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## READING THE STANDING TEA LEAVES IN *AMERICAN ELECTRIC POWER CO. V. CONNECTICUT*

Bradford C. Mank \*

*The U.S. Supreme Court by an equally divided vote of four to four affirmed the Second Circuit's decision finding standing and jurisdiction in the case in American Electric Power Co. v. Connecticut. While not binding as precedent beyond the Second Circuit, the case offers clues to how the Court is likely to rule in future standing cases. This article discusses the likely identities of the four Justices on each side of the standing issue in the case, as well as how Justice Sotomayor might have voted if she had not recused herself. Furthermore, the article examines how the decision expanded on the standing analysis in Massachusetts v. EPA, which recognized special standing rights for states suing as parens patrie to protect their state's natural resources or the health of their citizens. State suits are likely to be an important vehicle for litigating climate change cases and the decision in American Electric casts light on how the Court will handle these types of cases in the future.*

### I. INTRODUCTION

In *American Electric Power Co. v. Connecticut* (“AEP”),<sup>1</sup> eight Justices of the U.S. Supreme Court unanimously concluded that the U.S. Environmental Protection Agency’s (the “EPA”) authority to regulate greenhouse gases (“GHGs”) pursuant to the Clean

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I thank Michael Solimine for his comments. This article will be presented at the University of Cincinnati College of Law Summer Scholarship Program and the Second Annual Vermont Law School Environmental Scholarship Symposium. All errors or omissions are my responsibility. This article is one of a series of explorations of possible extensions of modern standing doctrines.

1. 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011).

Air Act,<sup>2</sup> which the Court recognized in its 2007 decision in *Massachusetts v. EPA*,<sup>3</sup> “displace[s] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”<sup>4</sup> Thus, the *AEP* decision endorsed the *Massachusetts* decision’s interpretation of the Clean Air Act to include regulation of GHGs, stating that it “speaks directly to emissions of carbon dioxide from the defendants’ plants.”<sup>5</sup> Justice Sonia Sotomayor recused herself from hearing the *AEP* case because she sat on the three-judge panel of the U.S. Court of Appeals for the Second Circuit that heard the case below, although she was appointed to the Supreme Court before the Second Circuit actually decided the case.<sup>6</sup> Her absence was crucial to the Supreme Court’s decision regarding standing and jurisdiction in the case. The Court, by an equally divided vote of four to four, affirmed the Second Circuit’s decision finding standing and jurisdiction in the case.<sup>7</sup>

In virtually all cases involving a tie vote, the Supreme Court simply announces: “The judgment is affirmed by an equally divided Court.”<sup>8</sup> Even though it did not announce the identities of the Justices who voted for or against standing, the *AEP* decision took the unusual step of providing some explanation for how the Court divided on the standing question, and, as a result, provided im-

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2. 42 U.S.C. §§ 7401–7671q (2006). EPA has commenced a rulemaking under § 111 of the Act, 42 U.S.C. § 741, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, the EPA has committed to issuing a proposed rule by July 2011, and a final rule by May 2012. *Am. Electric Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2533.

3. 549 U.S. 497, 528–29 (2007).

4. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2537–40.

5. *Id.* at \_\_\_, 131 S. Ct. at 2537. Justice Alito, joined by Justice Thomas, wrote a concurring opinion observing that none of the parties had questioned that “the interpretation of the Clean Air Act . . . adopted by the majority in *Massachusetts* . . . is correct.” *Id.* at \_\_\_, 131 S. Ct. 2540–41 (Alito, J., concurring in part and concurring in the judgment).

6. *Id.* at \_\_\_, 131 S. Ct. at 2540 (stating that Justice Sotomayor did not participate in the consideration or decision of the case); Petition for a Writ of Certiorari at 8 n.1, *Am. Electric Power Co. v. Connecticut*, 564 U.S. \_\_\_ (2011) (No. 10–174) [hereinafter *Cert Petition*] (“The original panel [on the Second Circuit] included then-Judge Sotomayor, who was appointed to the Supreme Court on August 8, 2009, before the panel opinion issued.”).

7. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2535 & n.6.

8. *E.g.*, *Flores-Villar v. United States*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2312, 2313 (2011) (per curiam); Brendan Koerner, *What Happens in a Supreme Court Tie?*, SLATE (Nov. 2, 2004, 4:46 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2004/11/what\\_happens\\_in\\_ascotus\\_tie.html](http://www.slate.com/articles/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html) (“Tradition holds that the court’s per curiam opinion in such ties is usually very, very terse, often consisting of no more than a single sentence: ‘The judgment is affirmed by an equally divided court.’”).

portant information about the positions of the Justices on the issue.<sup>9</sup> While it is not binding as a decision for the lower courts except for the Second Circuit,<sup>10</sup> the four to four affirmance of the Second Circuit's standing decision provides important clues on how the Court is likely to rule in future standing cases. This article will discuss the likely identity of the Justices on each side of the standing issue in *AEP*. Furthermore, the article will speculate regarding how Justice Sotomayor might have voted in the case if she had not recused herself.

Implicitly, the *AEP* decision reaffirmed and even expanded its standing analysis in *Massachusetts*, which recognized that states have special standing rights when they sue as *parens patriae* to protect their state's natural resources or the health of their citizens.<sup>11</sup> *AEP* arguably adopted an even broader standing analysis than *Massachusetts* by eliminating the requirement of a statutory procedural right as a basis for standing.<sup>12</sup> State standing is important because state attorney generals are involved in many different kinds of suits in federal courts.<sup>13</sup> In particular, state suits are likely to be significant in future climate change cases if states file state common law nuisance claims or challenges to EPA regulations relating to GHGs.<sup>14</sup>

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9. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2535.

10. Michael B. Gerrard, 'American Electric Power' Leaves Open Many Questions for Climate Litigation, N.Y. L.J., July 14, 2011, available at [http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP\\_NewYorkLawJournal\\_Gerrard\\_7.14.11.pdf](http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NewYorkLawJournal_Gerrard_7.14.11.pdf) (stating that the standing portion of the *AEP* case "did not set precedent in the technical sense"); Lyle Denniston, *Opinion Analysis: Warming an EPA Worry, at First*, SCOTUSBLOG (June 20, 2011, 1:31 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-warming-an-epa-worry-at-first> ("Because the [*AEP*] Court split 4-4 on the right to sue issue, that part of the Second Circuit decision was left intact, but without setting a nationwide precedent.").

11. See *infra* Parts III, VI.D., and VII.

12. See *infra* Parts III, VI.D., and VII.

13. Bradford C. Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 40 WM. & MARY L. REV. 1701, 1780-84 (2008) [hereinafter Mank, *States Standing*] (discussing role of state attorneys general in possible *parens patriae* cases).

14. See *infra* Parts VI.D and VII.

## II. STANDING BASICS<sup>15</sup>

### A. Constitutional Standing

Although the Constitution does not explicitly require a plaintiff possess “standing” to file suit in federal courts, since 1944 the Supreme Court has inferred from the Constitution’s Article III limitation of judicial decisions to “Cases” and “Controversies” that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case.<sup>16</sup> The federal courts have jurisdiction over a case only if at least one

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15. The discussion of standing in Part I relies upon my earlier standing articles: Bradford C. Mank, *Informational Standing After Summers*, 39 B.C. ENVTL. AFF. L. REV. (forthcoming 2011) (on file with author) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1825307](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825307) [hereinafter Mank, *Informational Standing After Summers*]; Bradford C. Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute’s Misuse of Lyons’s “Realistic Threat” of Harm Standing Test*, 42 ARIZ. ST. L.J. 837, 837–44 (2010); Mank, *States Standing*, *supra* note 13; Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 4–5 (2009) [hereinafter Mank, *Standing and Future Generations*]; Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005) [hereinafter Mank, *Global Warming*]; Bradford C. Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 672–73 (2009) [hereinafter Mank, *Standing and Statistical Persons*]; Bradford C. Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing When Environmental Harm is Difficult to Prove*, 115 PENN. ST. L. REV. 307, 307–15 (2010); Bradford C. Mank, *Summers v. Earth Island Institute: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10958, 10958–59 (2010); Bradford C. Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, but a “Realistic Threat” of Harm Is a Better Standing Test*, 40 ENVTL. L. 89, 91–97 (2010).

16. U.S. CONST. art. III, § 2. It states in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–42 (2006) (explaining why the Supreme Court infers that Article III’s case and controversy requirement necessitates standing limitations); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating explicitly the Article III standing requirement in a Supreme Court case for the first time); Mank, *States Standing*, *supra* note 13, at 1709–10. *But see* *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652 (7th Cir. 2011) (questioning whether standing is based on Article III requirements and citing academic literature). See generally Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing the debate as to whether the Constitution implicitly requires standing to sue).

plaintiff can prove standing for each form of relief sought.<sup>17</sup> A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.<sup>18</sup>

Standing requirements are related to broader constitutional principles. Standing doctrine prohibits unconstitutional advisory opinions.<sup>19</sup> Furthermore, standing requirements support separation of powers principles defining the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>20</sup> There is disagreement, however, regarding to what extent separation of powers principles limit the authority of Congress to authorize standing for private citizens challenging alleged executive branch under-enforcement or non-enforcement of statutorily mandated requirements.<sup>21</sup>

For constitutional standing, the Court has used a three-part standing test that requires a plaintiff to show that: (1) she has “suffered an injury-in-fact,” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely specu-

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17. *DaimlerChrysler*, 547 U.S. at 351–54; *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”).

18. See *DaimlerChrysler*, 547 U.S. at 339–43; *Friends of the Earth*, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”).

19. See *DaimlerChrysler*, 547 U.S. at 340–42; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23–24 (1998).

20. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

21. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (arguing courts should not use standing doctrine as “a backdoor way to limit Congress’s legislative power”). Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding Article III and Article II of the Constitution limit Congress’s authority to authorize citizen suits by any person lacking a concrete injury), with *id.* at 602 (Blackmun, J., dissenting) (arguing that the “principal effect” of Justice Scalia’s majority opinion’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates”).

lative, that the injury will be redressed by a favorable decision.”<sup>22</sup> A plaintiff has the burden of establishing all three prongs of the standing test.<sup>23</sup>

### B. Prudential Standing and Generalized Grievances

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements to limit unreasonable demands on limited judicial resources or for other judicial policy reasons.<sup>24</sup> Congress may enact legislation to override prudential limitations, but must “expressly negate[]” such limitations.<sup>25</sup> Requiring express statutory language to override the Court’s prudential standing rules probably does not demand the extraordinary specificity necessitated by a clear statement rule of statutory construction.<sup>26</sup>

The Supreme Court has been unclear regarding whether its restriction on suits alleging “generalized grievances,”<sup>27</sup> a term which courts sometimes use to refer to suits involving large segments of the public or to suits where a citizen who has suffered no personal injury seeks to force the government to obey a duly enacted law, is a prudential limitation or a constitutional one.<sup>28</sup> In *Duke Power*

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22. *Lujan*, 504 U.S. at 560–61 (citations omitted) (internal quotation marks omitted).

23. *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (stating also that parties asserting federal jurisdiction must carry the burden of establishing standing under Article III); LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009).

24. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (describing the “zone of interests” standard as a “prudential limitation” rather than a mandatory constitutional requirement); *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based “in policy, rather than purely constitutional, considerations”); YACKLE, *supra* note 23, at 318 (stating that prudential limitations are policy-based “and may be relaxed in some circumstances”).

25. *Bennett*, 520 U.S. at 162–66 (explaining that “unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress,” that prudential limitations must be “expressly negated,” and concluding that a citizen suit provision abrogated the zone of interest limitation).

26. YACKLE, *supra* note 23, at 386 & n.493.

27. Courts have failed to precisely define what constitutes a “generalized grievance.” *Id.* at 342 (“The generalized grievance formulation is notoriously ambiguous.”); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1884–92 (1996) (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”).

28. See YACKLE, *supra* note 23, at 342–44 (discussing debate in the Supreme Court regarding whether rule against generalized grievances is a constitutional rule or a non-

*Co. v. Carolina Environmental Study Group, Inc.*,<sup>29</sup> for example, the Supreme Court held that a court could deny standing in a suit involving generalized harms to large numbers of the public because such a suit would raise “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society.’”<sup>30</sup> Subsequently, however, in *Public Citizen v. United States Department of Justice*,<sup>31</sup> the Court rejected the argument that the plaintiffs were barred from standing because they alleged a generalized grievance shared by many other citizens. The Court stated:

The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under [the Federal Advisory Committee Act] does not lessen appellants’ asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.<sup>32</sup>

The *Public Citizen* decision did not mention *Duke Power’s* rejection of suits asserting a generalized grievance shared by many others.<sup>33</sup> Because the Court has never precisely defined the term “generalized grievance,” nor decided whether the bar against them is either a flexible judicial prudential doctrine or a firmer constitutional rule, it is difficult to decide whether the *Public Citizen* and *Duke Power* decisions are merely in tension with each other or actually inappropriate.<sup>34</sup>

In *Federal Election Commission v. Akins*,<sup>35</sup> the government argued that the plaintiffs, who sought information from the Federal Election Commission because the information allegedly could assist their voting decisions, did not have standing because they had suffered only a generalized grievance common to all other

constitutional policy waivable by Congress); Mank, *States Standing*, *supra* note 13, at 1710–15 (discussing confusion over whether the Court’s standing cases prohibiting generalized grievances are constitutional or prudential limitations); Solimine, *supra* note 16, at 1027 & n.14 (same); Guilds, *supra* note 27, at 1875–84 (same).

29. 438 U.S. 59 (1978).

30. *Id.* at 80 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

31. 491 U.S. 440 (1989).

32. *Id.* at 449–50.

33. *See id.* at 440–89.

34. *See* YACKLE, *supra* note 23, at 342 (“The generalized grievance formulation is notoriously ambiguous.”); Solimine, *supra* note 16, at 1027 (“The Court . . . has not been clear . . . whether the barrier to bringing such cases is a constitutional or prudential one.”).

35. 524 U.S. 11 (1998).



voters.<sup>36</sup> The Court rejected the government's arguments that the informational injury to the plaintiffs was too abstract or generalized to constitute a concrete injury or that it violated judicially imposed prudential norms because the statute specifically authorized the right of voters to request information from the Commission and, therefore, overrode any prudential standing limitations against generalized grievances.<sup>37</sup> The Court distinguished prior cases that had enforced judicially imposed prudential norms against generalized grievances by reasoning that it would deny standing for generalized injuries only if the harm is both widely shared and also of "an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'"<sup>38</sup> *Akins* stated that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.<sup>39</sup> The Court declared that the fact that "an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, *where sufficiently concrete*, may count as an 'injury in fact.'"<sup>40</sup> Accordingly, the *Akins* decision recognized that a plaintiff who suffers a concrete actual injury may sue even though many others have suffered similar injuries:

Thus the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. . . . This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law.<sup>41</sup>

*Akins'* broad acceptance of suits involving widespread injuries has not been accepted by all members of the Court. In his dissenting opinion in *Akins*, Justice Scalia, joined by Justices O'Connor and Thomas, argued that Article III prohibits all generalized grievances, even ones involving concrete injuries, because plain-

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36. *Id.* at 19.

37. *Id.* at 13–21; Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 678 (2007).

38. Solimine, *supra* note 16, at 14. The *Akins* decision implied that the rule against generalized grievances is prudential and not constitutional in nature, but did not explicitly decide the issue. See *id.* at 24–25; accord Mank, *Standing and Statistical Persons*, *supra* note 15, at 717 (discussing *Akins* as treating generalized grievances as prudential rule).

39. *Akins*, 524 U.S. at 24–25.

40. *Id.* at 24 (emphasis added).

41. *Id.*; accord Mank, *Standing and Statistical Persons*, *supra* note 15, at 717.

tiffs must demonstrate a “particularized” injury that “affect[s] the plaintiff in a personal and individual way.”<sup>42</sup> He contended that the *Akins* plaintiffs’ alleged informational injury was an “undifferentiated” generalized grievance that was “common to all members of the public,” and, therefore, that they must resolve it “by political, rather than judicial, means.”<sup>43</sup> More broadly, Justice Scalia dissented in *Akins* because he argued that generalized injuries to a large portion of the public are inherently unsuitable for judicial resolution and must be addressed by the political branches of government and especially the executive branch under the President’s Article II authority.<sup>44</sup> Similarly, as is discussed in Part II, Chief Justice Roberts’s dissenting opinion in *Massachusetts*, which was joined by Justices Scalia, Thomas, and Alito, argued that suits alleging that the EPA had failed to regulate carbon dioxide and other GHGs were generalized grievances because climate change affects everyone in the world, and, therefore, such issues should be addressed by the political branches rather than the federal judiciary.<sup>45</sup> Furthermore, as is discussed in Part IV.B, the acting U.S. Solicitor General in his brief for *AEP* argued that the Court should utilize a prudential barrier against generalized grievances to limit standing in climate change cases.<sup>46</sup>

### III. *MASSACHUSETTS V. EPA: PARENS PATRIAE* STATE STANDING<sup>47</sup>

In *Massachusetts*, the Supreme Court for the first time concluded that states have greater standing rights in some circumstances than other litigants pursuant to the *parens patriae* doctrine.<sup>48</sup> Chief Justice Roberts’ dissenting opinion disagreed with the majority’s use of the *parens patriae* doctrine to expand the standing rights of states.<sup>49</sup> Additionally, Chief Justice Roberts’s

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42. *Akins*, 524 U.S. at 35 (Scalia, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 n.1 (1992)).

43. *Id.* (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)) (internal quotation marks omitted); accord Mank, *Global Warming supra* note 15, at 39.

44. *Akins*, 524 U.S. at 31–37; see also Brown, *supra* note 37, at 702–03.

45. See *infra* Part III.B.

46. See *infra* Part V.B.

47. The discussion of *Massachusetts v. EPA* and *parens patriae* state standing in Part III is based on my earlier articles, Mank, *States Standing, supra* note 13, and Mank, *Standing and Future Generations, supra* note 15.

48. *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007); Mank, *Standing and Future Generations, supra* note 15, at 68.

49. *Massachusetts*, 549 U.S. at 536–37 (Roberts, C.J., dissenting).

broader argument was that separation of powers principles prohibit courts from recognizing standing for social problems that affect all citizens because it is the role of the political branches to address generalized grievances.<sup>50</sup>

### A. *Justice Stevens's Majority Opinion on Standing*

#### 1. Congress May Broadly Define What Constitutes an Injury

Because global warming affects everyone in the world, Chief Justice Roberts's dissenting opinion argued that generalized injuries resulting from climate change are too nonspecific to justify individual standing rights and are better addressed through the political process.<sup>51</sup> Justice Stevens, in his *Massachusetts* majority opinion, however, responded that Congress has the authority to authorize climate change challenges if it carefully defines such suits as constituting a concrete injury in an appropriate statute.<sup>52</sup> He quoted Justice Kennedy's concurring opinion in *Lujan v. Defenders of Wildlife* for the principle that

"Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . [Provided that Congress] identifi[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit."<sup>53</sup>

#### 2. The Special Standing Rights of States

The *Massachusetts* decision used the *parens patriae* doctrine as a justification for giving greater standing rights to states than other litigants.<sup>54</sup> The *parens patriae* doctrine developed as an English common law doctrine regarding the authority of the English King to protect incompetent persons including minors, the

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50. *Id.* at 535 ("This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992))).

51. *Id.* at 535, 548–49.

52. *Id.* at 516 (majority opinion) ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. . . . That authorization is of critical importance to the standing inquiry . . .").

53. *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

54. *Id.* at 518–20.

mentally ill, and mentally limited persons.<sup>55</sup> Since the early twentieth century, federal courts have recognized that states may sue as *parens patriae* to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens.<sup>56</sup> In its 1901 decision in *Missouri v. Illinois*, the Supreme Court held that Missouri could request injunctive relief to enjoin Illinois from discharging sewage that polluted the Mississippi River in Missouri.<sup>57</sup> The *Missouri* decision declared that a state could sue to protect the health of its citizens, stating:

It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.<sup>58</sup>

The *Missouri* decision “relied upon an analogy to independent countries in order to delineate those interests that a State could pursue in federal court as *parens patriae*, apart from its sovereign and proprietary interests.”<sup>59</sup> The Court stated:

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.<sup>60</sup>

Relying upon the *parens patriae* doctrine, Justice Stevens in his *Massachusetts* decision stated that “the special position and interest of Massachusetts” was important in determining stand-

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55. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 n.4 (1st Cir. 2000); see also Mank, *States Standing, supra* note 13, at 1756–57.

56. *Massachusetts*, 549 U.S. at 518–19; *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); Mank, *States Standing, supra* note 13, at 1757–59.

57. 180 U.S. 208, 248–49 (1901). In a subsequent case, the Court denied Missouri’s request for an injunction without prejudice because it was unclear whether the typhoid bacillus in the sewage survived the journey from Illinois to Missouri and there was evidence of possible infection in other sewage sources, including towns in Missouri, but the Court left it open to Missouri to submit additional evidence addressing whether Illinois was the source of the alleged disease. *Missouri v. Illinois*, 200 U.S. 496, 523–26 (1906).

58. *Missouri*, 180 U.S. at 241.

59. *Snapp*, 458 U.S. at 603.

60. *Missouri*, 180 U.S. at 241.

ing.<sup>61</sup> He declared that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”<sup>62</sup> Citing Justice Holmes’s 1907 *Georgia v. Tennessee Copper* opinion, which authorized Georgia to sue on behalf of its citizens to protect them from air pollution from outside its borders because of the state’s quasi-sovereign interest in the state’s natural resources and the health of its citizens, the *Massachusetts* decision observed that the Court had long ago “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>63</sup> In *Tennessee Copper*, the Court followed the *Missouri* decision’s approach of justifying state *parens patriae* suits for quasi-sovereign interests as a substitute for the sovereign interests states surrender when they join the United States.<sup>64</sup> Additionally, *Tennessee Copper* expanded the use of *parens patriae* suits from protecting not only the health of a states’ citizens but also to safeguarding their land, air, and natural resources.<sup>65</sup> The *Tennessee Copper* decision stated:

This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. . . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.<sup>66</sup>

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61. *Massachusetts*, 549 U.S. at 518.

62. *Id.*

63. *Id.* at 518–19 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

64. *Tenn. Copper Co.*, 206 U.S. at 237 (citing *Missouri*, 180 U.S. at 241).

65. See *id.*; Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1867 (2000) (“In . . . *Tennessee Copper*, a state’s quasi-sovereign interest was extended beyond the general concepts of the health and comfort of its citizens to specifically include interests in the land on which they reside and in the air that they breathe.” (citing *Tennessee Copper*, 206 U.S. at 237)); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENVTL. L. & POLY F. 57, 107–08 (2005) (“The Supreme Court, observing that the state owned very little of the property alleged to be damaged, recast the state’s claim as a suit for injury to resources owned by Georgia in its capacity of ‘quasi-sovereign.’” (quoting *Tenn. Copper Co.*, 206 U.S. at 237)).

66. *Tenn. Copper Co.*, 206 U.S. at 237 (citing *Missouri*, 180 U.S. at 241).

Justice Stevens concluded in the *Massachusetts* decision that, “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”<sup>67</sup> Additionally, the *Massachusetts* court stated that “Massachusetts does in fact own a great deal of the ‘territory alleged to be affected’ only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”<sup>68</sup>

Further explicating the *parens patriae* doctrine, Justice Stevens explained that states had standing to protect their quasi-sovereign interest in the health and welfare of their citizens because they had surrendered three crucial sovereign powers to the federal government: (1) states may no longer use military force; (2) the Constitution prohibits states from negotiating treaties with foreign governments; and (3) federal laws may in some circumstances preempt state laws.<sup>69</sup> Because states had surrendered these three sovereign powers to the federal government, the Court invoked the *parens patriae* doctrine to preserve the role for the states in a federal system of government by recognizing that states can file suit in federal court to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens.<sup>70</sup>

Justice Stevens somewhat confusingly combined the *parens patriae* doctrine with other arguments for granting standing in *Massachusetts*, including a procedural right conferred in the Clean Air Act to challenge the EPA’s decision to reject the plaintiffs’ rulemaking petition.<sup>71</sup> To support its conclusion that Massachusetts had the right to sue, the Court relied upon statutory language in the Clean Air Act to conclude that Congress had required the EPA to use the federal government’s sovereign powers to protect states, among others, from vehicle emissions “which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>72</sup> Additionally, the *Massachusetts* decision ob-

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67. *Massachusetts*, 549 U.S. at 518–19 (quoting *Tenn. Copper Co.*, 206 U.S. at 237).

68. *Id.* at 519 (quoting *Tenn. Copper Co.*, 206 U.S. at 237).

69. *Id.*

70. *See id.* at 519–20.

71. *Id.*

72. *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2006)).

served that Congress has “recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious.”<sup>73</sup> Combining these justifications for standing with the *parens patriae* doctrine, Justice Stevens concluded, “[g]iven that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”<sup>74</sup>

Justice Stevens’s intermingling of the *parens patriae* doctrine with statutory language in the Clean Air Act would subsequently allow the utility petitioners in *AEP* to argue that the special standing rights of states applied only in statutory cases and not common law actions.<sup>75</sup> However, it is far from clear that Justice Stevens intended to limit the *Massachusetts* holding to statutory actions as four members of the Court in *AEP* concluded that *Massachusetts* supported standing for the common law suit in *AEP*.<sup>76</sup> The biggest problem with the *Massachusetts* decision is that it did not clearly delineate to what extent the special state standing resulted from the *parens patriae* doctrine as opposed to either statutory rights in the Clean Air Act<sup>77</sup> or the special standing rights of plaintiffs seeking to vindicate procedural rights.<sup>78</sup> Because the standing analysis in *Massachusetts* invoked multiple factors to justify state standing, the parties in *AEP* were able to plausibly articulate radically different views of standing before the Supreme Court.<sup>79</sup>

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73. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1)).

74. *Id.*

75. *See infra* Part V.A.

76. *See infra* Part VI.D.

77. *See infra* Part V.A.

78. *See Massachusetts*, 549 U.S. at 517–18 (“When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (recognizing that procedural rights plaintiffs have special rights); Mank, *States Standing*, *supra* note 13, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying whether and to what extent the special treatment of state standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights or other factors).

79. *See infra* Part V.

### 3. Massachusetts Meets the Tests for Injury, Causation, and Redressability

The Court concluded that the Commonwealth had met the three-part Article III standing test for injury, causation, and redressability.<sup>80</sup> Regarding the injury prong of the standing test, the Court determined that climate change had caused rising sea levels that had already harmed Massachusetts's coastline and posed potentially more severe harms in the future.<sup>81</sup> The Court found that Massachusetts had already suffered loss of its coastline because of evidence in "petitioners' unchallenged affidavits [that] global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming," and, as a consequence, "[t]hese rising seas have already begun to swallow Massachusetts' coastal land."<sup>82</sup> Rejecting the premise that prudential or constitutional principles bar standing for any plaintiff seeking to challenge a generalized grievance,<sup>83</sup> Justice Stevens stated "that these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."<sup>84</sup> Because Massachusetts "owns a substantial portion of the state's coastal property," the Court concluded that "[the Commonwealth] has alleged a particularized injury in its capacity as a landowner" even if many others have suffered similar injuries.<sup>85</sup> Moreover, the Court determined that "[t]he severity of that injury will only increase over the course of the next century" as sea levels continue to rise, and that "[r]emediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."<sup>86</sup>

Addressing the causation prong of the standing test, the Court concluded that the "EPA does not dispute the existence of a caus-

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80. *Massachusetts*, 549 U.S. at 526.

81. *See id.* at 521–23; *see also* Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 *CARDOZO L. REV.* 149, 195–96 (2007); Mank, *Standing and Future Generations*, *supra* note 15, at 71–73.

82. *Massachusetts*, 549 U.S. at 522.

83. *See supra* Part II (discussing whether prudential standing or constitutional standing principles restrict or prohibit suits alleging generalized grievances).

84. *Massachusetts*, 549 U.S. at 522 ("Where a harm is concrete, though widely shared, the Court has found 'injury-in-fact.'" (quoting *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998))).

85. *Id.*

86. *Id.* at 522–23.



al connection between manmade [GHG] emissions and global warming.”<sup>87</sup> In light of the EPA’s acknowledgement that man-made GHG emissions cause climate change, the majority opinion determined that “[a]t a minimum, therefore, EPA’s refusal to regulate such emissions ‘contributes’ to Massachusetts’ injuries.”<sup>88</sup> Nevertheless, the EPA “maintain[ed] that its decision not to regulate GHG emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them” since “predicted increases in [GHG] emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease” that might result if the agency regulated GHGs from new vehicles.<sup>89</sup> The Court rejected the EPA’s causation argument because it “rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.”<sup>90</sup> Justice Stevens observed that agencies and legislatures “do not generally resolve massive problems in one fell regulatory swoop.”<sup>91</sup> He concluded, “[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.”<sup>92</sup>

Finally, the EPA similarly argued that the plaintiffs could not satisfy the redressability portion of the standing test since federal courts could not remedy the alleged harms to the petitioners from GHGs because most emissions come from other countries.<sup>93</sup> Rejecting the EPA’s argument, the Court emphasized that the EPA had a duty to reduce future harms to Massachusetts even if it could not prevent all such harms: “While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow or reduce* it.”<sup>94</sup> Responding to the EPA’s argument that its regulation of GHG emissions from new vehicles would have little impact because of

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87. *Id.* at 523.

88. *Id.*

89. *Id.* at 523–24.

90. *Id.*

91. *Id.* at 524.

92. *Id.*

93. *Id.* at 517, 525–26.

94. *Id.* at 525.

increasing emissions from developing countries such as China and India, the Court stated: “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>95</sup> Furthermore, the Court suggested that the EPA had a duty to prevent catastrophic harms to future generations: “The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA’s denial of their rulemaking petition.”<sup>96</sup>

### B. Chief Justice Roberts’s Dissenting Opinion

In his dissenting opinion, Chief Justice Roberts argued that the global problem of climate change was a nonjusticiable general grievance that should be decided by the political branches rather than the federal courts.<sup>97</sup> He argued that it was inappropriate for the Court to apply a more generous standing test for states because there was no basis in the statute, precedent, or logic for such a differentiation.<sup>98</sup> Furthermore, he contended that states do not have greater standing rights under the *parens patriae* doctrine.<sup>99</sup>

#### 1. The *Parens Patriae* Doctrine Does Not Provide Massachusetts with Greater Standing Rights

Chief Justice Roberts conceded that *Tennessee Copper* treated states more favorably than private litigants, but he argued that the case did so “solely with respect to available remedies,” giving Georgia the right to equitable relief when private litigants could obtain only a legal remedy.<sup>100</sup> He argued that “[t]he case had nothing to do with Article III standing.”<sup>101</sup> His point is technically correct because the Court did not develop the modern standing doctrine until the 1940s,<sup>102</sup> but he did not address the implication in

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95. *Id.* at 523–26.

96. *Id.* at 526.

97. *Id.* at 535–36 (Roberts, C.J., dissenting).

98. *Id.* at 536–40.

99. *Id.* at 538–39.

100. *Id.* at 537–38.

101. *Id.* at 537.

102. See *supra* note 16 and accompanying text.

the majority opinion that broad standing rights for states would enhance their ability to enforce their quasi-sovereign interest in protecting the health of their citizens or their natural resources.<sup>103</sup>

Applying a narrow interpretation of the *parens patriae* doctrine, Chief Justice Roberts argued that “*Tennessee Copper* has since stood for nothing more than a State’s right, in an original jurisdiction action, to sue in a representative capacity as *parens patriae*,” and that the *parens patriae* doctrine does not support giving states greater standing rights than individuals.<sup>104</sup> He contended that “[n]othing about a State’s ability to sue in that capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III.”<sup>105</sup> Justice Stevens’s majority opinion, however, did not seek to eliminate the three-part standing test for states, although his opinion did vaguely suggest that some portions of those three tests might be relaxed for states representing their quasi-sovereign interests in a *parens patriae* suit.<sup>106</sup> By contrast, Chief Justice Roberts argued that a *parens patriae* suit could in no way lessen a plaintiff state’s obligation to prove an injury because “[a] claim of *parens patriae* standing is distinct from an allegation of direct injury” and “[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a ‘quasi-sovereign interest’ *apart* from the interests of particular private parties.”<sup>107</sup> Chief Justice Roberts contended that “a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III” and that “[f]ocusing on Massachusetts’ interests as quasi-sovereign makes the required showing here harder, not easier.”<sup>108</sup>

Chief Justice Roberts argued that the Court did not explain how its “special solicitude” for Massachusetts affected its standing analysis “except as an implicit concession that petitioners

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103. See *supra* text accompanying note 62.

104. *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting).

105. *Id.*

106. *Id.* at 518–26 (majority opinion) (concluding that states asserting quasi-sovereign interests as *parens patriae* are entitled to a more lenient standing test, but also stating that Commonwealth of Massachusetts met the normal three-part standing test); Mank, *States Standing*, *supra* note 13, at 1727–34 (discussing standing analysis in *Massachusetts*).

107. *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting).

108. *Id.*

cannot establish standing on traditional terms.”<sup>109</sup> There is some merit to his criticism of the majority opinion because Justice Stevens never clearly explained to what extent the Court used “special solicitude” for Massachusetts’s status as a state to change the Court’s standing analysis.<sup>110</sup> Chief Justice Roberts asserted that “the status of Massachusetts as a State cannot compensate for petitioners’ failure to demonstrate injury in fact, causation, and redressability.”<sup>111</sup> Chief Justice Roberts maintained that the petitioners’ injuries from global warming failed to meet *Lujan v. Defenders of Wildlife*’s requirement that the alleged injury be “particularized” because they were common to the public at large.<sup>112</sup>

Additionally, Chief Justice Roberts argued that the petitioners failed to prove that a causal connection existed between the alleged injury of loss of coastal land in Massachusetts and “the lack of new motor vehicle [GHG] emission standards.”<sup>113</sup> Because GHGs persist in the atmosphere “for anywhere from 50 to 200 years” and “domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global [GHG] emissions.” He concluded: “In light of the bit-part domestic new motor vehicle [GHG] emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners’ alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.”<sup>114</sup> By contrast, the majority rejected similar arguments by the EPA and concluded instead that the petitioners had established causation because “U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.”<sup>115</sup>

Furthermore, Chief Justice Roberts argued that “[r]edressability is even more problematic” for the plaintiffs in meeting their

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109. *Id.* at 540.

110. See Mank, *States Standing*, *supra* note 13, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying whether and to what extent the special treatment of state standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights or other factors).

111. *Massachusetts*, 549 U.S. at 540 (Roberts, C.J., dissenting).

112. *Id.* at 540–41 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

113. *Id.* at 543–45.

114. *Id.*

115. *Id.* at 523–25 (majority opinion).

burden of proving standing because of the “tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue here,” as well as the additional problem that the “petitioners cannot meaningfully predict what will come of the 80 percent of [GHG] emissions that originate outside the United States.”<sup>116</sup> Chief Justice Roberts rejected the majority’s conclusion that “*any* decrease in domestic emissions will ‘slow the pace of global emissions increases, no matter what happens elsewhere.’”<sup>117</sup> He argued that the Court’s reasoning failed to satisfy the three-part standing test’s requirement that a court find that it is “*likely*” that a remedy will redress the “particular injury-in-fact” at issue in that case.<sup>118</sup> Chief Justice Roberts reasoned that “even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it likely that the injury in fact—the loss of land—will be redressed.”<sup>119</sup> By contrast, the majority was satisfied that the petitioners had shown that the EPA’s regulation of GHG emissions from new vehicles should reduce the risk to the Massachusetts coastline from rising sea levels resulting from GHGs and higher temperatures, despite the uncertainties about how much land the regulation would save.<sup>120</sup>

## 2. Chief Justice Roberts Argues the Case is a Nonjusticiable General Grievance Better Suited for Resolution by the Political Branches

Even granting the plaintiffs’ assumption that climate change is a significant policy problem, Chief Justice Roberts in his dissenting opinion argued that it was a nonjusticiable general grievance that should be decided by the political branches rather than by the federal courts.<sup>121</sup> Initially, he asserted that the petitioners’ injuries from global warming failed to meet *Lujan’s* requirement that the alleged injury be “particularized” because they were common “to the public at large.”<sup>122</sup> Moreover, he contended that

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116. *Id.* at 545 (Roberts, C.J., dissenting).

117. *Id.* at 546.

118. *Id.*

119. *Id.*

120. *Id.* at 525–26 (majority opinion).

121. *Id.* at 535–36, 548–49 (Roberts, C.J., dissenting).

122. *Id.* at 539–41, 543 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 573–74 (1992)) (internal quotation marks omitted).

the Court's lax application of standing principles in this case failed to consider separation of power principles limiting the judiciary to "concrete cases."<sup>123</sup> He argued that the majority's recognition of standing in a case involving policy issues affecting the entire nation and the world at large caused the Court to intrude into policy decisions which are only appropriate for the political branches of government.<sup>124</sup> Chief Justice Roberts suggested that the right of citizens to elect representatives to Congress and a President was an adequate answer to any sovereign rights that states had lost when they joined the United States, and, therefore, that there was no need for the Court to recognize liberal *parens patriae* standing rights for states to raise questions of quasi-sovereign interests in the federal courts.<sup>125</sup>

Justice Roberts's dissenting opinion argued that only the political branches should decide issues involving generalized harms such as climate change, and, accordingly, opposed the majority's recognition of state standing to bring *parens patriae* suits to effectuate their alleged quasi-sovereign interests in protecting natural resources or citizens against generalized harms.<sup>126</sup> His dissenting opinion raised broader separation of powers issues about the role of Congress in establishing constitutional standing boundaries that the Court has never fully resolved.<sup>127</sup> In his concurring opinion in *Lujan*, Justice Kennedy suggested that Congress has the authority to define new injuries not recognized by the common law if Congress utilizes specific language in the statute to define such injuries.<sup>128</sup> By contrast, Justice Scalia, in his *Lujan* opinion, suggested that there are limits to how far Congress may expand standing without intruding on the President's authority in Article II, Section 3 of the Constitution to "take Care that the Laws be faithfully executed."<sup>129</sup> Justice Stevens's majority opinion in *Massachusetts* implied that the Court favored Justice Kennedy's ap-

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123. *Id.* at 539–40, 547.

124. *Id.* at 535–36, 548–49.

125. *See id.* (arguing the majority usurped the authority of political branches by unduly expanding standing rights of states).

126. Mank, *Standing and Future Generations*, *supra* note 15, at 76.

127. *Id.* at 76–77.

128. 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (stating that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," provided that Congress "identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit").

129. *Id.* at 576–77 (quoting U.S. CONST. art. 11, § 3).

proach to congressional authority to establish standing even for generalized grievances by quoting his concurring opinion in *Lujan*,<sup>130</sup> but the Court did not provide a definitive answer as to whether states or individuals may achieve standing in such suits and left that issue to be reargued in *AEP*.<sup>131</sup> As a result of the *Massachusetts* decision's failure to resolve some of the separation of powers questions raised in Chief Justice Roberts's dissenting opinion, the question of whether suits concerning climate change involve generalized grievances and whether such grievances are better addressed by the political branches rather than the judiciary remained a controversy in the *AEP* case.<sup>132</sup>

#### IV. *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.* IN THE LOWER COURTS

##### A. *The Plaintiffs' Public Nuisance Action*

The *Connecticut v. American Electric Power Co.* suit was filed before the Supreme Court's seminal *Massachusetts* decision in 2007.<sup>133</sup> In 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York alleging that the five defendant electric power companies were committing a public nuisance by operating fossil-fuel burning electric generating plants in the United States that emitted large amounts of carbon dioxide that significantly contributed to global climate change.<sup>134</sup> Eight States<sup>135</sup> and New York City filed the first complaint ("States Plaintiffs"), and three nonprofit land trusts<sup>136</sup> filed the second complaint ("Land Trust Plaintiffs").<sup>137</sup> The defendants were four

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130. *Massachusetts*, 549 U.S. at 516 (majority opinion) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

131. See *infra* Part V.

132. See *infra* Parts V.B and VI.D.

133. See *Am. Elec. Power v. Connecticut*, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011).

134. *Id.* at \_\_\_, 131 S. Ct. 2533–34.

135. California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin withdrew by the time the case came before the Supreme Court. *Id.* at \_\_\_, 2533 & n.3.

136. Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire. *Id.* at \_\_\_, 2534 n.4.

137. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267–68 & nn.2–3 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309, 393 (2nd Cir. 2009), *rev'd and remanded*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2540 (2011).

private companies<sup>138</sup> along with the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several states.<sup>139</sup> According to the complaints, the defendants “are the five largest emitters of carbon dioxide in the United States.”<sup>140</sup> Annually, the five utilities collectively emit 650 million tons of carbon dioxide, which constitutes 25% of emissions from the domestic electric power sector, 10% of emissions from all domestic human activities, and 2.5% of all anthropogenic emissions worldwide.<sup>141</sup>

In their complaints, the plaintiffs asserted that the defendants’ carbon dioxide emissions worsened global climate change and thereby “created a ‘substantial and unreasonable interference with public rights,’ in violation of [either] the federal common law of interstate nuisance, or, in the alternative, of state tort law.”<sup>142</sup> The States Plaintiffs alleged that their “public lands, infrastructure, and [the health of their citizens] were at risk from climate change.”<sup>143</sup> The Land Trust Plaintiffs alleged that “climate change would destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved.”<sup>144</sup> Plaintiffs each sought injunctive relief requiring each defendant “to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.”<sup>145</sup>

### B. *The District Court Invokes the Political Question Doctrine to Dismiss the Suits*

In 2005, the District Court for the Southern District of New York dismissed both suits as presenting nonjusticiable political

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138. American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation, which is now merged into Duke Energy Corporation. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2534 n.5; Cert Petition, *supra* note 6, at ii (stating that Cinergy Corporation has merged into Duke Energy Corporation).

139. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2534.

140. *Id.* at \_\_\_, 131 S. Ct. at 2534 (quoting Joint Appendix at 57, 118, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011) (No. 10-174) [hereinafter Joint Appendix]).

141. *Id.*

142. *Id.* (quoting Joint Appendix, *supra* note 140, at 103–05, 145–47).

143. *Id.* (citing Joint Appendix, *supra* note 140, at 88–93).

144. *Id.* (citing Joint Appendix, *supra* note 140, at 139–45).

145. *Id.* (quoting Joint Appendix, *supra* note 140, at 11, 153) (internal quotation marks omitted).



questions.<sup>146</sup> Invoking separation of powers concerns, Judge Preska concluded that the complex issue relating to whether and how to reduce carbon dioxide emissions from fossil-fuel burning power plants was a political question for resolution by the political branches and, therefore, not appropriate for judicial decision.<sup>147</sup> Relying upon the six-factor test in *Baker v. Carr* for determining what is a nonjusticiable political question,<sup>148</sup> the district court concluded that a public nuisance suit seeking to reduce carbon dioxide emissions from numerous electric power plants presented a nonjusticiable political question because of “the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>149</sup> The court reasoned that the plaintiffs’ prayer for relief, requiring reductions of carbon dioxide from the plants over several years, was nonjudicial because making a decision would

require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States’ ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States’ energy sufficiency and thus its national security—all without an “initial policy determination” having been made by the elected branches.<sup>150</sup>

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146. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *rev’d*, 582 F.3d 309, 393 (2nd Cir. 2009), *rev’d and remanded*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2540 (2011).

147. *Id.* at 274.

148. 369 U.S. 186, 217 (1962). *Baker v. Carr* established a six-factor test:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*

149. *Connecticut*, 406 F. Supp. 2d at 272 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2003)).

150. *Id.* at 272–73.

The court determined that the “identification and balancing of economic, environmental, foreign policy, and national security interests” is a policy determination properly suited for resolution by the political branches, and, therefore dismissed the plaintiffs’ complaints.<sup>151</sup>

C. *The Second Circuit Reverses the Decision of the District Court and Allows an “Ordinary Tort Suit” to Proceed*

The U.S. Court of Appeals for the Second Circuit reversed the decision of the district court.<sup>152</sup> The case was unusual in that it was argued in 2006, but was not decided until 2009.<sup>153</sup> The long delay was likely caused in part by the Second Circuit’s postponement of its decision until the Supreme Court decided *Massachusetts*, which decision the Second Circuit extensively discussed in its *AEP* decision.<sup>154</sup> Additionally, Judge Sonia Sotomayor was a member of the original three-judge panel of the Second Circuit until she was elevated to the Supreme Court on August 8, 2009.<sup>155</sup> The two remaining members of the panel decided the case on September 21, 2009, pursuant to a Second Circuit rule on that subject.<sup>156</sup>

Addressing the threshold jurisdiction questions, the court of appeals held that the suits were not barred by the political question doctrine<sup>157</sup> and that all the plaintiffs’ complaints met the Article III standing requirements.<sup>158</sup> The Second Circuit rejected the district court and defendants’ view that the complex issues involved in the case made it a nonjudiciable political question stating that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”<sup>159</sup> Crucially, the Second Circuit characterized the plaintiffs’ suit as an “ordinary tort suit” suitable for judicial resolution.<sup>160</sup> The court of

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151. *Id.* at 274 (quoting *Vieth*, 541 U.S. at 278).

152. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009), *rev’d and remanded*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2540 (2011).

153. *Id.* at 310.

154. *Id. passim.*

155. *Id.* at 314 n.\*.

156. *Id.* at 310, 314 n.\*.

157. *Id.* at 332.

158. *Id.* at 349.

159. *Id.* at 326.

160. *Id.* at 329, 331.

appeals acknowledged that Congress by legislation or the executive branch by appropriate regulations might in the future regulate power plant emissions of carbon dioxide and thereby displace the role of the judiciary under federal common law, but the court concluded that the political question doctrine did not bar the plaintiffs' suit because it was similar in its essential nature to other public nuisance cases that courts had handled in the past, even if climate change was a new issue.<sup>161</sup> The Second Circuit's discussion of standing will be examined in Section D below.<sup>162</sup>

Assessing the merits of the case, the Second Circuit held that all the plaintiffs had stated a claim pursuant to "the federal common law of nuisance."<sup>163</sup> The court of appeals relied on a series of Supreme Court decisions holding that states may maintain suits to abate air and water pollution produced by other states or by out-of-state industry.<sup>164</sup> The court of appeals further concluded that the Clean Air Act did not "displace" federal common law. The Second Circuit distinguished the Supreme Court's decision in *City of Milwaukee v. Illinois* ("*Milwaukee II*"), which held that Congress had displaced the federal common law right of action previously recognized by the Court in *City of Milwaukee v. Illinois* ("*Milwaukee I*") by adopting amendments to the Clean Water Act that comprehensively addressed interstate water pollution, and thus eliminated any role for federal common law actions addressing interstate pollution.<sup>165</sup> Since the EPA had not yet promulgated any rule regulating GHGs when it decided the *AEP* case, the Second Circuit concluded that the Act did not displace the plaintiffs federal common law cause of action because "we cannot speculate as to whether the hypothetical regulation of [GHGs] under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs."<sup>166</sup>

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161. *Id.* at 332.

162. *See infra* Part IV.B.

163. *Connecticut*, 582 F.3d at 371.

164. *See id.* at 350–51 (citing *Illinois v. City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 93, 104 (1972) (recognizing federal common law action by Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236–38 (1970); *Missouri v. Illinois*, 180 U.S. 208, 243 (1901)).

165. *Id.* at 378–80; *City of Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 316–19 (1981); *see* 33 U.S.C. §§ 1251-1387 (2006).

166. *Connecticut*, 582 F.3d at 379–81 (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236–37 (1985)).

#### D. *The Second Circuit's Standing Analysis*

The district court's decision "explicitly declined to address Defendants' standing arguments," reasoning in a footnote that "because the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing."<sup>167</sup> Because it reversed the district court's dismissal of the case on political question grounds, the Second Circuit found it necessary to address whether the plaintiffs had standing to sue.<sup>168</sup> The court examined whether the States Plaintiffs had *parens patriae* standing and concluded that any uncertainties in *Massachusetts* about the relationship between that standing doctrine and traditional Article III standing were irrelevant because the States Plaintiffs met both tests.<sup>169</sup> The Second Circuit also discussed whether the States and Land Trusts Plaintiffs had Article III standing in their proprietary capacity as property owners.<sup>170</sup> The court then applied the three-part Article III standing test for (1) injury, (2) causation and traceability, and (3) redressability.<sup>171</sup>

Regarding the standing test for injury, the Second Circuit concluded that the States Plaintiffs had adequately alleged current injury from the reduced size of the California snowpack from increasing temperatures caused by rising levels of carbon dioxide.<sup>172</sup> Additionally, similar to the *Massachusetts* decision, the states also reasonably alleged future injury to their coastal lands from rising sea levels caused by climate change, despite the defendants' argument that such injuries were not imminent, because there was sufficient scientific evidence that rising sea levels would inevitably harm the states' coastlines and that such a certain injury

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167. *Id.* at 332 (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 n.6 (S.D.N.Y. 2005), *rev'd* 582 F.3d 309 (2009), *rev'd and remanded*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2540 (2011)).

168. *Id.* at 315, 333.

169. *Id.* at 334–39. The Second Circuit did not address whether New York City had standing because once the court found that the States Plaintiffs had standing it was not necessary to decide the standing of the city since only one plaintiff need have standing for a suit to proceed. *Id.* at 339 n.17 (quoting *Lumsfield v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

170. *Id.* at 339–40.

171. *Id.* at 340–49.

172. *Id.* at 341–42.

was imminent even if it might not occur for years.<sup>173</sup> For the same reason, the Land Trust Plaintiffs had adequately proven future harm to their properties from rising sea levels caused by increasing levels of carbon dioxide.<sup>174</sup>

Following the reasoning in *Massachusetts*, the Second Circuit concluded that the defendants' significant contribution to rising global levels of carbon dioxide was sufficient to establish causation and traceable injury for Article III standing, even though a majority of global GHG emissions come from other sources.<sup>175</sup> The defendants argued that the plaintiffs had failed to establish causation because the

Plaintiffs' use of the words "contribute to" is not sufficient to allege causation, that the multiple polluter cases relied upon by Plaintiffs are inapposite because causation was presumed by contributions of a harmful pollutant in amounts that exceeded federally prescribed limits, and that, in any event, carbon dioxide is not inherently harmful but mixes with worldwide emissions that collectively contribute to global warming.<sup>176</sup>

Rejecting the defendants' arguments against standing for the plaintiffs, the Second Circuit observed that plaintiffs in public nuisance cases need merely establish that defendants contribute to a nuisance to establish causation for standing and, therefore, the defendants' argument that the plaintiffs needed to demonstrate something more was unavailing.<sup>177</sup>

Regarding the redressability prong of the standing test, the defendants argued that the plaintiffs had failed to demonstrate that their proposed remedy of reducing carbon dioxide emissions from the defendants' power plants was likely to prevent global warming.<sup>178</sup> The Second Circuit concluded that the defendants' redressability arguments were foreclosed by the *Massachusetts* decision.<sup>179</sup> Following the reasoning in *Massachusetts*, the Second Circuit concluded that the plaintiffs had demonstrated that it was likely that a court decision in their favor ordering reductions in carbon dioxide emissions from the defendants' power plants

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173. *Id.* at 342–44; see *Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007).

174. *Connecticut*, 582 F.3d at 342–44.

175. *Id.* at 345–47; see *Massachusetts*, 549 U.S. at 523–25.

176. *Connecticut*, 582 F.3d at 345.

177. *Id.* at 345–47.

178. *Id.* at 348.

179. *Id.* at 348–49 (quoting *Massachusetts*, 549 U.S. at 525–26).

would slow or reduce the pace of global climate change even if it would not stop it entirely.<sup>180</sup>

In light of the *Massachusetts* decision, the Second Circuit's conclusion that the States Plaintiffs had standing was understandable given the similarities in the injuries alleged and commonalities in the causation and redressability in both cases.<sup>181</sup> More questionable was the Second Circuit's conclusion that the Land Trust Plaintiffs had standing since the *Massachusetts* decision avoided addressing the standing rights of the private plaintiffs in that case and suggested that the states had greater standing rights than private parties; the Second Circuit arguably should have avoided the thorny issue of standing for the private plaintiffs since the remedies sought by the States and Private Land Trust Plaintiffs were the same.<sup>182</sup>

#### V. SUPREME COURT BRIEFS IN *AMERICAN ELECTRIC POWER CO. V. CONNECTICUT*

Because the *AEP* decision only briefly addressed the issue of standing and implicitly referred back to the standing issues presented in the main briefs,<sup>183</sup> it is especially important to discuss the three conflicting standing theories presented in the three main briefs before the Supreme Court. In their brief to the Supreme Court, the four private utilities argued that the plaintiffs lacked Article III constitutional standing to sue, but their arguments directly and indirectly contradicted the standing analysis in *Massachusetts*.<sup>184</sup> In the Tennessee Valley Authority's (the "TVA") brief, the acting U.S. Solicitor General acknowledged that at least some of the States Plaintiffs had Article III constitutional standing in light of *Massachusetts*, but the brief argued that the Court should nevertheless deny standing because the plaintiffs'

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180. *Id.* (quoting *Massachusetts*, 549 U.S. at 525–26).

181. *See supra* Part III.

182. Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut*, 2010–2011 CATO SUP. CT. REV. 295, 304–05, 312 n.79 (arguing that the Second Circuit in *AEP* should not have addressed standing of private parties).

183. *See infra* Part VI.A.

184. Brief of the Petitioners at ii, 16–29, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011) (No. 10-174) [hereinafter Petitioners' Brief] (stating that the four private utilities included American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, Xcel Energy Inc., and Cinergy Corporation, which is now merged into Duke Energy Corporation, in addition to the Tennessee Valley Authority); *see infra* Part V.A.

claims were barred by prudential standing barriers against judicial resolution of generalized grievances better suited for the political branches.<sup>185</sup> The TVA's generalized grievance argument against recognizing standing for the *AEP* plaintiffs, however, is inconsistent with *Massachusetts* and other Supreme Court decisions addressing such grievances.<sup>186</sup> Finally, Connecticut along with five other states and the City of New York argued that the States Plaintiffs met both Article III constitutional standing and prudential tests, especially in light of the *Massachusetts* decision.<sup>187</sup> As discussed in Part V, four of the justices in *AEP* appeared to endorse the argument that at least some States Plaintiffs had standing, and it is more likely than not that Justice Sotomayor would do so as well if she were to decide the issue of standing in a similar case.<sup>188</sup>

#### A. *The Utilities Brief: No State Standing for Common Law Claims*

In their brief to the Supreme Court, the four private utilities made three constitutional standing arguments and one prudential standing argument.<sup>189</sup> Because the Solicitor General's brief for the TVA focused on a similar prudential standing argument, this part will address only the private utilities' three constitutional standing arguments: (1) the plaintiffs' alleged injuries were not fairly traceable to defendants' emissions; (2) the plaintiffs' alleged harms would not be redressed by the relief sought; and (3) the plaintiffs did not have standing because the standing analysis in statutory rights cases, including *Massachusetts*, does not apply in a case alleging a common law public nuisance.<sup>190</sup> The petitioners' first two standing arguments would have required the Court to implicitly overrule *Massachusetts*, or at least severely narrow the standing analysis in that decision. Their third argument had a

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185. Brief of Tennessee Valley Authority as Respondent Supporting Petitioners at 11-53, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011) (No. 10-174) [hereinafter *TVA Brief*]; see *infra* Part V.B.

186. See *infra* Part V.B.

187. Brief of Respondents Connecticut, New York, California, Iowa, Rhode Island, Vermont, and the City of New York at 8-9, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011) (No. 10-174) [hereinafter *States Brief*]; see *infra* Part V.C. This article will not discuss the separate brief of the Land Trusts Plaintiffs.

188. See *infra* Part VI.

189. Petitioners' Brief, *supra* note 184, at 16-31.

190. *Id.* at 16-29.

small degree of support in the *Massachusetts* decision, but was inconsistent with the broader *parens patriae* reasoning in the standing analysis in *Massachusetts*.

### 1. The Plaintiffs' Alleged Injuries Are Not Fairly Traceable to Defendants' Emissions

Initially, the petitioners argued that the plaintiffs had failed to prove a direct causal connection between their carbon dioxide emissions and global climate change.<sup>191</sup> According to the petitioners, the plaintiffs' theory of harm would allow suits by any entity alleging harm from climate change against many emitters of GHGs.<sup>192</sup> Because GHGs are fungible, one can never specifically trace back a particular harm to a particular emitter.<sup>193</sup> Additionally, the petitioners argued that the chain of causation alleged by the plaintiffs was insufficient because the overwhelming majority of GHG emissions come from independent sources not controlled by the defendants.<sup>194</sup>

Prior to the *Massachusetts* decision, the petitioners would have had plausible arguments that federal courts should not allow suits against emitters of GHGs because the harms from such emissions are too indistinct to trace back to a particular defendant, and because the overwhelming majority of emissions are from independent sources not named in the suit. The petitioners' arguments, however, are similar to Chief Justice Roberts's dissenting opinion in *Massachusetts*, where he pointed out that it was impossible to tease out which climate change harms were caused by American vehicle emissions as opposed to those from China or India that are beyond the jurisdiction of American courts:

Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle [GHG] emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners'

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191. *Id.* at 18.

192. *Id.* at 19.

193. *See id.* at 18–19.

194. *Id.* at 21.



alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.<sup>195</sup>

The *Massachusetts* decision rejected Roberts's argument by finding that American vehicles made a "meaningful contribution" to climate change even if a plaintiff cannot prove how a particular American vehicle's emissions causes a particular harm from climate change.<sup>196</sup> Similarly, the "meaningful contribution" analysis in the *Massachusetts* decision supports the *AEP* plaintiffs' argument that they can sue the defendants because they emit a substantial portion of U.S. carbon dioxide emissions even if they only contribute 2.5% of global emissions.<sup>197</sup>

## 2. The Alleged Harms Will Not Be Redressed by the Relief Sought

For reasons similar to its argument that the plaintiffs could not prove causation for standing, the petitioners also argued that the plaintiffs could not "plausibly allege that the relief they seek will redress their alleged harms."<sup>198</sup> Because the requested injunctive relief would only reduce the defendants' share of GHG emissions and would not prevent potentially larger increases from independent sources, the petitioners argued that such relief was insufficient for standing because it was not certain to redress global warming.<sup>199</sup> While the *Massachusetts* decision concluded that the Commonwealth of Massachusetts had met standing requirements by seeking incremental actions by a regulatory agency to slow or reduce global warming, the petitioners argued that its case in a common law action was distinguishable because relief against a tort defendant must actually redress the plaintiff's injury.<sup>200</sup> Additionally, the overwhelming majority of GHG emissions are from

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195. *Massachusetts v. EPA*, 549 U.S. 497, 543–45 (2007) (Roberts, C.J., dissenting).

196. *Id.* at 523–25 (majority opinion); see *supra* Part III.A.

197. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2534 (2011) (observing that the defending utilities collectively emit 650 million tons of carbon dioxide, which constitutes "25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities . . . and 2.5 percent of all anthropogenic emissions worldwide"); see *infra* Parts V.A–B (discussing and criticizing petitioners' argument that plaintiffs lack Article III standing).

198. Petitioners' Brief, *supra* note 184, at 23–24.

199. *Id.* (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

200. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

independent sources that were not parties to the case and reside outside the United States and its federal jurisdiction.<sup>201</sup>

While their redressability arguments may have been plausible before the *Massachusetts* decision, they were rejected by the majority and more directly resemble Chief Justice Roberts's dissent. For example, he complained that the *Massachusetts* "petitioners cannot meaningfully predict what will come of the 80 percent of global GHG emissions that originate outside the United States."<sup>202</sup> Because the *Massachusetts* decision could not address the overwhelming majority of foreign sources, Chief Justice Roberts contended that the petitioners had failed to prove that their proposed remedy was "likely" to succeed in preventing harms to Massachusetts' coastline.<sup>203</sup> The majority opinion in *Massachusetts* responded: "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."<sup>204</sup> Even if the *AEP* petitioners were correct in asserting that prior tort cases had required a plaintiff to demonstrate that its proposed remedy will fully redress the alleged harm, the *Massachusetts* decision clearly endorsed remedies that slow or reduce climate change even if a remedy cannot address a majority of GHG sources.

### 3. The Standing Analysis in Statutory Rights Cases, Including *Massachusetts v. EPA*, Does Not Apply in Common Law Actions Like *AEP*

The Petitioners argued that the Second Circuit erred in following the standing analysis in the *Massachusetts* decision—a statutory case—in *AEP*, which was a nonstatutory common law case.<sup>205</sup> There is a plausible basis for distinguishing the *AEP* decision from the *Massachusetts* decision on the grounds that the latter decision emphasized that it was "of critical importance" that Congress had "authorized this type of challenge to EPA action,"<sup>206</sup> and no such statutory procedural rights were at issue as a basis for

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201. *Id.* at 24.

202. *Massachusetts v. EPA*, 549 U.S. 497, 545 (2007) (Roberts, C.J., dissenting).

203. *Id.* at 546.

204. *Id.* at 525 (majority opinion).

205. See Petitioners' Brief, *supra* note 184, at 24–25.

206. *Massachusetts*, 549 U.S. at 516.

standing in *AEP*.<sup>207</sup> The *Massachusetts* decision appeared to endorse a congressional role in defining some boundaries of standing when it quoted Justice Kennedy's concurrence in *Lujan*, which observed, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>208</sup> In some circumstances where Congress has conferred a procedural right in a statute, courts may relax normal standards for redressability and immediacy,<sup>209</sup> but may not relax other constitutional standing requirements such as the need for a concrete and particularized injury.<sup>210</sup> Yet the *Massachusetts* decision also emphasized the importance of giving "special solicitude" to state standing where a state is protecting its quasi-sovereign interests regarding its natural resources or the health of its citizens.<sup>211</sup> The reasons for recognizing special solicitude for state standing in such cases would appear to apply regardless of whether Congress has conferred procedural standing in a statute. Justice Stevens's majority opinion in *Massachusetts* laid the seeds for future confusion by emphasizing the separate and potentially contradictory grounds of state *parens patriae* standing and statutory procedural standing without ever explaining which was more important in the case.<sup>212</sup> Thus, the private petitioners' argument that the standing rationale in *Massachusetts* should be limited to statutory cases was plausible, but at least equally plausible was the States Plaintiffs' argument that states deserved special solicitude in non-statutory cases.<sup>213</sup>

Additionally, while discussing causation for standing, the *Massachusetts* decision observed in passing that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . [but] instead whittle away at them over

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207. Adler, *supra* note 182, at 312-13 (distinguishing *Massachusetts* from *AEP* on the grounds that the former case involved standing based on procedural right in statute, but the latter did not).

208. *Massachusetts*, 549 U.S. at 516 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)); Petitioners' Brief, *supra* note 184, at 25.

209. *Massachusetts*, 549 U.S. at 517-18; *see also* Petitioners' Brief, *supra* note 184, at 25.

210. *Massachusetts*, 549 U.S. at 517 (citing *Lujan*, 504 U.S. at 560); Mank, *Informational Standing After Summers*, *supra* note 15, at 4-5 (stating that a procedural rights plaintiff must still assert a concrete injury).

211. *Massachusetts*, 549 U.S. at 518-20.

212. *See supra* Part III.A.

213. *See supra* Part III.A. and *infra* Parts V.C, VI.D.

time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.”<sup>214</sup> The *Massachusetts* decision’s discussion of how agencies solve problems provides possible support for the *AEP* petitioners’ brief in its argument that the statutory analysis in the *Massachusetts* decision does not apply to plaintiffs seeking a common law remedy.<sup>215</sup> The *AEP* petitioners in their brief argued that the common law remedies sought in their case differed from the statutory ones at issue in the *Massachusetts* decision because “[a] court is not a regulator and lacks the discretion of a legislature to craft ‘tentative’ remedies designed to ‘whittle away’ at a larger problem.”<sup>216</sup> Nevertheless, the *Massachusetts* decision’s emphasis on the need for special solicitude for state standing when states sue regarding their quasi-sovereign interests appears to be equally applicable in both regulatory and common law cases.<sup>217</sup> A state’s quasi-sovereign interest in protecting its natural resources under the *parens patriae* doctrine, as in the *Massachusetts* decision, applies equally in statutory, regulatory, or common law actions.<sup>218</sup> Indeed, the *Georgia v. Tennessee Copper Co.* decision involved a public nuisance suit in which the Supreme Court applied the *parens patriae* doctrine to protect a state’s natural resources.<sup>219</sup> Unfortunately, *Massachusetts* contains language that can be used to support either side of the standing argument in *AEP*.<sup>220</sup>

In their reply brief, the petitioners emphasized the unprecedented nature of the relief sought by the plaintiffs in seeking to change how the nation generates electricity and argued that “[t]hese policy judgments should be made by the political branches, not the courts.”<sup>221</sup> The petitioners’ argument that courts lack the authority to address broad issues like climate change through individualized common law suits is essentially similar to Chief

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214. *Massachusetts*, 549 U.S. at 524.

215. See Petitioners’ Brief, *supra* note 184, at 26–27.

216. *Id.*

217. See *supra* Part III.A. and *infra* Parts V.C and VI.D.

218. See *Massachusetts*, 549 U.S. at 518–20 (discussing state’s quasi-sovereign interest in natural resources and health of its citizens as justification for *parens patriae* doctrine); *supra* Part III.A.

219. 206 U.S. 230, 237 (1907).

220. *Massachusetts*, 549 U.S. at 518–19.

221. Reply Brief for the Petitioners at 1–3, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011) (No. 10-174) [hereinafter Petitioners’ Reply Brief].

Justice Roberts's dissenting opinion in *Massachusetts* arguing that generalized grievances can only be redressed by the political branches and are inappropriate for judicial resolution.<sup>222</sup> The *Massachusetts* decision, however, concluded that the Court had standing to hear the case despite the global nature of climate change and observed "standing is not to be denied simply because many people suffer the same injury."<sup>223</sup>

To the extent that there should be a distinction between statutory or regulatory actions compared to common law actions, courts should focus on the merits of a case rather than the preliminary issue of standing.<sup>224</sup> Courts should deny relief in a public nuisance action only if regulatory or legislative action has displaced or preempted a tort solution, as the *AEP* decision partly did in concluding that the EPA's actions to regulate GHGs displaced any federal common law nuisance actions, rather than raise an artificial redressability doctrine demanding full redress when slowing or reducing emissions would at least represent a partial step forward.<sup>225</sup> While the petitioners' brief sought to distinguish *Massachusetts* as involving statutory rights as opposed to the common law issues in *AEP*, the petitioners' approach to standing was far closer to the reasoning of Chief Justice Roberts's dissenting opinion than the majority opinion in *Massachusetts*.<sup>226</sup> The broad approach to state standing pursuant to the *parens patriae* doctrine in *Massachusetts* also supported standing in the *AEP* decision for at least the state plaintiffs.<sup>227</sup> Accordingly, the TVA brief acknowledged that at least some of the state plaintiffs met Article III constitutional standing requirements.<sup>228</sup>

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222. See *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting) ("This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992))).

223. *Id.* at 526 & n.24 (majority opinion).

224. See *supra* Part II (discussing standing as a preliminary jurisdictional issue).

225. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2537-40 (holding EPA's authority to regulate GHGs displaces any federal common law nuisance remedies sought by the plaintiffs).

226. Compare Petitioners' Brief, *supra* note 184, at 14, with *Massachusetts*, 549 U.S. at 553 (Roberts, C.J., dissenting).

227. See *supra* Part III.A (discussing state standing pursuant to the *parens patriae* doctrine in *Massachusetts*).

228. See TVA Brief, *supra* note 185, at 25.

B. *The Solicitor General's Brief for TVA: Prudential Standing Doctrine Bars Generalized Grievances*

The Acting U.S. Solicitor General, Neal Katyal, filed a separate brief on behalf of the federally owned TVA utility as a respondent supporting the petitioners.<sup>229</sup> In contrast to the private petitioners' argument that the States Plaintiffs failed to meet the Article III standing tests for causation and redressability,<sup>230</sup> the TVA brief instead argued that, even if some of the States Plaintiffs met Article III standing requirements, the plaintiffs' common law nuisance claims were not justiciable because their suits were generalized grievances more appropriately addressed by the political branches of the government.<sup>231</sup> The United States appeared to invoke the prudential standing argument as a way to dismiss the *AEP* case without "alter[ing]" the Court's "settled approach . . . in establish[ing] Article III injury."<sup>232</sup>

The TVA argued that the plaintiffs' claims were generalized grievances because "virtually every person, organization, company, or government across the globe also emits [GHGs], and virtually everyone will also sustain climate-change-related injuries."<sup>233</sup> The TVA contended that the Court's prudential standing doctrine barred courts from adjudicating the plaintiffs' generalized grievances in the absence of statutory authorization, especially because the "EPA, which is better-suited to addressing this global problem, has begun regulating [GHGs] under the [Clean Air Act]."<sup>234</sup> Accordingly, the TVA requested that the Court dismiss the plaintiffs' suits on prudential standing grounds.<sup>235</sup> Disagreeing with the private petitioners, the TVA acknowledged that the coastal state plaintiffs' allegations of loss of sovereign territory from rising sea levels caused by climate change were similar to the allegations in *Massachusetts* and, therefore, were probably

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229. *Id.* at 5. The TVA is an Executive Branch agency with responsibility for the multi-purpose development of the Tennessee Valley Region. 16 U.S.C. § 831 (2006). The members of its board of directors are appointed by the President with the advice and consent of the Senate. *Id.* § 831a. Furthermore, the TVA is expressly authorized by federal statute to "produce, distribute, and sell electric power." *Id.* § 831d(l).

230. Petitioners' Brief, *supra* note 184, at 30–31.

231. See TVA Brief, *supra* note 185, at 14.

232. *Id.* at 21 n.7; see also States Brief, *supra* note 187, at 24 (discussing TVA Brief).

233. TVA Brief, *supra* note 185, at 11.

234. *Id.*

235. *Id.*

sufficient to establish Article III standing under the lenient standard for surviving a motion to dismiss.<sup>236</sup>

1. Plaintiffs Lack Prudential Standing Because Their Suits are Generalized Grievances More Appropriately Addressed by the Representative Branches

The TVA argued that “the principle of prudential standing requires federal courts to refrain from adjudicating ‘generalized grievances more appropriately addressed in the representative branches.’”<sup>237</sup> The TVA contended that the plaintiffs’ common law allegations were so broad that virtually any landowner or person in the world could allege similar allegations of harm from climate change.<sup>238</sup> Furthermore, while the plaintiffs only sued a few U.S. utilities, they could have sued a vast number of other domestic and foreign industrial, transportation, and agricultural corporations.<sup>239</sup> The TVA argued that suits potentially implicating extremely large numbers of potential plaintiffs and defendants would be better addressed by the representative branches of the U.S. government than a court, unless Congress had specifically authorized such suits.<sup>240</sup>

Additionally, the TVA brief argued that the plaintiffs’ requested relief of having a court issue an injunction requiring the defendants to reduce their carbon dioxide emissions by a specified percentage each year for at least a decade “would inevitably entail multifarious policy judgments, which should be made by decisionmakers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy—either at a single stroke or incrementally.”<sup>241</sup> The TVA maintained that Congress had delegated the authority to regulate GHGs to the EPA in the Clean Air Act, as the *Massachusetts* decision had recognized.<sup>242</sup> Especially because the EPA was in the process of developing and issuing GHG regulations, the TVA brief contended that prudential standing questions barred courts from ad-

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236. *Id.*

237. *Id.* at 14 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 121 (2004)).

238. *Id.* at 15.

239. *Id.* at 17.

240. *Id.* at 15.

241. *Id.* at 18–19.

242. *Id.* at 19–20.

addressing the generalized grievances raised by the common law claims in the plaintiffs' suit.<sup>243</sup>

The TVA further argued that prudential standing was a more appropriate and deferential way to end the case because Congress may override prudential standing considerations, although not constitutional Article III standing limitations.<sup>244</sup> Like the private petitioners, the TVA sought to distinguish the case from *Massachusetts* on the grounds that Congress had not provided a statutory authorization for the plaintiffs' claims, and, therefore, prudential standing limitations against generalized grievances could be invoked in this case even if similarly broad claims were justiciable in the statutorily authorized *Massachusetts* decision.<sup>245</sup> The Solicitor General's brief in *AEP* appeared to invoke the prudential standing doctrine as a barrier to common law claims while at the same time respecting Congress's authority to authorize statutory suits similar to that in *Massachusetts*.<sup>246</sup>

Observing that the district court in *AEP* had dismissed the case under the political question doctrine as not fit for judicial resolution, the TVA brief argued that the prudential standing doctrine was a more suitable and narrow method for dismissing the case as a generalized grievance more appropriately addressed by the political branches.<sup>247</sup> The TVA brief reasoned that both the political question doctrine and the prudential standing bar against courts hearing generalized grievances were motivated by similar separation of power concerns about the appropriate roles of the judicial and political branches.<sup>248</sup> The Solicitor General argued that the political question doctrine was difficult for lower courts to apply because the six-factor test in *Baker v. Carr* could be interpreted in different ways, and was especially difficult in a public nuisance case like *AEP* involving numerous policy issues.<sup>249</sup> Accordingly, the TVA brief concluded that it would be easier to

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243. *Id.* at 20–21.

244. *Id.* at 22.

245. *Id.* at 23.

246. *Id.* at 23–24.

247. *Id.* at 33–39.

248. *Id.* at 34–35.

249. *Id.* at 35–39.



dismiss the case as a generalized grievance under the prudential standing doctrine than the political question doctrine.<sup>250</sup>

2. Under *Massachusetts v. EPA*, At Least Some of the State Plaintiffs Have Article III Standing in Their Capacity as Sovereign Landowners

While the TVA brief argued that the Court should deny standing to the plaintiffs for prudential reasons and not reach constitutional standing issues, it also acknowledged that at least some of the States Plaintiffs probably had Article III standing in their capacity as sovereign landowners.<sup>251</sup> Unlike the private petitioners' brief, which sought to completely distinguish the facts in *AEP* from those in *Massachusetts*,<sup>252</sup> the TVA brief conceded:

Some of the coastal States' allegations of potential injuries here are materially similar to those that were found sufficient in *Massachusetts v. EPA* to satisfy the requirements for Article III standing. While there are differences between that case and this one, the differences cut both ways and on balance do not deprive plaintiffs of Article III standing at the pleading stage.<sup>253</sup>

The TVA brief sought to limit the *Massachusetts* decision to its facts as a case involving a sovereign state seeking to protect state-owned land: "The Court's standing analysis in *Massachusetts v. EPA* was carefully limited in two ways. The Court considered only a single kind of plaintiff (a sovereign State) and relied on only a single kind of injury (the loss of state-owned land)."<sup>254</sup> The Solicitor General in the TVA brief appeared to endorse the *Massachusetts* decision as long as it was "carefully limited" to sovereign states protecting state-owned land. Accordingly, the TVA brief conceded that Connecticut and Rhode Island's allegations that they were losing state-owned beach property to erosion from rising sea levels allegedly caused by climate change were "materially identical" to those in the *Massachusetts* decision and therefore met the case's standard for a sufficient injury.<sup>255</sup>

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250. *Id.* at 39.

251. *Id.* at 25.

252. *See supra* Part V.A.

253. TVA Brief, *supra* note 185, at 25.

254. *Id.* at 26.

255. *Id.* at 28.

While the private petitioners' brief appeared to subtly reject the *Massachusetts* decision's approach to standing causation and redressability by adopting similar reasoning to Chief Justice Roberts's dissenting opinion,<sup>256</sup> the TVA brief accepted the *Massachusetts* decision's approach to standing causation and redressability as at least partly applicable to the facts in *AEP*. The TVA brief first pointed out factual differences between the two cases:

Unlike *Massachusetts v. EPA*, this case does not involve a challenge to a discrete agency action addressing a problem in an incremental way pursuant to a statutory directive or authorization to proceed in such a manner. Rather, it is plaintiffs themselves, through their choice of defendants, who seek to proceed incrementally, and thereby to have the courts do so in the adjudication of an asserted public nuisance under federal common law. The aspect of the Court's rationale in *Massachusetts v. EPA* that focuses on the particular authority and ability of agencies to proceed incrementally therefore is not directly applicable here.<sup>257</sup>

Conversely, the TVA brief found that the reasoning in *Massachusetts* concerning standing causation "focus[ed] on the amount of emissions . . . does appear to be applicable to this case."<sup>258</sup> While the amount of carbon dioxide emissions allegedly emitted by the *AEP* defendants, 650 million tons annually, was roughly one-third of the emissions at issue in the *Massachusetts* decision, the *Massachusetts* decision's conclusion that the more than 1.7 billion tons of annual carbon dioxide emissions at issue in that case were a "meaningful contribution" to global GHG emissions suggested that the larger amount was probably not the outer limit sufficient to show causation and, therefore, that the *AEP* States Plaintiffs' allegations might well be enough to meet the causation standard.<sup>259</sup>

Regarding redressability, the *Massachusetts* decision had reasoned that the Commonwealth had met the redressability standard because its proposed remedy—an EPA issued rule limiting carbon dioxide emissions—would "slow or reduce" global GHG emissions.<sup>260</sup> The private petitioners argued that the redressability reasoning in a statutory case such as *Massachusetts* was inap-

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256. See *supra* Part V.A.

257. TVA Brief, *supra* note 185, at 29.

258. *Id.*

259. *Id.* at 29–30 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 524–25 (2009)).

260. *Id.* at 30 (quoting *Massachusetts*, 549 U.S. at 525).

plicable in the *AEP* States Plaintiffs' common law nuisance action because in statutory cases Congress may loosen redressability requirements to an extent that courts may not in common law action.<sup>261</sup> The TVA brief disagreed with the private petitioners' argument that the *AEP* States Plaintiffs could not meet the redressability prong since there was more certainty about redressability in the *AEP* case than in the *Massachusetts* decision "because plaintiffs are not challenging an agency's action or failure to act to limit emissions by third parties."<sup>262</sup> The TVA brief explained "[p]laintiffs' chains of causation and redressability are shorter than the ones in *Massachusetts*, because they seek judicial relief directly from the entities responsible for the allegedly unlawful emissions."<sup>263</sup>

The TVA brief suggested to the Court that at least some of the States Plaintiffs had met the constitutional standing test.

If the Court agrees that, in light of *Massachusetts v. EPA*, the coastal States here have adequately alleged Article III standing at the pleading stage because, like *Massachusetts*, they are the owners of sovereign territory that could be destroyed by rising sea levels associated with global warming, then constitutional standing principles would pose no further barrier to this Court's consideration of whether the common-law nuisance claims asserted by plaintiffs have been displaced by the [Clean Air Act] or regulatory actions taken by EPA.<sup>264</sup>

Because only a single plaintiff needs standing for a case to go forward, the TVA brief did not address whether some of the plaintiffs did not meet Article III standing requirements.<sup>265</sup>

The private petitioners' arguments that the *AEP* plaintiffs could not meet Article III standing requirements for causation and redressability<sup>266</sup> and the TVA's argument that at least some of the States Plaintiffs could meet those requirements<sup>267</sup> reflected differences in their approaches to the *Massachusetts* decision. The private petitioners' brief sought to distinguish the *AEP* plaintiffs'

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261. *Id.* at 30–31.

262. *Id.* at 31.

263. *Id.*

264. *Id.* at 32–33.

265. *Id.* ("Only one of the petitioners needs to have standing to permit us to consider the petition for review." (quoting *Massachusetts*, 549 U.S. at 518)).

266. See *supra* Part V.A.

267. TVA Brief, *supra* note 185, at 25, 28–33.

common law claims from the statutory claims in the *Massachusetts* decision, but the underlying reasoning in the private petitioner's brief on causation and redressability was closer to Chief Justice Roberts's dissenting opinion than that of the majority in the *Massachusetts* decision.<sup>268</sup> Although the private petitioners' brief never called upon the Court to overrule the *Massachusetts* decision, if it had adopted the approach of the private petitioners, the Court in *AEP* would have effectively overruled or substantially narrowed *Massachusetts*. By contrast, the TVA brief appeared to agree with the reasoning in *Massachusetts* regarding causation and redressability, although limiting the case to the facts of a sovereign state suing to protect its state-owned coastal property.<sup>269</sup> Accordingly, whether the Court in the *AEP* case would follow the standing reasoning of the private petitioners or the TVA was potentially significant.

### C. *Connecticut's Brief: Massachusetts v. EPA's Standing Analysis Applies*

#### 1. The Plaintiffs' Allegations Suffice to Establish Article III Standing at this Stage for Injury, Traceability, and Redressability

Because the TVA brief agreed that at least some of the States Plaintiffs met Article III standing requirements,<sup>270</sup> this Part will only briefly summarize the States Plaintiffs' constitutional standing arguments. First, regarding the concrete injury requirement, the states' brief explained, that: "The States' complaint alleges two kinds of actual or threatened injuries from global warming: injuries to the States' own sovereign and proprietary interests, and injuries to the health and welfare of the States' citizens."<sup>271</sup> The TVA brief acknowledged that the states' allegations alleging loss of state-owned beach property from erosion resulting from rising sea levels caused by climate change were essentially the same injuries accepted as sufficient for standing in the *Massachusetts* decision.<sup>272</sup>

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268. See *supra* Part V.A.

269. TVA Brief, *supra* note 185, at 25–36.

270. See *supra* Part V.B.2.

271. States Brief, *supra* note 187, at 12.

272. See *supra* Part V.B.2.

Second, the states' brief argued that their allegations met the traceability or causation prong of the standing test because the emissions from the defendants met the "meaningful contribution" test in *Massachusetts*.<sup>273</sup> While the vehicle emissions at issue in the *Massachusetts* decision were six percent of global carbon dioxide emissions, the emissions from the defendant utilities in *AEP* constituted a roughly comparable 2.5%.<sup>274</sup> The TVA brief agreed that the amount of the emissions in the two cases were sufficiently similar.<sup>275</sup>

Third, the states' brief argued that they had sufficiently alleged that a ruling awarding them injunctive relief would redress their injuries.<sup>276</sup> In the *Massachusetts* decision, the Court did not require the States' Plaintiffs to prove that their remedy would completely solve the issue of global warming, but instead concluded that it was sufficient that the proposed remedy of regulating carbon dioxide emissions from new vehicles would "slow or reduce it."<sup>277</sup> Similarly, as the TVA brief conceded, the plaintiffs' proposed remedy in *AEP* of gradually reducing carbon dioxide emissions from the defendants' electric generating power plants would slow or reduce the global emission of GHGs.<sup>278</sup> Furthermore, the States Plaintiffs argued that as *parens patriae* they were entitled to a more lenient standard for remedies, as both the *Massachusetts* and *Tennessee Copper* decisions had recognized.<sup>279</sup>

Additionally, the *AEP* States Plaintiffs argued that their standing arguments were even stronger than those in *Massachusetts* for three reasons. First, *Massachusetts* involved a petition for review of agency action decided under the more stringent summary judgment standard rather than the more lenient standard for plaintiffs in deciding a motion to dismiss, which was the applicable standard in the *AEP* case.<sup>280</sup> In deciding a motion to dismiss, courts presume that a plaintiff's general allegations are factually

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273. States Brief, *supra* note 187, at 14–16.

274. *Id.* at 14.

275. See *supra* Part V.B.2.

276. States Brief, *supra* note 187, at 16–18.

277. *Id.* at 16–17 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)).

278. *Id.* at 17.

279. *Id.* at 18; see *Massachusetts*, 549 U.S. at 519–21; *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907).

280. See States Brief, *supra* note 187, at 18–19 (citing *Massachusetts*, 549 U.S. at 514).

sufficient to establish standing.<sup>281</sup> Second, in the *Massachusetts* decision, the alleged harm resulted not from the defendant EPA, but from third parties that could be regulated by the defendant.<sup>282</sup> Usually, standing is more difficult to establish if harm is caused by a third party.<sup>283</sup> By contrast, in *AEP* the defendants were directly contributing to the problem of GHG emissions and climate change, and, therefore, the *AEP* plaintiffs were entitled to a more lenient standing test than the plaintiffs in *Massachusetts*.<sup>284</sup> Third, the *AEP* case did not raise the same troublesome separation of powers issues as the *Massachusetts* decision because the former case involved only a common law suit against private defendants while the latter decision sought a remedy requiring the Court to order EPA, a part of the executive branch, to consider regulatory action.<sup>285</sup> The *AEP* plaintiffs contended that standing to sue in common law cases was “self-evident,” unlike suits in public rights cases in which courts invoke standing as a “gate-keeping function” to ensure that a plaintiff is the proper party to challenge the actions of the executive branch or serve as a private attorney general in lieu of agency action.<sup>286</sup>

## 2. In Light of the States Showing of a Concrete Injury, There Are No Prudential Limitations that Require Dismissal of the Case

The brief for the plaintiff states vigorously rejected the TVA’s argument that the prudential standing doctrine barred their suit.<sup>287</sup> The States Plaintiffs’ brief contended that the issue of whether generalized grievances are suitable for judicial resolution is an Article III standing issue and not a prudential standing concern.<sup>288</sup> For support, the brief quoted Justice Scalia’s concurring opinion in *Hein v. Freedom From Religion Foundation, Inc.*,

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281. *Id.* at 19 (citing *Bennett v. Spear*, 520 U.S. 154, 168 (1997)).

282. *Id.* at 20.

283. *Id.* at 19–20 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

284. *Id.* at 17–20. The plaintiffs’ brief argued that it was irrelevant that most GHG emissions were from sources that are not parties to the case because, following the *Massachusetts* decision, their suit would reduce the harm of global warming even if the suit could not solve the problem. *Id.* at 20–21 (citing *Massachusetts*, 549 U.S. at 526).

285. *Id.* at 14, 21–22.

286. *Id.* at 21–22 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972); CHARLES A. WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 69 (6th ed. 2002)).

287. *See id.* at 23–26.

288. *Id.* at 23.

where he observed that the Court “has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar,” but he explained that the doctrine “squarely rest[s] on Article III considerations, as the analysis in *Lujan* . . . confirms.”<sup>289</sup> The States Plaintiffs’ brief cited other decisions of the Court agreeing that the issue of whether generalized grievances are suitable for judicial resolution is an Article III standing issue and not a prudential standing concern.<sup>290</sup>

Furthermore, the States Plaintiffs’ brief argued that their claims were not generalized grievances even though everyone in the world is affected in some way by climate change.<sup>291</sup> The Court in *Akins* stated that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.<sup>292</sup> In their brief, the States Plaintiffs interpreted *Akins* as meaning that mass torts are not generalized grievances.<sup>293</sup> The states argued that their public nuisance claims were concrete injuries akin to mass torts rather than generalized grievances and, therefore, rejected the TVA’s view that such widespread injuries are inherently unsuitable for judicial review.<sup>294</sup> The states also argued that states acting as *parens patriae* to protect the interests of their citizens against public nuisances are treated as having a concrete injury for standing purposes, citing a decision of then-Judge Scalia when he was a member of the U.S. Court of Appeals for the District of Columbia.<sup>295</sup> Additionally, the author of this article would add that the *Massachusetts* decision concluded that the Court had standing to hear that case despite the global nature of climate change and observed that “standing is not to be denied simply because many people suffer the same injury.”<sup>296</sup>

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289. *Id.* at 23–24 (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 634 n.5 (2007) (Scalia, J., concurring in the judgment)).

290. *Id.* at 23 (citing *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23–24 (1998); *Lujan*, 504 U.S. 555, 573–74 (1992)).

291. *Id.* at 25–26 (citing *Akins*, 524 U.S. at 23).

292. *Akins*, 524 U.S. at 24–25; Mank, *Standing and Statistical Persons*, *supra* note 15, at 717.

293. States Brief, *supra* note 187, at 25–26.

294. *Id.* at 26.

295. *Id.* (citing *Md. People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985)) (“It is unquestionable that a state, in its *parens patriae* capacity, does qualify as personally suffering some actual or threatened injury.”).

296. *Massachusetts v. EPA*, 549 U.S. 497, 526 & n.24 (2007).

More generally, the States Plaintiffs' brief argued that the Court should not use the generalized grievance doctrine as a "catch-all" to dismiss "cases involving complex issues that could arguably be more efficiently or effectively addressed by regulation."<sup>297</sup> Congressional authorization in a statute can resolve prudential concerns about whether a case poses a generalized grievance inappropriate for judicial review, but common law suits involving many potential class members are not automatically barred by the prudential standing doctrine if they present a concrete injury as in *Akins*.<sup>298</sup> If a federal court has jurisdiction over a case, the States Plaintiffs' brief maintained that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction.<sup>299</sup> Additionally, the states contended that the TVA's prudential standing arguments were "indistinguishable from petitioners' arguments about whether the [Clean Air] Act has displaced the States' common law causes of action."<sup>300</sup> Additionally, the states' brief asserted that "TVA's arguments about the purported difficulties in fashioning a remedy here are identical to petitioners' political-question arguments."<sup>301</sup> It concluded, "The Court therefore should decline TVA's invitation to muddle settled principles of justiciability with a new prudential-standing test."<sup>302</sup> The States Plaintiffs appear to have convinced four Justices in the *AEP* decision that neither the TVA's prudential standing nor the political question doctrine "bars review."<sup>303</sup>

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297. States Brief, *supra* note 187, at 24.

298. See Fed. Election Comm'n v. *Akins*, 524 U.S. 11, 24–25 (1998); see also *supra* Part II.B.

299. States Brief, *supra* note 187, at 24 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2535 n.6 (2011); see *infra* Parts VI.A. and VI.D.



VI. THE SUPREME COURT'S FOUR TO FOUR DECISION IN  
*AMERICAN ELECTRIC POWER CO. V. CONNECTICUT* IMPLICITLY  
REAFFIRMS AND EVEN EXPANDS *MASSACHUSETTS V. EPA*'S  
STANDING ANALYSIS

A. *The Standing Decision in AEP*

In almost all cases involving a tie vote, the Supreme Court simply announces that “The judgment is affirmed by an equally divided Court.”<sup>304</sup> The Supreme Court usually follows that formulaic response because an equally divided vote simply affirms the decision below without setting precedent for other lower courts outside that circuit.<sup>305</sup> In the *AEP* decision, however, the Court took the unusual step of providing some explanation of how it divided on the standing and other jurisdictional questions, although it did not announce the identities of the Justices who voted for or against standing.<sup>306</sup> The Court stated:

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA’s refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.<sup>307</sup>

While technically not binding as a decision for the lower courts outside the Second Circuit,<sup>308</sup> the *AEP* decision’s four to four affirmation of the standing decision provides important clues to how the Court is likely to rule in future standing cases, at least until

304. *Flores-Villar v. United States*, 564 U. S. \_\_\_, \_\_\_, 131 S. Ct. 2312, 2313 (2011) (per curiam); Koerner, *supra* note 8 (“Tradition holds that the court’s per curiam opinion in such ties is usually very, very terse often consisting of no more than a single sentence: ‘The judgment is affirmed by an equally divided court.’”).

305. Gerrard, *supra* note 10 (stating that the standing portion of the *AEP* case “did not set precedent in the technical sense”); Denniston, *supra* note 10 (“Because the Court split 4-4 on the right to sue issue, that part of the Second Circuit decision was left intact, but without setting a nationwide precedent.”).

306. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2535.

307. *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 520–26, 535 (2007); *Nye v. United States*, 313 U.S. 33, 44 (1941)).

308. Gerrard, *supra* note 10; Denniston, *supra* note 10.

the Court's membership changes because of future retirements or appointments to the Court.

B. *Who Were the Four Justices on Each Side of Standing in AEP?*

The voting in the *Massachusetts* decision offers the best guide to how the eight Justices voted in *AEP*. Five Justices in the *Massachusetts* decision voted that the Commonwealth had standing under the *parens patriae* doctrine and general Article III standing principles: Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.<sup>309</sup> By the time of the *AEP* decision, Justices Stevens and Souter had retired from the Court and had been replaced by Justices Kagan and Sotomayor respectively.<sup>310</sup> Thus, three members of the original *Massachusetts* majority remained on the Court for the *AEP* decision: Justices Kennedy, Ginsburg, and Breyer. Because only four years passed between the two cases and there is no other evidence that any of the three Justices have radically changed their views about standing issues, most commentators have assumed that Justices Kennedy, Ginsburg, and Breyer voted in favor of standing in *AEP*, consistent with their endorsement of broad state standing principles in the *Massachusetts* decision.<sup>311</sup>

Justice Kennedy's vote in standing cases is especially important on the current Court as he has often been the key swing vote in such cases, most notably in his crucial concurring opinion in *Lujan*, which concluded that Congress has the authority to define new injuries not recognized by the common law if Congress does so by utilizing specific language in the statute.<sup>312</sup> During oral argument in *Massachusetts*, Justice Kennedy observed that the

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309. *Massachusetts*, 549 U.S. at 501, 526.

310. See *Members of the Supreme Court of the United States: Members in the Timeline*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited Dec. 12, 2011).

311. Gerrard, *supra* note 10 ("Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are [Justices] Ginsburg, Breyer, Kagan, and Kennedy.").

312. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgement) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, . . . [provided that Congress] identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."); Mank, *State Standing*, *supra* note 13, at 1726 n.128 (discussing crucial swing vote of Justice Kennedy in standing cases). See generally Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, WASH. POST, Jan. 31, 2006, at A4 (describing Justice Kennedy as a swing vote on the current Supreme Court).

*Tennessee Copper* decision, which none of the briefs in the case had addressed, was the “best case” for the plaintiffs, and, therefore, the decision’s recognition of special state standing rights under the *parens patriae* doctrine was arguably his idea.<sup>313</sup> Professor Gerrard speculates that when the language in the *AEP* opinion stating that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*”<sup>314</sup> is “considered in conjunction with *Massachusetts*,” that one might infer that “Justice Kennedy believes that only states would have standing. Thus, there might be a 5-4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.”<sup>315</sup>

Four Justices dissented in the *Massachusetts* decision; joining Chief Justice Roberts’s vigorous dissenting opinion arguing that standing was inappropriate in that case were Justices Scalia, Thomas, and Alito.<sup>316</sup> These four Justices remained on the Court at the time of the *AEP* decision.<sup>317</sup> Again, the most logical presumption is that these four Justices voted against standing in the *AEP* case as they had in the *Massachusetts* decision.<sup>318</sup>

Justice Elena Kagan, who was nominated by President Obama and confirmed by the Senate in 2010, was the only member of the Court who voted in *AEP*, but was not a member of the Court when *Massachusetts* was decided. Commentators have assumed that she voted in *AEP* with Justices Kennedy, Ginsburg, and Breyer in part because it was unlikely that any of the dissenting Justices in the *Massachusetts* decision changed their minds about standing for the *AEP* decision.<sup>319</sup> Furthermore, in her brief time on the Court, she has generally endorsed a permissive view of standing for plaintiffs<sup>320</sup> and has most often voted with Justices

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313. Transcript of Oral Argument at \*\*13, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120), 2006 U.S. Trans. LEXIS 50; see also Mank, *States Standing*, *supra* note 13, at 1738–40 (“It seems most likely that Justice Kennedy suggested that the majority rely on *Tennessee Copper*.”).

314. *Am. Elec. Power Co. v. Connecticut*, 564 U. S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2535 (2011).

315. Gerrard, *supra* note 10.

316. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

317. See SUPREME COURT OF THE UNITED STATES, *supra* note 310.

318. See Gerrard, *supra* note 10 (“The four who disagree [that there is standing in the *AEP* decision] are Roberts, Scalia, Thomas, and Alito.”).

319. See *supra* note 316.

320. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1436, 1451–52 (2011) (Kagan, J., dissenting).

Ginsburg and Breyer.<sup>321</sup> During the Supreme Court's 2010–2011 term, she voted with Justices Ginsburg and Breyer in 91% and 87% of all cases respectively.<sup>322</sup> Moreover, she replaced Justice Stevens, who authored the *Massachusetts* decision. If in *AEP* she had agreed with the four dissenting Justices in *Massachusetts*, it is likely that there would be five votes against standing unless Chief Justice Roberts or Justices Scalia, Thomas, or Alito radically changed their view of Article III standing in the four years since *Massachusetts*. Accordingly, commentators and bloggers have assumed that Justice Kagan voted for standing in *AEP*.<sup>323</sup>

### C. *How is Justice Sotomayor Likely to Vote on Standing?*

Although it is impossible to know for certain, a wide variety of commentators have speculated that Justice Sotomayor, who was appointed by President Obama, a Democrat, will probably vote for standing in a case similar to the *Massachusetts* decision or the *AEP* decision.<sup>324</sup> In her brief time on the Court, she has also generally endorsed a permissive view of standing.<sup>325</sup> Additionally and more generally, empirical studies have found statistically significant differences in judicial voting patterns between federal judges appointed by either a Democratic or a Republican President, although the party of appointment is more significant on average for some issues than others and not all judges appointed by a particular party have the same views.<sup>326</sup> There is conflicting evidence

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321. STAT PACK FOR OCTOBER TERM 2010, SCOTUSBLOG 19 (2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_OT10\\_stat\\_pack\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf) [hereinafter STAT PACK].

322. *Id.*

323. *See supra* note 318.

324. Adler, *supra* note 182, at 313 (suggesting Justice Sotomayor would endorse the approach to standing from *Massachusetts* or perhaps an even more liberal standard); Gerard, *supra* note 10 (“Should another case come up on which Justice Sotomayor is not recused, there might be a 5-4 majority to allow climate change nuisance litigation, but for the Clean Air Act displacement.”); Dan Farber, *The Supreme Court on Climate Torts—A Second Look*, LEGAL PLANET (June 30, 2011), <http://legalplanet.wordpress.com/2011/06/30/the-supreme-court-on-climate-torts-a-second-look/> (“[O]n the standing issue, four Justices voted to find standing, which almost certainly makes a majority if you add Justice Sotomayor (who recused herself in this case).”).

325. *See, e.g., Ariz. Christian Sch. Tuition Org.*, 563 U.S. at \_\_\_, 131 S. Ct. at 1450–62 (Kagan, J., dissenting) (arguing, joined by Justices Breyer, Ginsburg, and Sotomayor, that taxpayers had standing to challenge Arizona’s tuition tax credit); Adler, *supra* note 182, at 313.

326. *See generally* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 22–23 (2007) (“[P]residential ideologies are reflected in the ideologies of their judicial ap-

about whether the party of appointment affects how federal courts of appeals judges vote in standing cases,<sup>327</sup> and Professor Cross rightly observes that more empirical data is needed on how judges vote on procedural issues like standing.<sup>328</sup>

The predictive power of whether a judge is appointed by a Democratic or Republican President may have become more powerful with recent Supreme Court appointments as Presidents more consciously choose judges with a particular ideological viewpoint.<sup>329</sup> During her time on the Court so far, Justice Sotomayor has generally voted with the other Justices appointed by Democratic Presidents.<sup>330</sup> For example, the two Justices that President Obama nominated to serve on the Supreme Court, Justices Sonia Sotomayor and Elena Kagan, agreed 94% of the time during the 2010–2011 term.<sup>331</sup> Justice Sotomayor has also voted consistently with Democratic appointees Justices Ginsburg and

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pointees. The Republican appointees were consistently more conservative, on average, than the Democratic appointees.”); CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 11–12, 17–18 (2006) (analyzing 6408 published three-judge federal court of appeals decisions during the 1995–2004 period and finding statistical significant differences in judicial voting between Democratic and Republican appointees in several subject areas, but not in other subject areas, including standing questions). Professor Cross cautions, however, that not all Republican or Democratic Presidents have the same views as other Presidents of the same party and that judges do not perfectly replicate the ideologies of the Presidents who appoint them or the Senators who confirm them. CROSS, *supra* at 19–20.

327. Compare CROSS, *supra* note 326, at 185–86 (finding tentative empirical evidence that Republican judges are more likely to deny standing than Democratic judges), and Richard J. Pierce, *Is Standing Law or Politics*, 77 N.C. L. REV. 1741, 1742, 1760 (1999), with SUNSTEIN ET AL., *supra* note 326, at 53–54 (finding no statistically significant differences between Republican and Democratic appointees serving on the D.C. Circuit on standing issues).

328. CROSS, *supra* note 326, at 186.

329. For example, President Reagan stated that his goal was to appoint a federal judiciary “made up of judges who believe in law and order and a strict interpretation of the Constitution.” David M. O’Brien, *The Reagan Judges: His Most Enduring Legacy?* in THE REAGAN LEGACY 60–62 (Charles O. Jones ed., 1988). Some Justices in the past broke with the views of their appointing President. Justice Stevens was appointed by Republican President Gerald Ford and Justice Souter by Republican President George H.W. Bush, but both voted more closely with more liberal Democratic appointees. Robert Barnes, *The Un-Routine Sets Apart Sotomayor’s First Term*, WASH. POST, July 11, 2010, at A1 (reporting that John Oldham McGinnis, a law professor at Northwestern University, characterized Justice Souter as voting with the conservative wing of the Court during his first year, but thereafter becoming a reliable liberal vote); Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Without its Liberal Leader?*, NEW YORKER, Mar. 22, 2010, at 39 (identifying Justice Stevens as the leading liberal Justice for many years despite being appointed by a Republican President).

330. See Barnes, *supra* note 329.

331. Robert Barnes, *Justices Who Will Shape Supreme Court’s Future Pair Up*, WASH. POST, June 28, 2011, at A6; STAT PACK, *supra* note 321, at 19.

Breyer in 85% and 87% of all the cases during that term.<sup>332</sup> Similarly, Republican President George W. Bush's two nominees to the Court, Chief Justice Roberts and Justice Alito agreed in 96% of the Court's decisions, and each agreed with two other Republican appointees, Justices Scalia and Thomas in 86% and 90% of the cases.<sup>333</sup> By contrast, Justice Sotomayor only agreed with Chief Justice Roberts, Justices Scalia, Thomas, and Alito respectively in 71%, 67%, 68%, and 72% of the decided cases.<sup>334</sup> In most cases before the Supreme Court, Republican and Democratic appointed Justices agree regardless of the party of appointment, but concerning certain controversial issues there are substantial differences. For example, in the *Massachusetts* decision, where the generally more "liberal" Justices and "swing-voter" Justice Kennedy voted together to conclude that there was standing and the more "conservative" Justices disagreed.<sup>335</sup> If, as is widely believed, Justices Kagan, Ginsburg, and Breyer were three of the four Justices who voted in favor of the plaintiffs meeting standing requirements in *AEP*,<sup>336</sup> then it is likely, although not certain, that Justice Sotomayor would vote for standing in cases similar to *Massachusetts* or *AEP* based on which Justices she is more likely to agree with. Additionally, she may be influenced by her former colleagues on the Second Circuit who voted for standing in *AEP*.<sup>337</sup>

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332. STAT PACK, *supra* note 321, at 19.

333. *Id.*

334. *Id.*

335. The dissenting Justices in *Massachusetts*, Chief Justice Roberts and Justices Scalia, Thomas, and Alito, generally rank based on their overall voting records as four of the five most conservative Justices of the forty-three Justices to sit on the Court between 1937 and 2006. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 781–83 (2009) (ranking the most conservative to least conservative Justices). According to the Landes and Posner study, Justice Ginsburg is the ninth most liberal, Stevens the twelfth most liberal, Breyer the thirteenth most liberal, and Souter the fifteenth most liberal Justice during that time. *Id.* Justice Kennedy was the tenth most conservative Justice. *Id.* By contrast, in *Arizona Christian School Tuition Org. v. Winn*, which involved the issue of standing for taxpayers challenging Arizona's tuition tax credit, Justice Kennedy wrote the majority opinion denying standing, joined by four conservatives, Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito, while the four liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan—dissented and would have granted standing. 563 U.S. \_\_\_, \_\_\_ 131 S. Ct. 1436, 1440, 1450–51 (2011).

336. See *supra* Part VI.B–C.

337. See *supra* Part IV.B.

#### D. *The Impact of AEP on Future Standing Cases*

Implicitly, *AEP* reaffirmed and even expanded the Court's standing analysis in *Massachusetts*, which recognized that states have special standing rights when they sue as *parens patriae* to protect their natural resources or the health of their citizens.<sup>338</sup> In sum, four Justices concluded that at least some of the *AEP* plaintiffs met Article III standing requirements in light of *Massachusetts*.<sup>339</sup> Additionally, these four Justices implicitly rejected using the political question doctrine or prudential standing barriers as threshold limitations on suits.<sup>340</sup>

Four members of the *AEP* Court reaffirmed the broad state standing doctrine in the *Massachusetts* decision. The *AEP* decision stated: "Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate [GHG] emissions."<sup>341</sup> The "some plaintiffs" mentioned by the *AEP* decision were probably the States Plaintiffs because the *Massachusetts* decision only clearly endorsed standing rights for *states* to bring suits involving climate change.<sup>342</sup>

The *AEP* decision arguably adopted an even broader standing analysis than *Massachusetts* by eliminating the requirement of a statutory procedural right as a basis for standing.<sup>343</sup> In their brief, the private petitioners had argued that the plaintiffs could not meet the Article III constitutional standing test because the broad standing principles in *Massachusetts* were limited to statutory cases.<sup>344</sup> The petitioners' Article III standing argument, that the state standing doctrine in *Massachusetts* was limited to federal statutory claims, had some support in *Massachusetts* because that decision emphasized that the standing rights in that case

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338. See *supra* Part III.

339. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2535 & n.6 (2011).

340. *Id.*

341. *Id.*

342. See Adler, *supra* note 182, at 309–10 (suggesting the four Justices in *AEP* who stated that at least "some plaintiffs" had standing were most likely referring to the States Plaintiffs). See generally *supra* Part II (discussing the *Massachusetts* decision's "special solicitude" for state standing rights under *parens patriae* doctrine).

343. See Adler, *supra* note 182, at 312–13. See generally *supra* Part II (discussing *Massachusetts*'s requirement of a statutory procedural right as a basis for standing).

344. See *supra* Part V.A.

were based in part on the procedural rights established in the Clean Air Act.<sup>345</sup> The four Justices concluding that some of the *AEP* plaintiffs had standing implicitly rejected the argument that *Massachusetts's* broad standing analysis applied in only statutory cases and thus appeared willing to extend *Massachusetts's* broad state standing principles beyond its original statutory setting.<sup>346</sup> The *Massachusetts* decision was contradictory in emphasizing both the importance of the procedural standing rights in the case and the special standing rights of states.<sup>347</sup> If states really have special standing status, at least when they sue to protect "quasi-sovereign" interests, then why did Justice Stevens's majority opinion in *Massachusetts* also put such heavy emphasis on the procedural right in the case?<sup>348</sup> It is likely that Justice Stevens in an effort to attract five votes relied on multiple justifications for standing without deciding or explaining which justifications should guide future cases.<sup>349</sup> The *AEP* decision suggests that, at least for the four Justices who voted for standing in that case, the state standing rationale was more important in *Massachusetts* than the procedural right rationale.<sup>350</sup> Thus, though it is technically not binding on future decisions, the *AEP* decision might lead to broader standing rights than *Massachusetts*. Accordingly, four Justices appear willing to extend the standing analysis in *Massachusetts* to common law actions by states.

The four Justices who concluded that at least some of the plaintiffs had Article III standing also observed that "no other threshold obstacle bars review."<sup>351</sup> In footnote six of the *AEP* decision, the Court explained: "In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a 'prudential' bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar."<sup>352</sup> Thus, four Justices implicitly rejected the petitioners' argument that the political

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345. See *supra* Part V.A.

346. See Adler, *supra* note 182, at 313.

347. See *supra* Part II.A.

348. See *supra* Part III.A.

349. See *supra* Part III.A.

350. See *supra* Part III.A.

351. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2535 (2011).

352. *Id.* at \_\_\_, 131 S. Ct. at 2535 n.6 (citations omitted).



question doctrine barred the plaintiffs' suit.<sup>353</sup> Furthermore, these same four Justices implicitly rejected the TVA's argument that the prudential standing doctrine barred the plaintiffs' suit because it was a generalized grievance.<sup>354</sup> Implicitly, by concluding that some of the *AEP* plaintiffs had standing and that no other threshold barriers barred their suit, the four Justices refused the invitations of the petitioners and the TVA to narrow the reach of the standing analysis in *Massachusetts* and arguably expanded standing rights beyond *Massachusetts*'s statutory setting to common law cases.

## VII. CONCLUSION

On the merits, *AEP* concluded that the EPA's regulatory actions regarding GHGs displaced the plaintiffs' federal common law nuisance action.<sup>355</sup> The Court, however, did not decide whether the EPA's GHG regulations preempted state common law nuisance actions and remanded that issue back to the lower courts.<sup>356</sup> Accordingly, the issue of standing in state common law public nuisance actions involving GHGs remains a continuing controversy that may someday be resolved by the Court and is likely to be faced by the lower courts.

The main impact of the *AEP* decision on standing doctrine is that at least four Justices would not limit the *Massachusetts* standing doctrine to the facts of that decision or would not use other threshold barriers to limit state standing.<sup>357</sup> Whether the Court would adopt the petitioners' or TVA's standing or threshold arguments in future cases depends on how Justice Sotomayor receives them,<sup>358</sup> but at least for now the *Massachusetts* decision's broad state standing principles under the *parens patriae* doctrine remains valid.<sup>359</sup>

Implicitly, the *AEP* Court, by its equally divided vote on standing, reaffirmed the analysis in *Massachusetts*, which recognized that states have special standing rights when they sue as *parens*

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353. See *supra* Part V.A.

354. See *supra* Part V.B.

355. *Am. Elec. Power*, 564 U. S. at \_\_\_, 131 S. Ct. at 2537–40.

356. *Id.* at \_\_\_, 131 S. Ct. at 2540.

357. *Id.* at \_\_\_, 131 S. Ct. 2535 & n.6; see *supra* Part VI.D.

358. See *supra* Part VI.C.

359. See *supra* Part VI.D.

*patriae* to protect their natural resources or the health of their citizens.<sup>360</sup> This is an important issue because state attorneys general are involved in many different kinds of suits in federal courts.<sup>361</sup> State suits are likely to be significant in future common law nuisance claims regarding climate change.<sup>362</sup> Furthermore, states may challenge the GHG regulations that the EPA plans to issue in 2012.<sup>363</sup>

Like the *Massachusetts* decision, the *AEP* decision left unanswered whether non-state parties have standing to bring climate change suits against either the government or private defendants emitting GHGs. The Supreme Court may someday have to decide the standing question for non-state plaintiffs. In *Native Village of Kivalina v. Exxon Mobil Corp.*,<sup>364</sup> the Village of Kivalina, whose inhabitants are a self-governing, federally recognized Tribe of Inupiat Eskimos, filed a public nuisance action against several oil, energy, and utility companies for causing substantial GHG emissions that contribute to global warming, and alleged that the defendants' GHG emissions and resulting climate change caused the melting of sea ice that had protected Kivalina from coastal storm waves and surges.<sup>365</sup> The growing storm surges resulting from climate change have caused erosion that is making Kivalina uninhabitable.<sup>366</sup> The plaintiffs allege that, as a result of the erosion, the Village will have to be relocated at a cost estimated to range from \$95 to \$400 million.<sup>367</sup> Unlike the *AEP* plaintiffs who sought only injunctive relief, the *Kivalina* plaintiffs seek damages for the cost of relocating the village.<sup>368</sup>

In 2009, the District Court for the Northern District of California dismissed the *Kivalina* case on both political question and standing grounds. The district court concluded that the political question doctrine barred the suit because there were no judicially discoverable and manageable standards for a public nuisance suit

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360. See *supra* Parts III and VI.D.

361. Mank, *States Standing*, *supra* note 13, at 1780 (discussing role of state attorneys general in possible *parens patriae* cases).

362. *Am. Elec. Power*, 564 U.S. at \_\_\_, 131 S. Ct. at 2540.

363. *Id.* at \_\_\_, 131 S. Ct. at 2533.

364. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

365. *Id.* at 868–69.

366. *Id.* at 869.

367. *Id.*

368. *Id.*

addressing the complexities of global climate change and also determined that deciding the case would involve policy questions more appropriately resolved by the political branches of the government.<sup>369</sup> Additionally, the district court concluded that the plaintiffs could not prove standing causation because they could not trace the Village's harms to specific actions of the defendants in emitting GHGs and because any possible connection was too attenuated to support standing.<sup>370</sup> The district court rejected the plaintiffs' assertion that they were entitled to special *parens patriae* standing rights pursuant to the *Massachusetts* decision because "[t]his rationale does not apply to Plaintiffs, which did not surrender its sovereignty as the price for acceding to the Union."<sup>371</sup> Furthermore, the district court concluded:

Even if the special solitude mentioned in *Massachusetts* applied to Plaintiffs, they still would lack standing. As discussed above, Plaintiffs lack standing on the basis of the political question doctrine and based on their inability to establish causation under Article III. Even a relaxed application of the requisite standing requirements would not overcome these fatal flaws in Plaintiffs' case.<sup>372</sup>

The *Kivalina* case is now on appeal to the U.S. Court of Appeals for the Ninth Circuit.<sup>373</sup> Because the Village's complaint alleged not only a federal common law nuisance but also a state common law nuisance,<sup>374</sup> the *Kivalina* appeal remains viable and the Ninth Circuit probably will have to address the issue of standing in the case.

The standing portion of the *AEP* decision is not binding on the Ninth Circuit in the *Kivalina* appeal because of the equally divided vote in *AEP*.<sup>375</sup> Nevertheless, the district court's assertion in *Kivalina* that the plaintiffs could not prove causation *even if* the special standing rights in the *Massachusetts* decision were applicable is inconsistent at least with the reasoning of the four Justices who found standing in the *AEP* decision.<sup>376</sup> The private peti-

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369. *Id.* at 873–77.

370. *Id.* at 877–81.

371. *Id.* at 882.

372. *Id.*

373. James R. May, *Recent Developments in Climate Change Litigation: Oral Arguments in AEP v. Connecticut and Related Cases*, Daily Env't Rep. (BNA) No. 111, at 4 & n.26 (June 9, 2011).

374. *Kivalina*, 663 F. Supp. 2d at 869.

375. *See supra* Part VI.D.

376. *See supra* Part VI.D.

tioners in their *AEP* brief made essentially the same argument as the *Kivalina* district court decision in arguing that the plaintiffs could not establish standing causation when the defendants had caused only a tiny fraction of the worldwide GHG emissions contributing to climate change.<sup>377</sup> However, four Justices in the *AEP* decision concluded that the plaintiffs had met Article III constitutional standing requirements despite similar contrary causation arguments.<sup>378</sup> The stronger reasoning in the *Kivalina* decision is its conclusion that the state standing doctrine is inapplicable to a village that never gave up the type of political sovereignty enjoyed by a state before it joined the United States.<sup>379</sup> Thus, the *AEP* decision casts no light on the standing rights of non-state plaintiffs.<sup>380</sup> If *Kivalina* eventually reaches our highest Court, the Supreme Court will need to address whether non-state parties can file suit for harms caused by globalized problems.

It will be interesting to see how lower courts apply the *Massachusetts* decision in future cases involving standing and GHGs and whether they cite the *AEP* decision when they interpret the former decision.<sup>381</sup> The *AEP* decision arguably adopted an even broader standing analysis than *Massachusetts* by eliminating the requirement of a statutory procedural right as a basis for standing.<sup>382</sup> In light of the *AEP* decision, at least four current members of the Supreme Court appear to support the standing rights of states in both statutory and common law actions involving defendants releasing substantial amounts of GHGs, despite the

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377. See *supra* Part VI.A.

378. See *supra* Part VI.D.

379. *Kivalina*, 663 F. Supp. 2d at 882.

380. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2536 (2011).

381. See, e.g., *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, Nos. 6:09-cv-00037-RB-LFG, 6:09-cv-00414-RB-LFG, 2011 WL 3924489 (D.N.M. Aug. 3, 2011) (citing *Massachusetts* and *AEP* and holding that plaintiffs' subjective observations of changes in the New Mexico climate were too speculative to establish injury from government's approval of ninety-two oil and gas leases in New Mexico). Additionally, the plaintiffs in this case failed to prove standing causation because the ninety-two leases would amount to only 0.0009% of global GHG emissions and that amount did not constitute a "meaningful contribution" under *Massachusetts's* test. *Id.*

382. See *supra* Parts III.A and VI.D; see also Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 121–25 (2011), <http://yalelawjournal.org/2011/09/13/farber.html> (arguing *American Electric Power* demonstrates flaws in current standing doctrine because the doctrine is so incoherent that the Supreme Court could have justified any outcome five Justices desired and that jurisdictional questions overlapped with the merits of case).

worldwide source of such emissions.<sup>383</sup> Furthermore, based on her relatively short record on the Court and the President who appointed her to the Court, there is some reason to believe that Justice Sotomayor is more likely to join the four Justices who supported standing in *AEP* than the four Justices who concluded otherwise.<sup>384</sup>

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383. *See supra* Part VI.D.

384. *See supra* Part VI.C.-D.