STATE STANDING: WATERING DOWN ARTICLE III WITH SPECIAL SOLICITUDE

I. INTRODUCTION

The death of Justice Antonin Scalia, together with the subsequent refusal[1] 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

refusal to regulate greenhouse gas emissions.[18] The injury Massachusetts alleged was the loss of coastline property caused by global warming, and [19] One of the

special

solicitude [20]

for state plaintiffs.[21] Subsequently, the Southern District of Texas and the Fifth Circuit embraced this ill-

Article III standing.[22] *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.[23]

involve controversial political debates because individual plaintiffs do not have special standing requirements and cannot meet the injury-in-fact requirement.[24] -ness

political debates in cases against federal government agencies, especially executive agencies, to federal court.[25]

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 in

jurisprudence that defines an irreducible constitutional minimum;

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. Uymphas2 0.72 38.F 0 612dpE 0] TJET8q0.000018243 0 612 792 reW* e1TJETQ80 g0 G64 557.9ETQqS000006

II. AN IRREDUCIBLE CONSTITUTIONAL MINIMUM

Article III standing doctrine has evolved significantly since the 1920s, when the doctrine first appeared.[32] The bar against generalized grievances has evolved from merely being a prudential standard into a constitutional mandate.[33] 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.[34] 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.[35] The Court developed prudential standards to limit the role of the judiciary for other compelling reasons.[36] Cases that raise sensitive political questions, involve

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;

[43] In one case, the Court merely
n adversarial
process.[44] The first significant developments of standing doctrine began

within the zone of interests of a statute.[51] 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.[52] 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

insufficient to show standing.[68] -
burdens incurred based on fear of surveillance, were not sufficient.[69] 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.[70] *Spokeo, Inc. v. Robins*[71] demonstrates that the Court has accepted that generalized grievances are no longer a mere prudential bar.[72] This development is appropriate because generalized grievances by definition cannot be concrete and particularized.

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

court to enforce the statute, also known as citizen suit provisions.[73] 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.[74] 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 (Ginsbug, 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.

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92 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

As evidenced in *United States v. Texas*, special solicitude for state plaintiffs allows states to bring mere generalized grievances to court.[97] Texas alleged a self-inflicted injury, alleging that it had to change its own state law

licies,[98] the type of injury that was not permitted in *Clapper*.[99] In *Massachusetts*, the Court used the phrase

its analysis, it did not bypass or water down the injury-in-fact requirement.[100] The Court found that Massachusetts had met the traditional standing requirements, thereby making special solicitude unnecessary and, more likely, mere dicta.[101] As Professor Stevenson surmised, it is possible that

of the Court used this term in previous cases (not in a standing analysis) [102] 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.

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

protecting the rights of *all* people. In contrast, in a state-to-state or state-to-

because he went on to also discuss the procedural right created by statute.[130] 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.[131] It is not clear that Justice Stevens even used *parens patriae*

coastal land.[132] The loss of land is a proprietary interest, not a quasi-sovereign interest under *parens patriae*.[133] Thus, Massachusetts showed a concrete and particularized injury, sufficient to show an injury-in-fact.[134]

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.[135] One scholar notes that there are now two tiers of Article III standing: one for states as *parens patriae* and one for individual litigants.[136] Clearly, special solicitude, as an extension of *parens patriae*, cannot be reconciled with the recent jurisprudence of standing as an irreducible constitutional requirement.[137] Watering down standing requirements to

meeting the constitutional requirement of injury-in-fact is a risky analytical framework to allow.

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

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.[144] As Justice Kennedy noted in *Lujan*
to define injuries and articulate chains of causation that will give rise to a case or con [145] 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.[146] 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.[147] This was a similar right in *Massachusetts v. EPA*.[148] 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.[149] The Court did not use special solicitude in the analysis; in fact, as Professor Stevenson argues,
phrase was merely a jab at the conservative Justices.[150] 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.[151]

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*.[152] Even Justice Scalia agreed that

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 Elliot, *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.

when a plaintiff is himself the object of regulation he will ordinarily have standing.[153] When he is not the object, much more is needed.[154] Allowing standing in these scenarios risks transferring power from the executive to the courts.[155] Congress can make a state the object of an administrative agency by creating a joint program, even if the joint program requires minimal

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.[156]

Historically, states have been able to challenge federal statutes that preempt or undermine state law,[157] 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

[158] Unlike Massachusetts, TW[illegible]

deciding political debates that must be worked out between Congress and the executive. Chief Justice Roberts insisted that it is

decide concrete cases not to serve as a convenient forum for policy [160]

would necessarily be bootstrapping to conclude that such an interest can be [161]

states

definition, no matter how minor, and gain access to federal courts.[162]

permitted under federal law to remain in the United States, derives from Texas law.[163] 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

[166] Attorneys Generals should not have preferential standing in public interest litigation against federal agencies;[167]