

## Reconstitutionalizing *Parens Patriae*: How Federal *Parens Patriae* Doctrine Appropriately Permits State Damages Suits Aggregating Private Tort Claims

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Recent public debate about state attorney general “activism” is provoked in large part by the states’ suits against the tobacco industry in the mid-nineties. Those suits prompted a heated public debate between those who see the tobacco litigation as a stage in the development of an important tool for the resolution of mass torts and those who see it as a cautionary tale, illustrating how politically motivated state attorneys general might cripple whole industries.

The states’ claims against the tobacco industry were myriad, but a substantial number relied on the ancient doctrine of *parens patriae*, which permits a state to bring an action on behalf of its citizens to protect the state’s sovereign or “quasi-sovereign” interests.<sup>1</sup> The tobacco litigation was not so much revolutionary in the development of the *parens patriae* doctrine as an anomalous use of what has traditionally been viewed as an extremely broad power.

Nevertheless, the tobacco suits have become a focal point in the debate over the appropriate scope of state power to litigate in the public interest. Very little case law actually developed out of the tobacco litigation, but one decision in the Eastern District of Texas contains language seeming to approve the use of the *parens* power to aggregate tort damages claims.<sup>2</sup> Some commentators, encouraged by the relative success of the tobacco litigation, and relying the language from the Texas decision and previous cases, promote *parens patriae* as a viable

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<sup>1</sup> See Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1982).

<sup>2</sup> See Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997) (“In the Court’s opinion, [*parens patriae* as] such a basis for suit has long been available to the State.... In this case, the State has simply dusted off a long recognized legal theory and seeks to use it to further the purposes of the statutes in question and right the alleged wrongs involved in this matter.”).

alternative to the private class action as a means to resolve mass torts.<sup>3</sup> For example, former Attorney General of Louisiana Richard Ieyoub advocates a vision of *parens patriae* under which states can bring suits to “safeguard[] nearly all the interests that a state might reasonably seek to protect.”<sup>4</sup>

The “next tobacco” has been widely predicted in the areas of fast food, gun manufacturing and distribution, lead paint, and pharmaceuticals.<sup>5</sup> A number of states have in fact brought suits against those industries.<sup>6</sup> However, notwithstanding the portentions of both supporters and detractors of the tobacco litigation, it is unlikely that there will in fact be a “next tobacco” in the sense that the power of all 50 states is brought to bear against a single industry.<sup>7</sup>

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<sup>3</sup> See, e.g., Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847, 1851 (2000) (arguing generally for expanding the *parens* doctrine); Richard P. Ieyoub and Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tul. L.Rev. 1859 (2000) (embracing a broad view of the *parens* power); Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 Tul. L. Rev. 1919 (advocating the use of *parens* suits to recover for injuries to citizens’ health and economic well-being as an alternative to class actions); Annie Tai Kao, *A More Powerful Plaintiff: State Public Nuisance Lawsuits against the Gun Industry*, 70 Geo. Wash. L. Rev. 212 (2002) (advocating the use of the *parens* power to bring public nuisance suits against the gun industry).

<sup>4</sup> Ieyoub and Eisenberg, at 1882.

<sup>5</sup> Richard Parloff, *Is Fat the Next Tobacco? For Big Food, the Supersizing of America Is Becoming a Big Headache*, FORTUNE, February 3, 2003, at 50; Shelly Branch, *Obese America: Is Food the Next Tobacco*, Wall St. J., June 13, 2002, at B1; Carolyn Barta, *Cities Look to Courts in Fight Against Gun-Related Crimes: Both Sides Call Issue of Firearm Suits the ‘Next Tobacco’*, Dallas Morning News, June 6, 1999, at 1A; Howard M. Erichson, *Coattails Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 20 (“Many have called handguns ‘the next tobacco.’”); Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 Def. Couns. J. 119, 120 (2004) (noting that “[m]ore than one observer has referred to litigation against former manufacturers of lead pigment and lead paint as ‘the next tobacco’ or ‘the next asbestos’”); Douglas A. Robinson, *Recent Administrative Reforms of the Hatch-Waxman Act: Lower Prices Now in Exchange for Less Pharmaceutical Innovation Later?*, 81 Wash. U. L.Q. 829, 843 (2003) (“[T]he tactics employed by brand-name drug manufacturers drew the attention of state attorneys general and plaintiffs’ attorneys, many of whom viewed the brand-name drug manufactures as ‘the next tobacco.’”).

<sup>6</sup> See, e.g., *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct. 2001) (upholding state’s *parens* power to bring a public nuisance claim against lead paint manufacturers); *New York v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (N.Y.A.D. 2003) (*parens* suit to enjoin a public nuisance brought against manufacturers and wholesalers of handguns).

<sup>7</sup> Numerous commentators have suggested that the tobacco litigation was a unique event. See, e.g., Jean Macchiaroli Eggen and John G. Culhane, *Gun Torts: A Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. Rev. 115, 156 (2002) (noting that the “tobacco litigation arose in a unique political and social context that is not readily translatable to other products, including guns...”); Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 Depaul L. Rev. 457, 485 (2001) (suggesting that tobacco may be a unique governmental reaction to the industry’s unrivaled use of “scorched earth tactics”). Cf. Sherman Joyce and Michael Hotra, *Mississippi’s Civil Justice System: Problems, Opportunities and Some Suggested Repairs*, 71 Miss. L.J. 395, 411 (2001) (“While the state tobacco lawsuits were initially portrayed as a unique situation, evidence now indicates

The recent cases are probably better understood as more traditional exercises of the *parens* power, as it is used by a single state as a tool to resolve a more localized issue of public concern. Nevertheless, many of these cases do purport to use the *parens* power to resolve mass torts. This comment addresses the question of whether federal law permits the states to so use the *parens* power to aggregate private damages claims.

State *parens patriae* actions have a number of advantages over the class action as a tool for resolving mass torts. For example, the potential divergence of interests between class action counsel and their “clients” creates what Professor Coffee describes as an “agency problem.”<sup>8</sup> This agency problem can lead both to (1) the defensive use of class actions, by which a defendant may seek to facilitate a class action and then settle it on the cheap, insulating itself from greater liability with the suit’s *res judicata* effect; and (2) the “entrapment” of class members who do not wish to be party to the suit. These issues are of particular concern in the area mass torts.<sup>9</sup> The agency problem is arguably eliminated in the *parens* context, where the interests of class members are entrusted to attorneys whose ultimate responsibility is the protection of the public interest, and who in no event obtain a personal financial stake in the outcome of the lawsuit.<sup>10</sup> This responsibility to the public interest and the absence of a contingency fee arrangement suggest that attorneys general are less likely than private lawyers to

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that the tobacco experience may serve as a model for trial attorneys and attorneys general to go after other industries.”).

<sup>8</sup> See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representation Litigation*, 100 Colum. L. Rev. 370 (2000).

<sup>9</sup> *Id.* at 372 (“The mass tort class action . . . stands as the paradigmatic context in which the agency costs of holding the plaintiffs’ attorney accountable to the class are likely to be the highest.”). See also Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805 (1997).

<sup>10</sup> See *Troncilliti v. Minolta Corp.*, 666 F. Supp. 750, 754 (D. Md. 1987) (“[T]he Court cannot overlook the governmental nature of the *parens patriae* suits, which resulted in the initial settlement, where the primary concern of the attorney generals was the protection of and compensation for the states’ resident consumers, rather than insuring a fee for themselves....”).

have incentives that substantially diverge from the class they purport to represent.<sup>11</sup>

Additionally, the “manageability” problems that motivated Congress to allow *parens* actions to enforce the federal antitrust laws, particularly problems of notice, complexity of evidentiary issues, and distribution of recoveries,<sup>12</sup> also exist in the mass torts context. Title III of the Hart-Scott-Rodino Antitrust Improvements Act<sup>13</sup> is an explicit congressional acknowledgment of the unique capacity of state attorney generals to deal with such problems.<sup>14</sup> For similar reasons, courts have long noted that state governments are the most appropriate representatives of consumers.<sup>15</sup> Although competition between *parens* actions and class actions has generally only arisen in the antitrust field, some courts’ comments seem to reflect a general preference for *parens* actions over class actions.<sup>16</sup>

This comment seeks to clarify the legal framework in which the use of state *parens patriae* actions as a tool for resolution of mass torts should be evaluated. Part I begins with a brief historical overview of the Supreme Court’s *parens* doctrine and describes the confusion that has arisen among the lower federal courts. Part II seeks to clarify the doctrine by walking through the specific limitations that the constitution imposes on the states’ use of the *parens* power. Part III addresses the inevitable conflict between a *parens* suit and a class action that seek to resolve the same underlying dispute. Ultimately, this comment seeks to demonstrate that,

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<sup>11</sup> But see Issacharoff, note 104, *infra*.

<sup>12</sup> See H.R. Rep. No. 499, 94th Cong., 2d Sess 7 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2576.

<sup>13</sup> Pub. L. No. 94-435, *codified at* 15 U.S.C. §§ 15c-15h (1994).

<sup>14</sup> This is not to suggest that *parens* actions should completely replace class actions, but that they are a viable and sometimes preferable alternative. For an argument against using *parens patriae* to “deprivatize” the class action, *see* Alon Harel and Alex Stein, Auctioning for Loyalty: Selecting and Monitoring of Class Counsel, 22 *Yale L. & Pol’y Rev.* 69, 106-107 (2004).

<sup>15</sup> *See, e.g.,* In re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 274 (“[T]he states and cities, acting through their attorneys general and chief law officers respectively, are the best representatives of the consumers residing within their jurisdictions.”); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) (“[I]t is difficult to imagine a better representative of the retail consumers within a state than the state’s attorney general.”).

<sup>16</sup> *See, e.g.,* Pennsylvania v. Budget Fuel Co., Inc., 122 F.R.D. 184, 186 (E.D. Pa. 1988) (“[I]n the situation where a state attorney general and a private class representative seek to represent the same class members, the *parens patriae* action is superior to that of a private class action.”); text accompanying notes 90-103; note 103.

on a correct understanding of the Supreme Court's *parens patriae* jurisprudence, federal law poses no insuperable barriers to the states' use of *parens* suits to resolve mass torts.

### **Part I: The Historical Roots of the *Parens* Power**

The power of the state to bring suit as *parens patriae* derives from the English system, in which the King was said to exercise the *parens* power in his capacity as “father of the country.”<sup>17</sup> It has its roots in the common-law concept of the “royal prerogative,” under which “the king could do no wrong; he could never die; he was the representative of the state in its dealings with foreign nations; he was part of the legislature, the head of the army, the fountain of justice, always present in all his courts, the fountain of honor, the arbiter of commerce, the head of the church.”<sup>18</sup> Traditionally, the power was exercised by the sovereign on behalf of “infants, idiots, and lunatics,”<sup>19</sup> i.e. as guardian of legal incompetents.

Although the American courts early recognized the prerogative of *parens patriae* as inherent to the sovereign power of every state,<sup>20</sup> “the common-law approach ... has relatively little to do with the concept of *parens patriae* standing that has developed in American law.”<sup>21</sup> The development of the Supreme Court's expansive view of the *parens* power began with *Louisiana v. Texas*,<sup>22</sup> where, though the Court held that the exercise of the *parens* power was inappropriate in the case itself, it clearly recognized the state's broad authority to sue on behalf

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<sup>17</sup> *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 257 (1972), quoting Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193, 197 (1970).

<sup>18</sup> George P. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895, 896 (1976) (citing 3 W. Holdsworth, *A History of English Law* 459 (3d ed. 1923)).

<sup>19</sup> *Hawaii v. Standard Oil Co. of California*, 405 U.S. at 257.

<sup>20</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982) (citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

<sup>21</sup> *Id.* For a fuller exposition of the English origins of *parens patriae*, see Curtis, note 18, *supra*.

<sup>22</sup> 176 U.S. 1 (1900).

of all its citizens.<sup>23</sup> The Court subsequently acknowledged state standing to sue as *parens patriae* to enjoin the discharge of sewage into a common waterway,<sup>24</sup> enjoin the diversion of water from an interstate stream,<sup>25</sup> enjoin fumes from an out-of-state copper plant from injuring state lands,<sup>26</sup> enjoin restraints on the commercial flow of natural gas,<sup>27</sup> enjoin changes in drainage which increased the flow of water in an interstate stream,<sup>28</sup> and enjoin restraint of trade due to price fixing by railroads that favored out-of-state shippers.<sup>29</sup>

The leading modern *parens* case is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.<sup>30</sup> In *Snapp*, the Commonwealth of Puerto Rico sought a declaratory judgment that the labor practices of east coast apple growers violated a federal law preferring domestic laborers over foreign temporary labors. After a review of the Supreme Court's prior *parens* holdings, Justice White concluded that a state must meet two essential requirements to establish standing under the *parens patriae* doctrine. First, the state must establish that it is not "only a nominal party without a real interest of its own."<sup>31</sup> "[A] State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest."<sup>32</sup> Where it does so, the state lacks standing. Second, the state must assert a "quasi-sovereign interest ... sufficiently concrete to create an actual controversy between the State and the defendant."<sup>33</sup> Stressing that the category of quasi-sovereign interests defies "an exhaustive formal definition," Justice White divided the quasi-sovereign interests that had theretofore been

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<sup>23</sup> *Hawaii v. Standard Oil Co. of California*, 405 U.S. at 258.

<sup>24</sup> *Missouri v. Illinois*, 180 U.S. 208 (1901); *New York v. New Jersey*, 256 U.S. 296 (1921).

<sup>25</sup> *Kansas v. Colorado*, 206 U.S. 46 (1907).

<sup>26</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

<sup>27</sup> *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

<sup>28</sup> *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

<sup>29</sup> *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

<sup>30</sup> 458 U.S. 592 (1982).

<sup>31</sup> *Id.* at 600.

<sup>32</sup> *Id.* at 602.

<sup>33</sup> *Id.* at 602.

recognized by the Court into two general categories: a state's "interest in the health and well-being -- both physical and economic -- of its residents in general,"<sup>34</sup> and a state's interest "in not being discriminatorily denied its rightful status within the federal system."<sup>35</sup>

### **1. *Parens* Suits Seeking Damages for Aggregated Private Injuries**

*Parens patriae* has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals.<sup>36</sup>

In *California v. Frito-Lay, Inc.*,<sup>37</sup> the Ninth Circuit held that the state, as *parens patriae*, could not sue under the Clayton Act to recover treble damages on behalf of its citizen-consumers for injuries suffered by them. In an area of the law noted for its obscurity, the *Frito-Lay* court was particularly confused as to the grounds for its decision, stating both that the state action lay outside the traditional scope of the *parens* power,<sup>38</sup> and that to allow the action would be to "restore the substance of the common law rules of law in an area which has been pre-empted by legislation."<sup>39</sup> As such, the *Frito-Lay* court straddled two incompatible theories of the *parens* power: (1) that the scope of the power is a function of federal common law, and (2) that the scope of the *parens* power is contiguous with the scope of the states' police power, and limited by federal law only insofar as it runs afoul of constitutional constraints or affirmative federal legislation.

Congress abrogated *Frito-Lay*'s holding that the states could not aggregate private antitrust damages claims in 1976 with Title III of the Hart-Scott-Rodino Antitrust Improvements

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<sup>34</sup> *Id.* at 607.

<sup>35</sup> *Id.* at 607.

<sup>36</sup> *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

<sup>37</sup> 474 F.2d 774 (9th Cir. 1973).

<sup>38</sup> "[I]n our judgment [the state's exercise of *parens patriae* in order to secure injured citizens with the fullest possible recovery] is not the type of state action taken to afford the sort of benefit that the common-law concept of *parens patriae* contemplates." *Id.* at 777.

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

Act (amending the Clayton Act).<sup>40</sup> The purpose of Hart-Scott-Rodino Act was “to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates.”<sup>41</sup> It did so by giving them power to aggregate individual consumer claims.<sup>42</sup> The constitutional validity of Title III was universally upheld by the courts, and so it is clear that the scope of the *parens* power can extend to damages suits consisting of aggregated private claims. Hart-Scott-Rodino therefore raises the question: if Congress can authorize damages suits for aggregated private antitrust claims under the *parens power*, what prevents the states from aggregating private claims in other areas of the law?

In fact, numerous state statutes outside the antitrust arena also authorize their attorneys general to seek damages for aggregated private claims pursuant to their *parens* power.<sup>43</sup> This suggests that the broader view, that *parens* suits are generally permissible absent conflict with affirmative federal law, is the correct view. For if federal common law actually precludes *parens* suits for aggregated private damages absent affirmative congressional approval, how can a *state*

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<sup>40</sup> Pub. L. No. 94-435, *codified at* 15 U.S.C. §§ 15c-15h (1994).

<sup>41</sup> *New York v. Reebok Int’l, Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (quoting *In re Cuisinarts, Inc.*, 665 F.2d 24, 35 (2d Cir. 1981)).

<sup>42</sup> 15 U.S.C. § 15c(a)(1) reads:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

<sup>43</sup> *See, e.g.*, Fla. Stat. § 626.909(3) (authorizing *parens* actions for damages against unauthorized insurers on behalf of Florida residents); Pr. Stat. T. 32 § 3341 (giving Commonwealth of Puerto Rico broad authorization of *parens* actions for damages on behalf of consumers); C.G.S.A. § 3-129c (empowering the Connecticut Attorney General to bring a civil action in the name of the state as *parens patriae* to represent state residents being subjected to personal income tax by the City of New York); DC St. § 28-3909 (authorizing the District of Columbia Corporation Counsel to sue as *parens patriae* for restitution and damages on behalf of consumers for violations of the District of Columbia consumer protection laws); N.J.S.A. 2A: 53A-21(c) (authorizing the New Jersey Attorney General to bring damages suits as *parens patriae* on behalf of victims of bias crimes); R.I. St. § 40-8.2-6 (authorizing the Attorney General of Rhode Island to bring *parens* suits for damages on behalf of victims of medical assistance fraud); R.I. St. § 46-12.3-5 (authorizing the Attorney General of Rhode Island to bring *parens* suits for damages under the state’s Environmental Injury Compensation Act). *See also* *In re Edmonds*, 934 F.2d 1304 (4th Cir. 1991) (holding that Maryland Attorney General, suing as *parens patriae*, need not comply with R. 23 in a suit for restitution under the authority of the Maryland Consumer Protection Act).

legislature abrogate that limitation through the mere enactment of a statute? It cannot be seriously argued that federal law recognizes some distinction between state executive actions undertaken pursuant to legislative, as opposed to common law, authority. It is not the role of the federal courts to police state separation of powers.

Although *Snapp*'s discussion of quasi-sovereign interests appears to address the showing necessary to meet the injury in fact requirement of Article III standing,<sup>44</sup> and despite the abrogation of *Frito-Lay*, a number of subsequent lower court decisions have read *Snapp*'s discussion of quasi-sovereign interests as the foundation of a federal common law rule of standing for *parens* actions. A questionable consensus has developed among courts and commentators that between its two requirements, *Snapp* laid the foundation for a federal common law rule that a state may bring a *parens* suit for damages only insofar as the damages it seeks are discreet from those potentially recoverable by individuals.<sup>45</sup> This view assumes that the *affirmative ability* of the states to act as *parens patriae* is a question of federal common law.<sup>46</sup> To support this vision of the *parens* standard the lower federal courts sometimes rely on early *parens* decisions that suggest even more restrictive views, such as the idea that the

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<sup>44</sup> *Id.* at 602. See also text accompanying notes 55-59.

<sup>45</sup> See, e.g. *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) (“*Parens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit.”); *New York v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (“Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit.”); *California v. Frito-Lay*, 474 F.2d 774, 776 (9th Cir. 1973) (“[The state] asserts that the practical inability of an injured citizen to bring an individual suit in his own behalf ... warrants the establishment of a state prerogative to act for his protection.”); *In re Volpert*, 175 B.R. 247, 257 (N.D. Ill. 1994) (justifying the exercise of *parens patriae* in part due to the impracticability of private suit); Tribe, 1 *American Constitutional Law* 454 (3d ed. 2000) (“Its quasi-sovereign capacity ... entitles a state to bring suit... to challenge allegedly illegal business activities on behalf of citizen consumers as a statewide ‘class’ of sorts--a group whose members may lack a sufficient economic stake to justify bringing suit as individuals or who may have insufficient incentive, or may otherwise be unable to meet the criteria, to sue as a rule 23 class.”). An early articulation of the idea of *parens* suits for damages as gap fillers -- i.e. appropriate only where private damages are unavailable, can be found in *State Protection and Environment: Parens Patriae Suits for Damages*, 6 *Colum. J. L. & Soc. Prob.* 411, 423-431 (1970) (describing such claims as “class action supplements”).

<sup>46</sup> “[I]n our judgment [*parens* suits for damages to injured citizens practically unable to bring suit] is not the type of state action taken to afford the sort of benefit that the common-law concept of *parens patriae* contemplates.” *California v. Frito-Lay, Inc.*, 474 F.2d 774, 777 (9th Cir. 1973).

federalist structure of the government creates quasi-sovereign interests consisting only of those interests “which between states entirely independent might properly be the subject of diplomatic adjustment.”<sup>47</sup>

Assuming the correctness of this view that the *parens* power resides primarily with the federal government, Hart-Scott-Rodino might be explained as a delegation of the federal *parens* power to the states. However, this view is out of keeping with both the historical development of the *parens* doctrine and the Supreme Court’s modern view of the scope of the states’ *parens* power, which is that it is contiguous with state power.<sup>48</sup> As noted above, the restrictive view of the *parens* power also has difficulty drawing a reasoned distinction between *parens* suits undertaken pursuant to state common law authority, which it would preclude, and state statutory authority, which are certainly permitted. Moreover, the restrictive view is a creature of federal common law, a doctrine which has little currency with today’s Court. Finally, any limitations that apply not just to access to the federal courts but to the *parens* power itself pose the additional problem of purporting to limit the states’ *parens* power even as exercised in their own courts.<sup>49</sup>

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<sup>47</sup> *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923). A structural argument seemingly supportive of the position that the states may only undertake *parens* suits where individual relief is unavailable was laid out in *New Hampshire v. Louisiana*:

[N]o nation ought to interfere, except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the constitution, as it was originally construed, a citizen of one state could sue another state in the courts of the United States for himself, and obtain the same relief his state could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his state to sue in his behalf, and we cannot believe it was the intention of the framers of the constitution to allow both remedies in such a case.

108 U.S. 76, 90-91 (1883).

<sup>48</sup> See text accompanying notes 55-59.

<sup>49</sup> It should be noted that both *North Dakota v. Minnesota* and *New Hampshire v. Louisiana*, the venerable Supreme Court decisions that would seem to bolster the more restrictive view were articulated in the general common law world of *Swift v. Tyson*. 41 U.S. 1 (1842). The approach promoted here conforms to the *Erie* doctrine. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Criticism of the *parens* doctrine expounded in *Snapp* has generally focused on the vagueness inherent in the definition of “quasi-sovereign interests,”<sup>50</sup> but it is actually the erroneous view that *Snapp* establishes a federal common law doctrine of *parens patriae* that permits the states to only bring suits for damages that cannot be vindicated through private action that deserves scrutiny.

## **Part II: Clarifying the Constitutional Constraints on the Parens Power**

This Part seeks to clarify the federal courts’ *parens* doctrine by revisiting its foundations in constitutional law. Although the case law described above has sometimes been taken to suggest that due to the availability of private class actions, *parens* suits aggregating private claims are not available outside the realm of antitrust, a correct interpretation of Supreme Court precedent demonstrates that federal law imposes no insuperable barriers to the use of *parens* suits to aggregate private damages claims.

As a preliminary matter, it should be noted that the most important legal and political restraints on the exercise of states’ *parens* power are state-specific. Often, the discretion to exercise the state’s power as *parens patriae* is vested in the role of the attorney general. Some states have withdrawn common law *parens* power from the attorney general, relegating his/her role to enforcement of state statutes.<sup>51</sup> Other states impose political constraints on the exercise of

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<sup>50</sup> See e.g., Jim Ryan and Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 Ill. B.J. 684, 687 (1998) (“There is clearly tension, if not outright inconsistency, among some of the cases allowing and disallowing individual relief in *parens patriae* suits.”); Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847, 1851 (2000) (“‘Quasi-sovereign’ is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their mooring and drift off into the ether. It is a meaningless term absolutely bereft of utility.”).

<sup>51</sup> States whose attorneys general retains common law authority include: California, Delaware, Florida, Illinois, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Tennessee and North Carolina. In Arizona, Indiana, Iowa, New Mexico, New York, Oregon, Texas, Washington, West Virginia, and Wisconsin, the attorney general may act only pursuant to statutory authority. 7 Am. Jur. 2d Attorney General § 7 (2d ed. 2004).

the *parens* power, such as a requirement of prior approval by the governor or other state official.<sup>52</sup> Political reality dictates that attorneys general often bring *parens* suits in concert with the secretary of state or an appropriate agency head. Further, the powers of a state attorney general are generally subject to legislative alteration, unless that legislation infringes on powers granted the attorney general by the state constitution.<sup>53</sup> So there are a broad range of state-specific limitations on the attorneys generals' power to bring *parens* suits.

Federal law also imposes limits on the exercise of the *parens* power, and the focus of this Part is to clarify the nature and scope of these limits in hopes of dispelling from the doctrine the vague and outdated spectre of the federal common law. The approach preferred herein posits that the *parens* power is contiguous with the full scope of state power, and constrained only insofar as constitutional principles narrow its permissible scope of application. This approach is more consistent with Supreme Court precedent and general principles of federalism. It also serves to significantly clarify the doctrine.

The constitutional principles that appropriately restrict *parens patriae* standing are Article III standing doctrine, the Eleventh Amendment, federal preemption, and due process. Valid exercise of the *parens* power can clearly also run afoul of other constitutional principles, but they do not go to the question of *standing*. For instance, the Court has held that although a state had standing to bring a *parens* suit, the state's interest in enforcing its compulsory school attendance law was trumped by defendants' First Amendment right of free exercise.<sup>54</sup> But although other federal law may obviously be relevant to the merits of a given state suit, the constitutional factors here enumerated are uniquely relevant to the ability of the state to bring suit at all. The questions relevant to the state's ability to bring suit are therefore:

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<sup>52</sup> 7 Am. Jur. 2d Attorney General § 9 (2d ed. 2004).

<sup>53</sup> 7 Am. Jur. 2d Attorney General § 8 (2d ed. 2004).

<sup>54</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

- (1) Does the claim meet the actual case or controversy requirements of Art. III?
- (2) *In a case brought against another sovereign or under the original jurisdiction of the Supreme Court*, is the state the real party in interest to the suit, or is it actually bringing suit on behalf of a private party?
- (3) Is the state's common-law role as *parens patriae* preempted in this particular area of law by federal legislation? If so, is there a provision in the federal statutory scheme for the state to exercise its *parens* power?
- (4) Are there sufficient safeguards to assure that the state will adequately represent any private interests the subsequent vindication of which will be frustrated by the exercise of the *parens* power?

### 1. Article III Standing: Case or Controversy

[Quasi-sovereign interests] consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.<sup>55</sup>

By articulating a standard for “quasi-sovereign” interests, the *Snapp* Court meant to establish an Article III standing test for state *parens* suits. The requirement that the state articulate a “quasi-sovereign” interest is therefore best understood as a test for determining whether the state has met the Article III standing requirement that plaintiff show injury in fact.

All nine members of the *Snapp* Court seem to have agreed that the range of quasi-sovereign interests is contiguous with the full range of state power; that is, it is equal in scope with the sovereignty exercised by the state over its populace. The *Snapp* majority maintained that “[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking

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<sup>55</sup> Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982).

powers.”<sup>56</sup> Justice Brennan’s concurrence, joined by three other members of the Court, less ambiguously promotes an expansive definition of quasi-sovereign interests:

As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing -- *except the Constitution or overriding federal law* -- that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State’s assertion of sovereign interest.<sup>57</sup>

This interpretation is also supported by Justice Holmes’ treatment of “quasi-sovereign interest” in a passage which has been heavily relied on by the Court throughout its development of the *parens* doctrine:

[In its capacity of quasi-sovereign,] the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power....

...When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests....<sup>58</sup>

If the realm of quasi-sovereign interests is contiguous with the full scope of state lawmaking authority, the states certainly have authority to assert their *parens* power in the realm of tort, which is *the* paradigmatic state concern.<sup>59</sup> Article III standing requirements should thus pose no obstacle to a state suit seeking to aggregate private tort claims, so long as the state asserts that some public interest within the ambit of state power is at stake.

## **2. Real Party in Interest: The Showing Required by the Eleventh Amendment and for the Exercise of Original Jurisdiction**

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<sup>56</sup> *Id.* at 607.

<sup>57</sup> *Id.* at 612 (emphasis added).

<sup>58</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (Holmes, J.).

<sup>59</sup> See Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. Penn. L. Rev. 2263, 2266 (2000) (“Congress has scrupulously, and with very few exceptions, respected the right of the states to develop, enforce, and apply state norms as to what kinds of behaviors give rise to a private action for damages in tort.”).

*Snapp* states that to establish *parens patriae* standing, the state must also establish that it is not “only a nominal party without a real interest of its own.”<sup>60</sup> This requirement has been erroneously interpreted to mean that a state only has standing to seek damages that cannot be vindicated through private suit.<sup>61</sup> It is not clear whether this is the interpretation intended by the *Snapp* majority; what is clear is that the restriction, traced to its doctrinal roots, is far narrower. The requirement that the state be the real party in interest when asserting its *parens* power only applies in two circumstances: either when seeking the original jurisdiction of the Supreme Court, or when the state brings suit against another state.

#### **a. Original Jurisdiction**

The Supreme Court has original jurisdiction over all controversies between two or more states, or between a state and citizens of another state.<sup>62</sup> Because the Eleventh Amendment withdraws the federal judicial power from all private suits brought against a state,<sup>63</sup> in a dispute between an individual citizen and a state, only the state may bring suit under the original jurisdiction of the Supreme Court. Lest the Eleventh Amendment be relegated to a mere formality, the Supreme Court long ago adopted the sensible rule that a state may not bring suit in its own name on behalf of a private party and thus avail that private party of the original

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<sup>60</sup> *Id.* at 600.

<sup>61</sup> See note 45, *supra*. An alternative incorrect view was articulated by Justice Brennan, who seems to have assumed that a *parens* action would have no preclusive effect on a subsequent private suit for the same damages. Justice Brennan’s suggested that *parens* actions for damages should be permitted, but that “there may be excluded from [the state’s] recovery any monetary damages that might be claimed by its citizens individually or as part of a properly constituted class.” *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 277 (1972) (Brennan, J., dissenting). See also *New York v. Seneci*, 817 F.2d 1015, 1017-18 (2d Cir. 1987) (“To be sure, in this case the Attorney General alleges that the defendants’ conduct has caused substantial injury to the integrity of the state’s marketplace and the economic well-being of all its citizens. Since, however, the monetary relief sought by the complaint is not designed to compensate the state for those damages, the asserted presence of such damages cannot serve as the foundation for the state’s authority to act here as the representative of its citizens.”); *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973) (citing Brennan’s *Standard Oil* dissent).

<sup>62</sup> U.S. Const. art. III, § 2.

<sup>63</sup> U.S. Const. amend. XI.

jurisdiction of the Court.<sup>64</sup> In such a case, the state would be “only nominally a party.”<sup>65</sup>

Therefore, whenever its original jurisdiction is sought by a state claiming to act as *parens patriae*, the Court undertakes an analysis of whether the state is the real party in interest.<sup>66</sup>

Thus, to demonstrate that it is the real party in interest, a state “must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.”<sup>67</sup> In *Pennsylvania v. New Jersey*, the Court explained the common sense basis for this rule:

This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, this Court’s original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, s 2, of the Constitution, between suits brought by ‘Citizens’ and those brought by ‘States’ would evaporate.<sup>68</sup>

#### **b. Eleventh Amendment**

A second line of cases holds that the that the same test should be used for claims brought against the states, because under the Eleventh Amendment the states are immune from private suit.<sup>69</sup> To the extent it is based on the Eleventh Amendment, the real party in interest test will

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<sup>64</sup> See *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (“In order . . . to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals.”).

<sup>65</sup> *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938) (“[The principle of *parens patriae*] does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy.”).

<sup>66</sup> See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *Oklahoma v. Atchison, Topeka & Santa Fe Rwy. Co.*, 220 U.S. 277 (1911) (state sought to recover damages allegedly resulting from unlawful freight rates charged to certain of its citizens); *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (states sought to recover from other states damages representing taxes withheld from private parties).

<sup>67</sup> *Oklahoma v. Cook*, 304 U.S. at 396.

<sup>68</sup> *Pennsylvania v. New Jersey*, 426 U.S. at 665-66.

<sup>69</sup> See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (holding that states could not bring suit on behalf of bondholders where the states acted as “nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the states, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them”); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923) (refusing to exercise original jurisdiction on Eleventh Amendment grounds in a suit for injunctive relief and damages for injuries to crops and farmland where the suit was funded by, and damages would be paid to, individual farm owners); *Badgley v. City of New York*, 606 F.2d 358, 364-65 (2d Cir. 1979) (“[T]he standing of states to bring *Parens patriae* actions on behalf of their citizens is limited by the Eleventh Amendment’s prohibition against

generally be inapplicable to mass tort *parens* suits, at least to the extent that they are brought against private entities. Likewise, the test is unlikely to be triggered by a state’s attempt to bring suit under the Supreme Court’s original jurisdiction. This is because the Court generally exercises its discretion to decline original jurisdiction over cases “bottomed on local law.”<sup>70</sup>

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The cases that inspired this rule are of sufficient historical curiosity as to merit some attention. The sheer audacity with which the states undertook to bring these suits on behalf of private entities seeking to escape the restrictions imposed by Article III and the Eleventh Amendment is remarkable. The private entities in these cases hoped to commandeer the state’s power to sue either as a means of abrogating a defendant state’s sovereign immunity, or as a vehicle to shoot straight to the Supreme Court of the United States for a quick and final resolution of their disputes. A passage from one early case illustrates the nature of the suits that the Supreme Court sought to preclude through testing whether the state was a mere “nominal party”:

In New Hampshire, before the attorney general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the state can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney general such counsel as he chooses, the state being in no way responsible for fees. All moneys collected are to be kept by the attorney general, as special trustee, separate and a part from the other moneys of the state, and paid over by him to the owner of the claim, after deducting all expenses incurred, not before that time paid by the owner. The bill, although signed by the attorney general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the state and the attorney general are only nominal actors in the proceeding. The bond-owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and, if any money is ever collected, it

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suits by citizens of one state against another state. Thus a state acting as *Parens patriae* may not invoke the Supreme Court’s original jurisdiction to protect the individual rights of its citizens.”).

<sup>70</sup> *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 497-98 (1971) (“We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.”).

must be paid to him without even passing through the form of getting into the treasury of the state.<sup>71</sup>

It is certainly good policy to prevent private parties from commandeering the attorney general's office to exercise the legal power of the state in their own private interest. For this reason, modern state laws generally allow the attorney general to participate in litigation of a private character only when it has a bearing on the interests of the general public or affects the interests and welfare of the general public.<sup>72</sup> However, where the state asserts an interest in the welfare of its populace, in an area of the law where it has authority, the Supreme Court's original jurisdiction and Eleventh Amendment cases provide little justification for federal law to foreclose the suit. Properly understood, the real party in interest inquiry requires that there be a public interest at stake in the controversy -- it does not require the complete *absence* of a *private* stake in the controversy. Nor does it condition the scope of relief on the dimensions of the public interest at stake. Moreover, as noted above, when the suit is brought in a state or federal district court against a *private* party, the Court's real party in interest cases are inapposite.

Modern use of the terminology has been inconsistent, and is thus sometimes confusing. For example, in *Pennsylvania v. New Jersey* the Court seems to equate the state's "nominal interest" with the absence of a "quasi-sovereign interest"<sup>73</sup> -- under *Snapp*, these are clearly separate issues, bearing on separate constitutional requirements. Moreover, although it did not address the issue at length, the *Snapp* Court did recognize that less stringent requirements may apply in suits which are brought in the district courts.<sup>74</sup> And Justice Brennan's dissent is largely dedicated to emphasizing that the requirements of Article III regarding the exercise of original

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<sup>71</sup> *New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1883).

<sup>72</sup> *See* 7 Am. Jur. 2d Attorney General § 23 (2004) (citing cases).

<sup>73</sup> *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-66 (1976).

<sup>74</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 603 n. 12 (1982) ("Admittedly, the discussion here and in other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdiction of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court.").

jurisdiction and the Eleventh Amendment impose more stringent requirements on the exercise of the *parens* power.<sup>75</sup>

### 3. Federal Preemption

The states' common law *parens* power is also limited insofar as they seek to aggregate *federal* claims without a congressional mandate, or otherwise seek to vindicate private (or public) interests in an area that has been preempted by federal law.<sup>76</sup> This is because in a preempted field, it is the United States, and not the state, which represents its citizens as *parens patriae*.<sup>77</sup> For example, the Seventh Circuit has twice held that a state suit as *parens patriae* is not available under the federal Racketeer Influenced and Corrupt Organizations Act<sup>78</sup> absent a specific congressional mandate.<sup>79</sup>

The question of preemption is complicated by the fact that after preempting an area of the law, Congress may see fit to permit the limited exercise of state *parens* power in the field -- effectively letting the states in through the back door. In such cases, Congress may impose on the exercise of the *parens* power whatever limits it sees fit.<sup>80</sup> In any event, preemption is not

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<sup>75</sup> *Id.* at 610-11. *See also* North Dakota v. Minnesota, 263 U.S. 365, 372 (1923) (“Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the ... invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.” (quoting New York v. New Jersey, 256 U.S. 296, 309 (1921)); Missouri v. Illinois, 200 U.S. 496, 521 (1906) (“Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”).

<sup>76</sup> *See* Louisiana v. Texas, 176 U.S. 1, 19 (1900) (“Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded as not involving any infringement of the powers of the State...”). *See also* Connecticut v. Levi Strauss & Co., 471 F. Supp. 363, 367 n. 3 (D.C. Conn. 1979) (describing the relationship between federal and state *parens patriae* remedies in the field of antitrust)

<sup>77</sup> *See* Massachusetts v. Mellon, 262 U.S. 447, 486 (1923).

<sup>78</sup> 18 U.S.C. §§ 1961-1968 (1995).

<sup>79</sup> Dillon v. Combs, 895 F.2d 1175, 1177-78 (7th Cir. 1990); Illinois v. Life of Mid-American Ins. Co., 805 F.2d 763, 766-67 (7th Cir. 1986).

<sup>80</sup> *See, e.g.,* Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) (examining whether the Clayton Act authorizes *parens* damages claims); Kelly v. Carr, 691 F.2d 800, 806 n. 16 (6th Cir. 1980) (describing the statutory limits on state enforcement under the Commodities Futures Trading Act); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, *codified as amended at* 15 U.S.C. §§ 15c-15h (1994) (permitting *parens patriae* actions for damages under the Clayton Act).

(yet) an issue in the area of mass torts. Historically, Congress has studiously avoided preemption of state authority in the area of tort law.

#### 4. Due Process

Although due process cannot bar outright the use of *parens* suits that aggregate private damages claims, it does impose certain procedural requirements. In *California v. Frito-Lay*, the Ninth Circuit asserted that any *parens* action for damages has a “basic” problem insofar as “[t]he class action safeguards of Fed.R.Civ.P. 23 are absent.”<sup>81</sup> In dicta, the Supreme Court has rejected this position in view of the purpose of the Hart-Scott-Rodino Act.<sup>82</sup> Assessing the Act’s requirement that *parens* suit settlements must be approved by the court, the Second Circuit explicitly rejected the idea that *parens* suits for damages under statutory authority must meet the requirements of Rule 23.<sup>83</sup> The Fourth Circuit has also rejected the argument that *parens* settlements must meet the requirements of Rule 23.<sup>84</sup> Nevertheless, the federal courts generally look to Rule 23 for guidance in assessing the conformity of *parens* settlements with the requirements of due process.<sup>85</sup> The standard formulation is that a settlement will be approved if it is “fair, reasonable, and adequate.”<sup>86</sup>

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<sup>81</sup> 474 F.2d 774, 776 (9th Cir. 1973). For this argument, the court relied heavily on Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. L. Rev. 193, 215-17 (1970).

<sup>82</sup> *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 573 n.29 (1983) (“[T]he 1976 statute permit[ting] State attorneys general the right to institute *parens patriae* suits on behalf of State residents ... exempts such suits from the class action requirements of Rule 23.”).

<sup>83</sup> See *New York v. Reebok Int’l, Ltd.*, 96 F.3d 44, 46 (2d Cir. 1996) (explaining that *parens* suits were authorized by Hart-Scott-Rodino for the purpose of providing relief to consumers stymied by Rule 23’s certification and notification hurdles). See also *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 204 (D. Me. 2003) (“Rule 23 is inapplicable to *parens patriae* actions, because Attorneys General are specifically authorized by statute to sue on behalf of natural persons residing in their respective states.”).

<sup>84</sup> *In re Edmonds*, 934 F.2d 1304, 1313 (4th Cir. 1991) (“There being no class, class certification and other aspects of Rule 23, therefore, would have been inappropriate.”).

<sup>85</sup> See, e.g., *New York v. Nintendo of America, Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991) (“While the statute does not state the standard to use in approving a *parens patriae* settlement, courts have adopted the standard used in class actions.”); *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1383 (D.C. Md. 1983) (“Similar standards should govern judicial review of proposed settlements in both *parens patriae* actions and private class actions.”); *New York v. Keds Corp.*, 1994 WL 97201 at \*2 (S.D.N.Y. 1994) (accepting the R. 23 standard as appropriate for evaluating a *parens patriae* action for settlement purposes); *New York v. Salton, Inc.*, 265 F. Supp.

Outside the antitrust arena, courts have made similar case-specific determinations of whether the procedural safeguards provided by the state (e.g. notice, opportunity to opt out, equitable distribution scheme) are sufficient to protect the due process rights of individual citizens. This is precisely what the courts did in both *Kamm v. California City Development Co.* and *Brown v. Blue Cross and Blue Shield of Michigan*, discussed below.<sup>87</sup> The federal courts' broad authority to enforce procedural due process rights gives them significant leeway to ensure the adequacy of a particular *parens* action to vindicate whatever private interests it may assert. As part of the analysis, in view of the unique position of the state as protector of the public interest, and barring any apparent conflict of interest, it seems appropriate that the courts generally infer a presumption that the state will adequately represent citizens' interests.<sup>88</sup>

### **Part III: Practical Considerations**

The previous Part sought to demonstrate that federal law leaves ample room for the states' use of the *parens* power to resolve mass torts. This section explores the practical difficulties that such use of the *parens* power can provoke. To the extent that the previous Part indicates that the federal courts have considerable leeway to scrutinize the fairness of such use of

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2d 310, 313 (S.D.N.Y. 2003) (same); *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 375 n.9 (D.D.C. 2002) (same).

<sup>86</sup> *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003).

<sup>87</sup> See text accompanying notes 100-105.

<sup>88</sup> See *Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 423 (8th Cir. 1999) (“[A]lthough the Movants’ motives may be distinguishable from the University’s, the Movants’ and the University’s interests are the same: both want the current fee system upheld.” (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) and *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997)). See also Symposium, *The Newest Federalism: State Attorneys General in Cases of National Significance*, Panel Two: State AGs and the Role of *Parens Patriae* (2003) available at [http://www.law.columbia.edu/center\\_program/ag/Past\\_Conference/CorporateGov/Program](http://www.law.columbia.edu/center_program/ag/Past_Conference/CorporateGov/Program) (Professor Issacharoff argues that “[t]here should be greater deference, for pecuniary reasons, to the attorney general claiming to speak for the public than for private firms saying they speak for the public. That’s my general position and I think that’s what the courts have done. They say a strong, some say an overwhelming, presumption of adequacy when the attorney general comes in claiming to be a representative.”).

the *parens* power in the context of a due process analysis, this Part may be read to suggest some of the issues that analysis should address.

The argument most commonly made against broad recognition of state power to bring suit on behalf of the public is that by claiming such powers and acting in concert, the attorneys general can force *in terrorem* settlements by exposing a given company or industry to the potentially crippling costs of litigation and bad publicity. The position that attorneys general would actually wield their power thus is premised on the distressingly cynical assumption that state attorneys general are less interested in their states' economic health than getting their names in the headlines. This position seems to ultimately boil down to a basic discomfort with a democratically elected government, and as such would seem to merit little serious consideration.

As Professor Ratliff points out, a less publicized but perhaps more serious problem posed by a broad *parens* power is the degree to which a state suit may frustrate private actions arising from the same dispute.<sup>89</sup> This Part is largely addressed to this problem.

There are two ways in which *parens* suits can frustrate the vindication of private claims.

### 1. *Res judicata*

First, a *parens* suit may have preclusive effect on subsequent actions brought by the state's citizens themselves. Acting as *parens patriae*, a state is considered to represent the interests of all of its citizens.<sup>90</sup> Therefore, when a state brings a *parens* suit on behalf of an

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<sup>89</sup> Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847, 1858 (2000). Ratliff suggests that “[t]he solution may lie in a dual approach: an expansion of the role of attorneys general in *parens patriae*, combined with a relaxation of the exclusivity granted to state *parens* actions through preemption.” *Id.* Although he uses the term “preemption,” Professor Ratliff actually seems to suggest a relaxation of *preclusion* doctrine. The problem with this suggestion is that insofar as the *parens* suit is for damages, relaxation of preclusion doctrine would open the door to double recovery; and insofar as the *parens* suit seeks injunctive relief, a subsequent suit would undermine the court's resolution in the state suit.

<sup>90</sup> See *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (holding that the City of Philadelphia could not intervene in a dispute between the states of New Jersey, New York and Pennsylvania concerning diversion of water from the Delaware River); *Menzel v. County Utilities Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (holding that doctrine of

injured population, the doctrine of *res judicata* will likely foreclose the injureds' ability to bring private suits with regard to the same dispute. For example, in *Badgley v. City of New York*,<sup>91</sup> owners of riparian lands in Pennsylvania brought damages claims against New York City for the reduction in value of their properties caused by the city's manipulation of the headwaters of the Delaware River. The Second Circuit upheld the district court's determination that the owners' claims had been precluded by a prior *parens* suit brought by the Commonwealth of Pennsylvania. Because the riparian rights of the owners were *derivative* of the state's rights to the waters and subject to change by the laws of the state, it followed that they could not exceed in scope those rights of Pennsylvania which had been conclusively determined by the *parens* suit.<sup>92</sup>

Under the doctrine of *parens patriae*, private suits may also be precluded by statutory claims insofar as the applicable statutes are grounded in *parens patriae* principles.<sup>93</sup> For example, in *Alaska Sport Fishing Ass'n v. Exxon Corp.*,<sup>94</sup> the Ninth Circuit upheld the dismissal of a class action brought by sport fishermen for damages to natural resources caused by the Exxon-Valdez oil spill. The court held that the consent decree between defendants and the state and federal governments by its terms precluded any award of damages or other relief regarding

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*res judicata* barred state residents from relitigating matter in which their interests had been adequately represented by the Commonwealth of Virginia).

<sup>91</sup> 606 F.2d 358 (2d Cir. 1979).

<sup>92</sup> *Id.* at 365.

<sup>93</sup> See Richard P. Ieyoub and Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae, 74 Tul. L.Rev. 1859 (2000) (“[S]everal kinds of state laws, including unfair and deceptive practices laws, can be viewed as statutory embodiments of parens patriae principles.”). Examples of statutory suits brought by a state as *parens patriae* include *Edmond v. Maryland*, 934 F.2d 1304 (4th Cir. 1991) (holding that the state's consumer protection division had standing to bring nondischargeability proceeding against a debtor); *New York v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995) (holding that the state had standing to sue to enforce the Americans with Disabilities Act and Rehabilitation Act of 1973); *New York v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809 (N.D.N.Y. 1996) (holding that the state had standing to sue to prohibit racial discrimination against its citizens under the Civil Rights Act and state law).

<sup>94</sup> 34 F.3d 769 (9th Cir. 1994).

lost public use of natural resources.<sup>95</sup> The private suit was precluded despite the fact that it was filed almost two years before the governments' suit under provisions of the Clean Water Act.<sup>96</sup>

The traditional justification for the preclusionary rule, articulated in *New Jersey v. New York*, is that it is “a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration.”<sup>97</sup> The alternative rule would mean that a state could be “judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.”<sup>98</sup> This rule is obviously necessary in cases such as *New Jersey*, which concerned the allocation of water rights among the states, or *United States v. Olin*,<sup>99</sup> in which a consent decree between defendants and the federal and state governments concerning the cleanup of environmental damages caused by defendant's chemical plant barred state residents' claim for injunctive relief. In either situation, private suits for injunctive relief would unseat the settlement between the state and opposing parties, effectively undermining the state's ability to negotiate resolution of matters of obvious public import. In cases where the state seeks damages for aggregated private injuries rather than injunctive relief, the “sovereign dignity” rationale loses its juice. However, state damages suits aggregating private claims must either preclude subsequent private suits or threaten defendants with double liability. Recognizing that the latter would be inequitable, the likelihood that private remedies will be foreclosed points up the essentiality of the courts' due process inquiry into the adequacy of the state's representation of the aggregated private interests.

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<sup>95</sup> *Id.* at 771 (emphasis in original). The consent decree was subsequently held *not* to preclude actions for damages to *economic* interests or for punitive damages. In re Exxon Valdez, 270 F.3d 1215, 1227-28 (9th Cir. 2001).

<sup>96</sup> Plaintiffs filed in June 1989; the governments filed in March, 1991. Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d at 771. *See also* Satsky v. Paramount Communications, Inc., 7 F.3d 1464 (9th Cir. 1993) (property owners' claims precluded by consent decree between defendant and State of Colorado insofar as they sought damages for claims that had been raised by the state's complaint).

<sup>97</sup> *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

<sup>98</sup> *Id.*

<sup>99</sup> 606 F. Supp. 1301 (N.D. Ala. 1985).

## 2. Superiority

A *parens* action may also frustrate an effort to certify a class action, even when it does not preclude it outright. A second line of cases consists of motions for class certification denied in view of pending state actions arising from the same dispute. In these cases, a state *parens* action was explicitly held *not* to preclude the class action, but the courts held that aggregation under F.R.C.P. 23(b)(3) was nevertheless not the superior means of adjudication, in view of the pending state suit. For example, in *Kamm v. California City Development Co.*,<sup>100</sup> plaintiffs sought to certify a class action to recover for alleged fraud in a land sale scheme. The district court determined that a class action was not the superior method of adjudication because a state action had already been brought by the California Attorney General and Real Estate Commissioner with respect to the same controversy, and a settlement reached. Although the state settlement did not provide a remedy for all prospective class members, nor provide relief “even close to that sought in the class action”<sup>101</sup> for those it did cover, the Ninth Circuit nevertheless upheld the district court’s determination.

Similarly, in *Brown v. Blue Cross and Blue Shield of Michigan, Inc.*,<sup>102</sup> plaintiff sought to certify a class action seeking damages under ERISA and federal claims of breach of fiduciary duty, challenging defendant’s method of computing coinsurance obligations. The district court held that the interests of the class would be adequately served by an agreement reached between the defendant and the State of Michigan, rendering a class action unnecessary.<sup>103</sup>

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<sup>100</sup> 509 F.2d 205 (9th Cir. 1975).

<sup>101</sup> *Id.* at 211.

<sup>102</sup> 167 F.R.D. 40 (E.D. Mich. 1996).

<sup>103</sup> See also *Wechsler v. Southeastern Properties, Inc.*, 63 F.R.D. 13 (S.D.N.Y. 1974) (dismissing a securities fraud class action on the grounds that a consent injunction had been agreed on by the Attorney General and defendant in a state proceeding); *Caro v. Proctor & Gamble Co.*, 18 Cal. App. 4th 644, 660 (Cal. App. 4. Dist. 1993) (upholding trial court’s denial of class certification due in part to consent decrees and settlement agreements with various governmental agencies including the California Attorney General, county District Attorneys and the FDA); Penelope A. Prevolos and Evan L. Land, *The Newest Breed of Unfair Competition Cases: Consumer Fraud Class*

Although both *Brown* and *Kamm* were undertaken by attorneys general pursuant to statutory authority, their logic applies equally to common law suits undertaken pursuant to the *parens* power. Thus, in a situation where both a private class action and a state action seek to address the same wrong, the mere existence of the state action may prevent certification of the class action. Those class members who are not covered by the state action may go uncompensated, unless there is great enough incentive for them to bring individual suits. And even those class members who are compensated may receive far less than they would have in a private class action. Professor Issacharoff has suggested that *parens* actions may present serious agency problems, which would be exacerbated by broad preclusion of private damages suits by state settlements. He argues that the risk of capture and the movement of enforcement agency personnel between the private and public sectors create incentives for underenforcement.<sup>104</sup> A powerful industry seeking to limit exposure to private liability would arguably have considerably more leverage negotiating a settlement with the state than with a private party, with whom its political clout would not factor. Thus a movement toward broader enforcement of private rights could result in systemic undercompensation of private injury.

Assuming *Kamm* and *Brown* are correct in their conclusion that private suits are appropriately precluded by *parens* actions, and in view of the public interest role of the attorneys general, the adapted Rule 23 analysis that has been adopted by the courts to evaluate *parens* settlements should be at least as effective a means of protecting private rights as private class actions.<sup>105</sup> As to the question of whether *parens* suits systematically undercompensate victims of

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Actions, 537 PLI/Pat 301, 354-55 (1998) (“It is fairly common in false advertising cases for government actions to be filed first but to be pending at the same time as the private action. A key strategic question in such cases is whether to settle with the government entity in hopes that this will bar the private lawsuit.”).

<sup>104</sup> Samuel Issacharoff, Group Litigation of Consumer Claims: Lessons from the U.S. Experience, 34 Tex. Int’l L.J. 135, 139-43 (1999).

<sup>105</sup> Should private settlements have similar preclusive effect as to subsequent *parens* suits? A view that they do not threatens to undermine the finality of federal judgments. Illustrative of this conflict is a Second Circuit decision

private injury, it should be kept in mind that a third of class action plaintiffs' recovery generally goes to class counsel. Additionally, if one were to start from the baseline assumption that the present tort regime systemically *overcompensates* plaintiffs, an alternative view might consider broad use of the *parens* doctrine an appealing brand of "tort reform." It certainly is a more sophisticated and flexible means of reform than damages caps, and less offensive to the idea of federalism than a federal law barring class actions under state law. In any event, state *parens* actions are unlikely to entirely *replace* class actions as a means of resolving mass torts -- as a practical matter, state attorneys general simply lack the resources to bring many of these suits. As such, regardless of whether federal law forbids it, mass torts *parens* suits are unlikely to be brought by attorneys general where there are other means of vindicating the victims' rights.

## Conclusion

This comment has sought to demonstrate that the Constitution does not in fact pose any insurmountable barrier to the states' use of *parens* suits to aggregate private tort claims. There is broad agreement to the sensible proposition that government should not take upon itself the vindication of private claims when there is no barrier to the vindication of those interests by the right holders themselves,<sup>106</sup> but this result is not required by federal law. To this proposition

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approving a district court's injunction, pursuant to its authority under the All-Writs Act, 28 U.S.C. § 1651 (1982), of a number of attorney general state court suits in order to facilitate the settlement of twenty-six class actions consolidated before it. In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985). See also Pennsylvania v. BASF Corp., 2001 WL 1807788 at \*6 (Pa. Com. Pl. 2001) (holding that a *parens* suit for damages was precluded by pending class actions brought on behalf of the same class, but that the state could continue to pursue its claims for restitution, civil penalties, an injunctive relief).

The Hart-Scott-Rodino Act deals with the problem by simply dictating that a *parens* action may not recover damages for an injury that has already been compensated through private suit. 15 U.S.C. §§ 15c ("The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury...."). Most state statutes authorizing *parens* suits for damages also embrace this simple mechanism for avoiding the problem. See note 65, supra. A recent Ninth Circuit decision illustrates a creative alternative solution. In Hanlon v. Chrysler Corp., the court upheld the validity of a private settlement agreement that conditioned recovery on class members' opposition to any subsequent *parens* actions. 150 F.3d 1011, 1028 (9th Cir. 1998).

<sup>106</sup> See note 56, supra.

should be added the caution that private class actions are not equivalent to vindication of rights by the right holders themselves. Where the alternatives are vindication by a “private attorney general” or “public attorney general,” there may be good policy arguments preferring both. But the question of which mechanism is preferable in a particular context should be distinguished from the federal courts’ task of testing the compliance of *parens* claims with the requirements the Constitution and federal statutory law. This comment has examined the constitutional doctrines that limit state standing to exercise the *parens* power. Probably the most important is procedural due process, whereby the federal courts make fact-specific determinations of the adequacy of class representation. This determination will of course be sensitive to the question of whether the claims at issue are amenable to resolution by private suit. Ultimately, however, it seems clear that federal law should not pose an absolute barrier to the use of *parens* suits to aggregate private claims in cases implicating the public interest, even in cases where private vindication of those claims is available.