
*Article III — Standing — Special Solitude Doctrine —
Affordable Care Act — California v. Texas*

In the 2007 case *Massachusetts v. EPA*,¹ the Supreme Court determined, in a 5–4 vote, that Massachusetts had standing to challenge the EPA’s failure to regulate greenhouse gases.² Integral to at least one Justice’s vote was the idea that states should receive “special solicitude,” special or favorable treatment, when trying to prove standing.³ The doctrine of special solicitude has been murky and divisive from the outset, and in the following years many courts have declined to invoke it.⁴ Nonetheless, it has never been formally overruled. Last Term, in *California v. Texas*,⁵ the Supreme Court held that the plaintiffs — including twenty states — lacked standing to challenge the Patient Protection and Affordable Care Act⁶ (ACA), popularly known as “Obamacare.”⁷ Yet, neither the majority, the dissent, the lower courts, nor the parties themselves seemed to believe that the doctrine of special solicitude was controlling, or even relevant, precedent — adding to already existing evidence that the doctrine may, functionally, no longer be good law. The result is a precarious doctrine that raises some of the same practical concerns as the Court’s recent trend of “stealth overruling” precedent.

In 2010, Congress passed the 906-page ACA along intensely partisan lines.⁸ Two of the most controversial and oft-litigated provisions⁹ have been the so-called “individual mandate” — which requires most Americans to obtain health insurance¹⁰ — and the “shared responsibility provision” (SRP) — which operates as an exaction on individuals required to comply with the individual mandate who fail to obtain health insurance.¹¹ Most famously, in *National Federation of Independent Businesses v. Sebelius*¹² (*NFIB*), these provisions were

¹ 549 U.S. 497 (2007).

² *Id.* at 501, 526.

³ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 67–68, 70.

⁴ See Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1301, 1308 nn.77–78 (2019).

⁵ 141 S. Ct. 2104 (2021).

⁶ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29, and 42 U.S.C.).

⁷ See *California v. Texas*, 141 S. Ct. at 2112.

⁸ See *id.* at 2124 (Alito, J., dissenting); Martha Minow, *The Supreme Court, 2011 Term — Comment: Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 120 (2012).

⁹ See Minow, *supra* note 8, at 120.

¹⁰ Affordable Care Act § 1501, 124 Stat. at 244 (codified at 26 U.S.C. § 5000A(a)).

¹¹ *Id.* (codified at 26 U.S.C. § 5000A(b)).

¹² 567 U.S. 519 (2012).

challenged on the grounds that the Act constituted constitutionally impermissible overreach.¹³ The case resulted in a highly fractured and hotly debated opinion¹⁴ authored by Chief Justice Roberts and upholding the provisions. Chief Justice Roberts ruled that the individual mandate was not authorized by the Commerce Clause.¹⁵ But the individual mandate was constitutional under the taxing power, and the SRP operated as an exaction pursuant to that power.¹⁶

In the aftermath of *NFIB*, challenges to the ACA continued both in courtrooms¹⁷ and in Congress.¹⁸ After several failed attempts to repeal the ACA,¹⁹ the Tax Cuts and Jobs Act of 2017²⁰ (TCJA) became law through Congress's budget reconciliation process — an expedited vote limited to matters directly related to the federal budget.²¹ Relevantly, the TCJA zeroed out the SRP, calling into question the ACA's constitutionality under Congress's taxing power.²² In February 2018, twenty states, later joined by two individuals, sued the United States as well as relevant federal agencies and officials in the Northern District of Texas.²³ They sought both declaratory and injunctive relief.²⁴ Fearing that the Trump Administration, which came into power in part on campaign promises to repeal the ACA,²⁵ would not sufficiently defend the

¹³ *Id.* at 540.

¹⁴ See Minow, *supra* note 8, at 132; Ariane de Vogue, *4 Things We Learned About John Roberts*, CNN (June 25, 2015, 2:52 PM), <https://www.cnn.com/2015/06/25/politics/supreme-court-john-roberts-obamacare-takeaways/index.html> [<https://perma.cc/HY3F-RNNN>].

¹⁵ *NFIB*, 567 U.S. at 558 (opinion of Roberts, C.J.).

¹⁶ *Id.* at 562–63; *id.* at 574 (majority opinion). Chief Justice Roberts based his holding on the canon of constitutional avoidance. See *id.* at 562–63 (opinion of Roberts, C.J.).

¹⁷ See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam); *King v. Burwell*, 576 U.S. 473, 484 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014); see also Abbe R. Gluck et al., *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1472–73 (2020).

¹⁸ See John E. McDonough, *The Tortured Saga of America's Least-loved Policy Idea*, POLITICO (May 24, 2021, 2:22 PM), <https://www.politico.com/news/magazine/2021/05/22/health-care-individual-mandate-policy-conservative-idea-history-489956> [<https://perma.cc/YA6P-FE9G>]; Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 67–68 (2015).

¹⁹ See McDonough, *supra* note 18.

²⁰ Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.).

²¹ See McDonough, *supra* note 18.

²² See *id.*; § 11081, 131 Stat. at 2092 (codified at 26 U.S.C. § 5000A(c)).

²³ Complaint for Declaratory and Injunctive Relief at 1, 5, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 18-cv-00167).

²⁴ *Id.* at 5.

²⁵ See Jenna Johnson, *Trump's Grand Promises to "Very, Very Quickly" Repeal Obamacare Run into Reality*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/politics/trumps-grand-promises-to-very-very-quickly-repeal-obamacare-run-into-reality/2017/07/18/91b5f220-6bd3-11e7-9c15-177740635e83_story.html [<https://perma.cc/GP3D-G99S>].

statute, sixteen states and the District of Columbia intervened.²⁶ On December 14, 2018, the district court issued a lengthy opinion deciding three key issues: (1) whether the plaintiffs had standing,²⁷ (2) whether the individual mandate remained constitutional after the TCJA, and (3) if the individual mandate was not constitutional, whether it could be severed from the rest of the ACA.²⁸

The district court ruled that the individual plaintiffs sufficiently met the test for constitutional standing. They had suffered an “injury in fact” that was “fairly traceable” to the defendant’s challenged conduct and was “likely to be redressed by a favorable decision.”²⁹ Specifically, the court cited *Lujan v. Defenders of Wildlife*³⁰ to support the contention that the individual plaintiffs gained standing by being the “object of the action . . . at issue”³¹: they were obligated by the individual mandate to obtain health insurance against their will and in a way that required an increased compliance burden.³² On the merits, the district court ruled that the individual mandate was unconstitutional³³ and inseverable.³⁴

A Fifth Circuit panel, in an opinion written by Judge Elrod,³⁵ affirmed in part and vacated in part the district court’s judgment.³⁶ First, the panel held that the defendants had standing to bring the appeal.³⁷ Second, it agreed that the individual plaintiffs had standing, but went further, finding that the state plaintiffs also had standing based on the

²⁶ See Motion to Intervene and Memorandum in Support Thereof at 1, *Texas*, 340 F. Supp. 3d 579 (No. 18-cv-00167). The sixteen states that intervened are California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington.

²⁷ The district court ruled that any arguments related to “prudential standing” had been forfeited and were, therefore, not at issue. *Texas*, 340 F. Supp. 3d at 595 n.7.

²⁸ See *id.* at 593. Standing was not originally raised by either the federal defendants or the intervenor defendants but was raised by amici and then addressed by the intervenor defendants at oral argument. See *id.* at 593–94. The district court held that because standing is a matter of subject matter jurisdiction, it could not be waived or forfeited. See *id.* at 594.

²⁹ *Id.* at 592, 595 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The district court did not address whether the state plaintiffs had standing. *Id.*

³⁰ 504 U.S. 555 (1992).

³¹ *Texas*, 340 F. Supp. 3d at 594.

³² See *id.* at 594–95.

³³ *Id.* at 596. The district court ruled that, under the Supreme Court’s reasoning in *NFIB*, the individual mandate could not be constitutional because (1) it no longer constituted a valid exercise of Congress’s taxing power after the SRP was zeroed out, *id.* at 601, and (2) it was still not a valid exercise of power under the Commerce Clause, *id.* at 605.

³⁴ *Id.* at 605. The district court held that Congress intended the individual mandate to be inseverable based on the text of the ACA, as well as the Supreme Court’s findings on congressional intent in prior cases involving the individual mandate. See *id.* at 605–19.

³⁵ Judge Elrod was joined by Judge Engelhardt.

³⁶ See *Texas v. United States*, 945 F.3d 355, 403 (5th Cir. 2019).

³⁷ See *id.* at 374–77.

increased financial costs stemming from greater regulatory burdens associated with complying with the individual mandate.³⁸ Third, it agreed with the district court's finding as to the unconstitutionality of the individual mandate.³⁹ Fourth, and finally, it held that the district court's parsing of the ACA for the severability analysis was lacking and remanded the case for further engagement on the severability question.⁴⁰

Judge King dissented on the last three points. She would have held that none of the plaintiffs had standing. As for the individual plaintiffs, their choice to obtain healthcare as opposed to paying zero dollars could not give rise to an injury traceable to the individual mandate.⁴¹ And as for the state plaintiffs, their increased regulatory burden was supported only by conclusory statements and insufficiently traceable to the *individual mandate* rather than other components of the ACA.⁴² Assuming standing for purposes of argument, Judge King disagreed with the majority on the constitutionality and severability issues.⁴³ The Fifth Circuit then denied a motion for rehearing en banc.⁴⁴

The Supreme Court reversed and remanded.⁴⁵ Writing for the Court, Justice Breyer⁴⁶ dispensed of the case on standing grounds and did not reach the constitutionality and severability issues.⁴⁷ First, he found the individual plaintiff's traceability arguments to be deficient.⁴⁸ Specifically, he noted that the individual mandate has no enforcement mechanism given the zeroed-out SRP.⁴⁹ Because the government could not legally effectuate the individual mandate, the individual plaintiffs could suffer no injury *traceable* to the individual mandate, regardless of whether the mandate is constitutional.⁵⁰ Additionally, Justice Breyer identified a redressability issue: none of the relief sought would remedy the supposed injury because a declaratory judgment on the issue would amount to no more than an advisory opinion and an injunction would be impossible without federal enforcement action to actually enjoin.⁵¹

³⁸ See *id.* at 378, 384. For both the individual and state plaintiffs, the court focused on the fact that there was no dispute or challenge as to the factual evidence presented by the plaintiffs in support of their claims of financial injury. See *id.* at 380, 385.

³⁹ See *id.* at 387.

⁴⁰ See *id.* at 393–403.

⁴¹ See *id.* at 407 (King, J., dissenting).

⁴² See *id.* at 411–12.

⁴³ See *id.* at 412–23.

⁴⁴ See *Texas v. United States*, 945 F.3d 182, 186 (5th Cir. 2020) (per curiam).

⁴⁵ See *California v. Texas*, 141 S. Ct. at 2120.

⁴⁶ Justice Breyer was joined by Chief Justice Roberts and Justices Thomas, Sotomayor, Kagan, Kavanaugh, and Barrett.

⁴⁷ See *California v. Texas*, 141 S. Ct. at 2113.

⁴⁸ See *id.* at 2114.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* at 2116.

Finally, Justice Breyer declined to consider the respondent's standing-through-inseverability argument that had been put forth last minute because it was not argued below, at the certiorari stage, in their opening brief, or in their reply.⁵²

As to the state plaintiffs, Justice Breyer doubled down on his position that they were unable to show an injury traceable to an unenforceable provision.⁵³ He concluded the states had failed to show the unenforceable mandate would lead to increased enrollment in state health programs, a necessary link for traceability.⁵⁴ Rather, he argued, the evidence of increased costs and administrative burdens showed only costs attributable to the individual mandate *before* Congress zeroed it out.⁵⁵ Finally, he dismissed the state plaintiffs' other claims as to financial injury, reasoning that they did not stem from the individual mandate.⁵⁶

Justice Thomas, in addition to joining the majority opinion, wrote a brief concurrence. Despite his skepticism of the Court's prior ACA cases, he agreed with the majority's point that the issue of standing through inseverability was not properly before the Court.⁵⁷

Justice Alito dissented.⁵⁸ He began by asserting that the case constituted the "third installment" of the Court's "epic Affordable Care Act trilogy," whereby the Court time after time "pulled off an improbable rescue" of the ACA.⁵⁹ Unlike the majority, he would have held that the state plaintiffs had standing.⁶⁰ He then proceeded to recount case after case⁶¹ wherein the Court was "selectively generous" when it came to state standing.⁶² To him, it was dubious that none of the plaintiffs had suffered traceable harm given the "many burdensome obligations" the ACA imposes on states.⁶³ Further, he argued the majority had "patent[ly] distort[ed]" the traceability prong in holding that traceability requires government conduct to be "'fairly traceable' to enforcement of

⁵² See *id.*; *id.* at 2122 (Thomas, J., concurring).

⁵³ See *id.* at 2116 (majority opinion).

⁵⁴ See *id.* at 2117.

⁵⁵ See *id.* at 2117–18. Furthermore, Justice Breyer found the state plaintiffs' citation to a 2017 Congressional Budget Report — finding that at least some people would continue to obtain health insurance based on the individual mandate regardless of the zeroed-out SRP — to be deficient in that it again failed to meet the traceability bar. See *id.* at 2118.

⁵⁶ See *id.* at 2118.

⁵⁷ See *id.* at 2120–23 (Thomas, J., concurring).

⁵⁸ Justice Alito was joined by Justice Gorsuch.

⁵⁹ *California v. Texas*, 141 S. Ct. at 2123 (Alito, J., dissenting).

⁶⁰ See *id.* at 2124.

⁶¹ Specifically, Justice Alito cited the Court's treatment of *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); and *Massachusetts v. EPA*, 549 U.S. 497, 521–26 (2007). *California v. Texas*, 141 S. Ct. at 2124 (Alito, J., dissenting).

⁶² *California v. Texas*, 141 S. Ct. at 2124 (Alito, J., dissenting).

⁶³ *Id.*

the ‘allegedly unlawful’ provision” at issue, rather than viewing traceability as requiring “injury fairly traceable to the defendant’s allegedly unlawful conduct.”⁶⁴ Under his formulation, all plaintiffs must do to obtain standing is to have an injury traceable to government conduct that they allege to be unlawful — potentially through a nexus between the allegedly unlawful conduct and the provision causing them injury.⁶⁵ A requirement that plaintiffs demonstrate the conduct was actually unlawful would convert the issue to a merits issue.⁶⁶ Under this theory, he would have ruled that the state plaintiffs had standing⁶⁷ and held that the individual mandate was unconstitutional⁶⁸ and inseverable.⁶⁹

On its face, *California v. Texas* seems rather narrow: neither individual nor state plaintiffs have Article III standing to challenge an unenforceable law that, by definition, does them no harm. But, noting the broader context, including recent trends in the Court’s jurisprudence, the implications for state standing may be more complex. On one hand, there is good reason for caution in reading any major doctrinal implications into such a politically charged case. On the other hand, it seems notable that one of the few exceptions to the recent trend of narrowed standing, *Massachusetts v. EPA*’s “special solicitude” doctrine, was not discussed. Instead, it was only cited in passing in a dissent. Furthermore, this arguably relevant precedent seems to have been ignored by all involved — the Court, lower courts, and the parties themselves. Considering this context, *California v. Texas* may constitute further evidence that “special solicitude” doctrine has been functionally overruled. What looks like a cabined opinion may have actually introduced more confusion into a doctrine already fraught with ambiguity.

At first blush, Article III standing seems doctrinally straightforward. “[A] plaintiff must show: (1) ‘an injury in fact’; (2) that this injury ‘is fairly traceable to the challenged conduct of the defendant’; and (3) that the injury ‘is likely to be redressed by a favorable judicial decision.’”⁷⁰ But the application of the doctrine is not so simple. As Professor Richard Fallon notes: “Recent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related sub-doctrines. Scarcely a Term goes by without the Supreme Court deciding

⁶⁴ *Id.* at 2130 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.* at 2135.

⁶⁸ Under his own dissenting view in *NFIB* and a critique of the Chief Justice’s view therein, Justice Alito reasoned that the individual mandate would be unconstitutional given the zeroed-out SRP provision. *See id.* at 2135–37.

⁶⁹ *See id.* at 2140.

⁷⁰ *Id.* at 2126 (majority opinion) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

one or more high-profile standing cases . . . [that] have done little to enhance clarity in this contentious corner of constitutional law.”⁷¹ Consider October Term 2020. In addition to *California v. Texas*, the Court decided five other standing cases: *Trump v. New York*,⁷² *Carney v. Adams*,⁷³ *Texas v. Pennsylvania*,⁷⁴ *Uzuegbunam v. Preczewski*,⁷⁵ and *TransUnion LLC v. Ramirez*.⁷⁶ Plaintiffs consistently lost, except in *Uzuegbunam*. And, while *Uzuegbunam* constituted a win, commentators have suggested that its impact may be limited to a narrow set of “purely constitutional cases based on federal question jurisdiction.”⁷⁷ Therefore, not only is standing doctrine lacking in clarity, but also modern standing doctrine⁷⁸ seems to have been generally narrowed.

An exception to this trend was the Court’s ruling in *Massachusetts v. EPA*. A high-water mark for state standing, the case introduced the doctrine of “special solicitude,”⁷⁹ whereby states “merit special treatment” in standing inquiries.⁸⁰ Yet, special solicitude has been plagued by ambiguity from the beginning.⁸¹ Despite the fact that the doctrine

⁷¹ Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061–62 (2015).

⁷² 141 S. Ct. 530, 536–37 (2020) (per curiam) (holding that plaintiffs challenging a presidential memorandum, which instructed the Secretary of Commerce to provide census data that excluded “from the apportionment base aliens who are not in a lawful immigration status,” did not have standing to sue, *id.* at 534).

⁷³ 141 S. Ct. 493, 496–97 (2020) (holding that a plaintiff challenging a state constitution’s political balancing requirements for judicial appointments did not have standing).

⁷⁴ 141 S. Ct. 1230, 1230 (2020) (holding that Texas did not have standing to challenge the election procedures of another state).

⁷⁵ 141 S. Ct. 792, 802 (2021) (holding that “for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right”). For a more in-depth analysis of this case, see *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 323, 323–32 (2021).

⁷⁶ 141 S. Ct. 2190, 2200 (2021) (holding that a majority of class members had not suffered a concrete and particularized harm and thereby lacked standing). For a more in-depth analysis of this case, see *The Supreme Court, 2020 Term — Leading Cases*, *supra* note 75, at 333–42.

⁷⁷ Diane Flannery et al., *Supreme Court Opens Door for Nominal Damages to Satisfy Article III Standing Requirement*, JD SUPRA (Mar. 16, 2021), <https://www.jdsupra.com/legalnews/supreme-court-opens-door-for-nominal-7534094> [<https://perma.cc/KZH9-HY49>].

⁷⁸ It has been argued that Article III standing doctrine is rather modern, though its history prior to the early 1900s is contested. Compare Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 690–92 (2004).

⁷⁹ Note, *supra* note 4, at 1304 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)).

⁸⁰ *Id.* at 1305. While *California v. Texas* involved both individual and state plaintiffs, the majority and the dissent disagreed as to the standing of state plaintiffs. Compare 141 S. Ct. at 2116–17, with *id.* at 2124 (Alito, J., dissenting).

⁸¹ See Freeman & Vermeule, *supra* note 3, at 67–68, 70. The ambiguity appears to be twofold: the opinion left unclear (1) the impact of “special solicitude” on the outcome of the case, as it seemed the majority found Massachusetts had sufficiently shown standing independent of any “special solicitude,” see *id.* at 70, and (2) whether the “special solicitude” was to be awarded to all state plaintiffs seeking to show standing or whether it was limited in application to specific kinds of cases, see Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?*:

has never been formally overruled, the lack of clarity has allowed lower courts to, at best, adopt varying approaches and, at worst, “move away” from relaxed state standing inquires.⁸²

The academic response to *Massachusetts v. EPA* has been similarly muddled. Some scholars have proposed that the case could be read broadly, as standing for the proposition that all states in all circumstances should face a lower bar when alleging financial injury.⁸³ Others have argued for a narrower reading, suggesting that “special solicitude” should apply only in certain types of cases, ranging from when states (1) sue the federal government in a way that implicates a “structure of federalism and the unique political accountability of state officials”;⁸⁴ (2) seek to defend sovereign or quasi-sovereign interests;⁸⁵ (3) seek to defend state law, but not when challenging how “the federal executive enforces federal law”;⁸⁶ or (4) sue “in a uniquely public capacity.”⁸⁷

Amidst this muddled doctrine, a broader reading of *Massachusetts v. EPA* remains quite plausible. One could, in good faith, read the case as lowering the bar for states establishing traceability.⁸⁸ Or, even more broadly, one could argue that *Massachusetts v. EPA* lowered the bar across all three prongs of the standing inquiry.⁸⁹ Moreover, despite the limitations read into the opinion or normatively advocated for by academics, on the opinion’s face, there is no explicit limitation on when states merit “special solicitude.” Nor is the theoretical justification for special solicitude clear enough to constitute an express or implied limitation on the doctrine.

However, despite *Massachusetts v. EPA*’s relevance to the case at hand, not one Justice mentioned “special solicitude” in *California v. Texas*. The fact that the Court did not even attempt to engage with the doctrine and the broader jurisprudential landscape of state standing — if only to distinguish it — begs the question: Is the doctrine of special solicitude still functionally good law?

In recent years, some have been critical of the Court’s trend of not formally overruling controlling precedent.⁹⁰ In some circumstances,

Massachusetts v. EPA’s *New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1746, 1755–56, 1786 (2008).

⁸² See Note, *supra* note 4, at 1301, 1308.

⁸³ See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1240, 1292–94 (2019).

⁸⁴ See *id.* at 1240.

⁸⁵ See, e.g., Mank, *supra* note 81, at 1775–77, 1786.

⁸⁶ See Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 854–55 (2016).

⁸⁷ See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 84 (2014).

⁸⁸ See *Massachusetts v. EPA*, 549 U.S. 497, 524, 526 (2007); *id.* at 540, 542–45, 547–48 (Roberts, C.J., dissenting).

⁸⁹ See *id.* at 536, 540–49 (Roberts, C.J., dissenting).

⁹⁰ See, e.g., Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 6–16 (2010) (coining the term “stealth overruling”); William D.

this trend has been described as “stealth overruling” — whereby the Court “issu[es] decisions that distinguish or ignore precedents that would be expected to control the outcome of a case without acknowledging that the decision functionally overrules the prior decisions.”⁹¹ Critics argue that this analytical move creates doctrinal confusion, encourages “[d]efiance and [d]efection,”⁹² and makes it “more difficult to challenge [the issues] head-on.”⁹³

Yet, what may be notable about the Court’s approach to special solicitude in *California v. Texas* is what distinguishes its approach from paradigmatic instances of stealth overruling.⁹⁴ Classic stealth overruling generally involves (1) concurrences or dissents that are “unusually irate precisely because their colleagues would not come clean” and (2) a Court that actually overrules precedent by “drawing distinctions that are unfaithful to the prior precedent’s rationale; or . . . reducing a precedent to essentially nothing.”⁹⁵ What is remarkable about *California v. Texas* is that no one — not the parties, not the lower courts, nor the majority or the dissent at the Supreme Court — seemed to believe that the Court’s special solicitude holding in *Massachusetts v. EPA* controlled, or was even germane enough to be worth distinguishing. Other than Justice Alito’s brief gestures at *Massachusetts v. EPA* in his dissent — without explicitly citing “special solicitude”⁹⁶ — none of the opinions invoked the doctrine and the Fifth Circuit expressly side-stepped the issue.⁹⁷ Even if an accurate reading of *Massachusetts v. EPA* is a narrower one, only applying in some subset of cases, that limitation on the doctrine is unclear. If special solicitude is still good law, one would have at least expected the state plaintiffs to raise it in their briefing or for the Court to either apply the doctrine or distinguish the case before it.⁹⁸ Yet neither the parties nor the Court did.

There are additional reasons to think that special solicitude no longer fits within the Court’s jurisprudence. At least twice, the Court has

Araiza, Essay, *Playing Well with Others — But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-member Court*, 46 GA. L. REV. 1059, 1063 (2012).

⁹¹ Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51 online app. A at 4 (2017).

⁹² Friedman, *supra* note 90, at 50; see also *id.* at 46–53.

⁹³ Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 209 (2011).

⁹⁴ Paradigmatic examples of stealth overruling include the Court’s jurisprudence following its decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), see Friedman, *supra* note 90, at 16–25; and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), cf. *The Supreme Court, 2016 Term — Leading Cases*, 131 HARV. L. REV. 223, 320 (2017).

⁹⁵ Friedman, *supra* note 90, at 15–16.

⁹⁶ See *California v. Texas*, 141 S. Ct. at 2124 (Alito, J., dissenting).

⁹⁷ See *Texas v. United States*, 945 F.3d. 355, 384 (5th Cir. 2019).

⁹⁸ Cf. Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 2–3 (2016).

“failed to clarify the doctrine,”⁹⁹ and it has “denied certiorari in two cases that would have presented an opportunity to revisit special solicitude.”¹⁰⁰ And when the Court actually “granted certiorari on the explicit question of state standing,” the Justices fractured “in a 4–4 split that highlighted a direct challenge to the ‘durability’ of special solicitude.”¹⁰¹

If special solicitude doctrine has been functionally overruled, many of the criticisms lodged against the practice of stealth overruling — the creation of doctrinal confusion, incentives for “[d]efiance and [d]efection,”¹⁰² and roadblocks to litigants being able to “challenge [the issue] head-on”¹⁰³ — similarly apply. Moreover, the fact that standing is nonwaivable under Article III exacerbates the obstacles for litigants and lower courts alike.¹⁰⁴ Even if the parties fail to raise the issue, amici could raise the issue, as was the case here.¹⁰⁵ Or, strictly speaking, courts are obligated to raise and consider the issue *in every case*.¹⁰⁶ If the Supreme Court has functionally, but not expressly, overruled the special solicitude doctrine, lower courts are left in quite a bind. The Court has made clear that lower courts should not rule based on how they predict the Court would rule but should rather base their decisionmaking on formalist doctrine.¹⁰⁷ Yet, if special solicitude is functionally overruled but relied upon by lower courts, they could be introducing a fundamental error into cases involving state standing.

Viewed in the context of wider standing doctrine, *California v. Texas* therefore seems to deepen doctrinal uncertainties. In a world where the Court has functionally overruled special solicitude, lower courts must choose between a rock — impermissibly deciding cases based on the assumption that the Court has implicitly overruled the doctrine — and a hard place — relying on a doctrine that may have been overruled and potentially introducing a defect into cases involving state plaintiffs relying on special solicitude. And yet, despite this dilemma, it seems likely this ambiguity is not one the Court has an appetite for clarifying.

⁹⁹ *Id.* at 1307–08 (citing *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011)).

¹⁰⁰ *Id.* at 1308 (citing *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir.) (per curiam), *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)).

¹⁰¹ *Id.* (discussing *Texas*, 136 S. Ct. 2271).

¹⁰² Friedman, *supra* note 90, at 46; *see id.* at 46–53.

¹⁰³ Moses, *supra* note 93, at 209.

¹⁰⁴ *See Bauer v. Marmara*, 774 F.3d 1026, 1029 (D.C. Cir. 2014).

¹⁰⁵ *See Texas v. United States*, 945 F.3d 355, 379 n.22 (5th Cir. 2019).

¹⁰⁶ *See Bauer*, 774 F.3d at 1029.

¹⁰⁷ *See, e.g., Agostini v. Felton*, 521 U.S. 203, 217 (1997).