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THE HELICOPTER STATE: MISUSE OF *PARENS PATRIAE* UNCONSTITUTIONALLY PRECLUDES INDIVIDUAL AND CLASS CLAIMS

Gabrielle J. Hanna*

Abstract: The doctrine of *parens patriae* allows state attorneys general to represent state citizens in aggregate litigation suits that are, in many ways, similar to class actions and mass-tort actions. Its origins, however, reflect a more modest scope. *Parens patriae* began as a doctrine allowing the British king to protect those without the ability to protect themselves, including wards and mentally disabled individuals. The rapid expansion of *parens patriae* standing in the United States may be partly to blame for the relative absence of limiting requirements or even well-developed case law governing *parens patriae* suits. On the one hand, class actions are subject to myriad stringent procedural rules that help protect class members, members who “opt out,” and even defendants who find themselves liable for often sky-high damages. On the other hand, *parens patriae* suits are largely unregulated and free from requirements that plaintiffs seeking class certification must meet. Part of this distinction seems to stem from an assumption that attorneys general are adequate representatives of their citizens’ interests. The relative ease of bringing a *parens patriae* suit, compared to the increasingly onerous requirements of private class actions, has led state attorneys general to bring claims under *parens patriae* standing more frequently in the twenty-first century. But the lack of procedural protections in *parens patriae* suits means that state citizens affected by a *parens patriae* suit may potentially be precluded via *res judicata* from bringing valid, individual or class claims that have already been brought by the state on their behalf. Furthermore, it is not clear that *parens patriae* suits are an adequate, let alone superior, method of litigating citizens’ claims. Settlements reached between states and defendants pose additional adequacy problems due to being unregulated and determined by a political representative, who may have interests distinct and separate from the interests of individual citizens.

First, this Comment traces the history of *parens patriae* as a doctrinal theory and as it has developed in American statutory and common law. Next, it considers the preclusive effect of *parens patriae* suits on private individual claims and damages class actions. In particular, final judgments issued in *parens patriae* suits have the potential to bar individuals and entire classes from bringing valid claims under *res judicata*. Because *parens patriae* actions are not subject to the same procedural requirements as private class actions, the due process rights of certain individuals are, at times, put in jeopardy. In order to protect individual due process rights, this Comment suggests four possible solutions: courts should (1) heighten the procedural requirements for state aggregate suits, (2) hold that *parens patriae* suits cannot bind private claimants, (3) join related public and private suits, at least for liability litigation to ensure private claims are not dismissed unfairly, or (4) allow private citizens with claims, either individually or through class representation, to stay a *parens patriae* action to avoid preclusion.

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INTRODUCTION

Parens patriae means “parent of the country,” which “refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability.”¹ In the modern context, state attorneys general may invoke *parens patriae* standing to sue on behalf of their state’s citizens. The most powerful and sweeping exercise of *parens patriae* power in U.S. history occurred during the 1990s against the tobacco industry.² While the tobacco litigation had relatively little impact on the actual development of *parens patriae* doctrine, it resuscitated *parens patriae* as a viable and expansive tool capable of resolving mass tort suits³ and simultaneously brought an industry to its knees.⁴ The specific context made for an ideal use of *parens patriae*: injury was substantial and widespread, states had a direct sovereign interest that had been impacted, and individual citizens were essentially unable to litigate against the behemoth tobacco companies.⁵ And indeed, the success of the tobacco litigation was spectacular.⁶ The scope of cooperation among interstate attorneys general was remarkable, the \$206 billion settlement was unprecedented, and it was the first successful action against an otherwise-undefeated litigant.⁷ To a large extent, the states succeeded as

1. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600, 600 n.8 (1982) (internal quotation marks omitted) (quoting BLACK’S LAW DICTIONARY 1003 (5th ed. 1979)).

2. See Richard P. Ieyoub & Thomas Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1860–61 (2000).

3. See, e.g., Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997) (“In the Court’s opinion, . . . [*parens patriae* as] 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. Ieyoub & Eisenberg, *supra* note 2, at 1860–61.

5. *Id.*

6. Indeed, many scholars have speculated as to what “the next tobacco” would be. See, e.g., Howard M. Erichson, *Coattail 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 (2000) (handguns); Joe Nocera, *The Next Tobacco?*, N.Y. TIMES (Dec. 3, 2012), <http://www.nytimes.com/2012/12/04/opinion/nocera-the-next-tobacco.html> [<https://perma.cc/F4WK-PRRH>] (NFL football); Roger Parloff, *Is Fat the Next Tobacco? For Big Food, the Supersizing of America Is Becoming a Big Headache*, FORTUNE (Feb. 3, 2003), http://archive.fortune.com/magazines/fortune/fortune_archive/2003/02/03/336442/index.htm [<https://perma.cc/W2LU-RUFF>] (fast food); Elizabeth Weil, *Is Sugar the Next Tobacco?*, SALON (Jan. 1, 2013), https://www.salon.com/2013/01/01/is_sugar_the_next_tobacco/ [<https://perma.cc/7MA4-C5WA>] (sugar).

7. Ieyoub & Eisenberg, *supra* note 2, at 1860 (citing Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18 (“noting the unsuccessful efforts of plaintiffs in the first forty-five years of tobacco litigation”)); Erin Myers, Note, *The Manipulation of Public Opinion by the Tobacco Industry: Past, Present, and Future*, 2 J. HEALTH CARE L. & POL’Y

a result of the utilization of litigation operating under the doctrine of *parens patriae*.⁸

Around the same time, state attorneys general used *parens patriae* power against another large corporate defendant—Exxon Corporation (Exxon)—in another massive and complex litigation arising out of the Exxon-Valdez oil spill in Alaska.⁹ While the tobacco litigation had highlighted the power and potential breadth of *parens patriae*, the Exxon-Valdez litigation revealed a potential drawback to *parens patriae* suits. In 1989, Alaskan sport-fishermen and the Alaska Sport Fishing Association jointly filed a class action against Exxon, alleging injuries from their loss of use and enjoyment of natural resources as a result of the catastrophic oil spill.¹⁰ The district court dismissed their action two years later on the grounds that their claims were precluded by a settlement reached in a concurrent *parens patriae* action brought by the state of Alaska claiming natural resource damages.¹¹ In other words, judgment on behalf of the State's public suit ultimately precluded the private litigants from seeking individual relief.

Preclusion is a fundamental common law doctrine of American jurisprudence. It promotes repose and efficiency by ensuring that individuals cannot re-litigate the same suit or matter endlessly in an attempt to obtain a more favorable outcome.¹² In particular, the doctrine of res judicata, or claim preclusion, helps preserve the stability of judicial decisions.¹³ Still, preclusion rules are ultimately subject to the confines of the U.S. Constitution. Preclusion is of particular concern in aggregate litigation, where multiple suits are joined or aggregated in a single action, because such suits are representative in nature—injured individuals who are absent or passive can be potentially bound by a judgment in which they had no voice. For individuals to be bound by a judgment of a case to

79, 80 (1998) (noting that plaintiffs previously won only two trials of 813 filed claims against tobacco companies, and those two trial victories were reversed on appeal).

8. Ieyoub & Eisenberg, *supra* note 2, at 1861 (crediting private and government litigants' successes in part to "the paradigmatic shift in attitude towards the [tobacco] industry resulting from the state litigation brought by attorneys general").

9. *See generally* Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994).

10. *Id.* at 771.

11. *Id.*

12. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 (AM. LAW INST. 1982) ("When a valid and final personal judgment is rendered in favor of the plaintiff: (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof"); Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 81 (1984).

13. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

which they were not parties, due process, under the Fifth and Fourteenth Amendments, requires that their interests be adequately represented.

While it is not unusual for private claims to be precluded by judgments or settlements of aggregate litigation, the most common type of aggregate litigation—the private class action—is governed by strict procedural requirements to ensure adequacy of representation.¹⁴ In many ways, *parens patriae* suits mirror typical damages class actions. But despite their similarities, *parens patriae* suits are largely free from the procedural restraints curtailing private class actions. In damages class actions, class counsel must, *inter alia*, demonstrate their superior ability to litigate on behalf of the class, provide adequate notification to class members, and allow class members to opt out of the class judgment and avoid future preclusion.¹⁵ While *parens patriae* suits bear a striking resemblance to their private counterparts and can have the same preclusive effect, none of these protections are generally required of *parens patriae* suits.¹⁶ Thus, when *parens patriae* judgments preclude private claims, it is not clear that *parens patriae* representation is always constitutionally adequate.¹⁷ This dilemma raises troublesome due process concerns and suggests a new approach is necessary to protect individuals from the unjust preclusionary effect of certain *parens patriae* suits.

Part I of this Comment explains the defining characteristics of *parens patriae* suits and the requirements for invoking *parens patriae* standing.¹⁸ In particular, *parens patriae* suits require that a state adequately demonstrates a sovereign or quasi-sovereign interest.¹⁹ The lack of clarity in what constitutes a quasi-sovereign interest has resulted in a majority of courts adopting an expansive view of this category, which includes claims that private individuals could bring separately.

Part II sketches the lengthy and contentious history surrounding *parens patriae* authority.²⁰ Two theories offer explanations for the foundation of *parens patriae* standing in the U.S.²¹ The somewhat bizarre and confusing origins of the doctrine help, in part, to explain some of the current murkiness surrounding *parens patriae* law. Additionally, courts' interpretations of *parens patriae* since the start of the twenty-first century

14. See *infra* section III.A.

15. See FED. R. CIV. P. 23(b)(3).

16. See *infra* section III.B.

17. See *infra* section III.C.

18. See *infra* section I.A.

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

20. See *infra* Part II.

21. See *infra* section II.A.

have consistently expanded the doctrine's use to contexts that overlap and potentially conflict with private individual interests.²²

Part III describes the procedural requirements governing private class actions in comparison to the lack of requirements governing *parens patriae* suits.²³ This procedural gap ultimately leaves state citizens vulnerable to the final judgments achieved by state attorneys general. This results in injured individuals being represented without familiar requirements of notice, consent to specific legal representation, or formal adequacy of representation.²⁴ The resulting preclusion of private claims by *parens patriae*, therefore, may result in the violation of individuals' due process rights.

Part IV proposes four potential paths forward for *parens patriae*.²⁵ First, implementing class-action style procedural requirements for *parens patriae* suits may ensure that individuals are adequately represented and allow for appropriate preclusion. Still, doing so may undermine the very purpose and character of *parens patriae* as a form of public litigation.²⁶ Second, courts could hold that *parens patriae* suits cannot preclude private claims, remedying due process concerns.²⁷ But such a solution poses its own challenges in that it may unfairly allow plaintiffs to recover twice for the same claim. Third, courts could require consolidation of concurrent *parens patriae* and private actions.²⁸ This would allow courts to more fully consider whether claims are best brought by the state or individuals. Finally, courts might permit private parties to stay a concurrent *parens patriae* action if a state claim overlapped a private individual claim.²⁹ Although the effect of this option would substantially prevent unconstitutional preclusion, the likelihood of its implementation is slim. As *parens patriae* suits undoubtedly become more prevalent, courts must delineate the limits of both *parens patriae* preclusion and, more generally, quasi-sovereign interests.

22. See *infra* section II.B.

23. See *infra* Part III.

24. See *infra* section III.C.

25. See *infra* Part IV.

26. See *infra* section IV.A.

27. See *infra* section IV.B.

28. See *infra* section IV.C.

29. See *infra* section IV.D.

I. AN OVERVIEW OF AGGREGATE LITIGATION: PUBLIC *PARENS PATRIAE* SUITS AND PRIVATE CLASS ACTIONS

The use of class actions as procedural vehicles for complex and mass tort litigation has a long history in Anglo-American jurisprudence.³⁰ Despite a notable increase in private class actions in the middle of the twentieth century, their importance has declined in recent decades.³¹ The Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*,³² *Ortiz v. Fibreboard Corporation*,³³ and *Wal-Mart Stores, Inc. v. Dukes*³⁴ stymied subsequent attempts to bring class actions to aggregate large mass tort claims because federal courts have tended to deny class certification.³⁵ Furthermore, the Court's 2011 decision in *AT&T Mobility v. Concepcion*³⁶ validated arbitration provisions containing class action waivers, meaning that "most class cases will not survive the impending tsunami of class

30. See *The Supreme Court, 1996 Term-Leading Cases*, 111 HARV. L. REV. 197, 350 (1997) (citing David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563 n.9 (1987) (pointing out the notable increase in mass tort claims filed in the last few decades)); John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims After Amchem Products, Inc. v. Windsor*, 33 TORT & INS. L.J. 905, 907 (1998) (noting the "explosion" of mass tort claims filed against corporate defendants in the last decade).

31. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 623 (2012) (describing class actions as being "on the ropes" in part because "[c]ourts in recent years have ramped up the standards governing the certification of damages classes and created new standing requirements for consumer class actions"); Deborah R. Hensler, *Goldilocks & the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012) (noting that "[m]ass tort actions have virtually disappeared"); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346 & n.37 (2014) ("[A]ttempts to use the class action device under Rule 23 to aggregate nationwide mass tort claims to facilitate global settlements have been increasingly doomed because federal courts often decline to certify such classes.").

32. 521 U.S. 591 (1997).

33. 527 U.S. 815 (1999).

34. 564 U.S. 338 (2011); see also Gilles & Friedman, *supra* note 31, at 623 ("[I]n *Wal-Mart v. Dukes*, the Supreme Court articulated a new and highly restrictive interpretation of the commonality requirement of Rule 23(a).").

35. See Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 747 (2006); Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589, 601 (2012) (noting the waning use of class actions under Rule 23); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 ("As a result, class actions seemed to drop out of the available set of tools for attempting to settle most mass torts . . .").

36. 563 U.S. 333 (2011).

action waivers.”³⁷ In particular, private class actions have in part been supplanted by public litigation.³⁸

This Comment focuses on state litigation seeking financial relief to remedy unlawful activities against the state’s citizens.³⁹ State litigation finds its authority, on one hand, in state statutes, and on the other hand, in the doctrine of *parens patriae*. *Parens patriae* actions represent an alternative and increasingly popular method of aggregate litigation,⁴⁰ particularly in the fields of consumer, antitrust, environmental, and health law.⁴¹

A. *To Invoke Parens Patriae Standing, States Must Assert a Sufficiently Aggregated Sovereign or Quasi-Sovereign Interest*

Today, courts uniformly acknowledge a state’s legal right to sue as *parens patriae* on behalf of its citizens’ interests.⁴² State attorneys general use *parens patriae* standing to obtain monetary relief and damages for their respective states’ citizens. *Parens patriae* suits nearly always settle and can vary wildly in size:

Such suits run the gamut from multimillion-dollar, multistate treble-damages antitrust suits to single-state actions against unscrupulous businesses that bilked residents out of a few hundred dollars But attorneys general take pains to publicize their litigation successes, and their press releases paint a colorful picture of public attorneys going to bat for the “little guy” against a variety of bad actors.⁴³

37. Gilles & Friedman, *supra* note 31, at 623.

38. *See id.* (positing that “we would hope to see the ‘private attorney general’ role assumed by class action lawyers over the past several decades give way to a world in which state attorneys general make unprecedented use of their *parens patriae* authority”).

39. Financial relief sought by state litigation is often supplemented by other remedial or preventative relief, including injunctions or civil penalties. However, for the purposes of this Comment, the analytical lens is primarily focused on state suits seeking financial relief because such claims pose preclusion challenges separate from and more egregious than claims seeking injunctive relief.

40. *See* Ieyoub & Eisenberg, *supra* note 2, at 1859; Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1851 (2000).

41. *See* Margaret S. Thomas, *Parens Patriae and the States’ Historic Police Power*, 69 S.M.U. L. REV. 759, 764 (2016).

42. *See* Nebraska v. Central Interstate Low-Level Radioactive Waste Comm’n, 834 F. Supp. 1205 (D. Neb. 1993), *aff’d*, 26 F.3d 77 (8th Cir. 1994); Maine v. M/V Tamano, 357 F. Supp. 1097 (D. Me. 1973); Maryland Dep’t Nat. Res. v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972).

43. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 498–500 (2014) (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (“multistate antitrust action that

The leading case discussing *parens patriae* in the modern context is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.⁴⁴ To maintain a *parens patriae* action, the Court in *Snapp* established that a state must have standing as *parens patriae* in the context of a particular claim.⁴⁵ In particular, to invoke *parens patriae* standing, a state must: (1) “articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party,” and (2) assert an injury to a sovereign or quasi-sovereign interest.⁴⁶ Thus, *parens patriae* standing requires the state *itself* to have an interest in the claim,⁴⁷ which can be satisfied if the state acts on behalf of “its residents in general”⁴⁸ as opposed to “particular citizens.”⁴⁹

A state’s sovereign interests encompass its right to enforce its criminal or civil laws, or other state regulatory provisions.⁵⁰ Courts have struggled

settled for \$67.375 million in cash payments and \$75.7 million worth of CDs to be distributed to states based on population”); John Mariani, *Wedding Photographer Must Complete Work for Old Customers Before Taking on New Ones*, SYRACUSE (Apr. 29, 2010), http://www.syracuse.com/news/index.ssf/2010/04/wedding_photographer_must_comp.html [https://perma.cc/479U-VCE4] (“A local wedding photographer has reached a settlement with the Attorney General’s office spelling out how he will make good on his contracts with 33 clients to provide them with wedding pictures, albums and DVDs that they paid for but never received. It also orders Harold J. ‘Bud’ Thorpe III to pay \$4,000 in penalties and costs and at least \$500 in restitution.”); OHIO ATT’Y GEN., CONSUMER PROTECTION ANNUAL REPORT (2010), <http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/c2/c205fbde-7328-4fad-a129-6a12f4af0360.pdf> [https://perma.cc/F36K-NFRM]; Press Release, Iowa Dep’t of Justice, Office of the Att’y Gen., Florida Telemarketer Pays Full Restitution to 227 Iowans (Dec. 2, 2008), http://www.state.ia.us/government/ag/latest_news/releases/dec_2008/Galaxy_Restitution.html [https://perma.cc/63ML-MB4D] (“describing settlement with telemarketers under which \$12,824 will be provided to Iowa citizens in restitution”); Press Release, N.Y. State Office of the Att’y Gen., Cuomo Secures an Additional \$8.5 Million in Settlements with Companies that Tricked Consumers into Signing up for Discount Clubs with Hidden Fees (Sept. 21, 2010), <http://www.ag.ny.gov/press-release/cuomo-secures-additional-85-million-settlements-companies-tricked-consumers-signing> [https://perma.cc/8YQJ-TKF2]; Press Release, Office of Att’y Gen. Terry Goddard, DirecTV to Provide Refunds to Consumers as Part of Deceptive Advertising Settlement (Dec. 28, 2010), http://www.azag.gov/press_releases/dec/2010/Press%20Release%20%20-%20DIR ECTV.html [https://perma.cc/S87Y-U8M9].

44. 458 U.S. 592 (1982); *see also* Lemos, *supra* note 43, at 494.

45. *See Snapp*, 458 U.S. at 607.

46. *Id.*; *see also* Ieyoub & Eisenberg, *supra* note 2, at 1863–64.

47. *See* Ieyoub & Eisenberg, *supra* note 2, at 1882 (“[S]tates cannot be acting simply as enforcement agencies for small collections of private individuals. There must be a state interest beyond that of private parties to warrant a *parens patriae* action.”).

48. *Snapp*, 458 U.S. at 607.

49. *Id.* at 600; *see also* Lemos, *supra* note 43, at 495 (“In other words, private interests can rise to the level of a quasi-sovereign state interest when sufficiently aggregated.”).

50. *See* Ieyoub & Eisenberg, *supra* note 2, at 1865 n.27 (citing *Snapp*, 458 U.S. at 598, 601) (noting that the *Snapp* “Court recognized a second sovereign interest”—“recognition from other sovereigns,” and “maintenance and recognition of borders”).

to provide a clear and concrete definition of what exactly constitutes quasi-sovereign interests.⁵¹ In *Snapp*, the Court emphasized that quasi-sovereign interests defy “an exhaustive formal definition.”⁵² The Supreme Court in *Snapp* summarized *parens patriae* standing as follows:

In order to maintain [a *parens patriae* action], the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident . . . First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.⁵³

The Court specifically did not attempt “to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.”⁵⁴ As a result, courts have adopted an expansive and flexible category of quasi-sovereign interests, consisting of a state’s “interest in protecting and vindicating the health, safety, and welfare of its people.”⁵⁵ In contrast, harm to *proprietary interests* (such as business ventures or ownership of land) or *private interests* (nominal state pursuit of private party interests) does not justify *parens patriae* standing.⁵⁶

Finally, when evaluating a state’s *parens patriae* standing, a court may consider “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”⁵⁷ A court may also consider whether the challenged conduct affects, either directly or indirectly, a “sufficiently substantial segment of its population.”⁵⁸ Even

51. *Id.* at 1866 (“The Court developed the concept of quasi-sovereign interests through example and counterexample rather than through deductive reasoning.”).

52. *Snapp*, 458 U.S. at 607.

53. *Id.*

54. *Id.*

55. Ieyoub & Eisenberg, *supra* note 2, at 1864.

56. *Snapp*, 458 U.S. at 601–02.

57. *Id.* at 607.

58. *Id.*; see also *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (*parens patriae* action brought on behalf of “a substantial portion of the state’s population,” who were denied access to natural gas).

here, the Court has avoided establishing precisely how many of the state's residents must be affected to constitute sufficient aggregation.⁵⁹

B. Parens Patriae Suits Resemble Private Class Actions but Lack Similar Procedural Protections

Private class actions share many similarities with *parens patriae* suits.⁶⁰ Both can be efficient and effective methods of aggregating damages claims to obtain compensation for a large number of plaintiffs.⁶¹ Class actions and *parens patriae* suits also provide unique opportunities for deterrence of unlawful conduct.⁶² Such conduct is often committed by powerful corporations that would otherwise be, in effect, immune from such deterrence if claims were not aggregated through class actions or *parens patriae* suits because “[s]uch large cases are thought to be necessary to enforce the laws prohibiting a defendant’s wrongful behavior, since without aggregation, such claims are too monetarily insignificant to warrant individual lawsuits.”⁶³ Both forms of aggregate litigation allow for potentially enormous compensatory and punitive damages. Furthermore, their aggregation provides representative attorneys with adequate compensation in the class action context, and provides state attorneys general with sufficient justification to expend large quantities of resources in pursuing their claims in the *parens patriae* context. Indeed, both class actions and *parens patriae* suits are representative by nature—individuals have their rights adjudicated without having to play a direct role in the case.⁶⁴

59. It is clear that a state can have *parens patriae* standing without involving all or even a majority of the state’s residents. See *Snapp*, 458 U.S. at 609 (involving 787 job opportunities for residents of Puerto Rico, which had a population of approximately 3 million); Lemos, *supra* note 43, at 495 n.37.

60. See Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 *FORDHAM L. REV.* 361, 362 (1999) (describing *parens patriae* actions as “an efficient alternative to consumer class actions”); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 *J. LAND RESOURCES & ENVTL. L.* 273, 300 (2007) (“[T]he emphasis on harm to a substantial segment of the population suggests that this type of [*parens patriae*] suit is similar to a class action.”).

61. See GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: CASES AND MATERIALS* 639 (Robert C. Clark et al. eds., 11th ed. 2015) (“A class action allows a large number of related claims to be ‘aggregated’ together and resolved in a single case.”); Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 *TUL. L. REV.* 1919, 1922 (2000) (“The nature of these suits is to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a large set of state citizens.”).

62. See HAZARD, *supra* note 61, at 639.

63. See *id.*

64. See Lemos, *supra* note 43, at 500.

Federal courts have regularly allowed *parens patriae* suits to substitute—and take precedence over—private class actions or other forms of aggregate litigation for several reasons.⁶⁵ First, as discussed below, *parens patriae* suits avoid the complex and time-consuming procedural requirements applicable to private class actions. Second, some courts consider attorneys general to be better able to represent citizens' interests than private counsel.⁶⁶ Finally, state attorneys general receive a much smaller portion of any received compensation, “put[ting] more money in the hands of the interested individuals.”⁶⁷

65. See *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 207–08 (9th Cir. 1975); *New York v. Intercounty Mortgage Corp.*, 448 N.Y.S.2d 675, 677 (N.Y. App. Div. 1982) (holding that the New York Attorney General's action was “a superior and more effective device for obtaining restitution than [the pending] class actions” without explanation); 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23.46[2][c] [hereinafter *MOORE'S FEDERAL PRACTICE*] (“[I]f a governmental unit has brought suit on the same issue, a court may decide that the proposed private class action is unnecessary and an inferior method of adjudication.”); Farmer, *supra* note 60, at 387–88 (“When confronted with the choice, courts generally have respected Congress's intentions [in federal antitrust law], concluding that statutory *parens patriae* actions brought by the state Attorney General on behalf of the natural-persons citizens of the state are superior to class actions brought under Rule 23.” (footnote omitted)); Robert L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 *LOY. CONSUMER L. REV.* 497, 514 (2005) (“Courts have repeatedly recognized the superiority of government actions in a variety of contexts.”). Indeed, the state of Maryland has codified the superiority of *parens patriae* suits over class actions. See MD. CODE ANN., COM. LAW § 11-209(c) (West 2005) (“An action brought by the Attorney General as *parens patriae* . . . is presumed superior to any class action brought on behalf of the same person.”).

66. See, e.g., Lemos, *supra* note 43, at 506–07 n.84 (citing *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 WL 3359482, at *3 (N.D. Ohio Nov. 17, 2006) (remarking that “[p]roceedings by the state . . . are presumably taken with the best interests of state residents in mind”); *Sage v. Appalachian Oil Co.*, Nos. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at *1–2 (E.D. Tenn. Sept. 7, 1994) (“[T]he State, through the Attorney General, is clearly in a superior position to bring a *parens patriae* action . . . on behalf of all natural persons in this state. . . . [T]he State should be the preferred representative of a class of all persons, including non-natural persons such as business entities”); *Lohse v. Dairy Comm'n of Nev.*, 25 Fed. R. Serv. 2d 1018, 1977 WL 1523, at *7 (D. Nev. 1977) (“This kind of state action [was] much preferred to a punitive treble damage antitrust private civil remedy the proceeds from which will only slightly benefit any individual plaintiff.”).

67. Lemos, *supra* note 43, at 507 n.85 (citing *Thornton*, 2006 WL 3359482, at *3 (“[P]otential class members will often recover more [from attorney general litigation] than they would in a private action when costs and attorneys' fees are factored in.”); Farmer, *supra* note 60, at 388 (“In some . . . decisions, courts have considered the state Attorney General's lack of pecuniary interest, contradistinguished from consumer class action suits brought by private counsel, to be a relevant factor in choosing the *parens patriae* action over class actions.” (footnote omitted)); Stephen B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 *GEO. J. LEGAL ETHICS* 1419, 1422 (2005) (“[T]he vast majority of courts holding that private class actions are not superior to Government Action have apparently done so, in part, simply because of deference to the government and/or a belief that [government] lawsuits . . . provided private plaintiffs with a more economical and manageable method of obtaining relief than a class action lawsuit.”).

In other circumstances, private class actions and *parens patriae* suits “proceed in tandem, with public and private attorneys working together to seek common remedies.”⁶⁸ In these situations and those involving complex tort litigation with dozens of class actions, individual suits, and *parens patriae* claims, problems with the application of preclusion can occasionally arise. In particular, *parens patriae* claims based on quasi-sovereign interests are particularly prone to issues of preclusion. This preclusion problem happens when a state has a quasi-sovereign interest in a particular claim that overlaps with a private individual’s or classes’ interest in the same claim.⁶⁹

In general, judgment for a *parens patriae* state suit is binding “on every person whom the state represents as *parens patriae*,”⁷⁰ which invariably includes the respective state’s citizens. In this sense, *parens patriae* suits are similar to private class actions in that they represent—and bind—absent individuals. This rationale rests on two fundamental principles of preclusion law wherein plaintiffs should not be entitled to “multiple bites at the apple”⁷¹ and defendants should not be subjected to a sort of double jeopardy.⁷² Thus, if a party’s interests are ultimately advanced by the state in its *parens patriae* suit, then that citizen is a “part[y]” to the . . . suit within the meaning of *res judicata*⁷³ and is barred from bringing a private individual or class action on the same interests.

68. Lemos, *supra* note 43, at 499 (citing ROBERT L. HUBBARD, THE ANTITRUST PLAINTIFF’S PERSPECTIVE: PUBLIC AND PRIVATE ENFORCEMENT IN COMPLEX LITIGATION — STATE ATTORNEY GENERAL PERSPECTIVE 9 (2002)) (“Not every state attorney general joins every litigation. Usually class counsel will assert claims on behalf of the residents in states not represented by an attorney general.”); *see also In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 460 (D. Md. 1987).

69. *See* Lemos, *supra* note 43, at 532–35.

70. Farmer, *supra* note 60, at 384; *see also* Satsky v. Paramount Commc’ns, Inc., 7 F.3d 1464, 1470 (10th Cir. 1993) (“When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.”); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549 (Ga. 2006) (concluding that a punitive damages claim filed by decedent’s estate against tobacco companies was barred by the master settlement between the tobacco companies and the state acting as *parens patriae*); *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (holding that defeat of an antitrust suit brought by the Attorney General via *parens patriae* barred a similar action by a private party because “the Attorney General’s action . . . was brought on behalf of all the people in the state . . . who were adversely affected by the alleged antitrust violations”); *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487 (N.Y. App. Div. 2008) (similar holding as *Brown & Williamson*, 627 S.E.2d 549).

71. Lemos, *supra* note 43, at 500.

72. *Id.* at 546–48; Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L. J. 339, 344 (1948).

73. *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (“State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest. . . . There is a presumption that the state will

However, while class actions are restricted by procedural requirements that ensure absent members are adequately represented or can opt out, preventing preclusion, *parens patriae* suits are largely free from such protections.⁷⁴ As a result, individuals may be bound by the judgment of a *parens patriae* suit without having the opportunity to opt out or even receive notice, and without any inquiry into whether their interests are being adequately represented.⁷⁵ Furthermore, individuals precluded by *parens patriae* suits have no say in how damages obtained by a *parens patriae* judgment or settlement are disbursed.

Nonetheless, courts generally permit states to bring *parens patriae* claims even when the state's interest overlaps with an individual interest.⁷⁶ The decision in *Snapp* supports this majority approach that state *parens patriae* claims may be premised on injuries to citizens for which those citizens could individually sue.⁷⁷ The important distinction between this type of quasi-sovereign interest and a private interest—which cannot support *parens patriae* standing—is that damages must be sufficiently aggregated. In other words, the state interest must be on behalf of “residents in general” and not just “particular individuals.”⁷⁸ In order to qualify, the injury must affect a “sufficiently substantial segment of [a state's] population.”⁷⁹ Still, a minority of courts have interpreted *Snapp* “to preclude states from using *parens patriae* authority to pursue damages that could be recovered through private litigation, on the view that the state in such cases is not the real party in interest.”⁸⁰ Regardless, most *parens patriae* cases have another form of authority explicitly allowing

adequately represent the position of its citizens. . . . Thus, the sportfishers here, as members of the public, were ‘parties’ to the . . . suit within the meaning of *res judicata*.”).

74. See Lemos, *supra* note 43, at 500–10.

75. *Id.*

76. See *id.* at 494.

77. See *id.*; Wildermuth, *supra* note 60, at 300 (explaining that *Snapp* “says nothing about limiting quasi-sovereign interest suits” to “those instances in which it would be unlikely for individuals to bring their own suits”).

78. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 608 n.14 (1982).

79. *Id.* at 607. Thus, the injured population does not need to constitute the entirety of a state's residents.

80. Lemos, *supra* note 43, at 494 (citing *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.”), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); *Pennsylvania v. Nat'l Ass'n of Flood Insurers*, 520 F.2d 11, 23 (3d Cir. 1975) (suggesting that a state cannot establish standing as *parens patriae* in situations where citizens can pursue private actions), *overruled by Pennsylvania v. Porter*, 659 F.2d 306, 317–18, 317 nn.15–16 (3d Cir. 1981) (disapproving the relevant portions of *Nat'l Ass'n of Flood Insurers*)).

state attorneys general to sue on behalf of the state's citizens—namely, state⁸¹ or federal statutes.⁸²

II. THE ORIGINS AND DEVELOPMENT OF *PARENS PATRIAE* AUTHORITY

Although contemporary class actions have their justificatory roots at least somewhat settled in the Federal Rules of Civil Procedure,⁸³ the historical origins of *parens patriae* are less clear and more contentious.⁸⁴ Tracing and understanding the heritage of *parens patriae* is important for several reasons. First, the original use and purpose of *parens patriae* power in fourteenth century England⁸⁵ and its early adoption in federalist American law⁸⁶ were critical in shaping the doctrine and supplying it with its defining characteristics. Second, courts have struggled to articulate the scope and bounds of when a state has authority to sue on behalf of its citizens under *parens patriae* in large part due to the confusion and “murkiness” surrounding the source and history of the doctrine.⁸⁷ Finally, a grasp on the history of *parens patriae* is useful, perhaps even necessary, to frame a more defined scope of *parens patriae* actions that capitalizes on their efficiency and effectiveness, while avoiding occasional conflicts of interest or violations of due process.

81. See, e.g., ALASKA STAT. § 45.50.577(b) (2017 1st Reg. Sess.); ARK. CODE ANN. § 4-75-212 (West 2016); CAL. BUS. & PROF. CODE § 16760 (West 2008); COLO. REV. STAT. § 6-4-111 (2011); CONN. GEN. STAT. § 35-32 (2016); DEL. CODE tit. 6, § 2108 (2016); FLA. STAT. § 542.22 (West 2007); HAW. REV. STAT. § 480-14 (2016); IDAHO CODE § 48-108 (2016); WASH. REV. CODE § 19.86.080 (2016) (authorizing *parens patriae* actions for restitution on behalf of Washington victims of consumer protection violations).

82. See, e.g., 15 U.S.C. § 15c (2006) (authorizing suit for violations of federal antitrust law); 15 U.S.C. § 1679h(c)(1) (2006) (authorizing suit for violations of federal law governing credit repair organizations); 15 U.S.C. § 1681s(c) (2006 & Supp. V 2011) (credit reporting agencies); 15 U.S.C. § 5712 (2006) (pay-per-call services); 15 U.S.C. § 6103 (2006 & Supp. V 2011) (telemarketers); 15 U.S.C. § 6309(c) (2006) (professional boxing matches); 15 U.S.C. § 6504 (2006) (children's online privacy protection); 15 U.S.C. § 7706(f) (2006) (email spam); 15 U.S.C. § 7804 (2006) (sports agents).

83. See FED. R. CIV. P. 23.

84. See Thomas, *supra* note 41, at 759 (noting the “vague and ill-defined” source of the power to sue under *parens patriae*).

85. See Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978).

86. Thomas, *supra* note 41, at 764–65.

87. *Id.*

A. *The Murky Origins of Parens Patriae Authority*

The concept of “group litigation” has existed since medieval times in English common law. While class actions originated in the U.S. and are still predominantly an American phenomenon, the doctrine of *parens patriae* has unusual and somewhat contested beginnings. The most popular theory postulates that, following the American Revolution, states “inherited” the prerogative of the British king to act as “guardian of the realm,” a prerogative that became the foundation for contemporary *parens patriae* power.⁸⁸ This “sovereignty transference” theory⁸⁹ seems to be the most accepted account of how *parens patriae* power developed in the United States, although it is not without critique.⁹⁰ The “Universal Sovereignty” theory suggests that *parens patriae* power reflects an idea of inherent sovereignty characteristic of universal governance.⁹¹ The two distinct theories further reflect the murkiness behind the origins of *parens patriae* in American jurisprudence, and may explain why courts have been hesitant to formally define the doctrine.

1. “Sovereignty Transference” Theory

Many legal scholars trace the doctrine of *parens patriae* “to the role of the English Crown as a guardian of realm.”⁹² In 1324, the British Parliament passed the Statute Prerogativa Regis, which formally recognized the king’s governors’ power to claim wardship over “all natural fools and idiots.”⁹³ In 1567, Sir William Staunford, an English jurist and judge, wrote:

The king is the protectour of all hys subiectes and of all their goods, landes and tenements, and therefore of suche as cannot gouerne them selues nor order their lands and tenements his grace

88. *Id.* at 769–70; JAY L. HIMES, *STATE PARENS PATRIAE AUTHORITY: THE EVOLUTION OF THE STATE ATTORNEY GENERAL’S AUTHORITY* 1–2 (2004); *see generally* Custer, *supra* note 85.

89. I adopted this label from Thomas, *supra* note 41, at 769.

90. *See, e.g., id.* at 769–73 (pointing out that “the robust English royal prerogatives that were a feature of the Stuart Kings’ absolutist designs were already waning in England more than a century before the Framing” and that “the lack of a robust royal prerogative to supervise charities at the time of the Framing undermines a core premise of the Sovereignty Transference theory of *parens patriae* power”).

91. *See id.* at 769.

92. *Id.*; *see also* George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896 (1976); Ratliff, *supra* note 40, at 1850.

93. *See* Custer, *supra* note 85, at 195 (citing H. E. BELL, *AN INTRODUCTION TO THE HISTORY AND RECORDS OF THE COURT OF WARDS & LIVERIES* 128 (1953)).

(as a father) must take vpon him to proude for them, that they them selues and their things may bee preserued.⁹⁴

Here, the king is referred to directly as the parent of his subjects, which may be where the name “*parens patriae*,” or “parent of the country,” originated.⁹⁵ In 1610, King James I addressed himself as “*Parens patriae*, the political father of his people” to Parliament.⁹⁶ The basis for this power is essentially protective⁹⁷—the guardian-king has a duty to care for his subjects, and this duty becomes a legal power over those who are legally unable to care for themselves.⁹⁸

It is not entirely clear how this distinctly British authority made its way into American jurisprudence, although it seems to have entered through the channels of common law.⁹⁹ The earliest American court cases to address *parens patriae* only considered the prerogative of supervising charities.¹⁰⁰ In 1819 the Supreme Court recognized the royal lineage of *parens patriae* in *Trustees of Philadelphia Baptist Association v. Hart's Executors*.¹⁰¹ Importantly, Chief Justice Marshall's opinion in *Baptist Association* designated state attorneys general as the proper parties to wield *parens patriae* power—a designation that remains true today.¹⁰² The Court quoted a passage from Blackstone's treatise, *Commentaries on the Laws of England*, which described the king as “the general guardian of all infants, idiots, lunatics; and has the general superintendance of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery.”¹⁰³

94. STAUNFORD, *supra* note 93, at 37 (referring to ANTHONY FITZHERBERT, NATURA BREVIVM (n.p. 1553) as his authority); *see also* Custer, *supra* note 85, at 200–01.

95. *See* Custer, *supra* note 85, at 201.

96. *Id.* (italics in original) (citing PAUL L. HUGHES & ROBERT F. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 167 (1959)).

97. *See id.* at 196; BELL, *supra* note 93, at 127–32.

98. *See* Thomas, *supra* note 41, at 769–70. This included children and persons with mental infirmities, as well as charitable trusts. Curtis, *supra* note 92, at 896 & n.5.

99. *See* HIMES, *supra* note 88, at 1–2.

100. *See* Thomas, *supra* note 41, at 771.

101. 17 U.S. 1 (1819).

102. *Id.* at 50; *see also* Thomas, *supra* note 41, at 778 (“As an initial matter, the [*Baptist Ass'n*] opinion identified the state attorney general as the proper party to take up any residual *parens patriae* power. It observed that the practice of the attorney general filing an information ‘might very well grow out of [the royal] prerogative’ to supervise charitable uses.” (citations omitted)).

103. *Trs. of Phila. Baptist Ass'n*, 17 U.S. at 47 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *47).

However, the Supreme Court overruled *Baptist Ass'n* in 1853.¹⁰⁴ Justice Story's opinion in *Vidal v. Girard's Executors*¹⁰⁵ claimed that American *parens patriae* power was founded in English common law alone, ultimately "plant[ing] the seed for current confusion over the source of the *parens patriae* power."¹⁰⁶ In 1972, the Supreme Court reaffirmed *parens patriae*'s sovereign roots and stated simply that the English King's "royal prerogative" and accompanying *parens patriae* power "passed to the States" during the American Revolution.¹⁰⁷

2. "Universal Sovereignty" Theory

Another less popular theory explaining *parens patriae* authority originates from universal principles of sovereignty and what it means to be a functioning government. The first suggestion of this "universal sovereignty" theory can be found in the Court's 1890 opinion in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.¹⁰⁸ The Supreme Court invoked *parens patriae* doctrine under "those principles of reason and public policy which prevail in all civilized and enlightened communities."¹⁰⁹ Further still, the Court explained that the power to regulate and oversee charities via *parens patriae* "prevail[ed] in all civilized countries pervaded by the spirit of Christianity," with its roots in Roman law.¹¹⁰ According to this theory, *parens patriae* is an "ordinary power"—an inherent right of any "government, or sovereign, as *parens patriae*."¹¹¹ The universal sovereignty theory attributes *parens patriae* power to the mere existence of government, be it the state, "a royal

104. *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1853).

105. *Id.*

106. See Thomas, *supra* note 41, at 779–80 (citing *Vidal*, 43 U.S. at 192–95).

107. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); see also Thomas, *supra* note 41, at 770 (noting that the *Standard Oil* Court "makes this sweeping historical conclusion without citing any sources or even offering arguments in support of the claim").

108. 136 U.S. 1 (1890). This case involved a dispute over land owned by the Church of Jesus Christ of Latter-Day Saints, which had been seized by the U.S. to enforce a federal polygamy statute. *Id.* at 8–9. Interestingly, the Court made no distinction between this case and earlier *parens patriae* cases even though all earlier cases dealt exclusively with *state parens patriae* power while this case involved *federal parens patriae* power. See Thomas, *supra* note 41, at 783–85. Still, the federal general law was eventually deemed unconstitutional in 1938 in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which returned general law (including the general law of charities) to the states.

109. *Latter-Day Saints*, 136 U.S. at 51; see also Thomas, *supra* note 41, at 783.

110. *Latter-Day Saints*, 136 U.S. at 51; see also Thomas, *supra* note 41, at 783–84.

111. *Latter-Day Saints*, 136 U.S. at 56.

person[,] or . . . the legislature.”¹¹² As recently as 1982, the Court cited the rationale of *Latter-Day Saints* approvingly in *Snapp*.¹¹³

The rationale of the universal sovereignty theory in *Latter-Day Saints* led to a broader interpretation and more flexible perspective of *parens patriae* power. Indeed, in 1900, just a decade after *Latter-Day Saints*, the state of Louisiana sued as *parens patriae* to enjoin an embargo, imposed by the state of Texas on Louisiana to prevent the spread of yellow fever.¹¹⁴ The Court ultimately declined to extend its jurisdiction because it “interpreted [Louisiana’s] cause of action to be an assertion that the state was empowered to seek relief on behalf of its citizens, rather than a cause of action asserting a special injury to the state itself.”¹¹⁵ Injury to a state’s citizens was not, in itself, sufficient to invoke the Court’s original jurisdiction.¹¹⁶ Even so, the case was significant in that it implicitly recognized a state’s quasi-sovereign interest in disputes affecting its citizens and expanded the potential application of *parens patriae* authority beyond purely sovereign interests.¹¹⁷

B. *Parens Patriae Authority Expanded Rapidly in American Common Law Throughout the Twentieth Century*

Although *parens patriae* authority within the U.S. originated as a very limited doctrine of standing for the supervision of charities,¹¹⁸ the first half of the twentieth century saw a rapid expansion of the doctrine toward “all-purpose guardianship power.”¹¹⁹ This new and broader conception of *parens patriae* extended beyond limited classes of vulnerable citizens—hitherto the extent of the royal prerogative—to a state’s entire citizenry. The Court’s implication in *Louisiana v. Texas*¹²⁰ that *parens patriae* standing extended over quasi-sovereign interests opened the door for *parens patriae* actions to permeate a multitude of legal spheres.¹²¹

For the twenty-five years following the Court’s decision in *Louisiana v. Texas*, state *parens patriae* suits claimed authority over injuries caused

112. *Id.* at 57.

113. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982).

114. *Louisiana v. Texas*, 176 U.S. 1 (1900).

115. Thomas, *supra* note 41, at 786–87 (citing *Louisiana v. Texas*, 176 U.S. at 19).

116. *Louisiana v. Texas*, 176 U.S. at 22.

117. *See* Thomas, *supra* note 41, at 787; Ratliff, *supra* note 40, at 1851.

118. *See* Thomas, *supra* note 41, at 786.

119. *Id.* (internal quotation marks omitted).

120. *Louisiana v. Texas*, 176 U.S. 1 (1900).

121. *See id.* at 786–88.

by environmental torts.¹²² In *Missouri v. Illinois*¹²³ the Court recognized the state as the “proper party” to represent its citizens through *parens patriae* when their health and welfare are threatened.¹²⁴ The Court relied on a pseudo-universal sovereignty theory wherein states took the place of sovereign nations with power to invoke *parens patriae*.¹²⁵ In *Georgia v. Tennessee Copper Company*,¹²⁶ Justice Holmes held that Georgia’s quasi-sovereign interest extended to “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.”¹²⁷

Next, the Court extended *parens patriae*’s reach to injuries based upon economic torts, including antitrust and price-fixing claims.¹²⁸ More recently, *parens patriae* suits have exploded into mass tort and consumer protection litigation.¹²⁹ In the modern context, *parens patriae* has firmly developed beyond the confines of a royal prerogative or derivative universal power and has adopted a distinctly American flavor: expansive, flexible, and powerful.

The lack of clarity surrounding the history and source of *parens patriae* authority has “confounded courts attempting to distinguish permissible state interests from impermissible citizen interests,” which helps explain why courts have been reluctant to create clear boundaries for quasi-sovereign interests.¹³⁰ In turn, the absence of a full-fledged common law analysis of the concept of quasi-sovereign interests in regards to *parens patriae* suits leaves questions of preclusion and due process unanswered.

122. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (drainage of waterways); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas); *New York v. New Jersey*, 256 U.S. 296 (1921) (discharge of sewage into public waters); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution from an industrial plant); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diverting stream water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (pollution of the Mississippi River).

123. 180 U.S. 208 (1901).

124. *Id.* at 241; see also Thomas, *supra* note 41, at 789.

125. Thomas, *supra* note 41, 789–90.

126. 206 U.S. 230 (1907).

127. *Id.* at 237; see also Ieyoub & Eisenberg, *supra* note 2, at 1867.

128. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 255 (1972); *Georgia v. Penn. R.R.*, 324 U.S. 439, 451 (1945) (holding that the defendant railroad’s price-fixing conspiracy in violation of federal antitrust laws “limits the opportunities of [the state’s] people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States”); Thomas, *supra* note 41, at 791–93.

129. See, e.g., *Nevada v. Bank of Am. Co.*, 672 F.3d 661 (9th Cir. 2012) (consumer fraud); *In re Gen. Motors LLC Ignition Switch Litig.*, 69 F. Supp. 3d 404 (S.D.N.Y. 2014) (vehicle ignition defects); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367 (J.P.M.L. 2015) (vehicle emissions litigation); Farmer, *supra* note 60, at 362–64.

130. Thomas, *supra* note 41, at 794.

The answers may very well depend on an understanding of the original purpose of *parens patriae* as a doctrine of standing utilized to protect citizens who are truly unable to protect themselves.

III. *PARENS PATRIAE* PRECLUSION MAY INFRINGE UPON INDIVIDUALS' DUE PROCESS RIGHT TO ADEQUATE REPRESENTATION

A notable distinction between *parens patriae* suits and private class actions is that class actions are subjected to extensive procedural safeguards to ensure that the interests of class members are protected and that members are adequately represented. Procedural requirements governing private class actions seem to reflect an anxiety that the increased efficiency of aggregation conflicts with the long-held ethic "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."¹³¹ Furthermore, when courts aggregate claims, they can pose a threat to "traditional notions of affirmative client consent—consent to be represented by a particular attorney, and consent to any settlement that the attorney negotiates."¹³²

A. *Class Actions Are Subject to Stringent Procedural Requirements Under Rule 23*

Rule 23(a) of the Federal Rules of Civil Procedure allows class certification only if four requirements are met: numerosity, commonality, typicality, and adequacy of representation.¹³³ The first requirement, numerosity, ensures that there is a sufficiently large number of related

131. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also* *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (discussing the "deep-rooted historic tradition that everyone should have his own day in court" (quoting 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (2d ed. 2002))); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Lemos*, *supra* note 43, at 501.

132. *Lemos*, *supra* note 43, at 501 (citing Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805) ("Nowhere else [but in class action] do we find so clear a departure from the premise that the attorney-client relationship is achieved through contractual voluntarism, with the terms of the engagement constrained only by the rules of professional conduct."); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 586 ("[T]he safety valve of client consent is missing, either to authorize the representation of multiple plaintiffs or to justify the settlement.")

133. *See* FED. R. CIV. P. 23(a). This Comment does not purport to discuss in detail the federal procedural requirements of class actions, but rather provides a cursory outline in which to contextualize the lack of procedural requirements for *parens patriae* suits.

claims and plaintiffs to warrant the aggregation of such claims.¹³⁴ The remaining three requirements are designed to guarantee that the representative parties share common interests with absent class members, and that those interests will be vigorously represented.¹³⁵ Damages class actions are subject to an even higher threshold.¹³⁶ Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹³⁷

Class actions are also subject to a further requirement that they provide class members “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”¹³⁸ This requirement ensures not only that represented parties are made aware of their representation and are provided with an opportunity to be heard, but it also gives them the right to opt out of the class action.¹³⁹ Importantly, persons with injuries that qualify them for class representation, but who would prefer, for a variety of reasons, to seek individual relief can choose to opt out and not be bound by the class judgment.¹⁴⁰ In doing so, they “escape the preclusive effect of the aggregate judgment.”¹⁴¹

B. Parens Patriae Suits Are Largely Free from Procedural Requirements and State Attorneys General Are Assumed to Constitute Adequate Representation

These procedural requirements are largely, though not entirely, absent from *parens patriae* actions. To an extent, *parens patriae* actions satisfy a hypothetical numerosity requirement by virtue of their representing a

134. See FED. R. CIV. P. 23(a)(1).

135. See Lemos, *supra* note 43, at 501 (citing Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in *CIVIL PROCEDURE STORIES* 233, 287–88 (Kevin M. Clermont ed., 2d ed. 2008) (describing functions of Rule 23(a) requirements)).

136. See David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 662–70 (2011).

137. FED. R. CIV. P. 23(b)(3).

138. FED. R. CIV. P. 23(c)(2)(B).

139. See FED. R. CIV. P. 23(c)(2)(B)(v) (“[T]he court will exclude from the class any member who requests exclusion.”).

140. See Lemos, *supra* note 43, at 507.

141. *Id.*

“sufficiently substantial segment” of the state’s population.¹⁴² Additionally, commonality is effectively ensured in that the state must allege an injury to the citizens it represents, thereby alleging issues or questions common to the group.¹⁴³ But the requirement of typicality is somewhat at odds with the basis of *parens patriae* authority because the state “may not be asserting a claim that can be analogized to a private plaintiff’s claim”; the state as representative party “need not assert that it has suffered . . . damages, but may simply claim an interest in remedying the . . . injury suffered by its citizens.”¹⁴⁴ While some statutes authorizing *parens patriae* actions include provisions for notice,¹⁴⁵ other *parens patriae* statutes¹⁴⁶ and “all state statutes authorizing attorneys general to seek restitution for injured citizens . . . omit any requirement of notice.”¹⁴⁷

Perhaps most significantly for this Comment, courts do not inquire into the adequacy of representation in public aggregate litigation.¹⁴⁸ Thus, whereas class actions undergo rigorous scrutiny to ensure fair and adequate protection of class interests under Rule 23(a)¹⁴⁹ by representative parties and under Rule 23(g)¹⁵⁰ by class counsel, *parens patriae* suits are largely devoid of such “loyalty” requirements. It seems that the public quality of *parens patriae* has exempted it from such concerns about representation.¹⁵¹ In general, courts presume that attorneys general will

142. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). It should be noted that actions under state consumer protection statutes often involve a small number of injured citizens. See Lemos, *supra* note 43, at 502 n.63 (citing Press Release, N.Y. State Office of the Att’y Gen., Attorney General Cuomo Secures More Than \$100k for Victims of Geneva Car Dealership that Engaged in Fraud (June 22, 2010), <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-more-100k-victims-geneva-car-dealership-engaged-fraud> [https://perma.cc/EWZ2-BN4Q] (judgment of more than \$100,000 against car dealership for defrauding thirty-eight customers)).

143. See Lemos, *supra* note 43, at 502.

144. See *id.*; cf. Farmer, *supra* note 60, at 381.

145. See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 301, 15 U.S.C. § 15c(a)–(b) (2006); ALASKA STAT. § 45.50.577(e) (2011); CAL. BUS. & PROF. CODE § 16760(b)(1) (West 2008); OR. REV. STAT. § 646.775(2)(a) (2011).

146. See, e.g., Illinois Antitrust Act § 7(2), 740 ILL. COMP. STAT. § 10/7.2 (2010); NEB. REV. STAT. § 84-212 (2008); N.H. REV. STAT. ANN. § 356:4-a (2009); OHIO REV. CODE ANN. § 1345.07 (West 2012).

147. Lemos, *supra* note 43, at 508.

148. See *id.* at 503.

149. FED. R. CIV. P. 23(a).

150. FED. R. CIV. P. 23(g).

151. See, e.g., Troncelliti 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 . . .”).

diligently represent their citizens' interests.¹⁵² Ultimately, courts do not scrutinize *parens patriae* actions for any Rule 23(a) requirements, nor are they required to do so.¹⁵³ This general presumption that state attorneys general diligently represent the interests of their states' citizenries has resulted in a remarkably unregulated form of public aggregate litigation.¹⁵⁴ Thus, the stringent procedural rules governing private class actions are almost entirely absent from *parens patriae* suits, and a state's injured citizens must rely wholly on the competency and goodwill of their elected *parens patriae*.

Additionally, *parens patriae* suits are not subject to the standard class action requirement that any proposed settlement be "fair, reasonable, and adequate."¹⁵⁵ Such assessment provides a second layer of scrutiny that further encourages thorough and attentive representation. While some statutes have adopted similar settlement approvals,¹⁵⁶ "the primary concern of the Attorneys General is the protection of and compensation for the States' resident consumers, rather than insuring [sic] a fee for themselves."¹⁵⁷ Challenging the adequacy of representation in a *parens patriae* suit is no easy task—the attorney general must be shown to be "ill-equipped or unwilling to protect" the citizens' interests,¹⁵⁸ or to have committed "misfeasance or nonfeasance in protecting the public" as the state's *parens patriae*.¹⁵⁹ Barring this, state citizens whose interests are represented by the *parens patriae* have no opportunity to be heard.¹⁶⁰

152. See, e.g., *In re Ampicillin Antitrust Litig.*, 55 F.R.D. 269, 274 (D.D.C. 1972) ("[T]he states and cities, acting through their attorneys general . . . 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.").

153. See generally Lemos, *supra* note 43.

154. See *id.* at 508–10.

155. FED. R. CIV. P. 23(e)(2).

156. See, e.g., 15 U.S.C. § 15c(c) (2006); ALASKA STAT. § 45.50.577(g) (2011); CAL. BUS. PROF. CODE § 16760(c) (West 2008); COLO. REV. STAT. § 6-4-111(3)(b) (2011); FLA. STAT. ANN. § 542.22(3)(c) (West 2007); OR. REV. STAT. § 646.775(3) (2011).

157. *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 460 (D. Md. 1987) (applying 15 U.S.C. § 15c(c)); see also *New York v. Reebok Int'l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (observing that attorneys general are motivated by a concern for enforcement of the law); *In re Toys 'R' Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("[T]he participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected.").

158. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 (5th Cir. 1982).

159. *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997).

160. See Lemos, *supra* note 43, at 510.

C. *Parens Patriae Preclusion of Private Claims May Violate Due Process*

The lack of procedural regulation of *parens patriae* suits is particularly disturbing when considered in light of their preclusive effect on private individual or aggregate litigation. While there is little case law highlighting *parens patriae* preclusion,¹⁶¹ courts have generally agreed that judgments of public suits preclude private actions bringing the same claims.¹⁶² Any accompanying due process concerns have received surprisingly little attention from courts or scholars.¹⁶³

The Due Process Clause of the Fourteenth Amendment provides individuals the right to receive notice and the opportunity to be heard before a state can deprive them of their property interests.¹⁶⁴ Notably, “a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”¹⁶⁵ Accordingly, an individual who is not party to a suit generally cannot be bound by its judgment.¹⁶⁶ Only when representative parties have the same interests and adequately represent the absent party’s interests can the absent party be bound by such judgment under *res judicata*.¹⁶⁷ Both class actions and *parens patriae* suits have the potential to preclude subsequent actions by private parties.

The *Alaska Sport Fishing* case provides a clear example of *parens patriae* preclusion and hints at potential due process violations. In 1989,

161. *See id.* at 531 (“Case law on *parens patriae* preclusion is remarkably thin, but the consensus view seems to be that public suits preclude all private actions raising the same claims.”).

162. *See Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Commc’ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (“When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.”); *United States v. Olin Corp.*, 606 F. Supp. 1301, 1303, 1307–08 (N.D. Ala. 1985); *Menzel v. Cty. Utils. Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549 (Ga. 2006) (barring a punitive damages claim on decedent’s behalf based on the settlement between tobacco companies and the states’ attorneys general acting as *parens patriae*); *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (holding that defeat of a *parens patriae* antitrust suit barred a similar private individual claim because “the Attorney General’s action . . . was brought on behalf of all the people in the state . . . who were adversely affected by the alleged antitrust violations”); *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487 (N.Y. App. Div. 2008).

163. *See Lemos, supra* note 43, at 489–90.

164. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“[A]t a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

165. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

166. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

167. *See Taylor v. Sturgell*, 553 U.S. 880 (2008).

four Alaskan sport fishermen and the Alaskan Sportfishing Association filed a class action against Exxon for damages from loss of use and enjoyment of natural resources resulting from the Exxon Valdez oil spill.¹⁶⁸ The plaintiffs sought injunctive and monetary relief “to provide for an environmental mitigation and monitoring fund.”¹⁶⁹ Two years later, in March 1991, the state of Alaska joined in on the Exxon Valdez litigation fray.¹⁷⁰ Wielding his power as *parens patriae*, the Alaska attorney general brought suit on behalf of the state’s citizens seeking damages for restoration of the environment, and loss of public use of natural resources.¹⁷¹ A mere six months later, Alaska and the United States government entered into a court-approved settlement agreement and consent decree with Exxon.¹⁷² Exxon agreed to pay \$900 million to the state of Alaska and the U.S. government in damages, and in return it was released from any related liability, including all private claims for natural resource damages.¹⁷³ A district court dismissed the sport fishermen’s class action, holding that their claims were precluded by Alaska’s *parens patriae* action.¹⁷⁴ The Ninth Circuit affirmed.¹⁷⁵

Alaska Sport Fishing proved problematic because the quasi-sovereign interests claimed by the state of Alaska—namely, use and enjoyment of natural resources—overlapped with the *particularized* interests of a class of individuals. Had the state not brought its *parens patriae* suit, the sport fishermen’s suit may have advanced as a full-fledged class action, potentially providing class members with some form of damages. Alternatively, their suit may have been dismissed later on other grounds. Still, the sport fishermen were not given the opportunity to progress with their claims as a direct result of the state’s *parens patriae* settlement. Instead, the state of Alaska essentially *assumed* representation of the sport fishermen along with all other Alaskan citizens who were impacted by the natural resource damages. The *parens patriae* suit was not burdened by Rule 23 obstacles and had the clout of the government behind it, leading Exxon to quickly settle with the state and preclude any related private claims.

168. Amended Complaint, *In re Exxon Valdez*, 1993 WL 735037 (D. Alaska) (No. 3284); *see also* *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994).

169. *Alaska Sport Fishing Ass’n*, 34 F.3d at 771.

170. *Alaska v. Exxon Corp.*, No. A91-083 (D. Alaska 1991).

171. *Alaska Sport Fishing Ass’n*, 34 F.3d at 771.

172. *Id.*; Lemos, *supra* note 43.

173. *Id.*

174. *In re Exxon Valdez*, 1993 WL 735037 (D. Alaska).

175. *Alaska Sport Fishing Ass’n*, 34 F.3d at 774.

The *Alaska Sport Fishing* case represents a poignant example of *parens patriae* preclusion. But because *parens patriae* suits have yet to seriously impinge on due process rights with any frequency, courts have yet to seriously analyze the best way to regulate *parens patriae* claims and deal with res judicata effects. Notably, some courts are uneasy regarding the notion that *parens patriae* suits can potentially recover money damages for injuries suffered by individuals that might otherwise be recovered independently from the state's action.¹⁷⁶ This uncertainty stems, ultimately, from the loosely-defined scope of quasi-sovereign interests and courts' confusion surrounding the distinction between state interests and citizen interests. "Quasi-sovereign' is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility."¹⁷⁷ This historical tendency to avoid clear and precise boundaries as to what constitutes quasi-sovereign interests has created a record of inadequate common law for courts to rely on in deciding whether to permit *parens patriae* standing. Indeed, "[t]here is clearly tension, if not outright inconsistency, among some of the cases allowing and disallowing individual relief in *parens patriae* suits."¹⁷⁸

IV. FOUR APPROACHES TO AVOID UNCONSTITUTIONAL PRECLUSION

As discussed above, *parens patriae* suits may not always protect the interests of individuals who have been harmed. While private class actions also raise concerns regarding adequacy of representation and fairness of settlements, their many procedural safeguards help to diminish those concerns. When state attorneys general bring *parens patriae* claims that overlap private claims of individuals, they potentially deprive individuals of their due process and often bring about unfair settlements that ignore those who have in fact been harmed.

There are at least four ways that courts could resolve these concerns. Professor Margaret H. Lemos has provided the first two suggestions.¹⁷⁹

176. See, e.g., *California v. Frito-Lay, Inc.*, 474 F.2d 774, 777 (9th Cir. 1973) ("[I]n our judgment [the state's use of *parens patriae* to provide injured citizens with the best 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.").

177. Ratliff, *supra* note 40, at 1851.

178. Thomas, *supra* note 41, at 794 n.252 (quoting Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 687 (1998)).

179. See generally Lemos, *supra* note 43, at 542-48.

The first option calls for heightened procedural requirements for *parens patriae* and other state actions.¹⁸⁰ The second option calls for a limit on the preclusive effects of *parens patriae* suits.¹⁸¹ Both of these options provide valuable remedial effects to the concerns of *parens patriae* preclusion, but they also pose certain challenges—practically, in their implementation, and consequentially, in what they can accomplish. Accordingly, this Comment proposes two additional methods for avoiding *parens patriae* preclusion. First, courts could consolidate *parens patriae* suits and private class actions, at least for purposes of discovery and liability. Doing so would improve both the fairness and the efficiency of litigation and settlement. Alternatively, Congress could modify the Anti-Injunction Act (AIA) to allow private citizens with claims, either individually or through class representation, to stay a concurrent *parens patriae* suit that would otherwise preclude their claims. None of these options provides a clear or obvious solution. Each poses various challenges or leaves due process gaps that may require yet another solution. Still, as Professor Lemos aptly noted, “[t]he goal here is not to develop a comprehensive procedural ‘fix’ for the problems with *parens patriae* preclusion, but to shine some light on possible paths forward.”¹⁸² None of these four approaches requires exclusivity, and it may be the case that they are best adopted, ironically, in the aggregate.

A. *Heightened Procedural Requirements: Class Action Rules for Parens Patriae Suits*

Perhaps the most intuitive response to the problems with *parens patriae* suits is to require them to comply with some of the procedural requirements governing damages class actions.¹⁸³ This raises two primary considerations. First, should procedural requirements be applied to all *parens patriae* suits as a matter of law, or should they be applied strictly to *parens patriae* actions that run the risk of infringing on due process rights? Second, which procedural requirements should apply?

As Professor Lemos points out, procedural requirements might apply only when such *parens patriae* suits threaten to preclude individual damages claims.¹⁸⁴ However, this creates a dilemma in that a court must

180. *Id.* at 542.

181. *Id.*

182. *Id.*

183. *See id.*

184. *Id.* (“One way to address the formal and functional problems with *parens patriae* actions would be to subject such suits to some of the procedural requirements that govern damages class actions — at least when those suits seek to terminate individual claims for damages or other monetary relief.” (emphasis added)).

apply particular procedural requirements case-by-case. Furthermore, before procedural requirements could be applied, a court must first determine that shared claims actually exist between the *parens patriae* suit within the court's jurisdiction, and other private actions under the jurisdiction of a separate federal court. This Comment proposes that such procedural requirements, if applied at all, should apply to *parens patriae* suits generally, and not on a case-by-case basis. Doing so would provide some added assurance of adequacy of representation without requiring judges to make arduous and time-consuming analyses of other cases in other courts' jurisdictions.

On the other hand, all the rules and requirements governing damages class actions need not be applied to *parens patriae* actions. Indeed, such rigidity would be both undesirable as well as impracticable. Requiring adequate representation and notice may be a feasible and beneficial starting point. While the historical origins of the doctrine of *parens patriae* give state attorneys general somewhat of a façade of constitutional adequacy,¹⁸⁵ courts could actually inquire into the competency of state attorneys general in much the same way they assiduously inspect class action counsel. Courts might consider, for example, "whether the attorney general has both the resources and the incentives to pursue the relevant claims vigorously."¹⁸⁶ Professor Lemos notes that such an inquiry could occur within the state case¹⁸⁷ or in a later private action brought by the *parens patriae* members. The gist of the change would be to depart from the centuries-old assumption that the public nature of the *parens patriae* makes the attorney general an "adequate representation of a subgroup of citizens in an adjudicative context."¹⁸⁸

185. See *supra* notes 151–52.

186. Lemos, *supra* note 43, at 543 n.255 (citing Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1151 (2009) (explaining that adequate representation in class actions protects against "incompetence" and "indifference" of class counsel and class representatives)). Naturally, because there are no class representatives in *parens patriae* actions, no inquiry into their adequacy would be warranted.

187. Numerous state and federal statutes require courts to approve *parens patriae* settlements. In general, an inquiry into whether the settlement is "fair, reasonable, and adequate" could include an inspection of the attorney general. See Lemos, *supra* note 43, at 543 n.256 (citing *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991) ("While the [federal antitrust] 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-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D. Md. 1983) ("Similar standards should govern judicial review of proposed settlements in both *parens patriae* actions and private class actions.")).

188. Lemos, *supra* note 43, at 543. Lemos further notes that courts "should [not] categorically limit the state's *parens patriae* authority to cases in which private class actions are unavailable or unfeasible," and should instead assess the adequacy of private class actions versus *parens patriae* suits on a "case-by-case basis rather than adopting an across-the-board preference for either model."

Professor Lemos notes that expecting courts to conduct inquiries into the adequacy of *parens patriae* representation “puts [them] in the unenviable position of second-guessing the attorney general’s choices with respect to policy tradeoffs and other matters in which judges are unlikely to be expert.”¹⁸⁹ Furthermore, what constitutes adequate representation even in class actions is unclear, which places a substantial burden on courts to distinguish “possible conflicts between public and private interests” as well as to determine “whether the attorney general is capable of effectively representing the interests of the *parens patriae* group members.”¹⁹⁰ In general, courts have shied away from questioning the adequacy of public representation.¹⁹¹

Additionally, as discussed above, members of *parens patriae* groups are deprived of due process if they are not given notice of the suit representing them, or if they are not given an opportunity to opt out of such suit to avoid preclusion.¹⁹² Scholars have debated the costs and benefits of requiring notice and opt out procedures even in the class action field.¹⁹³ Actions with relatively small claims and a large potential class of plaintiffs, for example, may incur costs that are greater than the expected recovery and provide notice for little gain. On the other hand:

In cases where the individual claims are relatively large, so that concerns about fairness to individual claimants have real bite,

Id. at 543 n.257. Although I agree with the general principle that both private damages class actions and *parens patriae* actions are discretely valuable tools of aggregation, it does not follow that there should be no preference for one or the other. As discussed below, *parens patriae* actions may be most effective when they take a subsidiary, or at least secondary, role to private class actions. In this way, *parens patriae* returns to its purposive roots as an option *either* for cases in which class actions are unavailable or unfeasible, or simply after their preclusive effect can be avoided.

189. *Id.* at 543.

190. *Id.* at 544.

191. *See, e.g.,* *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961) (“Apart from anything else, sound policy would strongly lead us to decline [the] invitation to assess the wisdom of the Government’s judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.”); *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (“[D]iligence on the part of the State is presumed. . . . [C]ourts are not in the business of designing, constructing or maintaining sewage treatment systems.”).

192. *See* Lemos, *supra* note 43, 544–45, 545 n.265 (noting that “[s]ome statutes create rights to opt out of *parens patriae* actions, but coverage is spotty”).

193. *Compare, e.g.,* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27–28 (1991) (arguing that the benefits of notice in large-scale, small-claims class actions “appear minimal at best” while the costs “can be substantial,” and concluding that “notice has little realistic value to class members” in such cases), *with* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573–76 (1997) (emphasizing notice as a prerequisite to the right to be heard).

notice and opt-out rights can provide important protection for individuals who would prefer to sue separately, or who wish to keep a close eye on the conduct of the aggregate litigation before deciding whether to join in the judgment.¹⁹⁴

In these instances, it seems that due process requires both notice and an opportunity to opt out. Thus, courts must either require notice and an opportunity to opt out in every *parens patriae* case (as is the requirement under Rule 23 for damages class actions) or pursue a cost-benefit analysis of notice and opt-out rights in each individual *parens patriae* case.¹⁹⁵ Both options pose problems. The first is over-inclusive and costly; the second places a time-consuming and difficult burden on courts.¹⁹⁶

Furthermore, *parens patriae* suits might be especially relevant when an attorney general represents citizens who may, for various reasons, be unable to meet the requirements of Rule 23.¹⁹⁷ In that case, adding class-action style requirements would further obstruct individuals seeking relief and relinquish an alternative method of litigation.¹⁹⁸ Subjecting *parens patriae* suits to class action-style procedural requirements is compelling because *parens patriae* suits and class actions are, in a sense, procedural siblings. However, such a solution may be contrary to the historical purpose of *parens patriae*. First, allowing citizens to opt-out of a *parens patriae* suit would defeat the purpose of the state acting on behalf of its citizens. If individuals have the choice to opt-out, the state is actually acting on behalf of only *some* injured citizens, which makes *parens patriae* hardly distinguishable from private class actions.

Second, if citizens are given the option to opt-out, the assumption is that some *will* or *will want to*. This suggests that either the representation by the state attorney general is inadequate, or that harmed citizens would prefer to not be bound by the outcome, presumably because they intend to litigate individually or in a class capacity. This, too, cuts at the heart of *parens patriae*, wherein the state assumes the role of “parent” to its citizens who purportedly cannot act legally on their own behalf. If citizens *can* act on their own behalf, and perhaps are better represented that way, *parens patriae* power has seemingly overstepped its authority.

194. Lemos, *supra* note 43, at 545.

195. *Id.*

196. *Id.*

197. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-20, 454 (3d ed. 2000); HIMES, *supra* note 88, at 9.

198. TRIBE, *supra* note 197, at 454.

B. *Limiting Parens Patriae Preclusion*

Professor Lemos proposes an alternative “no-preclusion” solution to avoid due process violations.¹⁹⁹ Such an approach requires courts to “hold[] that state suits cannot preclude private actions for damages (whether individual or aggregate).”²⁰⁰ In important ways, this approach is simpler and preferable to the application of procedural requirements because it preserves the differences between public and private aggregate litigation.²⁰¹ This approach solves the problem of preclusion without posing the challenges of procedural processes, and indeed, neither notice nor opt-out rights would be required with this approach.

Still, defendants may be concerned that plaintiffs will be given the opportunity to “double-dip” by recovering twice for the same claim—once through *parens patriae* and once through private litigation.²⁰² Lemos proposes two solutions. First, courts could “adopt what is effectively an *opt-in* regime, under which any individuals who accept funds through a state suit relinquish their right to pursue private remedies.”²⁰³ However, this solution would once again require costly notice procedures or would rely on injured individuals to have the knowledge and resources to understand the costs and benefits of opting in.

Alternatively, Lemos suggests that courts “deduct any payments made in a state suit from the recovery in a subsequent private class action.”²⁰⁴ Still, settlement funds resulting from *parens patriae* suits are rarely distributed in whole to injured individuals,²⁰⁵ and often injured citizens receive no monetary value at all.²⁰⁶ So, unless unclaimed funds must return to the defendant, “a judicial policy against allowing the same claimant to recover twice from the same defendant will not protect the

199. Lemos, *supra* note 43, at 546.

200. *Id.*

201. *Id.*

202. *Id.* at 546–48.

203. *Id.* at 547 & n.270 (emphasis added) (citing *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980) (“[W]here the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.”)).

204. *Id.* at 547.

205. See Stephen Calkins, *An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 436 (1997) (noting that approximately 70,000 out of 340,000 eligible individuals received refund checks in a multistate antitrust settlement (citing *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987))).

206. See *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994).

defendant from paying twice for the same harm.”²⁰⁷ Thus, a “focus on preventing double *recoveries*” leaves the defendant with “no protection against subsequent private suits,” while a “focus . . . on preventing double *payments* for the same harms,” results in individuals “being bound by a judgment from which they gained little or nothing at all.”²⁰⁸

While both options—adding class action procedural requirements to *parens patriae* or asking courts to forbid *parens patriae* preclusion of private damages claims—provide valuable protections against constitutional violations, they also pose certain challenges. This Comment suggests two additional paths that may help to avoid these challenges, though they, too, are not without flaws. These two proposals should be considered both in light of the solutions posed by Lemos, and in conjunction with each other.

C. *Joinder of Private and Public Actions Would Increase Efficiency in Hearing Complex Actions and Help Prevent Unconstitutional Preclusion*

This Comment’s first proposal would allow for joinder of private class actions and state *parens patriae* suits. A similar consolidation approach has been suggested in the mass tort context for concurrent class actions and individual actions in state and federal courts.²⁰⁹ The purpose of consolidating concurrent lawsuits is, essentially, to avoid “expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued.”²¹⁰ As it stands, the law imposes no procedural requirement that lawyers consolidate the often tens of thousands of related lawsuits filed in federal and state courts throughout the country.²¹¹

207. Lemos, *supra* note 43, at 547 (noting that “[t]he problem is exacerbated in cases involving *cy pres* distributions, where none of the individuals represented by the attorney general actually recovers funds”).

208. *Id.*

209. See generally Tanya Pierce, *It’s Not Over ‘Til It’s Over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts*, 79 MO. L. REV. 27 (2014).

210. William H. Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 TEX. L. REV. 1523, 1524 (1995).

211. See, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1053 (9th Cir. 2013) (noting the overburdened district judges but rejecting multidistrict litigation judge’s offer to act as a visiting judge in the district where some of the cases had been transferred and where they would return); U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS 1–5 (2013), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL-Dockets_By_District-August-15-2013.pdf [<https://perma.cc/49BT-XURT>] (showing 1,531 actions currently pending related to Chantix, 2,917 actions currently pending related to Prempro, 9,868 actions currently pending related to Yasmin and Yaz, 2,854 actions currently pending related

Allowing consolidation of state *parens patriae* actions and private damages class actions when there are shared claims would allow courts to avoid these same efficiency concerns in several ways. First, doing so would decrease duplicative litigation during discovery, witness and expert testimonies, and determination of liability. Consolidated cases would likely be separated during the damages phase. Second, consolidation would lighten the judicial load by streamlining related cases. Third, judges could better assess the relevant injuries, liabilities, and causation with all the facts and claims on the same table. Finally, and most importantly for this Comment, consolidation would help prevent *parens patriae* suits from precluding at least those individual claims brought by private parties before judgment is entered on the *parens patriae* suit.²¹² This advantage, however, is limited. Only private claims brought prior to issuance of final judgment of a *parens patriae* suit would be protected from preclusion by consolidation. Still, at least some private claims would avoid *parens patriae* preclusion if they were compelled to consolidate with a concurrent *parens patriae* suit.

In joining *parens patriae* and private class actions, courts could ensure that the claims of injured individuals are addressed at the same time as the quasi-public injuries claimed by the state. Such consolidation would ensure that state governments do not receive more than their fair share—namely, that any recovery the state receives does not infringe upon the recoveries of injured individuals and injured classes. As it currently stands, *parens patriae* claims are often able to attain final judgment or settlement before class actions simply because they are unburdened by the procedural requirements of Rule 23 and, in particular, the high hurdle of obtaining class certification.²¹³ If courts were required to consolidate *parens patriae* with all related class actions, it would ensure that

to the Deepwater Horizon spill, 2,514 actions currently pending related to the Actos Products liability litigation, 1,279 actions currently pending related to NuvaRing, 3,531 actions currently pending related to Asbestos, and over 25,900 actions currently pending related to various pelvic repair products).

212. Private parties with claims who fail to initiate actions prior to the *parens patriae* action reaching judgment would inevitably be precluded despite allowing joinder, as would private parties with claims that arise after judgment is reached.

213. See, e.g., Edward Brunet, *Improving Class Action Efficiency by Expanding Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1938 (2000) (noting the effectiveness of *parens patriae* suits “particularly because of the ease or comparatively low transaction costs associated with initiating such . . . suit[s]”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012) (arguing that *parens patriae* suits should “fill the void left by class actions” because “[p]arens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions”).

individuals are not precluded merely because the state beat them to the finish line.

Consolidation would also serve to protect the rights of defendants. Claimants would be aggregated in a single forum, reducing duplicative and wasteful expenses on defending the same claims in countless states and districts. More importantly, consolidation would prevent plaintiffs from recovering twice for the same injury, and likewise, would protect defendants from being unjustly subjected to a kind of “double jeopardy.”

Consolidation may push *parens patriae* into more of a back-seat role in aggregate litigation. However, this would, in many cases, benefit injured citizens by ensuring that their claims are being vigorously represented under the protection of due process and without the threat of preclusion by the state. Courts could better distinguish between a state’s quasi-sovereign interests and the private interests of individuals, which may decrease the state’s damages but would almost certainly increase the recovery going directly into the hands of injured citizens. Such a process is in line with the original purpose of *parens patriae*—to protect the state’s citizens when they cannot bring claims, rather than to appropriate individual claims as state claims at the citizens’ expense.

D. *Allowing Private Parties to Stay Parens Patriae Suits*

Alternatively, courts could allow private parties to request an injunction staying a concurrent *parens patriae* suit until individual and class claims have been settled to avoid preclusion. The benefits of such a procedural mechanism would be extensive. First, it would ensure that only *parens patriae* suits with a genuine threat of precluding individual claims would be affected, leaving most *parens patriae* suits (including those premised on sovereign interests) free from restriction and with a flexibility that makes them distinctly useful aggregate tools. Second, it would put the onus on injured individuals or classes, under the representation and advisement of counsel, to protect their interests. This is useful because individuals are in the best position to know of their own injuries and are most likely to vigorously call for their own protection. It would also not require courts to adopt a piece-meal and extensive inquiry into whether and to what extent individual rights are being precluded. Furthermore, the public and publicized nature of *parens patriae* suits suggests that individuals with related harms would be able to access the information they need to prove preclusive effects with relative ease.

The problem with this approach is that it requires Congress to make an exception to the general rule that federal courts cannot enjoin state proceedings. The AIA states that “a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly

authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”²¹⁴ The AIA’s effect is to prohibit federal courts from issuing injunctions against state courts, with the three explicit exceptions,²¹⁵ as well as to prevent fraudulently obtained judgments from being enforced.²¹⁶ For the purposes of this section, one exception is found in the language, “expressly authorized by Act of Congress,” wherein Congress could permit federal courts to issue injunctions against state courts in limited circumstances.²¹⁷

This approach would require Congress to permit federal courts to issue injunctions on state court proceedings, for the limited purpose of staying a *parens patriae* suit when private parties can show that the state action would preclude their individual claims in violation of due process. Such a proposal admittedly faces an uphill battle. Even in the somewhat unlikely chance that Congress made an exception for a *parens patriae* injunction, other questions regarding the consistency of such an injunction with the principles of equity, comity, and federalism would ensue.²¹⁸

CONCLUSION

Early applications of *parens patriae* in U.S. jurisprudence were modest and strictly limited in scope. In a relatively short time, the doctrine was expanded to remedy environmental, antitrust, healthcare, and consumer protection injuries, to name just a few. The scope and breadth of *parens patriae* authority has exploded from a protective shield of last resort to a proactive sword wielded exclusively by the state. The murky history and development of *parens patriae* in the U.S. has resulted in a somewhat lackluster body of common law for courts to draw upon to delineate and define the scope of quasi-sovereign rights in particular, and *parens patriae* in general.

Parens patriae undoubtedly has the potential to play a unique and valuable role in aggregate litigation. Still, despite the fact that *parens patriae* suits and private class actions raise similar concerns about fairness to individuals, the two types of representative, aggregate litigation are treated entirely differently, largely because of the assumption that state attorneys general will always adequately represent the interests of state citizens. As courts grapple with these due process issues posed by *parens patriae* suits, they will likely need to provide a clearer definition of quasi-

214. 28 U.S.C. § 2283 (2012).

215. See *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281 (1970).

216. See *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

217. 28 U.S.C. § 2283.

218. See *Mitchum v. Foster*, 407 U.S. 225, 226 (1972); *Pierce*, *supra* note 209, at 45.

sovereign interests. Furthermore, courts should consider closing the procedural gap between *parens patriae* suits and private class actions by applying procedural requirements to *parens patriae* suits, perhaps modeled off Rule 23 requirements. But while heightened procedural requirements may serve to increase the protection of individuals' due process rights, they may also cripple *parens patriae* power in such a way that makes it indistinguishable from damages class actions, and thereby rendering it obsolete. Courts instead, or in addition, could revise preclusion law to prevent public suits from precluding private claims. Such a solution would be cleaner and more effective, but it likely requires more from courts and is therefore less likely to materialize. Alternatively, courts could require the consolidation of related private claims and *parens patriae* suits to avoid such preclusive effects. This option has the added benefit of increasing judicial expediency and preserving judicial and discovery resources, but it, too, places a burden on courts. Finally, Congress could make an exception to the Anti-Injunction Act to allow private parties to stay *parens patriae* claims. This option may hold the most potential of all and would likely be the simplest solution for courts, but it would require Congress to make a highly unlikely exception with potentially broad consequences beyond the scope of *parens patriae* claims.

While efforts to avoid due process violations resulting from public preclusion of private claims may in turn leave fewer claims available for state attorneys general, such an effect might be welcomed by the individuals *parens patriae* is intended to benefit. Indeed, creating speedbumps for *parens patriae* actions ultimately returns *parens patriae* to its roots—as a protective last resort for bringing relief to those who could not otherwise seek relief on their own behalf.