

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

The current debate on attorney general activism is fueled in large part by a continuing conservative reaction to the perceived threat of concerted action by the states, provoked by their tobacco suits in the mid-nineties. Those suits have prompted a vigorous debate between those who see such suits as a step toward developing an important alternative to the class action as a tool for resolving mass torts, and those who see the tobacco litigation as a cautionary tale, illustrating how politically motivated attorneys general might cripple whole industries.

The states' claims against the tobacco industry were myriad, but a substantial number of them relied on the ancient doctrine of *parens patriae*, which permits a state to bring an action on behalf of its citizens to protect its sovereign or quasi-sovereign interests.¹ The full scope of the states' quasi-sovereign interests is not clearly defined, but they basically represent the interests of the state in the well-being of its populace.² The tobacco litigation was not so much revolutionary in the development of *parens patriae* doctrine as a point in the evolution of an increasingly broad application of the power. Nevertheless, the tobacco suits have become the focal point of the discussion.

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

² Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982).

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 resolve mass tort-type claims.³ Some commentators, relying the language from the Texas decision and previous cases, and encouraged by the relative success of the tobacco litigation, have promoted *parens patriae* as a viable alternative to private class actions for the resolution of mass torts.⁴ 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."⁵ The "next tobacco" has been widely predicted in the areas of fast food, gun manufacturing and distribution, lead paint, and pharmaceuticals.⁶ A number of states have in fact

³ 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").

⁴ 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).

⁵ Ieyoub and Eisenberg, at 1882.

⁶ 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,

brought a variety of such suits.⁷ Notwithstanding the portentions of both supporters and detractors of the tobacco litigation, however, it is unlikely that there will in fact be a "next tobacco."⁸ The recent cases are better understood as examples of the more traditional exercise of the *parens* power, used at the state level as an important tool of attorneys general to resolve issues of public interest.

As the shortcomings of class actions have become increasingly apparent, *parens* actions for damages seem a more appealing alternative. Professor Coffee has noted that the agency problem presented by the class action mechanism, which can lead to both defensive use of class actions and the "entrapment" of class members, is of particular concern in the area mass

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) ("the 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'").

⁷ 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. 1Dept. 2003) (*parens* suit to enjoin a public nuisance brought against manufacturers and wholesalers of handguns).

⁸ Numerous commentators have noted that the tobacco litigation may have been 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 that the tobacco experience may serve as a model for trial attorneys and attorneys general to go after other industries").

torts.⁹ This agency problem is arguably eliminated in the *parens* context. This is largely due to absence of the profit motive and high financial stakes for public attorneys, whose ultimate responsibility is the protection of the public interest, as opposed to the acquisition of large legal fees.¹⁰ This dedication to the public interest and the absence of a contingency fee arrangement suggest that attorneys general are less likely than private lawyers to have incentives that substantially diverge from the class.¹¹ Moreover, 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,¹² also exist in the mass torts context. The Hart-Scott-Rodino Act is an explicit congressional acknowledgment of the unique capacity of state attorney generals to deal with such problems.¹³ For similar reasons, courts have long noted that state governments are the most appropriate representatives of consumers.¹⁴ Although

⁹ John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representation Litigation*, 100 Colum. L. Rev. 370, 372 (2000) ("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).

¹⁰ See *Troncilliti v. Minolta Corp.*, 666 F. Supp. 750, 754 (D. Md. 1987) ("the 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...").

¹¹ But see Issacharoff, note 31, *infra*.

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

¹³ 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).

¹⁴ See, e.g., *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269, 274 ("the states and cities, acting through their attorneys general and chief law officers respectively, are the best representatives of the consumers residing

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.¹⁵

The argument commonly made against broad 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. 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.¹⁶ This comment addresses the latter problem. Part I describes the means by which *parens patriae* suits in the area of mass torts can frustrate private vindication of individual rights. Part II examines the Supreme Court's development of federal limitations on the *parens* power, which might be read to preclude mass torts resolution by the states acting as *parens patriae*. Part III shows that the doctrine,

within their jurisdictions"); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) ("it is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general").

¹⁵ See, e.g., *Pennsylvania v. Budget Fuel Co., Inc.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988) ("in 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 27-30; note 30.

¹⁶ 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.

correctly understood, does not bar the use of the *parens* power to aggregate private tort claims.

Part I

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. When a state brings a *parens* suit on behalf of an injured population, the doctrine of *res judicata* will likely foreclose the injureds' ability to bring their own suits. Acting as *parens patriae*, a state is considered to represent the interests of all of its citizens.¹⁷ For example, in *Badgley v. City of New York*,¹⁸ 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 their claims had been precluded by a prior *parens* suit brought by the Commonwealth of Pennsylvania. Because the riparian rights of the citizens 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

¹⁷ 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 *res judicata* barred state residents from relitigating matter in which their interests had been adequately represented by the Commonwealth of Virginia).

¹⁸ 606 F.2d 358 (2d Cir. 1979).

scope those rights of Pennsylvania which had been conclusively determined by the *parens* suit.¹⁹

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.²⁰ For example, in *Alaska Sport Fishing Ass'n v. Exxon Corp.*,²¹ 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 lost public use of natural resources.²² 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.²³

The traditional justification for the preclusionary rule, articulated in *New Jersey v. New York*, is that it is "a necessary

¹⁹ *Id.* at 365.

²⁰ 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) ("several 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).

²¹ 34 F.3d 769 (9th Cir. 1994).

²² *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).

²³ 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).

recognition of sovereign dignity, as well as a working rule for good judicial administration."²⁴ 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."²⁵ 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*,²⁶ 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 sapping the state of its ability to negotiate the resolution of matters of obvious public import. In cases where the state seeks damages for aggregated private rights rather than injunctive relief, the "sovereign dignity" rationale loses some of its juice. However, state damages suits aggregating private claims raise the problem of either private suit preclusion or double recovery.

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

²⁴ *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

²⁵ *Id.*

²⁶ 606 F. Supp. 1301 (N.D. Ala. 1985)

dispute. In these cases, a state 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.*,²⁷ 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,"²⁸ 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.*,²⁹ plaintiff sought to certify a class action seeking damages under ERISA and federal claims of breach of fiduciary duty, challenging defendant's practice 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.³⁰

²⁷ 509 F.2d 205 (9th Cir. 1975).

²⁸ *Id.* at 211.

²⁹ 167 F.R.D. 40 (E.D. Mich. 1996).

³⁰ 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

Although the above cases were all undertaken by attorneys general pursuant to statutory authority, their logic applies equally to common law suits pursuant to the *parens* power. Thus, in a case where both a class action and a state action are available, the state action may prevent certification of a private class action. Those class members who are not covered by the state action will go uncompensated, unless there is great enough incentive for them to bring individual suits. Moreover, 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 points out that the risk of capture and the movement of enforcement agency personnel between the private and public sectors create incentives for underenforcement.³¹ 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

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 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").

³¹ Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 *Tex. Int'l L.J.* 135, 139-43 (1999).

private rights could result in systemic undercompensation of private injury.³²

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The problems illustrated above raise two important questions. First, what is the appropriate scope of the power of state attorneys general to bring suit on behalf of state citizens, thereby precluding private enforcement of those citizens' rights? Second, what are the legal and political mechanisms constraining this power? The rest of this comment seeks to demonstrate that a correct understanding of the Supreme Court's *parens patriae* jurisprudence leads to the conclusion that the federal judiciary should generally leave the problem to the federal and state legislatures.

The most important legal and political restraints on the exercise of the *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.³³ Other states impose political constraints on the exercise of the *parens* power, such as a requirement of prior approval by the governor or

³² If one were to start with 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.

³³ 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).

other state official.³⁴ Often attorneys general will bring *parens patriae* suits in concert with the secretary of state, or an appropriate agency head. 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.³⁵ So the most important limits on the powers of attorneys general are imposed by state law.

Federal law also imposes limits on the exercise of the *parens patriae* power, and the correct scope of these limits is the focus of this comment. There are four federal legal obstacles to the exercise of *parens patriae*. These are Article III standing requirements, the Eleventh Amendment, federal preemption, and due process. Federal limits on the *parens patriae* power have often been conflated in the case law, which has led to a cramped interpretation of the *parens patriae* power. The next Part sketches the historical development of federal *parens patriae* doctrine and describes the source of the confusion in the lower courts. Part III addresses how each of the federal legal principles enumerated above appropriately limits the exercise of the *parens patriae* power by the states.

Part II: The Development of Federal *Parens Patriae* Doctrine and the Problem of Hart-Scott-Rodino

1. The Historical Roots of the *Parens Patriae* Power

The power of the state to bring suits as *parens patriae* derives from the English system, in which the King was said to

³⁴ 7 Am. Jur. 2d Attorney General § 9 (2d ed. 2004).

³⁵ 7 Am. Jur. 2d Attorney General § 8 (2d ed. 2004).

exercise the power in his capacity as "father of the country."³⁶ 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."³⁷ Traditionally, the power was exercised by the sovereign on behalf of "infants, idiots, and lunatics,"³⁸ i.e. as guardian of legal incompetents. The American courts early recognized the prerogative of *parens patriae* as inherent to the sovereign power of every state.³⁹ However, "the common-law approach ... has relatively little to do with the concept of *parens patriae* standing that has developed in American law."⁴⁰

The development of the Court's expansive view of the *parens* power began with *Louisiana v. Texas*,⁴¹ where the Court, although holding the exercise of the *parens* power was inappropriate in the instant case, clearly recognized the propriety of allowing the state to sue on behalf of all its citizens.⁴² The Court subsequently acknowledged state standing to sue as *parens patriae*

³⁶ *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).

³⁷ 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)).

³⁸ *Hawaii v. Standard Oil Co. of California*, 405 U.S. at 257.

³⁹ *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)).

⁴⁰ *Id.* For a fuller exposition of the English origins of *parens patriae*, see Curtis, *supra* note 35.

⁴¹ 176 U.S. 1 (1900).

⁴² *Hawaii v. Standard Oil Co. of California*, 405 U.S. at 258.

to enjoin the discharge of sewage into a common waterway,⁴³ to enjoin the diversion of water from an interstate stream,⁴⁴ to enjoin fumes from an out-of-state copper plant from injuring state lands,⁴⁵ to enjoin restraints on the commercial flow of natural gas,⁴⁶ to enjoin changes in drainage which increased the flow of water in an interstate stream,⁴⁷ and to enjoin restraint of trade due to price fixing by railroads which favored out-of-state shippers.⁴⁸

The leading modern case is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.⁴⁹ In *Snapp*, Puerto Rico brought suit for a declaratory judgment that the labor practices of east coast apple growers violated federal laws which preferred domestic laborers over foreign temporary labors. Justice White took the opportunity to rearticulate the Court's *parens* jurisprudence. After a review of the Supreme Court's prior *parens* holdings, Justice White concluded that the 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."⁵⁰ "[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."⁵¹ Where it does so, the state lacks

⁴³ *Missouri v. Illinois*, 180 U.S. 208 (1901); *New York v. New Jersey*, 256 U.S. 296 (1921).

⁴⁴ *Kansas v. Colorado*, 206 U.S. 46 (1907).

⁴⁵ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

⁴⁶ *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

⁴⁷ *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

⁴⁸ *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

⁴⁹ 458 U.S. 592 (1982).

⁵⁰ *Id.* at 600.

⁵¹ *Id.* at 602.

standing. Second, the state must assert a "quasi-sovereign interest ... sufficiently concrete to create an actual controversy between the State and the defendant."⁵² Stressing that the category of quasi-sovereign interests defies "an exhaustive formal definition," Justice White divided the quasi-sovereign interests that had theretofore been recognized by the Court into two general categories: the states' "interest in the health and well-being -- both physical and economic -- of its residents in general,"⁵³ and the states' interest "in not being discriminatorily denied its rightful status within the federal system."⁵⁴

Although *Snapp* frames its exposition of quasi-sovereign interests as necessary to meet the requirements of Article III standing,⁵⁵ the lower federal courts have generally read *Snapp* to expound a federal common law rule of standing for *parens* actions. There has developed a shaky consensus among courts and commentators that between its two requirements, *Snapp* indicated that a state can bring a *parens* suit for damages only insofar as the damages it seeks are discreet from those recoverable by individuals.⁵⁶

⁵² *Id.* at 602.

⁵³ *Id.* at 607.

⁵⁴ *Id.* at 607.

⁵⁵ *Id.* at 602. See also text accompanying notes 65-67.

⁵⁶ 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

Criticism of the *parens* doctrine expounded in *Snapp* has generally focused on the vagueness inherent in the definition of "quasi-sovereign interests,"⁵⁷ but it is actually the erroneous view that *Snapp* held that the state only has standing to seek damages that cannot be vindicated through private suit that deserves scrutiny. A review of the federal jurisprudence regarding *parens* suits seeking damages for aggregated private injuries reveals why.

2. *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.⁵⁸

In *California v. Frito-Lay, Inc.*,⁵⁹ 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

(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").

⁵⁷ *Id.* at 602. ("The vagueness of this concept can only be filled in by turning to individual cases"). 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").

⁵⁸ *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

⁵⁹ 474 F.2d 774 (9th Cir. 1973).

confused as to the grounds for its decision, stating both that the state action lay outside the traditional scope of the *parens* power,⁶⁰ 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."⁶¹ In any event, Congress overruled *Frito-Lay* in 1976 with Title III of the Hart-Scott-Rodino Antitrust Improvements Act (amending the Clayton Act).⁶² 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."⁶³ It did so by giving them power to aggregate individual consumer claims.⁶⁴ 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 a troubling question: if Congress can authorize damages suits for aggregated private antitrust claims under the *parens* power, what prevents

⁶⁰ "[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.

⁶¹ *Id.*

⁶² Pub. L. No. 94-435, codified at 15 U.S.C. §§ 15c-15h (1994).

⁶³ *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)).

⁶⁴ 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.

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.⁶⁵ If *Snapp* actually precludes *parens* suits for aggregated private damages, how can the state legislatures abrogate that limitation through the mere enactment of a statute? It cannot be seriously argued that federal law recognizes some distinction between state executive action pursuant to legislative as opposed to common law authority. It is not the role of the federal courts to police state separation of powers. Part III seeks to resolve the tension between the federal courts' reading of *Snapp* and these statutes, by demonstrating that the *Snapp* opinion has been misinterpreted to represent an unnecessarily cramped view of the *parens* power.

Part III: Clarifying the Constitutional Constraints on the Parens Power

⁶⁵ 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).

This Part seeks to clarify the federal courts' *parens* doctrine by revisiting its foundations in constitutional law. Although the case law outlined above has been taken to suggest that *parens patriae* suits aggregating private claims are not available outside the realm of antitrust, a correct interpretation of Supreme Court precedent demonstrates that the opposite is in fact true.

A broad view of the *parens* power relying on constitutional principles to narrow its permissible application is generally consistent with principles of federalism and Supreme Court precedent, and significantly clarifies the doctrine. The constitutional principles that restrict *parens patriae* standing are Article III standing doctrine, the Eleventh Amendment, federal preemption, and due process.⁶⁶ The questions relevant to the state's ability to bring suit are therefore:

- (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

⁶⁶ Valid exercise of the *parens* power can clearly also run afoul of other constitutional principles. 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. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The constitutional factors here enumerated are uniquely relevant to the ability of the state to bring suit at all -- but they are not determinative of the merits of the state's case.

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.⁶⁷

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 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 to 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 powers."⁶⁸ Justice Brennan's concurrence, joined by three other members of the Court, less ambiguously promotes an expansive definition of quasi-sovereign interests:

⁶⁷ Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982).

⁶⁸ *Id.* at 607.

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.⁶⁹

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...⁷⁰

If the realm of quasi-sovereign interests is contiguous with the full scope of state lawmaking authority, the state certainly has authority to assert a *parens* action in the realm of tort, which is *the* paradigmatic state concern.⁷¹ Article III standing requirements should therefore be no obstacle to state suits aggregating private 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

⁶⁹ *Id.* at 612 (emphasis added).

⁷⁰ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (Holmes, J.).

⁷¹ 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."⁷² This requirement has been erroneously interpreted to mean that the state only has standing to seek damages that cannot be vindicated through private suits.⁷³ 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.⁷⁴ The Eleventh Amendment withdraws the judicial power from all private suits brought against a state.⁷⁵ Thus, in a dispute between an individual citizen and a state, only the state may bring suit under the original jurisdiction of

⁷² *Id.* at 600.

⁷³ See note 54, *supra*. An alternative, also 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).

⁷⁴ U.S. Const. art. III, § 2.

⁷⁵ U.S. Const. amend. XI.

the Supreme Court. A state may not bring suit in its own name on behalf of a private party under the original jurisdiction of the Court.⁷⁶ In such a case, the state is "only nominally a party."⁷⁷ 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.⁷⁸

To demonstrate that it is the real party in interest, the 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."⁷⁹ 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.⁸⁰

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

⁷⁶ 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").

⁷⁷ *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").

⁷⁸ 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).

⁷⁹ *Oklahoma v. Cook*, 304 U.S. at 396.

⁸⁰ *Pennsylvania v. New Jersey*, 426 U.S. at 665-66.

suit.⁸¹ Under the modern rule, in the realm of tort, the Eleventh Amendment and original jurisdiction requirement will apply to an substantially identical set of cases. This is because the Court will exercise its discretion to decline to exercise original jurisdiction over cases "bottomed on local law."⁸² As such, all such cases seeking the Court's original jurisdiction will be also be subject to the Eleventh Amendment.

* * *

It should be noted that the cases in this line were generally brought by the states on behalf of private entities seeking to escape the restrictions imposed by Article III and the Eleventh Amendment. These private entities either hoped to use the state as a means of abrogating a defendant state's sovereign immunity, or to avoid drawn-out arbitration of their disputes by the lower courts by using the state 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 of the early cases illustrates the nature of the suits which

⁸¹ 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 paid to, individual farm owners); *Badgley v. City of New York*, 6060 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 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").

⁸² *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").

established the grounds for adjudging the state 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 must be paid to him without even passing through the form of getting into the treasury of the state.⁸³

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 law generally allows 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.⁸⁴ 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

⁸³ New Hampshire v. Louisiana, 108 U.S. 76, 89 (1883).

⁸⁴ See 7 Am. Jur. 2d Attorney General § 23 (2004) (citing cases).

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, 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"⁸⁵ -- under *Snapp*, these are clearly separate issues, bearing on separate constitutional requirements. 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.⁸⁶ Justice Brennan's dissent is largely dedicated to emphasizing that the requirements of Article III regarding the exercise of original jurisdiction and the Eleventh Amendment impose more stringent requirements on the exercise of the *parens* power.⁸⁷

⁸⁵ *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-66 (1976).

⁸⁶ *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").

⁸⁷ *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

An alternative view, which seems to underlie some statements made by the *Frito-Lay* court, is that the affirmative ability of the states to act as *parens patriae* is a question of federal common law.⁸⁸ Early decisions suggest other more restrictive views, such as the idea that the 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."⁸⁹ If it be understood that the *parens* power resides primarily in the federal government, *Hart-Scott-Rodino* might be explained as a delegation of the federal *parens* power to the states. However, these more restrictive views are out of keeping with both the historical development of the *parens* doctrine and the Court's modern view of the scope of the *parens* power, which is that it is contiguous with state power.⁹⁰ A more restrictive view would have difficulty distinguishing *parens* suits undertaken pursuant to state

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").

⁸⁸ "[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).

⁸⁹ *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).

⁹⁰ See text accompanying notes 65-69.

statutory and common law authority, unless it did so by means of federal common law, a doctrine which has little currency with today's Court. Finally, any limitations that apply not just 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.⁹¹

3. Federal Preemption

The states' common law *parens* power is also limited insofar as it seeks to aggregate *federal* claims without a congressional mandate, or vindicate interests in an area of that has been preempted by federal law.⁹² This is because in a preempted field, it is the United States, and not the state, which represents its citizens as *parens patriae*.⁹³ 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 Act⁹⁴ absent a specific congressional mandate.⁹⁵ 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

⁹¹ It should be noted that both *North Dakota v. Minnesota* and *New Hampshire v. Louisiana*, the 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).

⁹² 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)

⁹³ See *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923).

⁹⁴ 18 U.S.C. §§ 1961-1968 (1995).

⁹⁵ *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).

cases, Congress may impose on the exercise of the *parens* power whatever limits it sees fit.⁹⁶ In any event, preemption is not (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 for aggregate private damages, it does impose additional 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."⁹⁷ In dicta, the Supreme Court has rejected this position in view of the purpose of the Hart-Scott-Rodino Act.⁹⁸ 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 23.⁹⁹ The Fourth Circuit has

⁹⁶ 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).

⁹⁷ 474 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).

⁹⁸ *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 573 n.29 (1983) ("the 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").

⁹⁹ 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").

also rejected the argument that *parens* settlements must meet the requirements of Rule 23.¹⁰⁰ Nevertheless, the federal courts generally look to Rule 23 for guidance in assessing the conformity of *parens* settlements with the requirements of due process.¹⁰¹ The standard formulation is that a settlement will be approved if it is "fair, reasonable, and adequate."¹⁰²

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 in Part I.¹⁰³ As part of this analysis, in view of the unique position of the state as protector of the public interest, and barring an apparent conflict of interest, it seems appropriate that the courts generally infer a presumption that state will adequately represent citizens' interests.¹⁰⁴

¹⁰⁰ 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").

¹⁰¹ 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. 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).

¹⁰² *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003).

¹⁰³ See text accompanying notes 27-30.

¹⁰⁴ See *Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 423 (8th Cir. 1999) ("although 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,

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. The problem of private suit preclusion, or the alternative problem of double recovery, therefore remains to be addressed. 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 protective of private rights as private class actions.¹⁰⁵

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. (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").

¹⁰⁵ 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 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'

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.¹⁰⁶ To this proposition should be added the caution that private class actions should not be considered vindication of rights by the right holders themselves. Where the alternatives are vindication by a "private attorney general" or "public attorney general," there are a good policy arguments preferring both.¹⁰⁷

But resolution of these kinds of policy question should not be confused with the narrow role of the federal courts in policing the exercise of the *parens* power to resolve private claims. This comment has explored a number of constitutional doctrines that limit the state *parens* power. Probably the most important is procedural due process, whereby the federal courts make fact-specific determinations of appropriate procedure, sensitive to the practical barriers to private claim vindication. Ultimately, however, it seems clear that federal law should not pose an insurmountable barrier to the use of *parens* suits to aggregate private claims in cases implicating the public interest. There are differences between the class action and the *parens* suit, but none of them are of constitutional dimension. As such, the issue is appropriately addressed by legislators, not the courts.

opposition to any subsequent *parens* actions. 150 F.3d 1011, 1028 (9th Cir. 1998).

¹⁰⁶ See note 56, *supra*.

¹⁰⁷ Cf. notes 14, 15 and Issacharoff, *supra* note 31.