

Massachusetts v. EPA, the cornerstone climate case, contains an extensive discussion of standing which opens by saying that lawsuits by state governments are entitled to “special solicitude.” In the last few weeks of its term, the Supreme Court opined repeatedly on state standing. “Special solicitude” seems to be on the wane. Overall, I think that might be a good thing.

The Court’s recent decisions.

The first mention of state standing this Term involved a challenge by Texas to part of a federal law relating to adoption of Indian children. Distinguishing an earlier case, the Court held that Texas could not represent the interests of non-Indians who were disadvantaged by the law.

State standing was the central issue in *United States v. Texas*, which involved an attack on the Biden Administration’s immigration policy. The state alleged that it was injured because it had to spend money dealing with immigrants convicted of crimes who were allegedly the federal government’s responsibility. The Court rejected this theory of a standing and expressed some concern about the overextension of state standing. A key footnote focused on this issue:

“Also, the plaintiffs here are States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer. To be sure, States sometimes have standing to sue the United States or an executive agency or officer. But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending.”

The Court continued: “And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State’s claim for standing can become more attenuated. In short, none of the various theories of standing asserted by the States in this case overcomes the fundamental Article III problem with this lawsuit.”

If anything this footnote seems to express skepticism rather than special solicitude toward standing claims by states. Dissenters were quick to point out the contrast with *Mass. v. EPA*. However, the two cases seem different to me: Under the Constitution, states retain a sovereign interest in defining the limits of their territories, but they have ceded control over who enters their borders to the federal government.

Finally, in the student loan case, *Biden v. Nebraska*, the Court held that Missouri had standing to challenge the loan forgiveness program, based on a clear injury to the loan-

processing corporation the state had set up. This case isn't very illuminating, however, because the discussion focused on whether the corporation was an organ of state government.

Should states have standing?

It was certainly helpful, if only in picking up Justice Kennedy's crucial vote, to have a state plaintiff in *Mass. v. EPA*. It seems unlikely that the Court today would come out the same way, given that the dissent by Chief Justice Roberts had four votes at a time when the Court was less conservative than today. A stronger standing theory today might focus on the air pollution connected with fossil fuels and their health effects on individuals.

There are both a strategic argument and more principled ones for being cautious about state standing. I'll start with the strategic one. Given that we have an extremely conservative Supreme Court, access to the courts is likely to be more useful to conservative states than liberal ones today. There's little reason to think these days that expansive standing rules are in the interest of those who care about protecting the environment.

The principled arguments are more significant. Doctrinally, state standing has the potential to wipe out any standing limitations for the reasons the Court points out in *U.S. v. Texas*: almost any significant federal action will impact state economies (and thus taxes) or otherwise impose costs on states. If we're going to get rid of standing law, fine. But if we think standing law serves some real purpose, we need to be careful about creating a giant loophole for state governments.

I also worry about state government litigation in systemic terms. These days, conservative Republican state attorney generals are likely to sue to stop any liberal policy, while the converse is also true. The result is that lawsuits are immediately framed as partisan and ideological. I don't think that's healthy for either the legal system or public discourse more generally. If we want to maintain some distinction between law and politics, we should avoid structuring litigation around the political ambitions of elected state attorney generals.

I do realize there are arguments on the other side. State lawsuits against the Trump Administration helped prevent a lot of abuses. But I think we could have gotten there through civil society institutions like environmental groups, and in some ways that might have been healthier.

Given the arguments on both sides, I wouldn't favor a radical change in current law. But some healthy skepticism about expansive claims of standing by states might be in order. In

particular, if individual citizens would not have standing to sue, we should be leery of efforts by claims to amalgamate diffuse or speculative individual injuries into derivative claims by state governments based on loss of tax revenue or indirect increases in routine administrative expenses. .