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## NOTES

### AN ABDICATION APPROACH TO STATE STANDING

During the Obama and Trump Administrations, state litigation has emerged as a powerful new tool for challenging federal policy. President Obama's eight years in office saw Republican state attorneys general bring no fewer than forty-six lawsuits against the Administration.<sup>1</sup> As the political pendulum changed direction, so too did the partisan valence of state litigation: in President Trump's first year in office alone, his Administration defended thirty-five lawsuits brought by Democratic attorneys general.<sup>2</sup> At the heart of this litigation wave is *Massachusetts v. EPA*,<sup>3</sup> the U.S. Supreme Court's seminal decision on state standing, which held that states are entitled to "special solicitude" in the Article III standing analysis.<sup>4</sup> *Massachusetts's* expansive view of state standing, in combination with its corollary holding that states may compel agency action when their independent regulatory authority is curtailed by the federal government,<sup>5</sup> opened the courthouse doors to an array of state-initiated suits contesting agency action and inaction, in the forms of both failure to regulate and failure to enforce existing regulatory schemes. But in the years since *Massachusetts* was decided, its doctrinal legitimacy has drawn increasing skepticism from courts and academics alike. The power and breadth of special solicitude seems to be diminishing as judges move away from relaxed standing analyses, leading many practitioners to wonder how much longer the states will enjoy a meaningfully lowered barrier to entry in bringing lawsuits against the federal government.<sup>6</sup>

This Note puts forth an alternative approach to state standing that would offer lasting access to judicial review in cases where the federal government has failed to meet its enforcement obligations under federal law, should the power of special solicitude be diminished. It is premised on a theory of abdication injury, which asserts that, when the federal government exercises jurisdiction over a particular policy area to the exclusion of the states, the states have a concrete interest in challenging a unilateral executive decision not to enforce federal law. Part I describes the Supreme Court's state standing doctrine, with an emphasis on the developments that led to the emergence of special solicitude in

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<sup>1</sup> Fred Lucas, *In 8 Years of Obama, GOP AGs Sued 46 Times. Democrats Already Sued Trump 35 Times.*, COUNTABLE: THE DAILY SIGNAL (Jan. 31, 2018), <https://www.countable.us/articles/2501-8-years-obama-gop-ags-sued-46-times-democrats-sued-trump-35-times> [<https://perma.cc/883X-NBKG>].

<sup>2</sup> *Id.*

<sup>3</sup> 549 U.S. 497 (2007).

<sup>4</sup> *Id.* at 520.

<sup>5</sup> *See id.* at 519–20, 527.

<sup>6</sup> *See infra* pp. 1307–09.

*Massachusetts v. EPA* and threats to the continued vitality of that model. Part II focuses on *Massachusetts's* corollary conclusion that states may challenge agency inaction and the significance of state suits that seek to compel agencies to act. Part III, applying existing justifications for preferential treatment of states in the standing analysis, explores abdication standing as an alternative approach that would reframe the injury to states resulting from federal nonenforcement without reference to special solicitude.

## I. ARTICLE III STANDING AND THE STATES

In recent years, states have increasingly used litigation to challenge federal policy. This development has occurred in large part because the Supreme Court's Article III standing doctrine has evolved to allow states to act as plaintiffs in a wider range of cases. Expansive views of the injuries a state may allege, in combination with the advent of special solicitude, mean that states can often bring claims for which few other viable plaintiffs exist. This Part traces the shifts in standing doctrine that culminated in the landmark decision of *Massachusetts v. EPA* and the rise of state public law litigation.<sup>7</sup>

### A. *An Introduction to Standing*

Constitutional standing doctrine establishes “the characteristics a person or another juridical entity must possess to bring a suit” in federal court.<sup>8</sup> Its purpose is to verify that “a matter before the federal courts is a proper case or controversy under Article III” and thus appropriate for the courts to hear in their constitutionally delineated capacity.<sup>9</sup> The Supreme Court outlined the requirements of modern Article III standing doctrine in *Lujan v. Defenders of Wildlife*.<sup>10</sup> The *Lujan* test imposes on plaintiffs the burden of showing that they have suffered an “injury in fact” that is (1) “concrete and particularized”<sup>11</sup> and “actual or imminent”;<sup>12</sup> (2) “fairly . . . trace[able] to the challenged action of the defendant”;<sup>13</sup> and (3) “likely to be redressed by a favorable decision.”<sup>14</sup> *Lujan* also suggested that “‘procedural rights’ are special,” and that the typical

<sup>7</sup> This Note defines “state public law litigation” as lawsuits brought by state plaintiffs challenging the federal government’s operation, structure vis-à-vis the states, or regulatory activity.

<sup>8</sup> Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 533 (2004).

<sup>9</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

<sup>10</sup> 504 U.S. 555 (1992).

<sup>11</sup> *Id.* at 560 (citing *Allen*, 468 U.S. at 756).

<sup>12</sup> *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>13</sup> *Id.* (alteration and omission in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

<sup>14</sup> *Simon*, 426 U.S. at 38; see also *Lujan*, 504 U.S. at 561.

standards of “redressability and immediacy” might be relaxed to account for the time lag between the commission of the procedural error and the plaintiff’s experience of harm.<sup>15</sup> However, the *Lujan* Court offered no further guidance on how lower courts should apply waived or reduced redressability and immediacy requirements to plaintiffs alleging procedural harms.<sup>16</sup>

*B. State Standing: From Parens Patriae to Quasi-Sovereign Interests*

The states have long benefited from a more expansive version of standing doctrine than that applied to private litigants.<sup>17</sup> Where private parties face barriers to pursuing injunctive relief from isolated injuries inflicted by government actors,<sup>18</sup> states may bring such claims in their citizens’ interest.<sup>19</sup> Likewise, states may sometimes seek damages unavailable to private litigants. For instance, a coalition of states asserting claims against major tobacco companies in the 1990s established standing to recover expenses to the public fisc resulting from citizens’ smoking-related illnesses, while private organizations’ equivalent claims were rejected.<sup>20</sup> These state privileges, which predate *Massachusetts*’s special solicitude rule,<sup>21</sup> stem from the concept of *parens patriae*, a common law doctrine with roots in the English practice of according the monarch the royal prerogative as “parent of the country” to serve as a guardian for those without legal capacity to act on their own behalf.<sup>22</sup>

Over time, American courts developed a similar prerogative for state legislatures and Congress.<sup>23</sup> A form of *parens patriae* known as “police

<sup>15</sup> *Lujan*, 504 U.S. at 572 n.7. Plaintiffs must establish both Article III standing and statutory standing, a requirement that a suit fall within the “zone of interests” protected by the relevant statutory provision. *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997); see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). In the context of the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), the zone of interests test is not “especially demanding” and “forecloses suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.’” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). As this Note focuses on suits brought under the APA, it assumes that the zone of interests test will not impede state standing in relevant cases.

<sup>16</sup> 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, 1718–19 (2008).

<sup>17</sup> See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 67–72 (2018).

<sup>18</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983).

<sup>19</sup> See *Pennsylvania v. Porter*, 659 F.2d 306, 315 (3d Cir. 1981); Lemos & Young, *supra* note 17, at 71.

<sup>20</sup> Lemos & Young, *supra* note 17, at 71–72.

<sup>21</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

<sup>22</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

<sup>23</sup> See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854).

power standing” gave the states a litigable interest deriving from their “‘police power’ to regulate property for the public good” in the late nineteenth and early twentieth centuries.<sup>24</sup> In a prominent police power case, *Georgia v. Tennessee Copper Co.*,<sup>25</sup> the Supreme Court recognized that states have “quasi-sovereign,” independent interests “in all the earth and air within [their] domain[s].”<sup>26</sup> But the 1923 case *Massachusetts v. Mellon*<sup>27</sup> curtailed the reach of *parens patriae* standing. *Mellon* established that states cannot claim *parens patriae* standing against the United States because the citizens of a state “are also citizens of the United States.”<sup>28</sup> Therefore, when citizens’ rights vis-à-vis the federal government are in question, “it is the United States, and not the State, which represents them as *parens patriae*.”<sup>29</sup> Six decades later, the Court reaffirmed this stance in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.<sup>30</sup>

### C. Massachusetts v. EPA and Special Solitude

Nearly eighty-five years after *Mellon* barred states from bringing *parens* claims against the federal government, the Supreme Court altered the state of play. In the landmark case *Massachusetts v. EPA*, Justice Stevens, writing for a 5–4 majority, concluded that the state of Massachusetts had constitutional standing to challenge the EPA’s failure to promulgate regulations concerning greenhouse gas emissions under the Clean Air Act.<sup>31</sup> In doing so, he announced for the first time that states are “entitled to special solicitude in [the] standing analysis.”<sup>32</sup> Justice Stevens cited three factors supporting special solicitude: First, individual states surrendered certain powers when they joined the Union and thus reduced their ability to remedy harms imposed by their interstate neighbors.<sup>33</sup> Second, the Constitution removes from the states the power to negotiate with foreign governments, so that states cannot mitigate international harms to their citizens.<sup>34</sup> Finally, federal preemption may preclude the states from resolving some problems even within their borders.<sup>35</sup> In any of these circumstances, the relevant “sovereign

<sup>24</sup> Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 451 (1995); see also *id.* at 450–55.

<sup>25</sup> 206 U.S. 230 (1907).

<sup>26</sup> *Id.* at 237; see also Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law’s Growing Shadow*, 2007 SUP. CT. REV. 111, 131–34.

<sup>27</sup> 262 U.S. 447 (1923).

<sup>28</sup> *Id.* at 485.

<sup>29</sup> *Id.* at 486.

<sup>30</sup> 458 U.S. 592, 610 n.16 (1982) (citing *Mellon*, 262 U.S. at 485–86).

<sup>31</sup> 42 U.S.C. §§ 7401–7671q (2012); see also *Massachusetts v. EPA*, 549 U.S. 497, 505, 526 (2007).

<sup>32</sup> *Massachusetts*, 549 U.S. at 520.

<sup>33</sup> *Id.* at 519.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

prerogatives are now lodged in the Federal Government,” which has assumed a concomitant duty to protect the states from harm.<sup>36</sup> States thus merit special treatment when they seek standing to compel the federal government to protect their interests and those of their citizens.<sup>37</sup>

Justice Stevens proceeded to apply the *Lujan* framework to Massachusetts’s alleged injuries, focusing on the injury to Massachusetts as a property-holding entity rather than as a quasi-sovereign entity.<sup>38</sup> He found that Massachusetts had suffered a “particularized injury in its capacity as a landowner” in the loss of several centimeters of coastal land due to climate change.<sup>39</sup> He further noted that Massachusetts stood at risk of suffering a second injury of future land loss, which would “only increase over the course of the next century.”<sup>40</sup> Causation stemmed from the “existence of a causal connection between manmade greenhouse gas emissions and global warming” and the “EPA’s refusal to regulate,” which “contribute[d] to Massachusetts’ injuries.”<sup>41</sup> Even though EPA regulation would address only a small fraction of all emissions, Justice Stevens found sufficient redressability because regulation would mitigate the possible future harm to Massachusetts: though the “risk of catastrophic harm[ was] remote, . . . [it] would be reduced to some extent” if the Court granted the requested relief.<sup>42</sup>

As Chief Justice Roberts observed in his dissenting opinion, the majority significantly relaxed the Court’s typical immediacy, causation, and redressability requirements.<sup>43</sup> The actual injury the Court identified, that of past land loss, could not be remedied by future regulation.<sup>44</sup> The threatened injury, that of potential future land loss, might be mitigated by regulation, but was predicted to occur over a century-long timespan.<sup>45</sup> Causation required only that the agency inaction had contributed to, not that it had directly inflicted, the state’s harm.<sup>46</sup> But the reason for this loosened approach to standing was unclear. The ambiguity arose from a single sentence in the majority opinion: “Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”<sup>47</sup> Before discussing special solicitude, Justice Stevens had situated

<sup>36</sup> *Id.*; see also *id.* at 519–20.

<sup>37</sup> *Id.* at 520.

<sup>38</sup> *Id.* at 521–26.

<sup>39</sup> *Id.* at 522.

<sup>40</sup> *Id.* at 523; see also *id.* at 522–23.

<sup>41</sup> *Id.* at 523.

<sup>42</sup> *Id.* at 526.

<sup>43</sup> *Id.* at 542–46 (Roberts, C.J., dissenting).

<sup>44</sup> *Id.* at 546.

<sup>45</sup> *Id.* at 542 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565 n.2 (1992)).

<sup>46</sup> *Id.* at 523 (majority opinion).

<sup>47</sup> *Id.* at 520.

the attenuated standards in Massachusetts's procedural right to challenge the EPA's denial of its rulemaking petition.<sup>48</sup> Yet he also indicated that states *qua* states had a sufficient "stake" in the outcome of cases where their quasi-sovereign interests were at issue to justify a lower bar for standing.<sup>49</sup> Thus, it was not obvious whether special solicitude emerged from the procedural right involved, Massachusetts's unique status as a state, a return to the Court's pre-*Lujan* standing doctrine, or a combination of the three.<sup>50</sup> This lack of clarity generated a series of questions for judges, litigants, and academics: Did special solicitude require the presence of both a quasi-sovereign state plaintiff and an injured procedural right? Was special solicitude the fulfillment of *Lujan*'s hints about a lower bar for procedural harms or a gateway to new substantive, state-led suits? A decade of post-*Massachusetts* litigation has failed to respond to these dilemmas, allowing the murkiness to linger.

#### D. Special Solicitude Post-*Massachusetts v. EPA*

*Massachusetts v. EPA* proved a useful tool for states seeking to challenge federal policy, empowering them to force, block, and influence federal policymaking through litigation.<sup>51</sup> In 2008, the year after *Massachusetts* was decided, state attorneys general, relying on the new rule of special solicitude, brought a record-setting forty cases against the federal government and other entities.<sup>52</sup> This trend has only accelerated over the course of the past decade.<sup>53</sup> The litigation *Massachusetts* made possible is more than an expression of partisan discontent.<sup>54</sup> These cases raise critical, and otherwise nonjusticiable, questions about the constitutional order. State-led lawsuits are battlegrounds for competing views of constitutional values,<sup>55</sup> judicial referenda on the propriety of unilateral exercises of executive power,<sup>56</sup> and discussions about the means by which the federal government may impose regulatory conditions on the states.<sup>57</sup> For example, *National Federation of Independent Business v.*

<sup>48</sup> See *id.* at 517–18.

<sup>49</sup> *Id.* at 520; see also *id.* at 518–20.

<sup>50</sup> See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 67, 70.

<sup>51</sup> See PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 18–42 (2015).

<sup>52</sup> *Id.* at 21; see also *id.* fig.2.1.

<sup>53</sup> See Lucas, *supra* note 1.

<sup>54</sup> See Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 646–49 (2018).

<sup>55</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>56</sup> See, e.g., *Texas v. United States*, 809 F.3d 134, 151–62 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>57</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 546–47 (2012) (opinion of Roberts, C.J.). Special solicitude cases also probe the states' role as regulators in many substantive areas, including environmental law, see, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015), healthcare,

*Sebelius*<sup>58</sup> (*NFIB*), a case premised at least in part on state standing,<sup>59</sup> adjudicated the reach of Congress's power to regulate the states through its spending power.<sup>60</sup> This is a question critical to federal-state policy coordination that would be nonjusticiable if raised by a nonstate plaintiff.

As *NFIB* illustrates, state public law litigation has thrived in part because it is well-suited to today's federal-state relationships.<sup>61</sup> States' primary role in the federal system is no longer that of co-sovereigns, but rather that of implementers of federal regulatory schemes.<sup>62</sup> The federal government relies on the states to bring its programs to life; the states depend on the grace and favor of Congress to preserve their independence, flexibility, and funding in the process of executing federal programs.<sup>63</sup> Litigation preserves states' voices in the integrated administrative state, not only through judicial resolution of disputes, but also through the opportunity to air grievances with their federal masters.<sup>64</sup>

But the doctrinal foundations of this federalism revolution stand on shaky ground.<sup>65</sup> Immediately after *Massachusetts v. EPA* was decided, commentators began to question the weight, scope,<sup>66</sup> and longevity of special solicitude for states,<sup>67</sup> in no small part because the logic undergirding the rule was ambiguous. More than ten years on, the confusion has not abated.<sup>68</sup> The Court has failed to clarify the doctrine on at least

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*see, e.g.*, *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017), employment, *see, e.g.*, *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), education, *see, e.g.*, *Complaint for Declaratory and Injunctive Relief, Massachusetts v. U.S. Dep't of Educ.*, No. 17-cv-01331 (D.D.C. July 6, 2017), ECF No. 1, immigration, *see, e.g.*, *Complaint for Declaratory and Injunctive Relief, New York v. U.S. Dep't of Justice*, No. 18-cv-06471 (S.D.N.Y. July 18, 2018), ECF No. 1, and tax policy, *see, e.g.*, *Complaint for Declaratory and Injunctive Relief, New York v. Mnuchin*, No. 18-cv-06427 (S.D.N.Y. July 17, 2018), ECF No. 1.

<sup>58</sup> 567 U.S. 519.

<sup>59</sup> The Supreme Court did not address standing in *NFIB*. The district court recognized associational and individual standing for nonstate plaintiffs to challenge the Affordable Care Act's individual mandate, *see Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1270–73 (N.D. Fla. 2011), suggesting that this claim would have survived absent a state plaintiff. However, the Spending Clause claim required state standing, though the lower court did not discuss the grounds on which state standing was premised. *See id.* at 1266–68.

<sup>60</sup> *See NFIB*, 567 U.S. at 575–85 (opinion of Roberts, C.J.).

<sup>61</sup> For a detailed treatment of the theory of cooperative, administrative federalism, *see generally* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

<sup>62</sup> Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1700–04 (2017).

<sup>63</sup> Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1267–68 (2009).

<sup>64</sup> *See* Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1047, 1049–50 (2017).

<sup>65</sup> *See* Mark L. Earley, "Special Solicitude": *The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 566–67 (2018).

<sup>66</sup> *See, e.g.*, Metzger, *supra* note 61, at 2062–63; Percival, *supra* note 26, at 134.

<sup>67</sup> *See, e.g.*, Freeman & Vermeule, *supra* note 50, at 70 ("There is reason to think that 'special solicitude' in particular will be limited and short-lived . . .").

<sup>68</sup> Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1745 (2017).

two occasions<sup>69</sup> and denied certiorari in two cases that would have presented an opportunity to revisit special solicitude.<sup>70</sup> *United States v. Texas*,<sup>71</sup> a case in which the Court granted certiorari on the explicit question of state standing,<sup>72</sup> resulted in a 4–4 split that highlighted a direct challenge to the “durability” of special solicitude.<sup>73</sup> While the Court has previously proven reluctant to reconsider, much less overrule, *Massachusetts*, the departure of Justice Kennedy, the fifth vote for special solicitude,<sup>74</sup> from the Court may change the tide, leading to its ultimate overruling<sup>75</sup> or gradual erosion.<sup>76</sup>

Even without an overt doctrinal change, expansive constructions of state standing may be waning. As a result of doctrinal ambiguity, the lower courts’ applications of special solicitude vary dramatically<sup>77</sup>: many have adopted restrictive interpretations of special solicitude that import additional requirements derived from third-party standing, proprietary interests, or rigorous applications of *Lujan*.<sup>78</sup> The U.S. Department of Justice has proposed that *Massachusetts*’s relaxed standing analysis applies only when a case features both a state plaintiff and a procedural harm,<sup>79</sup> suggesting a view that special solicitude applies only to states’ procedural claims, and has begun to argue in litigation that the Court should “revisit” the *Massachusetts* rule.<sup>80</sup>

Special solicitude is also met with doubts in the academy. Professor Tara Grove argues that *Massachusetts* was wrongly decided and that

<sup>69</sup> See *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (affirming the circuit court ruling with an equally divided eight-member Court); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (upholding the lower court’s grant of standing by a 4–4 vote).

<sup>70</sup> See *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir.), cert. denied *sub nom.* *Golden v. Washington*, 138 S. Ct. 448 (2017) (mem.); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268–69 (4th Cir. 2011), cert. denied, 567 U.S. 951 (2012).

<sup>71</sup> 136 S. Ct. 2271.

<sup>72</sup> 136 S. Ct. 906 (2016) (mem.) (granting certiorari to “the questions presented by the petition”); Petition for a Writ of Certiorari at I, *Texas*, 136 S. Ct. 2271 (No. 15-674).

<sup>73</sup> *Bulman-Pozen*, *supra* note 68, at 1745. The per curiam opinion, of course, did not explain the source of division among the Justices. See *Texas*, 136 S. Ct. 2271, 2271.

<sup>74</sup> *Freeman & Vermeule*, *supra* note 50, at 69.

<sup>75</sup> See Amanda Reilly, *Is Massachusetts v. EPA a Goner?*, E&E NEWS (June 28, 2018), <https://www.eenews.net/stories/1060087211/print> [<https://perma.cc/MH4U-MY87>].

<sup>76</sup> Cf. Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863–66 (2014) (explaining the Roberts Court’s practice of “narrowing” controversial precedents).

<sup>77</sup> Compare *Texas v. United States*, 809 F.3d 134, 151–62 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271, with *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146–48 (D.C. Cir. 2012) (per curiam).

<sup>78</sup> See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1158–61 (9th Cir. 2017); *Coal. for Responsible Regulation*, 684 F.3d at 148; *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241–42 (10th Cir. 2008); *New York v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 782–84 (S.D.N.Y. 2018).

<sup>79</sup> See Brief for the Petitioners at 29–31, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674); Reply in Support of Emergency Motion for Stay Pending Appeal at 1–3, *Washington*, 847 F.3d 1151 (No. 17-35105), ECF No. 70.

<sup>80</sup> Earley, *supra* note 65, at 567.



states are entitled to preferential status only “when they seek to enforce or defend state law.”<sup>81</sup> Even proponents of special solicitude recognize that *Massachusetts* provides inadequate doctrinal grounding. Professor Gillian Metzger attempts to bridge the gap by explaining that, when Congress disables the states from regulating, states assume “a sovereign interest in ensuring that the federal government performs its regulatory responsibilities”;<sup>82</sup> Professor Jonathan Nash puts forth a theory of “sovereign preemption state standing” meant to solidify *Massachusetts*’s instinct that states should be able to police federal enforcement of laws that preclude state regulation by allowing states to bring explicit *parens* claims against the federal government.<sup>83</sup> As Metzger’s and Nash’s efforts indicate, special solicitude needs additional doctrinal scaffolding.

To be clear: special solicitude is far from dead, but its weight appears to be diminishing and its scope shrinking as federal courts retreat from relaxed standing analyses, even when the litigants before them are states. Precedent begets precedent — as narrow readings of *Massachusetts* proliferate, lower courts are increasingly likely to adopt them. If special solicitude and the attenuated standing burden it provides to state plaintiffs were eliminated or cabined, many prominent challenges to federal power that now rely on special solicitude to get into court would likely be found nonjusticiable. Advocates of state public law litigation would do well to consider more durable theories of state standing. Abdication standing, a theory of Article III injury rooted in administrative law doctrine and traditional federalism concerns, is one such alternative available in the context of inaction cases.

## II. SPECIAL SOLICITUDE AND CHALLENGES TO FEDERAL INACTION

Though *Massachusetts v. EPA* is most frequently invoked for the general principle it represents — that states are entitled to special solicitude in the standing analysis — it also stands for a second, “corollary” proposition: that states, because their regulatory authority is abridged by the federal government, may compel agency action.<sup>84</sup> By allowing *Massachusetts* to challenge the EPA’s denial of its petition for rule-making, the Court held that agency inaction is “susceptible to judicial review.”<sup>85</sup> This, combined with special solicitude, indicates that states may “attack federal inaction” and consequently force regulation.<sup>86</sup> Since

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<sup>81</sup> Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 855 (2016); see also *id.* at 880–90.

<sup>82</sup> Metzger, *supra* note 61, at 2038; see also *id.* at 2037–38.

<sup>83</sup> See Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 206–08 (2017).

<sup>84</sup> Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 14 (2007).

<sup>85</sup> *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

<sup>86</sup> Stevenson, *supra* note 84, at 14.

2007, states' ability not only to establish standing but also to challenge agency inaction has become a powerful arrow in the federalism quiver.

*A. Abdication Actions: The Theoretical Framework*

The *Massachusetts* Court distinguished inaction in the form of failure to regulate, which is generally reviewable, from inaction in the form of nonenforcement, which is generally left to agency discretion and therefore not subject to judicial review, regardless of standing.<sup>87</sup> However, lower courts applying *Massachusetts* have eroded the line between the two, concluding both that agency nonenforcement is reviewable in certain instances and that state plaintiffs have standing to challenge it.<sup>88</sup> To be justiciable, the challenged nonenforcement typically must reach the level of "abdication," meaning that the agency in question must have "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities.<sup>89</sup> A single enforcement decision, or even a series of related enforcement decisions, would not meet this criterion and would be nonjusticiable. Inaction litigation like *Massachusetts* and *United States v. Texas*,<sup>90</sup> a suit brought by states challenging President Obama's policies of deferred action or nonenforcement of immigration laws against certain undocumented aliens, is a particularly important subclass of state public law litigation. These cases raise claims related both to the Administrative Procedure Act<sup>91</sup> (APA), as they attack agency decisions not to regulate or to otherwise decline to enforce federal law, and to the substantive statutes at issue.<sup>92</sup>

Inaction cases are one type of separation of powers cases brought by states against the federal government that tend to challenge the use of unilateral executive power in areas of domestic policy traditionally governed by Congress.<sup>93</sup> They represent the states' attempt to regain the policymaking influence they wield when Congress, not the executive, is

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<sup>87</sup> See *Massachusetts*, 549 U.S. at 527–28. The *Massachusetts* Court based its distinction on the presumption of unreviewability surrounding nonenforcement decisions rather than a pronouncement that special solicitude did not apply in the context of nonenforcement. See *id.* Therefore, assuming that a lower court finds the presumption of unreviewability to be overcome, it may undertake the *Massachusetts* standing analysis just as it would if the state challenged agency action or failure to promulgate a rule. See *infra* section III.A, pp. 1314–17.

<sup>88</sup> See, e.g., *Texas v. United States*, 809 F.3d 134, 149–50 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>89</sup> *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); see *infra* section III.A, pp. 1314–17.

<sup>90</sup> *Texas v. United States*, 809 F.3d 134. This Note refers to the case either by the name under which the Supreme Court decided it, *United States v. Texas*, or simply as *Texas*.

<sup>91</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>92</sup> See Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 37–39 (2011).

<sup>93</sup> See Lemos & Young, *supra* note 17, at 79–80.

dominant and the political safeguards of federalism are at play. Separation of powers cases operate on the premise that states, as implementers of federal policy, have a right to challenge “the faithfulness of the executive to the statutory scheme” they have consented to facilitate.<sup>94</sup> This prerogative is heightened where Congress or the Constitution disables the states via preemption, rendering them dependent on the federal government to protect their interests.<sup>95</sup> When the executive branch, via administrative agencies, enacts implementing regulations that do not align with the governing statute, declines to regulate, exercises expansive prosecutorial discretion, or otherwise deviates from the regulatory regime envisioned by Congress, it assumes a primary role in policymaking at Congress’s expense.<sup>96</sup> In turn, the shift of power from Congress to the executive branch effectively cuts the states out of the process, a phenomenon that is particularly problematic when the outcome of federal activity is to preempt state regulation.<sup>97</sup>

When the executive’s unilateral policymaking takes the form of plainly inadequate action or complete inaction, whether nonregulation or nonenforcement, litigation plays an especially important federalism function. Not only are the states disabled from actively regulating, as they are in the vast majority of separation of powers cases, but Congress’s ability to control the executive is also practically constrained. It has passed a statute with substantive requirements meant to constrain executive flexibility; the executive has willfully disregarded it.<sup>98</sup> Consequently, the traditional “political safeguards” of federalism are defunct. Recourse to the third branch offers states a key effective remedy.

### B. Abdication Actions: The Paradigmatic Case

*United States v. Texas* offers the paradigmatic example of the federalism-vindicating role that challenges to agency inaction can play. Beginning in 2010, Congress considered several bills that would have created a pathway to legal status for certain undocumented aliens.<sup>99</sup> None of these legislative attempts at immigration reform was successful. The DREAM Act, which would have granted permanent residency and work authorization to undocumented individuals who entered the United States as minors and met additional criteria, passed in the House

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<sup>94</sup> Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 462 (2012).

<sup>95</sup> See Metzger, *supra* note 61, at 2063.

<sup>96</sup> See Bulman-Pozen, *supra* note 68, at 1743–48.

<sup>97</sup> See Scott Keller, *Federalism as a Check on Executive Authority: The Perspective of a State Solicitor General*, 22 TEX. REV. L. & POL. 297, 302 (2018).

<sup>98</sup> See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1935–40 (2014).

<sup>99</sup> See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); DREAM Act of 2010, S. 3992, 111th Cong. (2010).

of Representatives but was filibustered in the Senate.<sup>100</sup> In June 2012, after the death of the bill was clear, President Obama announced Deferred Action for Childhood Arrivals (DACA), a new executive policy on immigration enforcement.<sup>101</sup> As an exercise of prosecutorial discretion, DACA allowed the deferral of deportation proceedings against approximately one million undocumented aliens who were brought into the United States as minors and satisfied additional criteria.<sup>102</sup> Two years later, the House refused to vote on a comprehensive immigration reform bill that had passed the Senate during the previous session.<sup>103</sup> President Obama again announced a new executive enforcement policy, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which allowed 3.6 million undocumented parents of minor U.S. citizens and lawful permanent residents to apply for deferred action.<sup>104</sup>

Together, DACA and DAPA created a formal, general executive policy of nonenforcement of federal immigration laws as applied to broad categories of undocumented aliens. After the President's proclamation of DAPA, the Secretary of Homeland Security stated that his agency would decline to prosecute over four million undocumented aliens otherwise eligible for deportation.<sup>105</sup> He further instructed Department of Homeland Security agents to "terminate removal proceedings" against individuals who met the DAPA standards for deferred action<sup>106</sup> and announced that the agency would not take enforcement action even against individuals who applied for deferred action under DAPA but were denied.<sup>107</sup> The policy merits of DACA and DAPA aside, such a sweeping policy against prosecution, in the face of a complex array of federal statutes and regulations providing for enforcement, is clearly unilateral executive policymaking, against Congress's will and in an area where the states, as a matter of Supreme Court precedent, are completely

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<sup>100</sup> Dylan Matthews, *17 Bills that Likely Would Have Passed the Senate If It Didn't Have the Filibuster*, WASH. POST: WONK BLOG (Dec. 5, 2012), <https://wapo.st/RChIQQ?> [<https://perma.cc/UTM4-8QCA>]; see also S. 3992.

<sup>101</sup> President Barack Obama, Remarks on Immigration Reform and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. (June 15, 2012).

<sup>102</sup> See *id.*; see also *National and State Estimates of Populations Eligible for DACA and DAPA Programs, 2009–2013*, MIGRATION POLICY INST. (2015), <http://www.migrationpolicy.org/sites/default/files/datahub/DACA-DAPA-2013State%20Estimates-Spreadsheet-FINAL.xlsx> [<https://perma.cc/ZE7M-GSH3>] [hereinafter *National and State Estimates*].

<sup>103</sup> *Transcript: President Obama's June 30 Remarks on Immigration*, WASH. POST (June 30, 2014), <http://wapo.st/VAAALV?> [<https://perma.cc/J3ER-N8FW>].

<sup>104</sup> President Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/55ZU-YMH8>]; see *National and State Estimates*, *supra* note 102.

<sup>105</sup> *Texas v. United States*, 86 F. Supp. 3d 591, 638 (S.D. Tex. 2015).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 638–39.

preempted from acting.<sup>108</sup> As the district court judge considering *United States v. Texas* put it: “If one had to formulate from scratch a fact pattern that exemplified . . . federal abdication, one could not have crafted a better scenario.”<sup>109</sup>

At present, the justiciability of inaction cases depends on special solicitude, as *Texas* itself illustrates. The Fifth Circuit in *Texas* recognized that the plaintiff states had standing, but noted that, “[w]ithout ‘special solicitude,’ it would be difficult for a state to establish standing.”<sup>110</sup> It is likely that neither the procedural injury that Texas alleged nor the proprietary injury it stated based on the costs of providing driver’s licenses to DAPA beneficiaries would have been independently sufficient to support standing.<sup>111</sup> Rather, the court allowed judicial review of DAPA because the state of Texas “now rel[ies] on the federal government to protect [its] interests” related to immigration, including its interest in avoiding the costs of processing driver’s licenses for undocumented aliens.<sup>112</sup> This logic harkens back to *Massachusetts v. EPA*’s invocation of the Commonwealth’s surrendered sovereignty as the grounding for its attenuated standing analysis.<sup>113</sup> Special solicitude permeated the panel’s finding of standing;<sup>114</sup> it is not at all clear that *Texas* would have been reviewable without the foundation of *Massachusetts*.

But as the reach of *Massachusetts v. EPA* continues to erode, state litigants will become less likely to rely prominently on special solicitude to open the courtroom doors. Moreover, lower courts grappling with state standing questions may seek to salvage the best parts of *Massachusetts*. In the discrete set of cases challenging agency inaction and particularly

<sup>108</sup> See *Arizona v. United States*, 567 U.S. 387, 415–16 (2012).

<sup>109</sup> *Texas*, 86 F. Supp. 3d at 639. *United States v. Texas* is not the only recent state-led challenge to federal abdication. State attorneys general have initiated litigation asserting that instances of agency inaction, such as failure to reach statutorily mandated determinations of environmental harm, *In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082, 1085–86 (N.D. Cal. 2018), enforce notice-and-comment rules, see Complaint for Declaratory and Injunctive Relief at ¶¶ 2–13, *Maryland v. U.S. Dep’t of Educ.*, No. 17-cv-02139 (D.D.C. Oct. 17, 2017), ECF No. 1, promptly promulgate rules essential to enforcing federal statutes, *Air All. Hous. v. EPA*, Nos. 17-1155, 17-1181, 2018 WL 4000490, at \*1–3 (D.C. Cir. Aug. 17, 2018), and timely implement compliance requirements for regulated entities, see *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1110–11 (N.D. Cal. 2017), *appeal dismissed*, No. 17-17456, 2018 WL 2735410 (9th Cir. Mar. 15, 2018), constitute violations of agencies’ statutory duty to comply with federal laws calling for executive branch enforcement. Not all of the enforcement practices at issue in these cases reach the level of general nonenforcement, but each suit demonstrates a concern with the Executive’s decision to disregard a congressionally enacted policy at its own discretion. And each could fall within the categories of inaction defined either by *Massachusetts* or by the idea of abdication described above.

<sup>110</sup> *Texas v. United States*, 809 F.3d 134, 162 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>111</sup> See Nash, *supra* note 83, at 204–06.

<sup>112</sup> *Texas*, 809 F.3d at 154; see also *id.* at 153–54.

<sup>113</sup> See *id.* at 153 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007)).

<sup>114</sup> See *id.* at 151–62.

nonenforcement, abdication standing offers a way to revive the federalism-vindicating power granted to states by special solicitude.

### III. ABDICATION STANDING AS AN ALTERNATIVE APPROACH

A theory of standing that focuses on the states' ability to challenge federal inaction and the harm inflicted on states by federal failures to enforce federal laws could preserve the thrust of special solicitude in some of the most important federalism litigation. It would apply Metzger's and Nash's theories of state standing by sidelining the doctrinal ambiguities with which their preemption-oriented explanations of *Massachusetts* grapple.<sup>115</sup> This Part sketches out that alternative theory.

Cases that seek to challenge agency inaction present state and private litigants alike with two preliminary hurdles: First, plaintiffs must show that agency inaction is reviewable under sections 701(a)(2) and 706 of the APA. Second, they must demonstrate Article III standing through an injury resulting from the alleged inaction. In cases like *Massachusetts* and *Texas*, where special solicitude currently provides the critical underpinning for state standing to challenge executive failure to enforce laws, a theory of abdication standing could reduce the obstacle imposed by this second requirement. The injury asserted by states would center on the denial of the benefits and protections promised through federal regulation in an area where states are effectively disabled from acting independently. Abdication standing would thus protect the federalism interests from which the *Massachusetts* majority derived special solicitude, but would reduce the ambiguity of the *Massachusetts* analysis by deemphasizing the unclear relationship between quasi-sovereign interests and procedural rights. Proprietary harms could bolster the abdication injury, but would not be essential to it. Abdication standing would apply when the state's alleged harm stemmed from the federal government's assertion of exclusive or extensive control in a particular area and simultaneous refusal to act in a substantively meaningful way.

#### A. Reviewing Agency Inaction

The Supreme Court understands the APA to impose a rebuttable presumption of unreviewability that shields agency decisions of whether to enforce from judicial oversight. The APA allows parties harmed by "agency action" to pursue judicial review;<sup>116</sup> it includes "failure to act"

<sup>115</sup> See *supra* p. 1309. Abdication standing also avoids a practical hurdle that might prove fatal to Nash's theory of sovereign preemption state standing: because of its explicit reliance on *parens patriae*, Nash, *supra* note 83, at 206, sovereign preemption state standing would implicate the still-binding *Mellon* bar on *parens patriae* suits against the federal government, see *id.* at 218.

<sup>116</sup> 5 U.S.C. §§ 702, 704, 706 (2012).

in its definition of agency action and offers no further distinction between the two.<sup>117</sup> Section 706 allows federal courts to “compel agency action unlawfully withheld or unreasonably delayed”<sup>118</sup> and to vacate agency actions that are “arbitrary, capricious, [or] an abuse of discretion.”<sup>119</sup> But § 701(a)(2) implements an exception to the rule of reviewability: courts cannot review “agency action [that] is committed to agency discretion by law.”<sup>120</sup>

Under the auspices of § 701(a)(2), the Supreme Court has narrowed federal courts’ ability to review an agency’s decision not to act under § 706. First, it has interpreted § 706(1), the provision allowing courts to compel agency action, to permit judicial review only when “a plaintiff asserts that an agency failed to take a *discrete* agency action that it [was] *required to take*.”<sup>121</sup> Second, it has determined that the “committed to agency discretion” language forecloses review in cases where there is “no law to apply”<sup>122</sup> or agencies’ resource allocation decisions are in question.<sup>123</sup> Finally, the Court held in *Heckler v. Chaney*<sup>124</sup> that the APA creates a presumption of unreviewability that shields agency enforcement decisions, such as the choice not to prosecute a civil or criminal violation of the agency’s governing statute, from judicial scrutiny.<sup>125</sup>

In *Heckler*, death row inmates petitioned the Food and Drug Administration (FDA) to initiate enforcement proceedings against manufacturers of lethal injection drugs used in executions.<sup>126</sup> The FDA denied the petition, claiming its jurisdiction over the issue was unclear and that, jurisdiction aside, it had the discretion not to enforce, absent a serious, general threat to public health.<sup>127</sup> The inmates sought judicial review.<sup>128</sup>

The Court held that the FDA’s failure to enforce was an exercise of prosecutorial discretion, presumptively unreviewable under § 701(a)(2)’s “committed to agency discretion” exception.<sup>129</sup> Four factors supported this conclusion: (1) limited resources, which necessarily require agencies to set enforcement priorities; (2) the fact that inaction is not coercive and

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<sup>117</sup> *Id.* § 551(13); *see also* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 657 (1985).

<sup>118</sup> 5 U.S.C. § 706(1).

<sup>119</sup> *Id.* § 706(2)(A).

<sup>120</sup> *Id.* § 701(a)(2).

<sup>121</sup> *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).

<sup>122</sup> *Citizens v. Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

<sup>123</sup> *Lincoln v. Vigil*, 508 U.S. 182, 191–92 (1993).

<sup>124</sup> 470 U.S. 821 (1985).

<sup>125</sup> *Id.* at 832–33.

<sup>126</sup> *Id.* at 823–24.

<sup>127</sup> *Id.* at 824–25.

<sup>128</sup> *Id.* at 823.

<sup>129</sup> *Id.* at 837–38.

therefore does not infringe on generally enforceable rights; (3) the nebulous nature of inaction, compared to concrete, discrete agency action; and (4) the similarities between agency enforcement and criminal prosecution.<sup>130</sup> The Court outlined several scenarios in which the presumption can be rebutted. Among these was the “abdication exception,” which might permit review in “a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>131</sup> Though *Heckler* itself did not meet the criteria for judicial review, the Court invoked *Adams v. Richardson*<sup>132</sup> for guidance.

*Adams*, a D.C. Circuit case, considered plaintiffs’ claim that the Department of Health, Education, and Welfare (HEW) had failed to enforce Title VI of the Civil Rights Act of 1964 by taking insufficient action to end segregation in federally funded public schools.<sup>133</sup> HEW considered Title VI enforcement to be “committed to agency discretion” and therefore unreviewable.<sup>134</sup> The D.C. Circuit disagreed, holding that § 701(a)(2) was to be narrowly construed and that Title VI provided sufficient law for the court to evaluate HEW’s actions.<sup>135</sup> The panel distinguished between isolated instances of nonenforcement within “a generally effective enforcement program” and a general policy of nonenforcement, “which is in effect an abdication of [an agency’s] statutory duty.”<sup>136</sup> HEW had relied on voluntary compliance to desegregate public schools instead of turning to Title VI’s formal enforcement procedures.<sup>137</sup> For the D.C. Circuit, the agency’s “consistent failure” to initiate formal enforcement was “a dereliction of duty reviewable in the courts.”<sup>138</sup>

In the decades since *Heckler* was decided, the Supreme Court has not revisited the question of when agency abdication is reviewable, nor have the lower courts developed the contours of the abdication exception.<sup>139</sup> The case law on reviewability under the APA is quite sparse, in large part because of the difficulties plaintiffs face in establishing an injury caused by agency inaction that can support Article III standing.<sup>140</sup> But the abdication exception is a live concept that is sometimes

<sup>130</sup> *Id.* at 831–32.

<sup>131</sup> *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

<sup>132</sup> 480 F.2d 1159.

<sup>133</sup> *Id.* at 1160–61.

<sup>134</sup> *Id.* at 1161.

<sup>135</sup> *Id.* at 1161–62.

<sup>136</sup> *Id.* at 1162.

<sup>137</sup> *Id.* at 1162–63.

<sup>138</sup> *Id.* at 1163.

<sup>139</sup> Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 185 (2014).

<sup>140</sup> TODD GARVEY, CONG. RESEARCH SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 17 n.115 (2014), <https://fas.org/sgp/crs/misc/R43708.pdf> [<https://perma.cc/W826-Q6DX>].



cited in lower court decisions, though courts most frequently find that agency nonenforcement does not reach the level of a general policy of abdication that merits judicial review.<sup>141</sup> Other cases apply the abdication exception in principle by determining if “an agency nonenforcement decision [is] arbitrary and capricious,” but do not cite to *Heckler*’s language.<sup>142</sup>

To the extent that the circuit courts have explicitly considered abdication as a mechanism to overcome the presumption of unreviewability, the results have varied. The Fifth Circuit, like several other courts,<sup>143</sup> has held that “[r]eal or perceived *inadequate* enforcement . . . does not constitute a reviewable abdication of duty”;<sup>144</sup> only a formal, general policy of nonenforcement will suffice. In contrast, the D.C. Circuit considers agencies’ official general enforcement policies reviewable regardless of whether they constitute total abdication, on the theory that judicial review is necessary to determine whether the agency has abdicated its responsibilities.<sup>145</sup> Four other courts have adopted this approach.<sup>146</sup> At least some of the states’ inaction cases could employ either version of the exception to overcome the presumption of unreviewability.

### B. Abdication Standing and Its Federalism Benefits

Abdication standing would offer an alternative approach to inaction cases, one rooted in administrative law principles and traditional views of federalism, that would reduce reliance on special solicitude. As applied to the states, it would rectify the common standing obstacle facing potential abdication plaintiffs: the challenge of establishing a cognizable injury in fact under *Lujan*.<sup>147</sup> The district court in *United States v. Texas* is, to date, the only court to consider a concept of abdication standing in relation to the states,<sup>148</sup> and characterized it as:

<sup>141</sup> See, e.g., *Mont. Air Chapter No. 29, Ass’n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990); Sunstein & Vermeule, *supra* note 139, at 185 n.121 (collecting cases).

<sup>142</sup> Sunstein & Vermeule, *supra* note 139, at 185 n.121; see also *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745–46 (7th Cir. 1986); *Jones v. Comptroller of the Currency*, 983 F. Supp. 197, 203–04 (D.D.C. 1997), *aff’d*, No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998) (per curiam).

<sup>143</sup> See, e.g., *Garcia v. McCarthy*, 649 F. App’x 589, 592 (9th Cir. 2016) (mem.); *California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997); *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 500–01 (D. Conn. 2006).

<sup>144</sup> *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997) (emphasis added).

<sup>145</sup> See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994); *Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 772–73 (D.C. Cir. 1992); *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep’t of Agric.*, 7 F. Supp. 3d 1, 10–13 (D.D.C. 2013); Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 NW. U. L. REV. 1171, 1186–88 (2018).

<sup>146</sup> See Lanza, *supra* note 145, at 1188 n.104 (collecting cases).

<sup>147</sup> GARVEY, *supra* note 140, at 17 n.115.

<sup>148</sup> *Texas v. United States*, 86 F. Supp. 3d 591, 636–43 (S.D. Tex. 2015).

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[W]hen the federal government asserts sole authority over a certain area of American life and excludes any authority or regulation by a state; yet subsequently refuses to act . . . . Due to this refusal to act in a realm where other governmental entities are barred from interfering, a state has standing to bring suit to protect itself and the interests of its citizens.<sup>149</sup>

Abdication standing, then, consists of three elements: (1) the policy at issue must fall within a regulatory field over which the federal government has established its jurisdiction at the states' expense; (2) the plaintiff state must demonstrate that the federal government has "abandoned its duty to enforce the law";<sup>150</sup> and (3) the state must suffer an injury resulting from the federal government's policy of abdication on which causation and redressability may be premised.<sup>151</sup>

The district court considered several injuries that might satisfy this final requirement and found each satisfactory. These included a *parens patriae* claim,<sup>152</sup> which could not have been maintained without special solicitude;<sup>153</sup> the "direct [fiscal] damages," or proprietary injury, of the costs associated with undocumented aliens' presence in the plaintiff states;<sup>154</sup> and, lastly, the injury inflicted by the fact of abdication itself.<sup>155</sup> On the basis of all three forms of injury, DAPA's explicit policy of non-enforcement, and the Supreme Court's finding that immigration was an area of essentially exclusive federal control,<sup>156</sup> the court found that the DAPA case was a "textbook example" of abdication standing.<sup>157</sup>

It is the last form of injury that suggests states could channel the untapped potential of *Heckler v. Chaney* to gain judicial review of some agency inaction claims without special solicitude. Like any litigant challenging agency abdication, with a sufficiently general policy of non-enforcement at issue, states could overcome the initial presumption of unreviewability under the APA. Unlike private litigants undertaking the second step in determining justiciability, the Article III standing analysis, states could often demonstrate concrete and particularized, actual, and imminent injury resulting from abdication, the "direct damages" to which the district court alluded, because they can rely on proprietary harms to the public fisc. These types of injuries are completely independent of a state's quasi-sovereign identity. Further, they do not require attenuated redressability, causation, or immediacy to satisfy the *Lujan* standards: a state can reliably forecast the impact of a federal

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<sup>149</sup> *Id.* at 636.

<sup>150</sup> *Id.* at 638.

<sup>151</sup> *Id.* at 639–43.

<sup>152</sup> *Id.* at 640–41.

<sup>153</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

<sup>154</sup> *Texas*, 86 F. Supp. 3d at 641.

<sup>155</sup> *Id.* at 642.

<sup>156</sup> See *Arizona v. United States*, 567 U.S. 387, 416 (2012).

<sup>157</sup> *Texas*, 86 F. Supp. 3d at 643.

policy on its budget, the harms would directly derive from the agency's decision against action, and the injury would begin as soon as a federal policy of nonenforcement was implemented.<sup>158</sup>

But proprietary harms may not always be apparent, or may be too attenuated from the alleged inaction to be cognizable. In these cases, abdication standing proposes that states could articulate an injury based on the breach of a federal guarantee to the states that abdication inevitably constitutes. With reviewability established by a general policy of abdication that fits within the exception as understood by the prevailing law of the circuit,<sup>159</sup> the fact of abdication itself could confer standing on state plaintiffs challenging inaction by analogy to *Heckler's* abdication exception. The theory behind *Heckler's* abdication exception to the presumption of unreviewability holds that abdication merits judicial review because "the President lacks authority to permit or instruct agencies to disregard their statutory obligations" and exceeds his Article II bounds when he pursues a deliberate policy of nonenforcement.<sup>160</sup> Private plaintiffs might identify a reviewable instance of abdication under this thinking, but will typically struggle to establish an actual injury inflicted by agency inaction.<sup>161</sup>

In contrast, when the President, through the systemic inaction of an administrative agency, fails to fulfill his duty to "take Care that the Laws be faithfully executed,"<sup>162</sup> a key promise of the structural Constitution to the states lapses. States lack assurance that the laws passed by Congress in areas where the states cannot independently regulate will be enforced. The federal government both totally preempts the states via statute or constitutional provision and subsequently fails to fulfill the terms of its own regulatory scheme. It has essentially entered into a contract with the state and, on the whim of a single set of actors in the executive branch, decided not to hold up its end of the bargain.<sup>163</sup> As a result, the state suffers several forms of harm. Most importantly, it does not experience the protection promised to it when it entered into the constitutional compact or when its representatives in Congress agreed, on behalf of its citizens, to surrender state prerogatives for the benefits

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<sup>158</sup> Cf. Bradford C. Mank, *State Standing in United States v. Texas: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 223–25 (situating the Fifth Circuit's finding of standing in *Texas* in the "economic losses" imposed on the states by DAPA, *id.* at 224).

<sup>159</sup> See *supra* pp. 1316–17.

<sup>160</sup> Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1680 (2004).

<sup>161</sup> See *id.* at 1674–75; see also Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 444.

<sup>162</sup> U.S. CONST. art. II, § 3.

<sup>163</sup> Cf. Bulman-Pozen, *supra* note 94, at 466–68, 470–71 (describing the potential for states to challenge "the executive[,][who now is] exercising a predominant, and often unchecked, role" in the administration of statutory schemes, *id.* at 466).

of national uniformity. Further, when the executive branch unilaterally institutes an unanticipated policy change through a policy of nonenforcement, state-level regulations crafted in light of an expectation of federal enforcement may become a source of economic or institutional harm to states. These forms of harm would bolster, but not replace, the injury inflicted on the state by federal abstention.<sup>164</sup>

Standing premised on the abdication injury could satisfy the *Lujan* framework. When the federal government takes the place of the state as primary regulator, either by claiming exclusive jurisdiction over a field or by enmeshing the state in the implementation of a federal program, the state government assumes an “actual, as opposed to professed, stake” in the enforcement of federal law.<sup>165</sup> The injury would be certainly impending because the state would experience it as soon as a federal policy of nonenforcement took root and it could anticipate with a high degree of certainty the form it would take;<sup>166</sup> *Massachusetts’s* attenuated immediacy requirement would not typically apply. The injury would be concrete and particularized because it would concern the state’s interest in governance, in ensuring that, where the state cannot regulate and enforce, the entity empowered to do so takes appropriate action. Critically, the Supreme Court has held that a concrete injury is not necessarily a tangible injury.<sup>167</sup> A state that is an actor in the integrated, administrative federal system takes on a clear and concrete interest in the functioning of federal regulation, and the failure of federal regulation under these conditions inflicts secondary harms on the states that they cannot otherwise vindicate.<sup>168</sup> Causation and redressability would flow from the identification of an injury that clearly stems from the Executive’s decision against enforcement; a court order compelling the agency to take at least preliminary steps toward enforcement or to provide a stronger basis for its determination would remedy the harm.

Abdication standing also shares several key features with already-acknowledged concepts of state standing distinct from special solicitude. For example, the D.C. Circuit has recognized an analogous theory of

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<sup>164</sup> This is not to argue that every federal policy that imposes negative externalities on the states is reviewable, nor to suggest that federal policies that do not place state interests at their center are immediately invalid. Rather, it is an observation that, when federal policy creates negative consequences without satisfying even facially the constitutional requirements of bicameralism and presentment, or proceeds in direct opposition to duly enacted federal statutes, it skirts the structural features of the Constitution that render harms to states from federal regulation permissible.

<sup>165</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment); cf. Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 682 (2016) (applying the “actual” injury requirement to “governance” injuries).

<sup>166</sup> Cf. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (rejecting claim of future injury based on multistep chain of possible causation).

<sup>167</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); Roesler, *supra* note 165, at 701 n.362.

<sup>168</sup> See Roesler, *supra* note 165, at 680–81.

standing in the context of regulatory preemption, finding that, when a federal agency decision might preempt existing state regulation and the “preemptive effect [of federal regulation] is the injury of which [state] petitioners complain, we are satisfied that the States meet the standing requirements of Article III.”<sup>169</sup> The court also observed that an agency’s representations as to its intentions or enforcement plans did not alter the preemptive injury,<sup>170</sup> suggesting that a generally applicable policy of nonenforcement reaching the level of abdication inflicts similar, cognizable harm on a state plaintiff. Further, several courts have recognized state standing to “‘vindicate the Congressional will’ by preventing an administrative agency from violating a federal statute.”<sup>171</sup> Such suits “do[] not implicate the federalism concerns behind the *Mellon* decision.”<sup>172</sup> These theories of standing derive from the state’s right to integration in the federal system on the terms to which it consented, not from its sovereign identity or its interests as *parens patriae*.

Likewise, the abdication injury is distinct from *parens* claims against the federal government that, absent special solicitude, *Mellon* and *Snapp* would preclude. While the *Mellon* bar operates to prevent states from shielding their citizens “from the operation of [federal law],”<sup>173</sup> it leaves open the possibility of state standing to protect state rights under federal law.<sup>174</sup> A state as a regulated party and implementer of federal law has its own rights under that law, distinct from its interest in protecting its citizens. It is the state’s procedural rights as a participant in the federal system and reliance interests as an administrator of federal programs and target of regulation that a theory of standing premised on abdication as injury would safeguard. The quantifiable injury to the state fisc bolsters the abdication injury by confirming its alignment with the *Lujan* framework, but the abdication injury should be regarded as sufficiently concrete to stand on its own terms.

If special solicitude is eroded in the years ahead, state litigation brought under a theory of abdication standing would continue to serve important federalism functions in the age of the administrative state.

<sup>169</sup> *Alaska v. U.S. Dep’t of Transp.*, 868 F.2d 441, 444 (D.C. Cir. 1989). Four additional courts of appeals have recognized a similar principle. See *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999); *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996); *Ohio ex rel. Celebrezze v. U.S. Dep’t of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); see also Kenneth T. Cuccinelli, II, et al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89, 110–11 (2012).

<sup>170</sup> *Alaska*, 868 F.2d at 444 n.2.

<sup>171</sup> *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984) (quoting *Wash. Utils. & Transp. Comm’n v. FCC*, 513 F.2d 1142, 1153 (9th Cir. 1975)); see also *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *Bulman-Pozen*, *supra* note 68, at 1747.

<sup>172</sup> *Abrams*, 582 F. Supp. at 1159.

<sup>173</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

<sup>174</sup> See *Bulman-Pozen*, *supra* note 68, at 1747.

This litigation would be justiciable only in extreme cases,<sup>175</sup> where non-enforcement exceeds the realm of prioritization compelled by resource scarcity and the bounds of prosecutorial discretion.<sup>176</sup> Further, the requirement of exclusive or extensive federal jurisdiction would limit abdication standing to only cases of general nonenforcement where the states lack political recourse and the ability to pass their own mitigating regulations. The narrow slice of cases in which the states could successfully invoke the abdication injury would therefore be litigation that raises some of the most pressing questions surrounding administrative federalism: the role of the states as “servants” to the federal government in the operation of cooperative federal programs, the diminished voice of the states in the federal policymaking process as power transfers from Congress to the unilateral executive, the distinction between policy determinations and federal abandonment of state interests, and the increasingly murky line between cooperation and coercion.

#### IV. CONCLUSION

Abdication standing does not offer a complete solution to the dilemma state attorneys general will face should special solicitude be eroded through doctrinal revisions by the Supreme Court or continued narrowing in the lower courts. Though it would preserve judicial review in one category of critical lawsuits concerning the federalism implications of separation of powers conflicts, it would exclude a broad array of litigation. Of particular concern, abdication standing would not reach challenges asserting that the executive branch has exceeded its delegated authority by carrying out its statutory duties too zealously, at the states’ expense, or not zealously enough, such that states’ interests remain ignored despite facial federal action. Some of these cases might rightly be construed as political questions that special solicitude improperly puts before the federal courts, but others highlight concerns about unilateral executive and administrative power that have merit independent of the specific policy determinations involved. Claims of this ilk are likely unreviewable in the absence of a state plaintiff empowered by special solicitude, diminishing the safeguards available to states in the administrative federal regime. But abdication standing could comprise one small part of a multifaceted solution to the standing problem that looks to the justiciable nature of the claims at issue, rather than the identity of states *qua* states, to defend the reviewability of state challenges to federal policy.

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<sup>175</sup> See Sunstein & Vermeule, *supra* note 139, at 162.

<sup>176</sup> See *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (per curiam).