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Spending Clause Standing

Edward Webre Plaut
University of Michigan Law School

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NOTE

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TABLE OF CONTENTS

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*Edward Webre Plaut**

The Biden Administration's American Rescue Plan Act allotted almost $220 billion to state, local, and tribal governments to help combat the COVID-19 pandemic. This money, the Coronavirus State and Local Fiscal Recovery Fund, gave recipients wide spending discretion to address their struggling economies. But the legislation had one key limitation: Recipients could not use the money to "directly or indirectly" cut their taxes. If a recipient violated this "Offset Provision," the Department of the Treasury might recoup the funds.

Nearly two-dozen states alleged that the Offset Provision was unduly coercive and ambiguous, violating the Spending Clause. However, with no threatened recoupment looming, it was unclear whether the states had standing to sue at all. The five circuit courts that heard these cases did not reach consensus on the standing issue. Numerous opinions across six cases offered differing conceptions of "sovereign" injuries and applied Massachusetts v. EPA*'s command for "special solicitude" to the state plaintiffs inconsistently.*

The Offset Provision cases provide the first opportunity to study the intersection of the Spending Clause and state standing. With no precedent on when states can challenge congressional spending legislation, the cases navigated standing's incoherent doctrine to craft new rules. The Offset Provision cases offer two novel categories of sovereign injuries-in-fact that states allegedly suffer in Spending Clause cases: the "Spending Contract" and "Tax Power" injuries. The former relates to an unconstitutionally ambiguous or coercive federal offer, while the latter describes an impermissible regulatory subject matter.

The Offset Provision cases define the terms of federalism's future battleground. The Spending Contract and Tax Power injuries provide enterprising state attorneys general with the weapons to dismantle disfavored federal policy. Instead of adhering to standing doctrine's core separation-of-powers principles, a majority of the involved circuit courts have enabled states to readily air their policy grievances in federal court. Because Congress increasingly relies on its spending power to pass legislation, when states can and cannot challenge fed-

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eral policy has enormous implications for modern policymaking. When appropriate, Spending Clause standing doctrine should permit heightened scrutiny when a state unilaterally attempts to block a federal program.

INTRODUCTION

Responding to the COVID-19 pandemic and the ensuing economic crisis, Congress passed the American Rescue Plan Act (ARPA).[1] The $1.9 trillion ARPA was meant to do more than stop the bleeding—it contained unemployment insurance, food assistance, child tax credit funding, and more programs meant to usher in a new era of robust public spending.[2] One such ARPA program, the Coronavirus State and Local Fiscal Recovery Funds (CSLFRF), provided certain non-federal government entities almost $220 billion to "mitigate the fiscal effects" of the pandemic.[3] The CSLFRF empowered states and local governments to spend on programs of their own choosing[4]—granting recipients wide discretion, but not a blank check. Indeed, the program contained one key limitation: the tax "Offset Provision." Recipients could spend the new money on nearly anything, but they could not use it to "directly or indirectly offset" their taxes.[5] If they did, the Department of the Treasury (Treasury) could "recoup" the impermissibly spent funds.[6]

This Offset Provision initiated a flood of litigation challenging Congress's use of its spending power.[7] Within weeks of ARPA's passage, twenty-one states brought suit to enjoin the Treasury's enforcement of the Offset Provision.[8] Several states, whether or not they had tax cuts planned, recoiled at a perceived coercive congressional limitation on their sovereign power.[9] The states also argued that the "directly or indirectly" language was impermissibly ambiguous—what did it mean to "indirectly" cut taxes?[10] Even before the Treasury threatened any recoupment action, the states wanted an injunction.[11]

Given the states' race to the courthouse prior to any real threat of enforcement, the Offset Provision opinions focused on the state-plaintiffs' standing.

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1. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

2. *See* Giovanni Russonello, *What Does $1.9 Trillion Buy?*, N.Y. TIMES (Apr. 29, 2021), https://nytimes.com/2021/03/10/us/politics/whats-in-covid-bill.html [perma.cc/5VJX-A7GE].

3. 42 U.S.C. §§ 802(a), (c)(1).

4. 42 U.S.C. §§ 802–806.

5. 42 U.S.C. § 802(c)(2)(A).

6. *Id.* § 802(e).

7. *See infra* Section I.A; U.S. CONST. art. I, § 8, cl. 1.

8. *See infra* Section I.A; Missouri v. Yellen, 538 F. Supp. 3d 906 (E.D. Mo. 2021); Arizona v. Yellen, 550 F. Supp. 3d 791 (D. Ariz. 2021); West Virginia v. U.S. Dep't of Treasury, 571 F. Supp. 3d 1229 (N.D. Ala. 2021); Kentucky v. Yellen, 563 F. Supp. 3d 647 (E.D. Ky. 2021); Texas v. Yellen, 597 F. Supp. 3d 1005 (N.D. Tex. 2022); Ohio v. Yellen, 539 F. Supp. 3d 802 (S.D. Ohio 2021).

9. *See, e.g.*, Missouri v. Yellen, 39 F.4th 1063, 1069–70 (8th Cir. 2022).

10. *See, e.g.*, Arizona v. Yellen, 34 F.4th 841, 848 (9th Cir. 2022).

11. *See, e.g.*, Kentucky v. Yellen, 54 F.4th 325, 329 (6th Cir. 2022).

The sparse Spending Clause case law confirms that Congressional "offers"—extensions of federal funds with spending or regulatory strings attached—to the states cannot be ambiguous or coercive.[12] But that case law never addresses standing—that is, *when* states have the power to challenge these congressional offers. Must states wait until something "happens" pursuant to their "contract" with the federal government? In the Offset Provision cases, that would have meant waiting until the Treasury actually threatened enforcement.

Relatedly, under *Massachusetts v. EPA*, the Supreme Court mandated that in a federal court's standing analysis, state-plaintiffs' unique sovereign status entitled them to "special solicitude."[13] But how should a court apply special solicitude in Spending Clause cases, if at all?[14] By virtue of their sovereign status, can states challenge federal spending conditions the moment Congress offers them, as the states in the Offset Provision cases did? For increasingly litigious state governments, these threshold questions have enormous implications for the future of federal-state litigation.[15] And, although special solicitude technically retains its precedential value, the Supreme Court has neglected to support the doctrine—or even apply it—since *Massachusetts v. EPA*.[16]

The Offset Provision cases are the perfect (and, currently, the only) experiment to study the intersection of state sovereign standing and the Spending Clause. The circuit courts are split in their first attempts to tie together these two jurisprudential threads. The Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits came to different conclusions on these questions and the underlying merits. Two courts found no standing for sovereign injuries;[17] three found standing for sovereign injuries,[18] two of which enjoined the Offset Provision.[19]

The disparate opinions help elucidate the contours of the sovereign "injuries-in-fact"—one of the three requirements for Article III standing—that states suffer when Congress makes a coercive or ambiguous offer under the

12. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); South Dakota v. Dole, 483 U.S. 203, 207, 211 (1987); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–81 (2012).

13. Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007).

14. *See* United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring).

15. *See* Steve Vladeck, *16. When Can States Sue the Federal Government?*, ONE FIRST (Feb. 27, 2023), https://stevevladeck.com/p/16-when-can-states-sue-the-federal [perma.cc/XE9L-NM97] (noting the frequency of state challenges to Biden administration policies); *Our Story: About the Alliance*, GOVERNORS SAFEGUARDING DEMOCRACY, https://govsfordemocracy.org/about-us [perma.cc/Z5FE-YKW5] (reflecting the same litigious ambition of Democratic Governors J.B. Pritzker and Jared Polis in the second Trump administration).

16. United States v. Texas, 143 S. Ct. at 1977 (Gorsuch, J., concurring).

17. Missouri v. Yellen, 39 F.4th 1063, 1070 (8th Cir. 2022); Kentucky v. Yellen, 54 F.4th 325, 329 (6th Cir. 2022); Ohio v. Yellen, 53 F.4th 983, 993 (6th Cir. 2022). The Sixth Circuit in *Kentucky v. Yellen* held that Tennessee had standing for a compliance cost injury. 54 F.4th at 342.

18. Arizona v. Yellen, 34 F.4th 841, 852 (9th Cir. 2022); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1136 (11th Cir. 2023); Texas v. Yellen, 105 F.4th 755, 767 (5th Cir. 2024).

19. *Morrisey*, 59 F.4th at 1148–49; Texas v. Yellen, 105 F.4th at 774.

Spending Clause. The Offset Provision cases produced two general categories of sovereign injuries, styled here as the "Spending Contract" injury and the "Tax Power" injury. The Spending Contract injury, the asserted basis for standing in the Fifth, Ninth, and Eleventh Circuits,[20] focuses on the *offer* : Congress offends state sovereignty when it offers federal funds with coercive or ambiguous spending conditions.[21] The Tax Power injury—a "plus factor" for standing in the Ninth and Eleventh Circuits—focuses on the *subject matter* : States can challenge congressional exercises of the Spending Clause that constrain certain sovereign prerogatives, like the power to tax.[22]

Although it is true that states suffer *some* form of sovereign injury when Congress exceeds its spending power, most of the Offset Provision decisions are simply too broad. An expansive Spending Contract injury incentivizes states to hunt for ambiguous provisions in legislative text and enjoin imagined enforcement merely because the ambiguity exists at the quasi-contractual offer stage. Furthermore, the Tax Power injury might significantly limit the use of the Spending Clause, granting standing if policy touches something—anything—"sovereign" enough. These injuries offer two new standing weapons to enterprising state attorneys general seeking to oppose federal spending policy: (1) searching and destroying legislative ambiguity, or (2) quarantining state tax policies from federal influence. Activist states and their chief prosecutors, already relying on "dubious" and "lawless" standing theories to circumvent decades of Article III limitations,[23] leave the fate of consequential policy decisions in the hands of an unelected judiciary. And unlike other forms of federal policymaking, the Spending Clause allows states to retain their agency and reject what Congress offers them. Because Congress often relies on its spending power for modern legislation,[24] an expansive "welcome" mat into federal court risks further turning the judiciary into the arbiter of policy battles.[25]

States should not have the power to hold federal law hostage. State standing under the Spending Clause should not depend on arbitrary determinations of sovereign prerogatives or hypothetical federal enforcement. By expanding state standing to challenge federal law, the Offset Provision cases risk breathing unneeded life into *Massachusetts v. EPA*. While some legal commentators have argued that expansive state standing offers states a meaningful policy platform,[26] federal courts should not accept incoherent doctrine that

20. *See infra* Section I.A.

21. *See infra* Section I.A.

22. *See infra* Section I.B.

23. *See* Vladeck, *supra* note 15; Steve Vladeck, *Bonus 35: The Lawlessness of Missouri's Standing in* Biden v. Nebraska, ONE FIRST (July 13, 2023) [hereinafter Vladeck, *Lawlessness*], https://stevevladeck.com/p/bonus-35-the-lawlessness-of-missouris [perma.cc/6URZ-EV56].

24. *See* Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. 209, 211, 213 (2024).

25. *See* Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 872 (2012).

26. These legal commentators have emerged from the "new process" federalism camp. *E.g.*, Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1746–50 (2017).

undermines the political process. Instead, courts should adhere to separation-of-powers principles and dispense with special solicitude—not create doctrinal hooks to transform "democracy into juristocracy."[27]

Part I outlines the Offset Provision and provides doctrinal background for the Spending Clause, standing, and special solicitude. Part II dives into the cases themselves, defining and explaining the Spending Contract and Tax Power injuries. Part III demonstrates the danger of the circuit courts' expansive approach to Spending Clause standing and prescribes better rules for future cases—ones that do not rely on special solicitude or illusory, novel theories of injury.

I. THE OFFSET PROVISION, SPENDING CLAUSE, AND ARTICLE III STANDING

Though largely incoherent, there are consistent, basic principles within the Supreme Court's standing jurisprudence. Among other things, a plaintiff in federal court must demonstrate a concrete and particularized injury-in-fact.[28] The Offset Provision cases considered whether the states met that requirement. At times, state plaintiffs have survived Article III scrutiny by alleging unique injuries via a "special solicitude" that courts have drawn from their sovereign status.[29] But nearly two decades after *Massachusetts v. EPA*, what "special solicitude" means remains unclear. This Part introduces the Offset Provision controversy and the sparse Spending Clause case law before drilling into the current state of standing doctrine.

A. *ARPA, the CSLFRF, and the Offset Provision*

ARPA was the Biden Administration's first legislative victory. President Biden signed into law the $1.9 trillion bill on March 11, 2021, hoping to provide immediate assistance to those still struggling from the COVID-19 pandemic.[30] Funding everything from individual stimulus checks to school reopenings, ARPA deployed congressional spending to alleviate many of the pandemic's fiscal crises.[31] Calling the bill "one of the most progressive pieces of legislation in history," the Biden Administration believed that ARPA would "build a bridge to an equitable economic recovery and immediately reduce

27. Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://bostonreview.net/articles/samuel-moyn-resisting-juristocracy [perma.cc/69T8-LDAJ].

28. Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

29. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007).

30. Morgan Chalfant & Brett Samuels, *Biden Signs $1.9 Trillion Relief Bill into Law*, THE HILL (Mar. 11, 2021, 2:14 PM), https://thehill.com/homenews/administration/542790-biden-signs-19-trillion-relief-bill-into-law [perma.cc/JX43-YK5H].

31. Russonello, *supra* note 2.

child poverty" with its expanded unemployment insurance, Supplemental Nutrition Assistance Program benefits, and Child Tax Credit funding.[32]

Within ARPA's collection of relief programs are the CSLFRF.[33] The CSLFRF allot more than $200 billion for state, tribal, and territory governments to "mitigate the fiscal effects" of the COVID-19 pandemic.[34] This lofty goal was imbued with wide discretion, with recipients eligible to spend the CSLFRF on nearly anything related to the "negative economic impacts" of the pandemic until 2025.[35] State and local governments have authorized diverse programs to revitalize communities, with the Treasury only once challenging those entities' spending decisions.[36] For example, Michigan committed to much-needed state infrastructure projects $686.3 million of its relief funds.[37] Cities like Austin, Texas focused on addressing the social welfare maladies of the pandemic through rental assistance programs and projects to decrease homelessness, among others.[38] Furthermore, despite initially opposing ARPA's hefty price tag, even Republican state governments—including some that challenged the Offset Provision in court—tapped into the CSLFRF for an array of infrastructure and public health investments.[39]

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32. *American Rescue Plan*, WHITE HOUSE, https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/American-Rescue-Plan-Fact-Sheet.pdf [perma.cc/LEC5-AVMF] (emphasis omitted).

33. American Rescue Plan Act, Pub. L. No. 117-2, § 9901, 135 Stat. 4, 223 (2021).

34. 42 U.S.C. § 802(a).

35. *Id.* § 802(c)(1)(A)–(E).

36. *See State and Local Fiscal Recovery Funds*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds [perma.cc/Z6AH-D624]; Alan Rappeport, *Arizona Could Lose Relief Funds for Undermining School Mask Mandates*, N.Y. TIMES (Oct. 14, 2021), https://nytimes.com/2021/10/05/us/politics/arizona-relief-funds-mask-mandates.html [perma.cc/JLE6-FB2T] (noting Treasury's only challenge to a state program).

37. *See American Rescue Plan Funding*, STATE BUDGET OFF. (Dec. 2024), https://michigan.gov/budget/covid-federal-funding/american-rescue-plan-funding [perma.cc/6C5B-EYGD]; *MI Clean Water Plan*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://michigan.gov/egle/regulatory-assistance/funding/fd/mi-clean-water-plan [perma.cc/7GHR-PMVW].

38. CITY OF AUSTIN FIN SERVS. DEP'T, RECOVERY PLAN: STATE AND LOCAL FISCAL RECOVERY FUNDS 2023 REPORT (JULY 1, 2022 – JUNE 30, 2023) 77–80 (2023) https://assets.austintexas.gov/financeonline/downloads/2023SLFRFRecoveryPlanCityofAustin.pdf [perma.cc/SE9J-788F].

39. Alan Rappeport, *Republicans Who Assailed Biden's Stimulus Bill Are Embracing the Money*, N.Y. TIMES (Dec. 15, 2021), https://nytimes.com/2021/12/15/us/politics/biden-stimulus-bill-republicans.html [perma.cc/CM5B-LW8U].

Despite the long leash, the funding came with one notable limitation: the Tax Offset Provision.[40] The more contentious of two specified CSLFRF restrictions,[41] the Offset Provision provides:

> A State or territory shall not use the funds provided under this section . . . to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase.[42]

If a state violates the Offset Provision, the statute authorizes the Treasury to recoup the lesser of "the amount of the applicable reduction to net tax revenue attributable to such violation" and the amount of money the state or territory received from the CSLFRF.[43] Essentially, states would have to pay back any of this federal money that they used to subsidize their tax cuts.[44] For example, a state could not cut its property taxes and use the CSLFRF funds to make up the difference. As professors Conor Clarke and Edward Fox explain, the Offset Provision is a variation on "maintenance-of-effort" provisions common in federal education programs designed to ensure that federal money "supplements and not supplants" state spending.[45] Interestingly enough, unlike other maintenance-of-effort provisions, Clarke and Fox argue that the Offset Provision is a far more flexible constraint than those in prior versions of the provision, ensuring that more federal dollars are used to support state and local governments than an equivalent "earmarked" spending program.[46]

Still, Republican-led states recoiled. On March 16, 2021, five days after ARPA became law, twenty-one Republican state attorneys general wrote to Secretary of the Treasury Janet Yellen asking her to explain the "unclear, but potentially breathtaking" scope of the Offset Provision.[47] In what would prove

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40. 42 U.S.C. § 802(c)(2)(A). Consistent with most of the relevant cases and discussion, I refer to this condition as the "Offset Provision" throughout this Note. Other sources have called this condition the "tax condition," "tax mandate," or "offset restriction." These all refer to the same condition. *See, e.g.*, SEAN M. STIFF, CONG. RSCH. SERV., LSB10588, SPENDING CLAUSE CONDITIONS AND THE CORONAVIRUS STATE FISCAL RECOVERY FUND (2021).

41. 42 U.S.C. § 802(c)(2)(B) (preventing states from using the CSLFRF in pension funds).

42. *Id.* § 802(c)(2)(A).

43. *Id.* § 802(e).

44. *See* Press Release, Janet L. Yellen, Treasury Secretary, Response to State Attorneys General Inquiries on Implementation of Section 9901 of the American Rescue Plan Act (Mar. 23, 2021), https://home.treasury.gov/news/press-releases/jy0075 [perma.cc/5KVM-VQ2L] [hereinafter Yellen Letter].

45. *See* Conor Clarke & Edward Fox, *No New Tax Cuts? Examining the Rescue Plan's New State Tax Limits*, 103 TAX NOTES STATE 1361, 1362 (2022).

46. *See id.* at 1364–66.

47. Letter from Mark Brnovich, Att'y Gen. of Ariz., et al., to Janet L. Yellen, Sec'y of the Treasury, Treasury Action to Prevent Unconstitutional Restriction on State's Fiscal Policy Through American Rescue Plan Act of 2021, at 2 (Mar. 16, 2021), https://ago.wv.gov/Documents/2021.03.16%20Yellen%20Letter%203-16%20FINAL.pdf [perma.cc/PTS2-2SBT] [hereinafter State AGs Letter].

to be the central quibble of this controversy, the states took particular issue with the Offset Provision's use of the term "indirectly."[48] The states feared that the Offset Provision could potentially prohibit "tax cuts or relief of any stripe" for the covered period.[49] In response to the letter and Senate Banking Committee questioning, Secretary Yellen insisted that "[n]othing in the Act prevent[ed] States from enacting a broad variety of tax cuts"[50]—undercutting the "breathtaking" accusation. Instead, states simply could not replace "lost revenue" with CSLFRF money.[51]

Unsatisfied by Secretary Yellen's assurances, twenty-one states[52] sued the Treasury.[53] Across six suits, different state plaintiffs sought roughly the same relief on similar legal grounds: an injunction to prohibit the Treasury's enforcement of the allegedly unconstitutional Offset Provision.[54] On the merits, the state plaintiffs argued that the Offset Provision was unconstitutionally ambiguous and unduly coercive in violation of the Spending Clause.[55]

Amidst this litigation, the Treasury issued an interim rule implementing the Offset Provision in May 2021,[56] and the final rule in 2022.[57] The rule reasserted that recipients of the CSLFRF "shall not use funds to either directly or indirectly offset a reduction in the net tax revenue" during the covered period and explained precisely how the provision would function.[58] In plain language: States must open their ledger and show that they paid for a tax cut

48. *Id.*

49. *Id.* at 2–4.

50. Yellen Letter, *supra* note 44; C-SPAN, Treasury Secretary and Federal Reserve Chair Testimony on COVID-19 Economic Recovery, at 55:40 (C-SPAN, streamed Mar. 24, 2021), https://c-span.org/video/?510059-1/treasury-secretary-federal-reserve-chair-testimony-covid-19-economic-recovery [perma.cc/5Q2Z-PJ7L] (responding to question from Idaho Senator Mike Crapo).

51. Yellen Letter, *supra* note 44.

52. The list of twenty-one state plaintiffs does not overlap perfectly with the twenty-one states that signed onto the letter. *See* State AGs Letter, *supra* note 47, at 7.

53. *See generally* Missouri v. Yellen, 538 F. Supp. 3d 906 (E.D. Mo. 2021) (Missouri); Arizona v. Yellen, 550 F. Supp. 3d 791 (D. Ariz. 2021) (Arizona); West Virginia v. U.S. Dep't of Treasury, 571 F. Supp. 3d 1229 (N.D. Ala. 2021) (Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia); Kentucky v. Yellen, 563 F. Supp. 3d 647 (E.D. Ky. 2021) (Kentucky and Tennessee); Texas v. Yellen, 597 F. Supp. 3d 1005 (N.D. Tex. 2022) (Louisiana, Mississippi, and Texas). Ohio sued to enjoin the Offset Provision before the Secretary had responded to the state attorneys general. *See* Ohio v. Yellen, 539 F. Supp. 3d 802 (S.D. Ohio 2021).

54. *See, e.g.*, Ohio v. Yellen, 539 F. Supp. 3d at 806.

55. *See* West Virginia v. U.S. Dep't of Treasury, 571 F. Supp. 3d at 1249–54; Kentucky v. Yellen, 563 F. Supp. 3d at 653–58. Judge Kacsmaryk also held that the provision violated the anti-commandeering principle of the Tenth Amendment. *See* Texas v. Yellen, 597 F. Supp. 3d at 1012–15.

56. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786 (May 17, 2021) (codified at 31 C.F.R. § 35).

57. *See* 31 C.F.R. § 35.8 (2024).

58. *Id.* § 35.8(a).

themselves, not with federal money.[59] And if a state funds a tax cut with CSLFRF money, the Treasury can recoup the funds.[60] Notably, the final rule's explanation does not distinguish between direct or indirect offsets.

That clarification did not deter the states, which pursued litigation anyway. Following its final rule, the Treasury argued that the state plaintiffs lacked standing for a pre-enforcement injunction. Specifically, the Treasury argued that because the states had not alleged a course of conduct that would violate the final rule's interpretation of the Offset Provision, the states faced no imminent injury as required by Article III.[61] This and the Treasury's other arguments have yielded mixed results.[62] For the first time, federal courts had to answer the question: When do states have standing to challenge under the Spending Clause?

B. *Spending Clause Doctrine*

The state-plaintiffs' central argument in the Offset Provision cases was that the Provision exceeded Congress's power under the Spending Clause.[63] In short, the states argued that the Offset Provision was unconstitutionally ambiguous and unconstitutionally coercive.[64] Understanding how these constitutional limits manifested as the necessary sovereign injuries for standing purposes requires a brief explanation of the Spending Clause.

Congress has the power to tax and spend.[65] Where the Constitution's other grants of legislative power circumscribe the limits of Congress's lawmaking, the Spending Clause allows Congress to "spend money in any way that advances the general welfare."[66] In recent decades, in the midst of worsening congressional gridlock and judicial constraints on other powers, the spending power has become Congress's most versatile legislative tool.[67] Akin to entering into a contract, Congress can use its spending to incentivize or discourage specific state action and effectuate its national policy goals.[68]

Although broad, Congress's spending power is not unlimited. In *South Dakota v. Dole*, the Supreme Court held that Congress could condition a

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59. *Id.* § 35.8(b).

60. 42 U.S.C. § 802(e).

61. *E.g.*, West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1135 (11th Cir. 2023).

62. *See infra* Figure 1.

63. *See supra* Section I.A.

64. *See, e.g.*, Arizona v. Yellen, 34 F.4th 841, 847 (9th Cir. 2022).

65. U.S. CONST. art. I, § 8, cl. 1.

66. Gould, *supra* note 24, at 217 (citing United States v. Butler, 297 U.S. 1, 66 (1936)).

67. *See id.*; Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 50–51 (2001).

68. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 472 (2003).

state's federal highway funding on the state raising its drinking age to 21. Critical to the ruling, the Court announced a four-part test for determining the constitutionality of spending-power legislation.[69] First, Congress must spend "in pursuit of 'the general welfare' ";[70] second, Congress must set any conditions on federal funds unambiguously;[71] third, the funds must be related to a federal interest;[72] and fourth, there must be no independent constitutional bar on the legislation.[73] *Dole* further noted that there could be circumstances in which Congress's offer to the states "might be so coercive as to pass the point at which 'pressure turns into compulsion' "—perhaps constituting an informal "fifth" prong.[74]

Of greatest significance to the Offset Provision cases (and most Spending Clause litigation) are the second and "fifth" prongs of this test: Congress's conditions must be unambiguous, and it may not unduly coerce the states. As articulated in *Pennhurst v. Halderman*, courts evaluate the second prong according to the "clear notice" canon of statutory interpretation.[75] The solution is not for courts to entirely strike down ambiguous provisions.[76] Instead, when interpreting relevant spending conditions, a court must fill the shoes of the funds' recipient (here, a state) at the time it chose to accept the deal and ask whether the state "would clearly understand" its statutory obligations and liabilities.[77] The spending condition is still enforced but in a way that the states could have fairly anticipated. The Court's clear notice rule for the second prong helps facilitate federalism by ensuring the spending conditions are enforced in unsurprising ways.

The "fifth" prong—the prohibition against coercion—can affirmatively invalidate an unconstitutional spending condition. The bar on congressional coercion was decisive in dismantling the Affordable Care Act's (ACA) Medicaid expansion provisions in *National Federation of Independent Businesses v. Sebelius*.[78] There, "*for the first time ever*,"[79] the Court held that Congress could not threaten the loss of existing Medicaid funds if states did not accept the new

69. South Dakota v. Dole, 483 U.S. 203 (1987); 1 RONALD D. ROTUNDA, JOHN E. NOWAK, VIKRAM D. AMAR & AKHIL REED AMAR, TREATISE ON CONSTITUTIONAL LAW § 5.7(a)(ii)(6) (2024).

70. *Dole*, 483 U.S. at 207 (quoting Helvering v. Davis, 301 U.S. 619, 640–41 (1937)).

71. *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

72. *Id.*

73. *Id.* at 208.

74. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

75. *See Pennhurst*, 451 U.S. at 17; *see also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300 (2006).

76. Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985) (holding that the federal government simply cannot "prospectively resolve every possible ambiguity" in the structure of a grant program).

77. *Arlington*, 548 U.S. at 296.

78. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

79. *Id.* at 625 (Ginsburg, J., concurring in part and dissenting in part).

Medicaid funds.[80] Chief Justice Roberts's opinion for the Court explained that although the congressional spending power is broad, the "financial inducement" to encourage state participation in expanded Medicaid was an unconstitutional "gun to the head."[81] Roberts was not precise as to *what* exactly was the decisive, coercive factor that pushed the ACA over the constitutional limit,[82] but the prevailing hypothesis is that it was Congress's choice to leverage *existing*, as opposed to *new*, funding.[83]

Nonetheless, given the Spending Clause's flexibility, Congress increasingly relies on appropriating funds to achieve its policymaking goals in lieu of other Article I powers subject to the Senate filibuster, political polarization, and other constitutional impediments.[84] Congressional reliance on spending should not be mistaken for abuse. Professor Jonathan Gould explains that in recent decades, Congress's ability to regulate through other Article I powers has faced greater challenges under judicial review, with the Supreme Court crafting limitations on Congress's interstate commerce power and in other constitutional doctrines such as anticommandeering and nondelegation.[85] For better or worse, the Spending Clause is one of the federal government's few remaining means to reliably effectuate welfarist policies on a national scale. Furthermore, even in the hands of a Congress uninterested in redistributive policies, the fourth prong of *Dole*—that spending conditions cannot require states to engage in unconstitutional behavior—prevents serious threats against individual liberties.[86]

Although the relevant cases place some limits on congressional spending, the Supreme Court has been "less interested" in policing exercises of the Spending Clause, possibly to avoid overreaching into a highly political negotiation process.[87] The Court's disinterest in enforcement likely results from the greater agency a state has when Congress creates a spending program as opposed to exercising another federal power: Instead of simple preemption by federal fiat, a state can say no to the contract.[88] Politics at *both* state and federal governing levels—not Article III courts—decide whether a state adopts a policy. Rather than involving itself in every political disagreement, the federal judiciary should step in only when necessary to ensure "healthy federalism"—when Congress has actually violated *Dole* (or *Sebelius*). This separation-of-

80. ROTUNDA ET AL., *supra* note 69, § 5.7(a)(ii)(6).

81. *Sebelius*, 567 U.S. at 580–81 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)) (internal quotation marks omitted).

82. *E.g.*, *id.* at 581–82 (highlighting the significant percentage existing Medicaid funding makes up in state budgets).

83. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 865 (2013).

84. *See* Gould, *supra* note 24, at 220–31.

85. *Id.* at 250–52.

86. South Dakota v. Dole, 483 U.S. 203, 210 (1987).

87. Gould, *supra* note 24, at 270.

88. *See Dole*, 483 U.S. at 210.

powers issue counseling for judicial restraint in striking down appropriations, coincidentally, is the precise doctrinal value underpinning Article III standing doctrine.

C. *Basic Standing Doctrine*

A relatively modern doctrine,[89] standing is rooted in Article III's vague articulation of the "judicial Power" of the United States.[90] The Constitution extends the judicial power to specified "Cases" and "Controversies," a phrase the Supreme Court has interpreted to limit the jurisdiction of federal courts to only "*actual* cases or controversies."[91] Federal courts do not issue advisory opinions,[92] and there is no standing "when there are no adverse parties with personal interest in the matter."[93] To eliminate plaintiffs and disputes without "proper" stakes, plaintiffs must demonstrate that (1) they have suffered an "injury in fact," (2) the injury is "fairly traceable" to the defendant's challenged conduct, and (3) the injury is "likely to be redressed by a favorable judicial decision."[94]

At its core, standing is rooted in separation-of-powers concerns.[95] Standing circumscribes "what activities are appropriate" for Article III courts, an "irreducible constitutional minimum" for when a federal judge can grant jurisdiction and get involved.[96] A court must refuse to resolve even a potentially meritorious claim if the plaintiff is "not properly situated to be entitled to its judicial determination."[97] As then-Judge Scalia phrased it in his influential article on the subject, standing "is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?' "[98]

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89. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179–86 (1992).

90. 13A WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 3531 n.12 (ed. Ed. 1998) [hereinafter WRIGHT & MILLER]; U.S. CONST. art. III, § 2, cl. 1.

91. U.S. CONST. art. III, § 2, cl. 1; Raines v. Byrd, 521 U.S. 811, 818 (1997) (emphasis added) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976)). State judicial systems typically have their own standing rules. WRIGHT & MILLER, *supra* note 90, § 3531 n.1.

92. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 91–92 (1984); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

93. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

94. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

95. Scalia, *supra* note 93, at 881.

96. Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992).

97. WRIGHT & MILLER, *supra* note 90.

98. Scalia, *supra* note 93, at 882.

Injury in fact is standing's "[f]irst and foremost" element,[99] and requires plaintiffs to show the "invasion of a legally protected interest."[100] The Supreme Court has described the requirements for injury in myriad ways,[101] boiling the concept down to a number of essential characteristics: The plaintiff's injury must be "concrete," "particularized," and sufficiently "actual or imminent, not conjectural or hypothetical."[102]

Future injuries may be "concrete" where plaintiffs have demonstrated sufficient risk.[103] The question of risk is most relevant where there is a hypothetical, illegal government enforcement of a law—but no actual enforcement. Plaintiffs have "pre-enforcement" standing for such threatened injuries when they allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and there is a "credible threat" that a governmental actor will stop them from doing so.[104] A threat is credible when it is "certainly impending" or there is a "substantial risk" of future harm.[105] Like so many areas of standing doctrine, the cases in this "future injury" vein are messy: Precisely when the harm is certain[106] or the curtailing of a constitutional right is chilled[107] enough for standing is highly case- (and pleading-) specific.[108]

99. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998).

100. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 799–800 (2015) (quoting Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 64 (1997)).

101. *E.g.*, *Steel Co.*, 523 U.S. at 103–04 (injury in fact); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (direct injury); Lewis v. Casey, 518 U.S. 343, 349 (1996) (actual injury).

102. Spokeo, Inc. v. Robins, 578 U.S. 330, 339–40 (2016) (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992)).

103. *See* GEO Grp., Inc. v. Newsom, 50 F.4th 745, 753–54 (9th Cir. 2022); *In re* Equifax Inc. Customer Data Sec. Breach Litig., 999 F.3d 1247, 1261–64 (11th Cir. 2021).

104. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

105. *Id.* at 158 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013)). Justice Alito's *Clapper* opinion initially relegated the pre-enforcement standard of "substantial risk" of harm to the footnote later cited in *Driehaus*, relying instead on the heftier "certainly impending" standard. *See Clapper*, 568 U.S. at 409–14.

106. *See, e.g.*, *Clapper*, 568 U.S. at 410; City of Los Angeles v. Lyons, 461 U.S. 95, 101–03 (1983); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 183–84 (2000).

107. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 10–15 (1972); Meese v. Keene, 481 U.S. 465, 467, 473–75 (1987).

108. *See supra* notes 101–102; Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1077–79 (2015).

D. *State Standing Doctrine*

State governments asserting claims in federal courts possess unique standing opportunities as opposed to private plaintiffs.[109] When asserting proprietary or private injuries, states are held to the same tripartite standing rule as all plaintiffs.[110] But, by virtue of their independent character, states can also assert "sovereign" and "quasi-sovereign" injuries otherwise unavailable to private individuals.[111] A state's quasi-sovereign interests and injuries arise from its citizens' wellbeing.[112] The state, in those instances, asserts *parens patriae* standing on behalf of its citizens.[113] States, however, also *directly* suffer sovereign injuries as a result of their unique character and not as a result of broader injuries to their citizens.[114] The earliest recognized examples of such direct sovereign interests include "the exercise of sovereign power over individuals and entities" and "the demand for recognition from other sovereigns," including other states.[115]

Despite some injuries belonging to states alone, the delineation between proprietary, quasi-sovereign, and sovereign injuries can be murky. Part of that murkiness can come from the pleadings themselves, in which states assert multiple, overlapping theories of standing across the different categories for the same conduct.[116] Additionally, courts and state plaintiffs reframe the same or similar injuries to fit different categories across cases, particularly with real property interests.[117]

Nonetheless, given federalism's unique stakes in states' suits against the federal government, the Supreme Court has attempted to fashion specific rules for state standing[118]—most notably in *Massachusetts v. EPA*.[119] In that case, Massachusetts and other state plaintiffs sued the EPA to compel it to regulate

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109. *See generally* WRIGHT, MILLER & COOPER, *supra* note 90, § 3531.11.1 (comparing state standing to private standing).

110. *See id.*

111. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982).

112. *Id.* at 602.

113. *Id.* at 600–02. *Parens patriae* means "parent of the country." States may not assert these quasi-sovereign injuries, however, against the federal government in federal court, as the federal government "represents [the state's people] as *parens patriae*[] when such representation becomes appropriate." Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

114. *Alfred L. Snapp*, 458 U.S. at 601.

115. *Id.*

116. *See, e.g.*, Brief for Respondents at 16–23, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58) (asserting proprietary, sovereign, and quasi-sovereign injuries for non-enforcement of immigration laws).

117. *See* WRIGHT & MILLER, *supra* note 90, § 3531.11.1 n.5.

118. *See* WRIGHT & MILLER, *supra* note 90, § 3531.11.1; Fallon, *supra* note 108, at 1082–1110.

119. Massachusetts v. EPA, 549 U.S. 497 (2007).

new car emissions under the Clean Air Act.[120] The EPA challenged the plaintiffs' standing, arguing that climate change was too generalized an injury to meet Article III's requirements.[121]

The Court disagreed, holding Massachusetts's asserted injury—that "rising seas" would "swallow Massachusetts' coastal land"—was sufficiently concrete and particularized for standing.[122] Although the Court did credit the proprietary, non-sovereign ramifications of coastal flooding vis-a-vis Massachusetts as a landowner,[123] Justice Stevens's majority opinion also factored Massachusetts's status as a state into the Court's standing analysis.[124] Distinguishing previous environmental cases where private plaintiffs lacked standing, Stevens asserted that "States are not normal litigants for the purposes of invoking federal jurisdiction."[125] Because the states "surrender[ed] certain sovereign prerogatives" to the federal government when they entered the Union, they are "entitled to *special solicitude* in [the Court's] standing analysis."[126] A bare majority thereafter held that Massachusetts had standing and ruled for the state on the merits—four justices dissented.[127]

Precisely how to apply special solicitude (or even how it functioned in *Massachusetts*)[128] has vexed scholars ever since.[129] Does special solicitude mean that states can broadly shirk *any* of standing's general requirements?[130] Does it create an ever-expanding list of sovereign and quasi-sovereign injuries unavailable to private plaintiffs?[131] Since 2007, the Supreme Court has not explicitly granted a state standing on special solicitude grounds, despite a number of close calls.[132]

In his concurring opinion in *United States v. Texas*, Justice Gorsuch addressed head-on the Court's protracted silence on the question.[133] Gorsuch pointed out that special solicitude had not "played a meaningful role in this

120. *Id.* at 504–05.

121. *Id.* at 517.

122. *Id.* at 521–23.

123. *Id.* at 523.

124. *See* Fallon, *supra* note 108, at 1104, 1110.

125. Massachusetts v. EPA, 549 U.S. at 518.

126. *Id.* at 519–20 (emphasis added).

127. *Id.* at 526, 535.

128. Professor Katherine Crocker discusses the many doctrinal issues with *Massachusetts v. EPA* and special solicitude, including, among other things: (1) Massachusetts's coastal injury was arguably proprietary, theoretically not requiring any special solicitude; (2) the majority conflated sovereign and quasi-sovereign injuries throughout its explanation of special solicitude. *See* Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815, 827–31, 836–37, 843 (2024).

129. *See, e.g.*, *id.* at 831 nn.70–71.

130. *See id.* at 832 n.74 (collecting scholarly perspectives on the different forms of standing extra-credit special solicitude offers).

131. *See id.* at 831–32.

132. *See id.* at 841–43; United States v. Texas, 579 U.S. 547 (2016) (mem.) (per curiam).

133. United States v. Texas, 143 S. Ct. 1964, 1977 (2023).

Court's decisions in the years since [*Massachusetts v. EPA*]."[134] Further, he continued, "it's hard not to think, too, that lower courts should just leave that idea on the shelf . . . ."[135] In dissent, Justice Alito, relying on *Massachusetts* to support Texas's standing claim, questioned if the majority opinion had "quietly interred" special solicitude.[136]

Special solicitude, then, appears on its way out. Since *Massachusetts v. EPA*, scholars have failed to characterize what special solicitude was or should be.[137] Professor Katherine Crocker argues that this is for the best: Special solicitude lacked serious doctrinal rigor and has not been the source of the "extraordinary scope that some cases accord sovereign and quasi-sovereign interests."[138]

With the explosion of state suits against the federal government since 2007, however, *Massachusetts v. EPA* has arguably still left its mark on public law litigation. In recent decades, state attorneys general have ramped up their attacks on federal law.[139] For politically motivated state officials, expansive state standing post-*Massachusetts v. EPA* has been perfect for state plaintiffs to levy challenges that would otherwise be nonjusticiable.[140] Although the precise role that special solicitude is playing in this increase is up for debate, the implicit pressure felt by federal courts to protect state policies and facilitate state lawsuits may come from special solicitude operating in the background.[141]

Many legal commentators in the "new process federalism" camp see this ability to readily challenge as desirable. As Professor Jessica Bulman-Pozen describes it, new process federalism calls for a reimagining of federalism as a highly integrated state-federal relationship in which states act as "servant[s]" to the federal government in implementing federal policy.[142] States, operating as conduits for federal regulation,[143] can use litigation as an outlet to voice

134. *Id.* at 1977–78.

135. *Id.*

136. *Id.* at 1997 (Alito, J., dissenting) (citing Justice Gorsuch's concurring opinion).

137. *See, e.g.*, Fallon, *supra* note 108, at 1104–10 (arguing that standing's "fragmentation" had created a diverse array of distinct doctrines, including for state standing rules in the wake of *Massachusetts v. EPA*); Bulman-Pozen, *supra* note 26, at 1745.

138. *See* Crocker *supra* note 128. Professor Crocker collected all of the circuit cases after *Massachusetts v. EPA* until the end of June 2023, analyzing them to show that special solicitude did not play a decisive role in any case.

139. *See* Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1306–08 (2019).

140. *See id.* (noting Trump v. Hawaii, 138 S. Ct. 2392 (2018) and United States v. Texas, 579 U.S. 547 (2016) (mem.) (per curiam)); Mark L. Earley, *"Special Solicitude": The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 562–63 (2018).

141. *See* Crocker, *supra* note 128, at 815–16.

142. Bulman-Pozen, *supra* note 26, at 1739.

143. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

their discontent with federal policy.[144] In this conception of federalism, states are not treated as co-equal sovereigns that must be protected from federal overreach, but as entities that should be able to "bargain with[] and even resist[] the federal government from within" the federal system.[145] Conceptually, the standing "boost" underpinning special solicitude in many ways mirrors this scholarly perspective: Given states' unique position in the federal regulatory world, Professor Seth Davis argues that, in deciding *Massachusetts v. EPA* the way it did, the Supreme Court "all but announced state governments as the new public interest litigants."[146] In this way, *Massachusetts v. EPA* has arguably stood not for any specific special solicitude doctrine, but rather a general invitation for state plaintiffs to "push the envelope."[147]

When states are given a standing inch, they take a policy mile. Although not discussing special solicitude or *Massachusetts v. EPA* directly, the Supreme Court's decision in *Biden v. Nebraska* reveals that the Court still has a soft-spot for state plaintiffs.[148] There, a 6–3 Court found that Missouri had standing to challenge President Biden's student loan forgiveness program for the harm that program would do to an independent government corporation (which itself had no interest in challenging the forgiveness plan), because that corporation was a "public instrumentality" of the state.[149] Despite the corporation's "financial and legal independence"[150] from Missouri—and the corporation's ability to bring suit itself—the Court's analysis ignored the core limitations that have animated standing doctrine for decades.[151] As Justice Kagan explained in dissent, the Court's standing decision circumvented the political process and resolved a controversial policy matter itself.[152] Reaching the merits, the Court found that the plan was invalid because it exceeded the language of the relevant statute under the Court's major questions doctrine.[153]

Biden v. Nebraska is a canary in the coalmine for the future interplay between expansive state standing, state attorney general activism, and the judicial dismantling of federal policy. State attorneys general have taken full advantage of favorable standing doctrine to become "automatic" challengers

144. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1267–68 (2009).

145. Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2222–24 (2022).

146. Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1232 (2019).

147. Ann Woolhandler & Julia D. Mahoney, *State Standing After* Biden v. Nebraska, 2023 SUP. CT. REV. 303, 343.

148. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

149. *Id.* at 2365–68.

150. *Id.* at 2388.

151. *Id.* at 2400 (Kagan, J., dissenting).

152. *Id.*

153. *Id.* at 2373–75 (opinion of Roberts, C.J.).

of all disfavored federal policy,[154] accepting the mantle of "omniplaintiffs."[155] Expansive state standing ensures that more and more policy decisions will be left in the hands of unelected judges, so long as plaintiffs follow a modern litigation playbook: (1) find state standing *somewhere*, (2) find an overreach of federal power *somewhere*, and (3) block the policy from taking effect. As shown in *Massachusetts v. EPA* and *Biden v. Nebraska* (and the Offset Provision cases), this seems like a sound formula for success.

And, as unelected political interest groups pose an increasing risk of state capture, it is not clear that state attorneys general can even claim they are acting for their states' citizens.[156] Ideological interest groups like the Alliance Defending Freedom, acting as counsel on behalf of a state, could piggyback off a state's special solicitude for standing to win policy battles in front of more favorable arbiters—handpicked federal judges.[157]

Despite Congress's increasing reliance on the Spending Clause, the Offset Provision litigation was the first time that the standing issue had arisen. That is, until now, the Supreme Court has never had an opportunity to consider Spending Clause and state standing jurisprudence together. And for good reason: In cases applying *Pennhurst*'s clear-notice requirement, nongovernmental plaintiffs (who were not involved in the grant of federal funds) were actively bringing suit and the defendants (recipients of federal funds) used the clear-notice rule as a defense to their liability.[158] Furthermore, in *Dole* and *Sebelius*, there was no question that the relevant legislation's spending conditions directly affected and injured the state plaintiffs.[159] There was no uncertainty that the spending conditions had a concrete and particularized effect on the states in some way—the states had to act to get their money. As a result, standing was not the issue of contention.

The same was not true with the Offset Provision cases.[160] There were no active lawsuits against the states, and the states were not compelled to *do*

154. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89–90.

155. Woolhandler & Mahoney, *supra* note 147, at 303.

156. *See* Steve Vladeck, *Bonus 67: Private Interest Groups *as* State Attorneys General*, ONE FIRST (Feb. 22, 2024), https://stevevladeck.com/p/bonus-67-private-interest-groups [perma.cc/US3P-R73E] (describing the risks associated with special interest groups like the Alliance Defending Freedom representing the State of Idaho pro bono in its challenge of the federal Emergency Medical Treatment and Labor Act and Idaho's abortion ban).

157. *See* Jacqueline Thomsen, *Shopping for the Judge You Want Honed to Perfection in Texas*, BLOOMBERG L. (May 9, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/shopping-for-the-judge-you-want-honed-to-perfection-in-texas [perma.cc/3ECN-9KJY].

158. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15–27 (1981); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295–300 (2006).

159. *See* Vladeck, *supra* note 25, at 862–63. The Eleventh Circuit opinion in the broader *Sebelius* litigation did consider a challenge to the state-plaintiffs' standing, but not on the Spending Clause issue. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1243 (11th Cir. 2011).

160. *See infra* Part II.

something for the funds.[161] Thus, the cases summoned the circuit courts to reconcile the doctrines of state standing and congressional spending. Based on previous spending cases, Professor Stephen Vladeck argues that the Spending Clause furnishes states with standing to challenge coercive spending conditions.[162] Based on the foregoing discussion of the judicial constraints on the congressional spending power and the states' role in administering federal policy, states clearly are constitutionally entitled to *some* standing to challenge truly coercive or ambiguous spending conditions.

But the Offset Provision cases give states too long a leash. A majority of the courts hearing the Offset Provision cases—likely drawing from their underlying, merits-based views of the Spending Clause—found standing for state plaintiffs in every instance of congressional ambiguity. Indeed, those courts also held mostly for the state plaintiffs on the merits. Further, although not always clearly articulated by the circuit courts, several of the Offset Provision opinions suggest that there are some categories of sovereign policy interests that create de facto sovereign injuries for standing purposes—in this case, the power to tax. As in *Biden v. Nebraska*, the Offset Provision cases have effectively provided state plaintiffs with a blueprint for challenging federal policy going forward: (1) assert state standing in legislative ambiguity or a "sovereign" policy area, (2) argue that these policies are ambiguous and coercive, and (3) wait for the court to block the federal policy from taking national effect.

II. THE OFFSET PROVISION CASES

The Offset Provision litigation spanned the entirety of the Biden Administration.[163] Across six cases, five circuits have decided whether the state plaintiffs had standing to challenge the Offset Provision.[164] By the numbers, four circuits found standing for at least some of the state plaintiffs;[165] three found

161. *See supra* Section I.A.

162. *See* Vladeck, *supra* note 25, at 862–63.

163. Ohio first sued to enjoin the Offset Provision in March 2021, six days after President Biden signed ARPA into law. *See* Ohio v. Sec'y, Dep't of Treasury, No. 1:21-cv-181, 2021 WL 1931522 (S.D. Ohio Mar. 30, 2021). The Fifth Circuit issued its opinion in *Texas v. Yellen* in June 2024. 105 F.4th 755 (5th Cir. 2024).

164. Missouri v. Yellen, 39 F.4th 1063 (8th Cir. 2022); Arizona v. Yellen, 34 F.4th 841 (9th Cir. 2022); Kentucky v. Yellen, 54 F.4th 325 (6th Cir. 2022); Ohio v. Yellen, 53 F.4th 983 (6th Cir. 2022); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124 (11th Cir. 2023); Texas v. Yellen, 105 F.4th 755.

165. Arizona v. Yellen, 34 F.4th at 845 (the Ninth Circuit); Kentucky v. Yellen, 54 F.4th at 329 (the Sixth Circuit); *Morrisey*, 59 F.4th at 1132 (the Eleventh Circuit); Texas v. Yellen, 105 F.4th at 763 (the Fifth Circuit).

standing for sovereign injuries;[166] two held that the challenges were not justiciable with the Supreme Court denying *certiorari* in both cases;[167] and three found the Offset Provision unconstitutionally ambiguous on the merits.[168] The Fifth, Sixth, and Eleventh Circuits' merits decisions permanently enjoined the Treasury from enforcing the Offset Provision.[169] After the Eleventh Circuit's decision in *Morrisey* and subsequent denial of rehearing en banc,[170] the Biden Administration punted, opting not to appeal despite success in other circuits.[171]

This Note catalogs the data of this unique legal experiment. Generally, the state plaintiffs pleaded multiple theories of injury, several of which are well-established bases for standing in federal court.[172] Most relevant to this Note are the entirely new asserted *sovereign* injuries that *only* a sovereign entity like a state can suffer.[173] Although the cases describe the states' sovereign injuries in slightly different ways, the descriptions gravitate toward two poles: a "Spending Contract" injury and a "Tax Power" injury. The opinions do not always distinguish between these sovereign injuries, but, at least as used in this Note, Spending Contract injuries are those created by *unconstitutional offers*, and Tax Power injuries are those created by *unconstitutional subject matter*. The courts' attempts to articulate these novel sovereign injuries reveal varying

166. Arizona v. Yellen, 34 F.4th at 848–53; *Morrisey*, 59 F.4th at 1135–38; Texas v. Yellen, 105 F.4th 763–67. The Sixth Circuit in *Kentucky v. Yellen* held that Tennessee had standing but for a proprietary, "compliance cost" injury. *See* 54 F.4th 342–43.

167. Missouri v. Yellen, 39 F.4th at 1066, *cert. denied*, 143 S. Ct. 734 (holding that Missouri lacked standing); Ohio v. Yellen, 53 F.4th at 989–93, *cert. denied*, 143 S. Ct. 2631 (holding that Ohio's case was mooted after it accepted ARPA funds).

168. Even when agreeing that the Offset Provision was ambiguous, the Fifth, Sixth, and Eleventh Circuits disagreed in their analyses. Kentucky v. Yellen, 54 F.4th at 347 (clarifying that the Offset Provision "is not 'unconstitutional' under the Spending Clause" but that Tennessee may discontinue compliance with it because it is unclear); *Morrisey*, 59 F.4th at 1141–43 (relying on Eleventh Circuit precedent to conclude that the ambiguity of the Offset Provision renders it facially unconstitutional); Texas v. Yellen, 105 F.4th at 768 (agreeing with the Eleventh Circuit).

169. Kentucky v. Yellen, 54 F.4th at 358; *Morrisey*, 59 F.4th at 1149; Texas v. Yellen, 105 F.4th at 762.

170. West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 82 F.4th 1068 (mem.) (11th Cir. 2023).

171. Letter from Elizabeth B. Prelogar, Solic. Gen. of the U.S., to Mike Johnson, Speaker of the U.S. House of Representatives, Re: *West Virginia v. U.S. Department of Treasury*, No. 22-10168 (11th Cir. 2023) (Jan. 26, 2024).

172. Broadly summarized, there were four theories of injury. The states alleged the "Spending Contract" and "Tax Power" sovereign injuries. *See infra* Section I.A–I.B. The states also alleged a *Driehaus* injury asserting pre-enforcement standing given the risk of Treasury recoupment. *See, e.g.*, Arizona v. Yellen, 34 F.4th 841, 848–51 (9th Cir. 2022) (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014)). Finally, the states alleged a compliance cost injury given the need to "track[]" if state expenditures violated the Offset Provision. *See, e.g.*, Kentucky v. Yellen, 54 F.4th at 342–44.

173. *See* Fallon, *supra* note 108, at 1105 (arguing that only sovereign injuries are not "transsubstantive," or unique to only one type of plaintiff).

perspectives on how state plaintiffs "suffered" these injuries. In particular, the opinions disagree on *when* and *how long* states suffered these injuries.

Figure 1 below summarizes how the circuits approached each injury and whether they ultimately enjoined the Offset Provision:

Figure 1[174]

CIRCUIT: CASE	STANDING UNDER THE SPENDING CONTRACT INJURY?	DOES A SPENDING CONTRACT INJURY REQUIRE IMMINENCE OF ENFORCEMENT?	STANDING UNDER THE TAX POWER INJURY?	ENJOINED THE OFFSET PROVISION?
Fifth: *Texas v. Yellen*[175]	Yes	No	Did Not Mention	Yes
Sixth: *Ohio v. Yellen* and *Kentucky v. Yellen*[176]	No	Yes	No[177]	Yes
Eighth: *Missouri v. Yellen*[178]	No	Yes	No	No
Ninth: *Arizona v. Yellen*[179]	Yes	No	Plus Factor	No
Eleventh: *West Virginia v. U.S. Dep't of the Treasury*[180]	Yes	No	Plus Factor	Yes

174. The circuit courts are not so cut-and-dry with these injuries. Rather, these are concepts invented for the purposes of this Note. The following Sections explain the courts' standing analysis and why some of the positions are unclear.

175. Texas v. Yellen, 105 F.4th 755 (5th Cir. 2024).

176. Ohio v. Yellen, 53 F.4th 983 (6th Cir. 2022); Kentucky v. Yellen, 54 F.4th 325 (6th Cir. 2022).

177. Judge Nalbandian found Tax Power standing in *Kentucky v. Yellen*. *See* 54 F.4th at 361 (Nalbandian, J. dissenting in part).

178. Missouri v. Yellen, 39 F.4th 1063 (8th Cir. 2022).

179. Arizona v. Yellen, 34 F.4th 841 (9th Cir. 2022).

180. West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124 (11th Cir. 2023).

A. *The "Spending Contract" Injury*

The Spending Contract injury describes how ambiguous or coercive federal spending conditions impose an intangible (and potentially ongoing) injury to state sovereignty. At its core, the injury is based on the contractual rules of *Dole* and *Pennhurst*: State plaintiffs are injured when the federal government "offers" money with conditions (here, the Offset Provision) that violate the Spending Clause.[181] Although articulated in slightly different ways, the common thread for this injury is the *bad* contract—either because the states could not understand the Offset Provision or because it was inherently coercive.[182] As the Ninth Circuit articulated:

> Just as a contract can be challenged under state law for containing ambiguous terms or being a product of duress, so too do we think that the quasi-contractual funding offer at issue here can be challenged by Arizona at the outset for offering conditions that are unconstitutionally ambiguous or coercive.[183]

The circuits disagreed on when a Spending Contract injury occurs. In the previous Spending Clause cases, there were no standing disputes based on what a spending condition meant or when it would be enforced.[184] Now, courts had to answer: Did the injury require imminence of federal enforcement, or could states challenge the spending condition at any time?

1. Spending Contract Injuries at the Moment of Offer

The Fifth, Ninth, and Eleventh Circuits indicated that imminence of injury was not required for the state to have standing. All three circuits found standing for the asserted Spending Contract sovereign injuries.[185] The Fifth Circuit was not explicit about requisite imminence, but it linked the Spending Contract injury to the "offer" stage of the contract.[186] That court held that because the state plaintiffs are, under their professed interpretation of the Offset Provision, coerced into a "double bind" of bad choices (take the money with

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181. *See* Arizona v. Yellen, 34 F.4th at 851–52 ("When Congress does not meet one of these [Spending Clause] criteria, and say, extends a federal grant with ambiguous or coercive terms to the States, Arizona contends that this offer offends state sovereignty and gives rise to a cognizable injury in fact. We agree.").

182. *See id.*, 34 F.4th at 847; *Morrisey*, 59 F.4th at 1135–36; *Missouri v. Yellen*, 39 F.4th at 1069 (alleging that a broad interpretation of the Offset Provision harmed Missouri's "interest" in the offer); Ohio v. Yellen, 53 F.4th 983, 988 (6th Cir. 2022) (arguing Ohio "was forced to 'ponder accepting an ambiguous deal' "); Texas v. Yellen, 105 F.4th 755, 764 (5th Cir. 2024) (noting Supreme Court precedent where states had standing to prevent coercive Spending Clause offers).

183. Arizona v. Yellen, 34 F.4th at 852.

184. *See supra* Section I.D.

185. All three Circuit Courts also found pre-enforcement standing for a *Driehaus* injury. Arizona v. Yellen, 34 F.4th at 848–53; *Morrisey*, 59 F.4th 1135–38; Texas v. Yellen, 105 F.4th at 764–65.

186. *See* Texas v. Yellen, 105 F.4th at 764.

an ambiguous condition or miss out on the money entirely), they have standing to challenge the law.[187] Citing *Sebelius*, the court stressed its role in arbitrating "[c]oercion in the bargaining process" in the contractual world of the Spending Clause.[188] The Fifth Circuit's finding that the injury manifests as soon as Congress extends its coercive offer suggests no imminent recoupment is required.[189]

The Ninth Circuit likewise believed the Spending Contract injury did not require any imminent agency enforcement. However, it is difficult to say whether the Ninth Circuit is in step with the Fifth Circuit because *Arizona v. Yellen* held in the alternative that the Treasury's recoupment was sufficiently imminent to allow for pre-enforcement standing on nonsovereign grounds.[190] But the court specifically tied the Spending Contract injury to a spending condition (the Offset Provision) that clouded the *offer* of federal funds, as opposed to the *enforcement* of that condition, meaning that no enforcement would actually be required.[191] The intangible injury to a state's "ability to exercise" its sovereign judgment and fairly accept or reject Congress's "quasi-contractual funding offer," allows the state to challenge unconstitutional terms "at the outset."[192] Moreover, Arizona's case was not mooted even after its acceptance of the CSLFRF.[193] In his concurrence, Judge Ryan Nelson seemed to confirm that the Ninth Circuit's conception of the Spending Contract injury did not require imminence.[194]

The Eleventh Circuit, despite finding imminent harm like the Ninth Circuit, also did not *require* imminent enforcement for a Spending Contract injury.[195] Notably, the court's conception of injury was more explicit than the Fifth and Ninth Circuits' explanations. The Eleventh Circuit held that the ambiguity of the Offset Provision "has injured, and continues to injure, the States' sovereign interests."[196] The court's reasoning did not depend on *any* likelihood

187. *Id.* at 764.

188. *Id.*

189. *Id.* at 765.

190. *Arizona v. Yellen*, 34 F.4th at 848–51.

191. *See id.* at 852.

192. *Id.*

193. *See id.* at 852–53 (noting that Arizona's acceptance of the funds is a factor for the merits, not justiciability).

194. *See id.* at 853–54 (Nelson, J., concurring) (disagreeing that Treasury enforcement was imminent but agreeing that Arizona had "sovereign injury" standing).

195. West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1137 (11th Cir. 2023).

196. *Id.* at 1136.

of the Treasury Department's recoupment: The states would suffer the Spending Contract injury for as long as the CSLFRF were available.[197] To the Eleventh Circuit, the Spending Contract injury amounted to a freestanding ability for the states to challenge federal spending legislation *at any time*.[198]

For these imminence-free conceptions of the Spending Clause, standing determinations are substituted with the courts' ultimate views of the merits. The Eleventh and Fifth Circuits' articulations of the Spending Contract injury are largely drawn from their shared understanding of policing ambiguity under the Spending Clause.[199] In stark contrast to the settled case law on the question, these courts create a free-standing right for states to enjoin *any* ambiguity in federal spending legislation: If a spending condition is ambiguous, it violates the Spending Clause.[200] For these courts, the limitation on ambiguity in the Spending Clause is an affirmative cause of action, not simply a part of the clear-statement rule.[201] Given the Fifth and Eleventh Circuits' aggressive conception of *Pennhurst*, standing without imminence makes some sense. As Professor Richard Fallon explains, a court's "substantive judgments" about the constitutional right at issue—here, a state's right to be free from Spending Clause ambiguity or coercion—are often decisive in touch-and-go standing determinations.[202]

This conception of injury under the Spending Clause hamstrings the federal government's ability to answer impending catastrophe. Consider a hypothetical climate change bill: With the future of executive agency deference in question,[203] Congress decides to invoke its spending power to fund green energy initiatives through the states. Congress does not want to hamper the state with specifics; states can use discretionary funds to answer local needs if they implement "reasonable" emission limits on local companies. Under the broad Spending Contract rule, ambiguity in the word "reasonable" would immediately invalidate the spending condition, even if the overseeing agency had no plans to enforce the requirement. Environmental bills, perpetually under scrutiny for their ambiguity,[204] might be entirely off-limits to the Spending Clause. As federal legislation continues to operate through the spending power,[205]

197. *Id.*

198. *Id.* at 1140.

199. *See infra* Section I.A.

200. Texas v. Yellen, 105 F.4th 755, 774 (5th Cir. 2024) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); *Morrisey*, 59 F.4th at 1142.

201. *See* Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 557, 589 (2013).

202. Fallon, *supra* note 108, at 1095–96.

203. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

204. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); *see also* Patrick Boyle & Charles Slidders, *The End of US Environmental Protection Regulation as We Know It*, CTR. FOR INT'L ENV'T L.: BLOG (Aug. 5, 2024), https://ciel.org/the-end-of-environmental-protection-regulation-as-we-know-it [perma.cc/MNL7-LUF5] (discussing how ambiguity in environmental statutes has made regulating under those statutes subject to constant litigation and upheaval).

205. *See* Gould, *supra* note 24, at 212.

Congress would face an impossible task of addressing major social issues by granting states enough discretion without using ambiguous language.

The circuit majority's approach—not requiring imminence—comports with at least one scholarly conception of special solicitude.[206] Professor Bulman-Pozen argues that state suits against federal agencies (and expansive state standing to facilitate those suits) are desirable to ensure that federal officials "come to the table" and bargain with the states on the terms of that federal policy.[207] Bulman-Pozen's argument is not based on the sovereignty of the state plaintiff—she concedes *Massachusetts v. EPA*'s confirmation that states have lost their sovereign prerogatives to the federal government.[208] Rather, it is based on her general view of federalism as a means to ventilate partisan disputes and create "deliberation-generating froth in our democratic system."[209] States, without their traditional autonomy, need a legal environment that can help facilitate this bargaining.[210] The expansive version of the Spending Contract injury would do just that. In some ways, the belabored analogy comparing spending legislation to contractual formation would take on new meaning: Congress and the states would have to shake hands and come to a mutual agreement on the terms of the federal grants.

2. Spending Contract Injuries Require Some Imminence of Enforcement

By contrast, the Sixth and Eighth Circuits both implicitly required imminent recoupment, thereby rejecting standing for sovereign injuries.[211] The Eighth Circuit held that Missouri's alleged Spending Contract injury was not imminent enough for standing.[212] The Sixth Circuit did address Ohio's "supposed ambiguity-as-injury" argument that articulated a Spending Contract theory.[213] But, the court held that because Ohio had accepted the CSLFRF since filing suit, the "cloud of uncertainty about the Offset Provision's meaning" no longer injured it, rendering the case moot.[214]

206. *See* Bulman-Pozen, *supra* note 26, at 1749–50.

207. *Id.* at 1749.

208. *See id.* at 1747–48.

209. *See* Bulman-Pozen & Gerken, *supra* note 144, at 1284; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

210. Bulman-Pozen, *supra* note 26, at 1740–41.

211. Judge Bush authored both Sixth Circuit majority opinions. *See* Kentucky v. Yellen, 54 F.4th 325, 339–41 (6th Cir. 2022); Ohio v. Yellen, 53 F.4th 983, 990 (6th Cir. 2022); Missouri v. Yellen, 39 F.4th 1063, 1069 (8th Cir. 2022).

212. Missouri v. Yellen, 39 F.4th at 1069 n.5, 1070. Missouri's alleged injury was to its "constitutional right to clarity regarding the conditions of congressional appropriations." *Id.* at 1069 n.5. Even though the court does not describe it as a sovereign injury, it compares its decision to the Ninth Circuit's in *Arizona v. Yellen*. *Id.*

213. Ohio v. Yellen, 53 F.4th at 988.

214. *Id.* at 990.

Furthermore, the Sixth Circuit in *Kentucky v. Yellen* rejected the states' argument that receipt of an ambiguous or coercive offer "*in the past*" was sufficient to create present standing without proof of present or future harm.[215] Even in finding the Offset Provision too ambiguous on the merits, Judge Bush clarified that the *Pennhurst* and *Arlington* clear-statement rule was a tool of statutory interpretation, not a means to void federal legislation outright.[216]

Judge Bush's opinion in *Kentucky v. Yellen* stands in stark contrast to the majority of circuits that have considered the issue, not only on the Spending Contract injury standing questions but also on the underlying merits of ambiguity in the Spending Clause. Both conceptions understand that the *Pennhurst* prohibition on ambiguity arises from a desire to protect state autonomy through the Spending Clause's quasi-contractual nature.[217] Judge Bush's conception of the injury, however, does not dispense with standing's requirements to achieve that goal. As discussed, the different approaches could follow the different conceptions of the merits.[218]

B. *The "Tax Power" Injury*

The circuits also had disparate interpretations of the Tax Power injury. The Tax Power injury describes the federal curtailing of a state's ability to exercise its sovereign tax powers, whether because of ambiguity, coercion, or undue federal limitations. Whereas the Spending Contract injury relates to the state's sovereign rights to an uncoerced and unambiguous offer, the Tax Power injury speaks more to the substance of that contract. State plaintiffs, the theory suggests, have a cognizable injury where a spending condition "casts a pall over" the "exercise [of their] sovereign tax power."[219] The Tax Power injury grants standing where federal legislation "unconstitutionally intrud[es] on [a state's] sovereign authority,"[220] and threatens the state's "sovereign prerogative to 'tax its residents as it sees fit.' "[221]

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215. Kentucky v. Yellen, 54 F.4th at 338–39 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)).

216. *See id.* at 347–48.

217. *See* Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 52 (2013) ("The connections between conditional spending power, clear notice, and federalism are direct. State autonomy is preserved by ensuring that states knowingly and voluntarily enter into cooperative arrangements with the federal government.").

218. *See* Fallon, *supra* note 108, at 1095–96.

219. Ohio v. Yellen, 53 F.4th at 990.

220. Kentucky v. Yellen, 54 F.4th at 360 (Nalbandian, J., concurring in part and dissenting in part).

221. Arizona v. Yellen, 34 F.4th 841, 851 (9th Cir. 2022).

1. Tax Power Plus Factor

Across the circuits, the states and courts articulated the injury somewhat similarly, each bemoaning federal limitations on a core sovereign power: taxation.[222] Despite this commonality, the courts differed greatly in actually recognizing the injury when analyzing standing, with no court finding state standing for the Tax Power injury alone.[223] The Ninth Circuit specifically noted the Tax Power injury as a *distinct* theory of state injury but then only analyzed the Spending Contract theory.[224] And in both the Ninth and Eleventh Circuits, the Tax Power injury was still treated as "heighten[ing the Offset Provision's] effect on state sovereignty."[225] Curtailing the power to tax was a vaguely articulated plus factor for standing.

The haziness of the courts' analysis complexifies what sovereign injury was really contributing to standing: Was the state injured *because* of the "sovereign" nature of the contract's subject matter, or was ambiguity in the federal offer sufficient? Given each court's reference to *Massachusetts v. EPA*, the Ninth and Eleventh Circuits appeared to accord the Offset Provision's curtailment of a sovereign power with special solicitude's "extra-credit."[226] This formulation of special solicitude, one that grants an unquantifiable amount of standing oomph, likely stems from the circuits' "preexisting normative commitments"—the regulation of a sacrosanct sovereign power like taxation just *has* to get a state plaintiff over the standing threshold and into federal court.[227]

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222. *See id.*; Missouri v. Yellen, 39 F.4th 1063, 1068 (8th Cir. 2022) (reiterating Missouri's description of its injury as an intrusion on "their sovereign taxing authority" and "orderly management of their fiscal affairs [and] interfering with state legislative functions"); Kentucky v. Yellen, 54 F.4th at 332 (describing Kentucky's and Tennessee's injuries as Missouri did); Ohio v. Yellen, 53 F.4th at 989 (recounting Ohio's argument that the Offset Provision "cast[s] a pall over legislators' abilities to contemplate such tax changes") (quoting Ohio v. Yellen, 574 F. Supp. 3d 713, 725 (S.D. Ohio 2021)); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1136 (11th Cir. 2023) (describing the injury as a "a present and continuous infringement on state sovereignty"). The Fifth Circuit did not explicitly discuss the Tax Power injury. Texas v. Yellen, 105 F.4th 755, 764 (5th Cir. 2024).

223. *See* Arizona v. Yellen, 34 F.4th at 851–53 (mentioning the Tax Power injury but finding only Spending Contract standing); Kentucky v. Yellen, 54 F.4th at 340–42 (denying standing for the Tax Power injury before finding compliance cost standing); *Morrisey*, 59 F.4th at 1136–37 (alluding to the effect on state taxing authority but finding only Spending Contract standing); Texas v. Yellen, 105 F.4th at 764 (noting the loss of taxing authority as part of Spending Contract injury).

224. *See* Arizona v. Yellen, 34 F.4th at 851–53.

225. *Morrisey*, 59 F.4th at 1136 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819)); Arizona v. Yellen, 34 F.4th at 853 (arguing that the Spending Contract injury would cause Arizona to "face serious consequences in losing control over its taxing policies").

226. Crocker, *supra* note 128, at 831; *see also* Arizona v. Yellen, 34 F.4th at 851; *Morrisey*, 59 F.4th at 1136.

227. *See* Fallon, *supra* note 108, at 1098 (discussing Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV., 1, 19–20 (2011)).

For the Ninth and Eleventh Circuits, special solicitude is not a new injury but a generalized invitation.

2. A Standalone Tax Power Injury

Only one opinion across the Offset Provision cases would have found Tax Power standing as a distinct injury. Writing separately in *Kentucky v. Yellen*, Judge Nalbandian articulated the Tax Power injury's broadest conception: His formulation was entirely distinct from the Spending Contract theory and peerlessly offered *Massachusetts v. EPA* to support its analysis.[228] Judge Nalbandian argued that special solicitude granted liberal injury and standing requirements for state plaintiffs.[229] And he suggested that, per *Massachusetts v. EPA*, states are subject to a reduced imminence standard for standing and that "as federal regulation has increased over the states, the list of sovereign injuries has grown."[230] Applying this elastic injury and imminence standard to the present case, Judge Nalbandian insisted that the Offset Provision created ongoing Tax Power standing.[231] Because the law "intruded" into a traditional state function and "chill[ed] the States from enacting" tax cuts, states risked damaging their economies—arguably a core sovereign concern.[232] Even if the final rule did moot the risk of recoupment,[233] Judge Nalbandian argued that the Rule "narrow[s]" state regulatory flexibility, "which in turn takes a toll on the States' citizens and economies."[234] To Judge Nalbandian, regardless of imminence or actual risk, states are continuously injured if they cannot *do something sovereign*, like tax.

Judge Nalbandian's conception of a Tax Power injury, however, is completely at odds with the Supreme Court's modern approach to congressional lawmaking. For decades, the Supreme Court has dispensed with dividing regulatory areas into "state" and "federal" buckets.[235] Judge Nalbandian's approach separates from more ancillary, nonsovereign regulation certain policies based on some set of core sovereign subject matters and quarantines

228. Kentucky v. Yellen, 54 F.4th at 360–62 (Nalbandian, J., concurring in part and dissenting in part).

229. *Id.* at 359.

230. *Id.* at 359; *see id.* ("And we give 'special' recognition to a case when a state sues the federal government." (quoting Saginaw County v. STAT Emergency Med. Servs., Inc., 946 F.3d 951, 957 (6th Cir. 2020))).

231. *Id.* at 360–62.

232. *Id.* at 359–61 (quoting Kentucky v. Biden, 23 F.4th 585, 599 (6th Cir. 2022)). As in *Massachusetts v. EPA*, this injury could also be framed as a quasi-sovereign (state on behalf of its citizens) or a proprietary (state's bottom line) injury. 549 U.S. 497, 518–20 (2007).

233. Judge Nalbandian did not think that the final rule credibly disavowed recoupment. Kentucky v. Yellen, 54 F.4th at 362–63 (Nalbandian, J., concurring in part and dissenting in part).

234. *Id.* at 363–64 ("[I]f the States wish to comply with the Rules, they must do *something*—either raise other taxes or lower expenditures elsewhere in the budget to offset a revenue reduction. That *something* creates an ongoing injury.").

235. *See* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

them from the federal government—a completely unworkable standard that would be based entirely on a judge's own understanding of sovereign interests. The quarantined policy space is also underinclusive. It is hard to imagine that, in a world where states have standing to challenge federal regulation that touched on tax, they would lack standing for regulations that pertained to a national healthcare program. Further, given the Fifth Circuit's categorical prohibition on using the Spending Clause to prohibit tax cuts, it is possible that legislative subject matter could be decisive on the merits as well.[236] Returning to the environmental bill hypothetical discussed above: Even with precise, unambiguous language, a bill that regulates a state's environment or land could also intrude on some sovereign prerogative (as it seemed to in *Massachusetts v. EPA*). States could rattle off any number of sacred sovereign subject matters (taxes, the environment, education, abortion—the sky is really the limit) to essentially reverse-preempt federal legislation on those questions.[237] On any of these subjects, states would be insulated from federal pressure and citizens might be marooned without federal solutions to pressing concerns.

Like the no-imminence-required approach to the Spending Contract injury, Judge Nalbandian's articulation of the Tax Power injury coincides with Bulman-Pozen's justification for special solicitude.[238] For Bulman-Pozen, states have a role in "vindicating the public interest" to the same extent as federal lawmakers.[239] The haphazard piling of Judge Nalbandian's inferences aside, a state's economic health would likely fall under this public interest umbrella. Although both arrive at the same legal conclusion—state standing—Bulman-Pozen does not equate special solicitude with the protection of the state-plaintiff's "residuary and inviolable sovereignty" as Judge Nalbandian does.[240] Instead, Bulman-Pozen argues, consistent with the new process federalism perspective on state servants in a federal regulatory system, *Massachusetts v. EPA* suggests the *loss* of state sovereignty: The "lodging" of the state's sovereign prerogatives into the federal government "gave the state a cognizable interest in ensuring the EPA's compliance with federal law."[241] Nonetheless, as Bulman-Pozen and Judge Nalbandian conceive it, federal courts—not Congress—are the appropriate forums to hash out policy differences and sovereign interests.[242]

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236. Texas v. Yellen, 105 F.4th 755 (5th Cir. 2024).

237. *Cf.* Metzger, *supra* note 143, at 2038–39 (arguing that standing for these issues is desirable).

238. *See supra* Section I.B.1.

239. Bulman-Pozen, *supra* note 26, at 1750.

240. Kentucky v. Yellen, 54 F.4th 325, 359 (6th Cir. 2022) (Nalbandian, J., concurring in part) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

241. Bulman-Pozen, *supra* note 26, at 1747.

242. *See id.* at 1748. Little legal scholarship exists offering a defense of special solicitude from Judge Nalbandian's perspective—that states have a sovereign interest that should be protected from federal overreach. Scholars seem to divide into two, relatively non-ideological camps: (i) end special solicitude and (ii) new process federalist special solicitude. *Compare* Vladeck, *supra* note 25, *and* Crocker, *supra* note 128, *with* Bulman-Pozen, *supra* note 26.

3. No Tax Power Injury

The Sixth Circuit majority (from which Judge Nalbandian dissented on this issue) otherwise had a more constrained view of the Tax Power injury.[243] The court explained that before the Treasury's final rule, the Offset Provision's constraint of Kentucky and Tennessee's "sovereign authority to tax . . . sufficed for standing."[244] However, after the final rule, the states no longer had Tax Power standing because they failed to identify a "specific course of conduct" that would lead to recoupment.[245] The court reasoned that the final rule "subsequently disavowed the States' interpretation of the Offset Provision," leaving them with an outdated fear of losing the CSLFRF.[246] The court reached a similar conclusion in *Ohio v. Yellen* : Ohio suffered no injury from the mere "subjective chill" the Offset Provision had on its taxing authority.[247] Likewise, the Eighth Circuit held that where there was no imminent threat to Missouri's "constitutional right to set taxes," there was no Tax Power injury.[248]

The Fifth Circuit did not explicitly discuss the Tax Power injury at all.[249] Instead, the court discussed the "surrendering [of the plaintiffs'] ability to set state tax policy" as part of the Spending Contract injury—the power to tax is simply part of the consideration in a coercive contractual offer.[250] It is entirely possible that the court would treat its analysis of ambiguity and coercion in the Offset Provision differently if the state were foregoing something pedestrian (and not sovereign) like contractual rights with a private party, but there is no specific discussion of how the sovereign nature of the tax power elevates plaintiffs' standing.

As with the Spending Contract injury, the circuit courts disagreed on whether the Tax Power injury required an impending constraint of state tax authority. What's more, the courts were divided on how the two sovereign injuries interacted with each other and where special solicitude played a part in their analysis, if at all. Nonetheless, the courts believed that the two injuries,

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243. Judge Bush did appear to incorporate Judge Nalbandian's analysis in his statement denying rehearing *en banc* in *Kentucky*. *See* Kentucky v. Yellen, 67 F.4th 322, 323 (mem.) (6th Cir. 2023) (denying rehearing *en banc*) (calling the Offset Provision a "violent assumption of power") (quoting THE FEDERALIST NO. 32, at 154 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).

244. Kentucky v. Yellen, 54 F.4th at 336.

245. *Id.* at 338–39.

246. *Id.* at 339.

247. Ohio v. Yellen, 53 F. 4th 983, 990–91 (6th Cir. 2022) (quoting Laird v. Tatum, 408 U.S. 1, 13–14 (1972)).

248. Missouri v. Yellen, 39 F.4th 1063, 1069–70 (8th Cir. 2022).

249. Texas v. Yellen, 105 F.4th 755, 764 (5th Cir. 2024). In finding that the final rule did not moot the challenge, the court does mention the constraint of the state's sovereign powers but does not otherwise mention the constraint of that power as an independent basis for standing. *Id.* at 767.

250. *See id.* at 764.

in one form or another, reflected the sovereign injuries states suffer when Congress violates the Spending Clause. The following Part attempts to reconcile these injuries with existing law to offer a clearer picture of the danger in allowing expansive state standing.

III. BETTER SPENDING CLAUSE STANDING

States should, in some cases, have standing to challenge unconstitutional congressional exercises of the Spending Clause. But when? Prior Spending Clause cases required states plaintiffs to have suffered some injury to have standing to challenge the unduly coercive or ambiguous spending conditions. The Offset Provision cases were a mixed, first attempt at articulating those injuries. Conceptually, the courts were not far off the mark: States suffer some form of the Spending Contract and Tax Power sovereign injuries when Congress spends impermissibly.

However, if future Spending Clause cases follow the majority of circuit courts, the Offset Provision cases will have lowered pleading standards for states. As this Part explains, the injuries create two new approaches for states to unilaterally block federal policy: *searching and destroying* ambiguity and *quarantining* "sovereign" powers from federal influence. Without any requirements of imminence or concreteness, states that sniff out qualifying spending conditions will always find their way into federal court.

The Spending Clause and standing doctrine should demand more. State attorneys general should not be able to dismantle federal policy so easily. Instead, the Spending Contract and Tax Power injuries should adhere to the touchstones of other standing injuries-in-fact, requiring objective imminence and concreteness, respectively. As standing doctrine is theoretically supposed to ensure, the Spending Clause has historically been free from federal courts' excessive meddling in highly sensitive political areas.[251] Instead, with the Offset Provision cases, the majority of the circuit courts hearing those cases have welcomed the crushing weight of "juristocracy" to yet another policy vehicle, inviting disruptive judicial activism to infect another Article I power.[252]

A. *No Search and Destroy*

Spending Contract injuries should not give states a freestanding right to challenge every federal spending offer. The Fifth, Ninth, and Eleventh Circuits' liberal Spending Contract injury would seemingly include any instance

251. Gould, *supra* note 24, at 269.

252. *See* Moyn, *supra* note 27. Although the merits (or existence) of judicial activism is subject to academic debate, modern judicial involvement in these kinds of federalist disputes tends to bias conservative policymakers. *See generally*, Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022) (describing the proliferation of policymaking "veto points").

of ambiguity in federal spending legislation.[253] The Eleventh Circuit's articulation in particular—that states have a live claim to "adjudicate [the] terms" of the Offset Provision—grants open-ended standing.[254] States could hunt for ambiguity in any new grant of federal money, insist that they "cannot determine at what point a breach will occur" because of that ambiguity, and get standing to enjoin that provision.[255] This conception undermines the separation-of-powers principles at the heart of standing.[256] Federal courts should not serve as the "councils of revision" Article III standing is meant to constrain.[257] Instead, the broad conception of the Spending Contract injury weaponizes Article III courts against all legislative ambiguity, inviting attorneys general to search and destroy even "dormant" spending conditions like the Offset Provision.

Nonetheless, states should have Spending Contract standing in some cases. Federal courts should be available to serve as "mediators" when states face *actual* coercion to ensure a healthy federalism.[258] The best way to achieve this balance of federalism and the separation of powers is to look to Spending Clause jurisprudence. In cases like *Dole* and *Sebelius*, there was no question that states had standing to sue given the legislation's immediate obligations.[259] There, the federal offers required legislation from the states—you don't get this money unless you raise the legal drinking age.[260] The states had to undertake immediate and definite compliance as a condition of receiving the money and risked losing existing federal funds if they failed to comply.[261] In such cases that require near-immediate action for money, states would not be able to complete the required act if Congress's expectations were ambiguous, or they would be unfairly forced to act if the bargaining was coercive or ambiguous. States have Spending Contract standing in these cases to challenge potentially ambiguous or coercive offers.

With spending conditions like the Offset Provision, the Spending Contract injury should require greater imminence. Open-ended spending conditions—you can pick how to spend this money—do not guarantee some form of federal or agency enforcement. In the Offset Provision cases, the Treasury actively disclaimed any enforcement against the state-plaintiffs' proposed conduct.[262] The states see a ghost: No agency action is "certainly impending," and

253. *See Texas*, 105 F.4th at 764; Arizona v. Yellen, 34 F.4th 841, 852 (9th Cir. 2022); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1136 (11th Cir. 2023).

254. *See Morrisey*, 59 F.4th at 1140.

255. *Id.* at 1138.

256. *See supra* Section I.C.

257. *See* Vladeck, *supra* note 25, at 872; Raines v. Byrd, 521 U.S. 811, 826–28 (1997).

258. WRIGHT & MILLER, *supra* note 90, § 3531.11.1.

259. *See supra* Section I.C.

260. South Dakota v. Dole, 483 U.S. 203, 205 (1987).

261. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–82 (2012); Bagenstos, *supra* note 83, at 870.

262. *See, e.g.*, Kentucky v. Yellen, 54 F.4th 325, 329 (6th Cir. 2022).

"fears of hypothetical future harm" should not be enough for standing.[263] Particularly in cases like these where a court would have to weigh in on congressional action (and the hypothetical actions of an executive agency), the separation-of-powers concerns underpinning standing doctrine are at their apex.[264] Courts should be wary to decide such cases involving coordinate branches of the federal government where any actual squabble has yet to materialize.

The Fifth, Ninth, and Eleventh Circuits overstepped this circumscribed role. In those circuits, the courts' standing analyses went off track in part because they misapplied the substantive Spending Clause precedent. The Fifth and Eleventh Circuits did not treat *Pennhurst* 's clear-statement rule as a rule of statutory construction to protect the states from unexpected duties and suits.[265] Instead, as the Eleventh Circuit explained, they believed the *Pennhurst* requirement incorporated in the *Dole* rule "is a binding constitutional command."[266] Following the "search and destroy" theme, the Fifth Circuit further argued that the Constitution imposes an affirmative "bar on ambiguous spending conditions and provid[es] grounds for an injunction against the enforcement of such conditions."[267] Ignoring the Supreme Court's reasoning in *Bennett v. Kentucky Department of Education*, which provides that Congress is not required to "prospectively resolve every possible ambiguity concerning particular applications" of its spending conditions, [268] the Fifth and Eleventh Circuits effectively eliminated any interpretive wiggle room. Forget about standing: States would *win* every Spending Clause ambiguity challenge under that conception of the *Pennhurst* rule.

No Article I power—let alone spending—demands linguistic perfection. *Pennhurst* does not provide this sort of substantive attack on ambiguity; it and *Arlington* applied a clear-statement rule of statutory construction that ensures states have fair notice of their duties and obligations after accepting federal funds.[269] The rule does not create any substantive limit on federal power,[270] so it should not give states a nebulous, ambiguity-challenging cause of action.

States should have standing for coercive and ambiguous federal offers under the Spending Clause, but those offers must present an imminent affront to state sovereignty. Federal courts can, as they did in *Sebelius*, step in when

263. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 416 (2013).

264. *Id.* at 408 (quoting Raines v. Byrd, 521 U.S. 811, 819–20 (1997)).

265. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (explaining that under *Pennhurst*, courts interpreting spending statutes must ask whether conditions on spending are such that a state official deciding whether to accept funds would clearly understand the obligations that accompany them).

266. West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1142 (11th Cir. 2023) (citing Benning v. Georgia, 391 F.3d 1299, 1303 (11th Cir. 2004)).

267. Texas v. Yellen, 105 F.4th 755, 771 (5th Cir. 2024).

268. Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985).

269. *See* Pasachoff, *supra* note 201, at 589.

270. *Id.*

Congress's offer is a "gun to the head" of the states that would immediately change state policy on an issue.[271] But for mere discretionary spending conditions like the Offset Provision, particularly one designed to ensure maintenance-of-effort,[272] states should not have standing without imminent federal enforcement.

B. *No Sovereign Power Quarantines*

Several of the Offset Provision opinions crafted an expansive Tax Power injury even if none attributed standing to that injury alone.[273] Judge Nalbandian's conception in *Kentucky v. Yellen*, that states have standing whenever legislation subjectively "intrude[s]" or "chill[s]" a state's sovereign authority to make laws (or broader yet, has "negative effects" on a state's economy),[274] would grant near-absolute state standing to challenge federal spending. As Judge Bush explains in the majority opinion, "*any* law could be said to 'limit the range,' in an abstract sense, of a plaintiff's legitimate behavior."[275] Federal legislation "cast[ing] a pall over legislators' abilities to contemplate" lawmaking is far too subjective and abstract an injury for standing.[276] States could always suggest that anything other than no limitations on federal funds would step on their sovereign toes.

Furthermore, states should not have standing based on the subject matter of the federal regulation alone. Both the Ninth and Eleventh Circuits appear to treat the subject matter of the Offset Provision, which implicates a state's ability to create and cut taxes, as a plus factor in finding standing.[277] Although the Fifth Circuit did not discuss the Tax Power injury directly, its reasoning on the merits is also troubling on this front, as anytime Congress "require[s] the States to accept policy changes, [it] triggers the [Spending Clause's] coercion analysis."[278] This rule is unworkable for standing: Standing should not be based on whether the spending condition at issue touches something "too sovereign-y" because that standard provides judges too much unfettered discretion.

Instead, the Tax Power injury—or, better named, the Regulatory Power injury, as it would not be subject-matter specific—should apply a similar distinction as outlined in the previous Section. If a federal spending program restrains a state's ability to *regulate*—a state may not pass any tax cuts for two

271. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012).

272. *See* Clarke & Fox, *supra* note 45, at 1362.

273. *See supra* Section I.B.

274. Kentucky v. Yellen, 54 F.4th 325, 360–61 (6th Cir. 2022) (Nalbandian, J., concurring in part and dissenting in part).

275. *Id.* at 339 n.8 (majority opinion).

276. Ohio v. Yellen, 53 F.4th 983, 989–91 (6th Cir. 2022) (quoting Ohio v. Yellen, 547 F. Supp. 3d 713, 725 (S.D. Ohio 2021), *rev'd and vacated*, 53 F.4th 983 (6th Cir. 2022)).

277. *See supra* Section I.B.

278. Texas v. Yellen, 105 F.4th 755, 768 (5th Cir. 2024).

years, a state's drinking age must be twenty-one, etc.—states should have standing. The state can no longer make law where it once could, regardless of the subject matter of that law. The constraint on this uniquely sovereign ability—to make laws for its own citizens—should be a justiciable injury-in-fact. The injury would also be distinct from the Spending Contract injury, as there would be nothing ambiguous or coercive about the federal *offer* ; states would be challenging the substance of the deal.[279]

For spending rules like the Offset Provision, states could still have Regulatory Power standing. However, the federal constraint of the state's power to regulate as it wants to must be concrete. States should not have standing merely because federal legislation subjectively chills their power, especially when federal regulators are not imminently constraining that power. But if the restriction is concrete, as in actual or imminent (not "'conjectural' or 'hypothetical'"),[280] then states should have standing to prevent the "loss" of their lawmaking function.

C. *The End of Special Solicitude*

The Offset Provision cases reveal the doctrinal incoherence of *Massachusetts v. EPA*'s special solicitude. Each of the courts that "applied" special solicitude did so differently, often giving lip service to the doctrine or *Massachusetts v. EPA* without actually explaining how it factored into their analysis. The Eighth Circuit appeared to shrug off Missouri's special solicitude, holding that it had not otherwise met "the basic requirements for standing."[281] By contrast, the Ninth and Eleventh Circuits, similar to their analysis of the Tax Power injury,[282] referenced *Massachusetts v. EPA* without outlining the substantive "work" special solicitude did in their analyses.[283] Based on the Ninth and Eleventh Circuits' temporally unrestricted description of the Spending Contract injury, special solicitude may be helping to eliminate standing's imminence requirement.[284] But it is hard to say for sure: Special solicitude seems to act as a vague, pro-state-standing background principle for these two courts in the same way as did the Tax Power injury. Judge Nalbandian also argued separately in *Kentucky v. Yellen* that special solicitude changed the test of imminence for state pre-enforcement standing from a

279. States would still likely plead multiple theories of injury, including the Spending Contract theory. *See supra* Section I.B; South Dakota v. Dole, 483 U.S. 203, 210–12 (1987) (analyzing both the alleged coercive effect of the federal offer and the alleged problems with the regulatory substance of the drinking age).

280. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

281. *See* Missouri v. Yellen, 39 F.4th 1063, 1070 n.7 (8th Cir. 2022).

282. *See supra* Sections I.B.2 and I.B.

283. *See* Arizona v. Yellen, 34 F.4th 841, 851 (9th Cir. 2022) ("This special standing has relevance here, where Arizona alleges that ARPA infringes upon its sovereign rights."); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1136 (11th Cir. 2023).

284. *See supra* Section I.B.1; Arizona v. Yellen, 34 F.4th at 852; *Morrisey*, 59 F.4th at 1136.

"credible threat" of enforcement to the lower "risk of harm" for both sovereign and quasi-sovereign injuries.[285] Judge Nalbandian's framing treats any intrusion into a state's affairs as a justiciable sovereign injury to the state.[286]

Scholars in the new process federalism camp have a similar view of special solicitude.[287] As outlined, Bulman-Pozen argues that expansive state standing forces federal officials to seek greater state buy-in before issuing their federal policy offer.[288] Somehow, the looming threat of litigation to "short-circuit" federal legislation is a more effective way to sort out inevitable federalism policy disputes than the political process.[289]

Perhaps unsurprisingly, Bulman-Pozen's support of special solicitude does not actually offer a solution to special solicitude's biggest hurdle: How does it work?[290] The Offset Provision cases and other circuit courts' attempts to apply *Massachusetts v. EPA* have elucidated no doctrinal framework for applying special solicitude.[291] While there may be normative benefits to federal-state bargaining in implementing regulatory policy, those benefits will arguably exist in every case. The core separation-of-powers principles at the heart of standing doctrine counsel against allowing every state suit into federal court simply for the sake of crafting a better deal.[292]

As Justice Gorsuch suggested in *United States v. Texas*, the best course of action is to "just leave [special solicitude] on the shelf in future [cases]."[293] Eliminating special solicitude will not instantly fix state standing's doctrinal issues, especially with the Supreme Court facilitating "lawless" standing theories.[294] But the last thing they need is more ammunition. The clear state-plaintiff pleading approach that emerged from *Biden v. Nebraska*—find standing and federal overreach somewhere—pales in comparison to the swift efficiency of the Spending Contract's search and destroy strategy.[295] Here, there are no major question doctrine hurdles to satisfy for victory: Any state attorney general can enjoin any federal spending condition. Even if the state loses, someone else can just try again in a more favorable district. The approach to dismantling the Offset Provision, with groups of state plaintiffs trying cases

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285. Kentucky v. Yellen, 54 F.4th 325, 359–60, 359 n.2, 363 (6th Cir. 2022) (Nalbandian, J., concurring in part and dissenting in part) (quoting Massachusetts v. EPA, 549 U.S. 497, 521 (2007)) (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 161–64 (2014)).

286. *Id.*

287. *See* Bulman-Pozen, *supra* note 26, at 1749–50; Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1703 (2017).

288. *See* Bulman-Pozen, *supra* note 26, at 1749.

289. *See* Vladeck, *supra* note 25, at 874.

290. Bulman-Pozen acknowledges that "[e]ven the basic question of what warrants special solicitude remains unclear." Bulman-Pozen, *supra* note 26, at 1745.

291. *See* Crocker, *supra* note 128.

292. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

293. United States v. Texas, 143 S. Ct.1964, 1977 (2023) (Gorsuch, J., concurring).

294. *See* Vladeck, *Lawlessness*, *supra* note 23.

295. *See supra* Section I.D.

around the country until they secured their desired injunction, could serve as the blueprint for future states trying to strike down federal spending policy.

Determining state standing for sovereign injuries should not be an open-ended affair. Curtailing special solicitude's future use will help simplify lower federal courts' standing analyses for continuing state challenges to federal policy.[296] State plaintiffs should not get a free pass to contest federal policy merely by virtue of their sovereign status. And if they somehow do, it should at least be on a more concrete doctrinal basis, rather than "extra-credit" and judicial spitballing.[297]

CONCLUSION

The Offset Provision cases were the perfect storm for a messy circuit split. ARPA was a highly political bill, the Offset Provision was complicated, and $200 billion were on the line. One legal doctrine at issue—standing—is inundated with inconsistency. The other—spending—is bereft of case law: a nascent jurisprudence likely to develop as Congress continues to rely on it. The Offset Provision cases were an intricate first attempt at conceptualizing together the two previously unwed doctrines. The fruits of the courts' analyses, the Spending Contract and Tax Power injuries, although not entirely off base, are (in their current form) invitations for courts to find state standing in nearly *every* case—regardless of whether there is, or there is even likely to be, actual friction between the federal and state governments. The sovereign Spending Clause injuries are powerful tools: pleading strategies for ambitious states to destroy the federal policies they oppose. Spending Clause standing must have a higher standard, and special solicitude must not become a renewed red carpet for state plaintiffs.

296. Woolhandler & Mahoney, *supra* note 147, at 35.

297. *See* Crocker, *supra* note 128, at 831.