ct. 1540 (2016). See *infra* Section II.C for a discussion on *Spokeo*.

72. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1555 (Ginsburg, J., dissenting). See also *infra* Section II.C discussing the change of a generalized grievance from a prudential standard to a constitutional requirement.

73. See Sunstein, *supra* note 34, at 165.

74. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); Sunstein, *supra* note 34, at 165.

Interior.<sup>75</sup> The Act contained a citizen suit provision that allowed “any person” to bring a claim alleging a violation of the Act.<sup>76</sup> Even under these circumstances, the Court made it clear that generalized grievances are *constitutionally* barred, not merely by prudential rules.<sup>77</sup> A plaintiff that alleges “only 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—does not state an Article III case or controversy.”<sup>78</sup> In *Lujan*, the Supreme Court required that an injury-in-fact be “actual or imminent.”<sup>79</sup> Congress could not secure standing merely by pasting citizen suit language into a statute.<sup>80</sup> Thus, the Supreme Court held to its “hard floor” of injury-in-fact; Congress may not bypass standing by means of a citizen suit provision.

Similarly, in *Spokeo, Inc. v. Robins*,<sup>81</sup> the Supreme Court solidified injury-in-fact as constitutionally required, further limiting Congress’s ability to guarantee standing.<sup>82</sup> Even the dissent in *Spokeo* seemed to agree that Article III requirements were constitutional, not prudential, in nature.<sup>83</sup> *Spokeo* may be the first time that all nine Justices agreed that constitutional requirements bar generalized grievances; generalized grievances are not a mere prudential bar. In *Spokeo*, the plaintiff alleged a violation of the Fair Credit Reporting Act because the search engine Spokeo, Inc. had incorrect information about him on its website.<sup>84</sup> The Fair Credit Reporting Act contained a citizen suit provision allowing any individual to sue to enforce the act.<sup>85</sup> The Court, including the dissent, acknowledged that Congress could create intangible harms where there were none before.<sup>86</sup> A statute that creates an intangible injury, however, did not automatically satisfy the injury-in-fact requirement.<sup>87</sup> A plaintiff must still meet the *irreducible* constitutional minimum for standing by showing that he has suffered a concrete and particularized injury.<sup>88</sup> If Congress watered down standing

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75. *Lujan*, 504 U.S. at 558-59.

76. *Id.* at 571-72.

77. *Id.* at 576-77.

78. *Id.* at 573-74.

79. *Id.* at 560.

80. *See id.* at 572-73; *see also* Sunstein, *supra* note 34, at 165.

81. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

82. *See id.*

83. *See id.* at 1555 (Ginsburg, J., dissenting).

84. *Id.* at 1544.

85. *Id.* at 1545.

86. *See id.* at 1554-56.

87. *Id.* at 1549.

88. *Id.*

through citizen suit provisions, without meeting the rigorous “concrete and particularized,”<sup>89</sup> “actual or imminent,”<sup>90</sup> “real and not abstract,”<sup>91</sup> and “not hypothetical”<sup>92</sup> standards, then the mere status of statehood, without more, cannot be justified to develop special solicitude for states.

Near automatic standing through citizen suit provisions would risk transferring power from the Executive to the courts because it would undermine the activities of the Executive branch, such activities would be subject to more judicial review without meeting standing requirements.<sup>93</sup> Similarly, allowing a state petitioner, under the guise of “special solicitude” to sue a federal agency merely by virtue of its status as a state without meeting traditional standing requirements, would risk transferring the power of the executive into the hands of individual states, bypassing the political process. Special solicitude reduces the constitutional standing minimum by allowing states to allege bare violations of the law, or failure to enforce the law, without a showing that the injury is both concrete and particularized.

Courts cannot water down a constitutional requirement even if the plaintiff is “special” in other respects. Congress may indicate to the courts that it is creating harms in enacted statutes, which the courts can use in its standing analysis, but only to the Constitutional limit. Arguably, this is what the Court did in its analysis for Massachusetts.<sup>94</sup> Standing principles ensure that there are limits to an “unelected, unrepresentative judiciary in our kind of government.”<sup>95</sup> Separation of powers is a fundamental principle of standing doctrine; the requirements of standing ensure that the right plaintiff is bringing particularized grievances to court.<sup>96</sup> Special solicitude opens the door to dilution of the injury-in-fact requirement. It is fundamentally incompatible with the Court’s recent jurisprudence barring generalized grievances.

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89. *Id.* at 1545.

90. *Id.* at 1548.

91. *Id.*

92. *Id.*

93. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (“[T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”); Sunstein, *supra* note 34, at 165.

94. *See* Massachusetts v. EPA, 549 U.S. 497, 521 (2007); Christie Henke, *Giving States More to Stand On: Why Special Solicitude Should Not be Necessary*, 35 *ECOLOGY L.Q.* 385, 386 (2008).

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

96. *See* Staudt, *supra* note 9 (“These concepts - injury and adverseness - have led federal courts to focus on individualized harms as distinct from generalized grievances. Without suffering a personal injury, litigants merely seek to enforce law on behalf of the public-at-large – the type of dispute that does not entail a sufficient stake in the controversy.”); Hessick, *supra* note 47, at 289-90.

As evidenced in *United States v. Texas*, special solicitude for state plaintiffs allows states to bring mere generalized grievances to court.<sup>97</sup> Texas alleged a self-inflicted injury, alleging that it had to change its own state law to avoid subsidizing drivers' licenses, to mask its mere generalized grievance about President Obama's immigration policies,<sup>98</sup> the type of injury that was not permitted in *Clapper*.<sup>99</sup> In *Massachusetts*, the Court used the phrase "special solicitude" when it was discussing Massachusetts' standing, yet in its analysis, it did not bypass or water down the injury-in-fact requirement.<sup>100</sup> The Court found that Massachusetts had met the traditional standing requirements, thereby making special solicitude unnecessary and, more likely, mere dicta.<sup>101</sup> As Professor Stevenson surmised, it is possible that Justice Stevens used the term "special solicitude" because the conservatives of the Court used this term in previous cases (not in a standing analysis) involving states' rights.<sup>102</sup> Special solicitude, if used as a new analytical framework as recent courts have done, is inherently incompatible with injury-in-fact requirements and standing doctrine generally.

### III. THE FEDERAL GOVERNMENT IS THE ULTIMATE *PARENS PATRIAE* REPRESENTATIVE

Some scholars justify special solicitude as an extension or part of *parens patriae* doctrine because in *Massachusetts v. EPA*, when discussing Massachusetts' standing, Justice Stevens wrote: "[W]hen a State enters the Union, it surrenders certain sovereign prerogatives[,] Massachusetts cannot invade Rhode Island to force reductions in greenhouse emissions."<sup>103</sup> He then cryptically cited to *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,<sup>104</sup> a case where a state had standing to sue another state based on the doctrine of *parens patriae*.<sup>105</sup> Despite the Court's cite to a case that relied on *parens patriae*, the Court held in *Massachusetts v. EPA* that Massachusetts had standing because it was injured as a state, not because of an injury to its

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97. See Frost, *supra* note 3.

98. See *id.*

99. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

100. See *Massachusetts v. EPA*, 549 U.S. 497, 522, 526 (2007); see also, Jeremy Nash, *Sovereign Preemption State Standing*, 2 NW. U.L. REV. 201, 203-04 (2017).

101. See Henke, *supra* note 94, at 394.

102. See Stevenson, *supra* note 17, at 22-25.

103. *Massachusetts*, 549 U.S. at 519.

104. 458 U.S. 592, 607 (1982).

105. *Id.*

citizens.<sup>106</sup> The Court did not use or explain special solicitude as an extension of *parens patriae* in its final analysis.<sup>107</sup>

Nonetheless, the Court's mysterious reference to *parens patriae* led scholars and courts to understand that *parens patriae* was the justification for special solicitude.<sup>108</sup> The argument is that special solicitude, like *parens patriae*, permits state petitioners to bring claims on behalf of their citizens to protect quasi-sovereign interests.<sup>109</sup> But, this argument fails to take into account that the Court has expressly prohibited states from using *parens patriae* against the federal government; arguably, this is because *parens patriae* doctrine would not threaten separation of powers.<sup>110</sup> In contrast, special solicitude directly undermines separation of powers when a state cannot show an injury-in-fact. Thus, despite the Court's mysterious cite to a *parens patriae* case, special solicitude cannot be justified by the *parens patriae* doctrine because they are fundamentally different doctrines with different serious implications.

#### A. *The Origins of Parens Patriae*

Historically, courts have allowed only state petitioners to use *parens patriae* doctrine in state-to-state or state-to-private entity cases.<sup>111</sup> The Court has used *parens patriae* to allow states to bring claims that involve injuries to their citizens when an ordinary citizen would be unable to bring the claim because the injury would be a generalized grievance to the citizen.<sup>112</sup> *Parens patriae* is what allows states to vindicate the rights of its citizens with respect to public nuisances and to protect common resources from misuse by *other*

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106. See Henke, *supra* note 94, at 394.

107. See Mank, *New Standing Test for States*, *supra* note 31, at 1736 (discussing Chief Justice Roberts' opinion that identified the flaw in the majority's opinion, "in the context of *parens patriae* standing, however, we have characterized state ownership of land as a 'nonsovereign interest' because a State 'is likely to have the same interests as other similarly situated proprietors.'").

108. See Henke, *supra* note 94, at 395; Mank, *New Standings Test for States*, *supra* note 31, at 1707-08; Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 252 (2009).

109. See Massey, *supra* note 108, at 260 n.44 (quoting Black's Law Dictionary 1144 8th ed. 2004 "A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit. . . The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.").

110. See *Massachusetts v. Mellon*, 262 U.S. 447, 487-88 (1923).

111. See Stephen I. Vladeck, *State's Rights and State Standing*, 46 U. RICH. L. REV. 845, 855 (2012) (discussing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), where Puerto Rico was permitted standing to vindicate the rights of its citizens against a private party).

112. See Henke, *supra* note 94, at 386.

states.<sup>113</sup> In *Missouri v. Illinois*,<sup>114</sup> for example, Illinois was dumping sewage water that went into the Mississippi River and the Court allowed Missouri to use *parens patriae* to sue Illinois.<sup>115</sup> The Court also permitted the doctrine in *Georgia v. Tennessee Cooper*,<sup>116</sup> where Georgia sued a private entity to stop it from discharging noxious gas into its territory.<sup>117</sup> Courts have also permitted the doctrine for product litigation such as suing tobacco companies that allegedly injured the health, welfare, and safety of its citizens.<sup>118</sup>

*Parens patriae* is also justified on the grounds that state plaintiffs gave up certain rights when they joined the federal union and are unable to protect quasi-sovereign interests against other states or private parties unless courts permit them to bring claims to the courts. Before using *parens patriae*, courts must first identify the quasi-sovereign interests at stake. In *Alfred L. Snapp & Son*, Chief Justice White identified two quasi-sovereign interests of states that the Court would permit under *parens patriae*: “the health and well-being—both physical and economic—of its residents in general . . . [and] . . . not being discriminatorily denied its rightful status within the federal system.”<sup>119</sup> That case involved non-federal defendants, not the federal government.<sup>120</sup> Courts may use *parens patriae* in state-to-state and state-to-private entity cases because the citizens, on their own, would be expressing only generalized grievances and would not have standing.

#### B. *Parens Patriae—Not For Lawsuits Against the Federal Government*

*Parens patriae* doctrine is not sufficient to justify special solicitude for state plaintiffs because *parens patriae* does not extend to claims against the federal government. Whereas *parens patriae* does not undermine separation of powers principles, special solicitude does risk undermining separation of powers because it allows claims against the federal government that are mere generalized grievances, not injuries-in-fact.<sup>121</sup> The federal government is

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113. See Ryke Longest, *Massachusetts versus EPA: Parens Patriae Vindicated*, 18 DUKE ENVTL. L. & POL’Y F. 277, 285 (2008).

114. 180 U.S. 208 (1901).

115. *Id.* at 248; see Henke, *supra* note 94, at 388-89.

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

117. *Id.* at 236-37; see Henke, *supra* note 94, at 389.

118. See Donald G. Gifford, *Impersonating the Legislature: States Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 932 (2008).

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

120. See Vladeck, *supra* note 111, at 856.

121. My argument is not that states should not sue the federal government, rather, it is that the doctrine special solicitude is not necessary. In cases where a state can show the constitutionally minimum injury-in-fact, there is no danger of undermining separation of powers. If special

protecting the rights of *all* people. In contrast, in a state-to-state or state-to-private entity suit, each entity is only protecting its respective citizens' interests. The Court has already explained that *parens patriae* does not work for state claims against the federal government in *Massachusetts v. Mellon*.<sup>122</sup>

[W]hile the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not the latter, they must look for such protective measures as flow from the status.<sup>123</sup>

The concept that the federal government protects the rights of all people and represents people as *parens patriae* goes as far back as *McCulloch v. Maryland* decided in 1819.<sup>124</sup>

In *McCulloch*, Chief Justice Marshall rejected the argument that the federal government obtained its power from the states; the federal government was and is not subordinate to the states.<sup>125</sup> Instead, Chief Justice Marshall explained, "the [federal] government proceeds directly from the people; is "ordained and established" in the name of the people . . . [t]he Constitution, when thus adopted, was of complete obligation and bound the State sovereignties."<sup>126</sup> Thus, extending *parens patriae* doctrine to allow states to sue the federal government is completely incompatible with the precedent that established *parens patriae*.

Professor Vladeck identifies *Georgia v. Pennsylvania Railroad Co.*<sup>127</sup> as the clearest case indicating that *parens patriae* may not be used to establish standing in claims against the federal government.<sup>128</sup> The Court permitted *parens patriae* in that case because "(1) the state was not suing the federal government; and (2) it was affirmatively seeking to enforce federal law, rather than challenge it."<sup>129</sup> In *Massachusetts*, Justice Stevens discussed the sovereignty that Massachusetts gave up when it joined the United States, but it is not clear that this was a serious consideration in the standing analysis

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solicitude reduces the requirement of injury-in-fact for states, then there is a greater danger of the courts undermining, rather than preserving, separation of powers.

122. 262 U.S. 447 (1923).

123. *Id.* at 485-86.

124. 17 U.S. 316 (1819).

125. *Id.* at 402.

126. *Id.* at 403-04.

127. 324 U.S. 439 (1945).

128. See Vladeck, *supra* note 111, at 854.

129. *Id.*



because he went on to also discuss the procedural right created by statute.<sup>130</sup> Special solicitude for all state petitioners may not be justified alone under *parens patriae* because Massachusetts had a procedural right and a clear injury-in-fact.<sup>131</sup> It is not clear that Justice Stevens even used *parens patriae* in his analysis because he identified Massachusetts' injury as the loss of coastal land.<sup>132</sup> The loss of land is a proprietary interest, not a quasi-sovereign interest under *parens patriae*.<sup>133</sup> Thus, Massachusetts showed a concrete and particularized injury, sufficient to show an injury-in-fact.<sup>134</sup>

Special solicitude is not an appropriate extension of *parens patriae* because the federal government acts on behalf of all citizens and states cannot protect their quasi-sovereign interests against the federal government. Additionally, special solicitude, as an extension of *parens patriae*, creates an inconsistency in standing doctrine and encourages judges to exercise their own discretion. The danger is evidenced in *United States v. Texas* where the Fifth Circuit found that Texas met standing requirements for an indirect injury.<sup>135</sup> One scholar notes that there are now two tiers of Article III standing: one for states as *parens patriae* and one for individual litigants.<sup>136</sup> Clearly, special solicitude, as an extension of *parens patriae*, cannot be reconciled with the recent jurisprudence of standing as an irreducible constitutional requirement.<sup>137</sup> Watering down standing requirements to accommodate states' interests in bringing political debates to court without meeting the constitutional requirement of injury-in-fact is a risky analytical framework to allow.

#### IV. SPECIAL SOLICITUDE IS NOT NECESSARY TO CREATE "SPECIAL-NESS" FOR STATES

Article III requires courts to only hear "cases and controversies" without a new standing framework that includes special solicitude; special solicitude is not necessary to hear challenges to federal government action because Congress has the ability to create procedural rights for state plaintiffs and to involve states in joint administrative programs when it wants courts to interpret Article III standing to the constitutional limit. These are steps that

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130. See Longest, *supra* note 113, at 286.

131. See *supra* Section II.C.

132. See *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007).

133. Vladeck, *supra* note 111.

134. See *supra* Section II.C (discussing the possibility that Justice Stevens used the term special solicitude as mere dicta).

135. See Frost, *supra* note 3.

136. Massey, *supra* note 109, at 276.

137. See *id.* at 280.

Congress can take in a statute in order to facilitate a state's showing of an injury. While it is true that these steps do not guarantee standing,<sup>138</sup> statutes using citizen suit provisions are nonetheless a better way to achieve executive agency accountability without special solicitude as a new standing consideration; special solicitude is ill-defined and has created great confusion amongst courts and commentators.<sup>139</sup> These steps would not depend on special solicitude and would not undermine separation of powers principles.

Courts and commentators have expressed concern over the lack of accountability of executive administrative agencies. Once Congress delegates authority to administrative agencies, these agencies are left in the sole hands of the Executive.<sup>140</sup> Congress is unable to monitor Executive agencies once it has delegated authority to them because it would be stepping into Executive functions in violation of separation of powers.<sup>141</sup> Agencies have broad discretion, often unchecked, because they operate according to the executive branch. Executive agencies may regulate so long as it is within the boundaries of the congressional delegation. Congress has the ability to make certain plaintiffs, including states, "special" in a standing analysis through statutes and provisions similar to the citizen suit provision. Statutes provide guidance to the courts even in a standing analysis.<sup>142</sup> Courts can preserve separation of powers by allowing Congress, through its political channels, to designate when it wants executive agencies to be monitored by state plaintiffs. Special solicitude is an inappropriate attempt by the Courts to resolve a delegation issue that should be resolved by Congress.

#### A. *Procedural Rights Accomplish the Same Special-ness*

*Lujan* and *Spokeo* affirmed that Congress may create an injury where there was none before;<sup>143</sup> if Congress wants the states to act as the police of

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138. See *supra* Section II.C.

139. Christie Henke, *Giving States More to Stand On: Why Special Solicitude Should Not be Necessary*, 35 *ECOLOGICAL L.Q.* 385, 389 (2008); Nash, *supra* note 100, at 203; Bulman-Pozen, *supra* note 4, at 1745 ("the meaning and durability of such solicitude remain unsettled").

140. See *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 968 (1983) (Justice White's dissenting opinion discussing the risks with administrative agencies, "Congress . . . either [must] refrain from delegating . . . authority, [or] abdicate its law-making function to the executive branch and independent agencies . . . to opt for the latter risks unaccountable policymaking by those not elected to fill that role.").

141. See Matthew S. Melamed, *A Theoretical Justification for Special Solicitude: States and the Administrative State*, 8 *CARDOZO PUB. L. POL'Y & ETHICS J.* 577, 607 (2010) ("States should have standing when an agency action (or inaction) preempts state action because agencies lack political accountability for their actions to citizens in their role as members of state sovereigns.").

142. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016).

143. See *supra* Section II.C.

executive administrative agencies it can do so by creating procedural rights through citizen-like provisions. Congress is in a special role to be able to identify new problems and to use the judicial system to address those problems.<sup>144</sup> As Justice Kennedy noted in *Lujan*, “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.”<sup>145</sup> Thus, Congress has a special role in articulating when it wants courts to allow states to take part in enforcing rights. Congress cannot create injury per se but it can create harms where there were none before and create citizen suit-like provisions for states, specifically.

In administrative agency regulations, Congress can define the actual violations for which states can sue.<sup>146</sup> In *Spokeo*, for example, the procedural right was in seeing that the Fair Credit Reporting Act was not violated by entities such as Spokeo, Inc.<sup>147</sup> This was a similar right in *Massachusetts v. EPA*.<sup>148</sup> Creating procedural rights would accomplish the same special-ness that special solicitude is aimed at accomplishing because the Court in *Massachusetts v. EPA* used the citizen-provision to find standing for Massachusetts.<sup>149</sup> The Court did not use special solicitude in the analysis; in fact, as Professor Stevenson argues, it is plausible that the “special solicitude” phrase was merely a jab at the conservative Justices.<sup>150</sup> Because Massachusetts needed the procedural right in the statute to establish injury-in-fact, special solicitude is unnecessary and creates more problems than it solves.<sup>151</sup>

### B. Joint Administration Creates Special-ness

In cases where a state has standing to challenge the constitutionality of statutes, it has standing because it possesses a special interest in the administration of the program *as a state*.<sup>152</sup> Even Justice Scalia agreed that

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144. See Heather Elliott, *Balancing As Well As Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181, 185 (2015) [hereinafter Elliott, *Balancing*] (“Congress is vested with constitutional authority to legislate, which means the Legislative Branch is charged with recognizing social problems and societal goals and adopting statutes to prevent or pursue them.”).

145. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

146. See Stevenson & Eckhart, *supra* note 16, at 1362.

147. *Spokeo*, 136 S. Ct. at 1545.

148. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

149. See *id.*

150. Stevenson, *supra* note 17, at 22-25.

151. See Henke, *supra* note 94, at 386.

152. See Vladeck, *supra* note 111, at 859 (discussing two voting rights cases where states were permitted standing).

when a plaintiff is himself the object of regulation he will ordinarily have standing.<sup>153</sup> When he is not the object, much more is needed.<sup>154</sup> Allowing standing in these scenarios risks transferring power from the executive to the courts.<sup>155</sup> Congress can make a state the object of an administrative agency by creating a joint program, even if the joint program requires minimal cooperation by a state. When there is a “shared responsibility” between states and the federal government, it is reasonable to allow states to bring an action against the executive branch for alleged failures to comply with the statute.<sup>156</sup>

Historically, states have been able to challenge federal statutes that preempt or undermine state law,<sup>157</sup> and so by creating a shared governance scheme Congress would be ensuring that states have ground to stand on. Under a shared governance scheme, Massachusetts would still have no problem in obtaining standing because there is a shared governance purpose in the EPA’s regulations.<sup>158</sup> Unlike Massachusetts, Texas would not have standing because immigration is solely under the realm of the federal government’s discretion; there is no shared governance in the area of immigration.<sup>159</sup>

Congress can create a sufficient stake in the outcome for states, and thus satisfy traditional injury requirements, by creating joint administration programs. Allowing Congress to be specific as to which administrative agencies it wants states to police through judicial channels would create the same special-ness, making special solicitude unnecessary. Special solicitude is overly broad and dangerous to separation of powers. Special solicitude is a judicially created doctrine that creates more harm than good and is not the best way to accomplish accountability for Executive administrative agencies.

## V. CONCLUSION

Special solicitude threatens to stretch Article III standing requirements beyond anything permitted in the past; it entangles an unelected court into

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153. See Scalia, *supra* note 28, at 894.

154. See *id.* at 894-95.

155. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 602 (1992); see Sunstein, *supra* note 34, at 165.

156. See Mank, *New Standing Test for States*, *supra* note 31, at 1775 (discussing this concept as part of *parens patriae*; I do not agree with this concept under *parens patriae* doctrine, see *supra* Part II, but it is reasonable to see this concept of shared governance as giving rise to an injury-in-fact without needing special solicitude).

157. See Tara Leigh Grove, *When Can A State Sue the United States?*, 101 CORNELL L. REV. 851, 863-64 (2016).

158. See Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 702 (2016).

159. See *id.* at 701.

deciding political debates that must be worked out between Congress and the executive. Chief Justice Roberts insisted that it is the role of the courts “to decide concrete cases—not to serve as a convenient forum for policy debates.”<sup>160</sup> Additionally, “state standing against the federal government requires a unique federal constitutional interest on the states’ part, and it would necessarily be bootstrapping to conclude that such an interest can be manufactured solely by state law.”<sup>161</sup>

Texas’s claim against the Department of Homeland Security falls into this “bootstrapping” problem. Under Texas’s theory of “special solicitude,” states can formulate their state law to depend on any federal regulation’s definition, no matter how minor, and gain access to federal courts.<sup>162</sup> Texas’s alleged injury, that it must subsidize driver’s licenses for the individuals permitted under federal law to remain in the United States, derives from Texas law.<sup>163</sup> The alleged injury is inconsistent with recent standing precedent. The injury is not a quasi-sovereign interest to protect its borders (immigration law is under the sole umbrella of the federal government), and Texas is not the object, directly or indirectly, of the Department of Homeland Security’s prosecutorial discretion.

Special solicitude is thus incompatible with recent standing doctrine. Commentators have already heavily criticized the Court for creating an incoherent doctrine that allows courts to further their own policy preferences;<sup>164</sup> special solicitude is another way to allow states to use the courts to further their political agendas. While some argue that special solicitude would not encroach on the legislative branch because Congress has already expressed its will,<sup>165</sup> this argument fails to take into account the danger of undermining separation of powers. The risk, then, is that “attorneys general [would] have a special role in protecting the national

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160. *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007).

161. *See* Vladeck, *supra* note 111, at 870.

162. *See* Frost, *supra* note 3.

163. *Texas v. United States*, 136 S. Ct. 2271 (2016); *see* Frost, *supra* note 3.

164. *See* Elliot, *Standing Lessons*, *supra* note 13, at 558 (“Article III standing doctrine has been criticized extensively. It has been called ‘incoherent,’ ‘manipulable,’ ‘doctrinal[ly] confus[ed],’ a ‘word game played by secret rules,’ and one of ‘the most amorphous [concepts] in the entire domain of public law.’ Critics say that it ‘reduc[es] the permissible role of Congress in government policymaking,’ permits courts to decide the merits by pretending instead to decide a threshold jurisdictional question, and amounts to *Lochner*-style substantive due process” (internal citations omitted); Elliott, *Balancing*, *supra* note 144, at 188; Mank, *Prudential Standing*, *supra* note 15, at 226-27 (discussing Dean Chemerinsky’s article, the “Court sometimes manipulates arbitrary distinctions between constitutional Article III standing and prudential standing for its convenience to reach desired policy results without any genuine logical basis.”).

165. *See* Henke, *supra* note 94, at 403.

interest in executive compliance with federal law.”<sup>166</sup> Attorneys Generals should not have preferential standing in public interest litigation against federal agencies;<sup>167</sup> to allow them preferential standing would act to preclude large portions of citizens from influencing agencies through traditional political mechanisms.

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166. Grove, *supra* note 157, at 856.

167. See Stevenson & Eckhart, *supra* note 16, at 1369.

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