



Volume 69

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2016

# Parens Patriae and The States' Historic Police Power

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## Recommended Citation

Margaret S. Thomas, *Parens Patriae and The States' Historic Police Power*, 69 SMU L. Rev. 759 (2016)  
<https://scholar.smu.edu/smulr/vol69/iss4/4>

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# PARENS PATRIAE AND THE STATES' HISTORIC POLICE POWER

Margaret S. Thomas\*

## ABSTRACT

*Class actions have long been contracting as procedural vehicles in mass tort litigation. At the same time, parens patriae actions brought by state attorneys general for injuries to their states' citizenry have been expanding. This form of public dispute has emerged as a full-fledged alternative form of aggregate litigation in mass torts. The use of this public alternative is already widespread in consumer, antitrust, environmental, and health law cases.*

*Despite the widespread use of parens patriae litigation by states, the source of the power to sue in this way is vague and ill-defined. Courts have struggled to articulate and explain the source and scope of the state's power to bring mass tort suits for injuries to the state's populace, sometimes reaching seemingly contradictory results.*

*Although the use of parens patriae power in mass tort litigation has been both praised and criticized by complex litigation scholars, commentators have largely overlooked the historical and constitutional functional role of parens patriae litigation. This Article fills that gap by examining the states' parens patriae power from the Framing Era to the modern era in order to excavate the doctrine's historical roots and purpose in our constitutional structure. It debunks the false history used by modern courts to justify the doctrine's existence, suggesting courts have relied on a faulty foundation to expand the doctrine. In so doing, this Article makes space for a new foundation for parens patriae litigation rooted in the historic police powers of the states.*

*This Article argues that the historic police powers of the states are inextricable from parens patriae power. Modern mass tort litigation brought by states is thus deeply connected to federalism in a way that traditional class actions are not.*

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## INTRODUCTION

CLASS actions have been waning in importance as procedural vehicles in mass torts for many years.<sup>1</sup> This purported demise of class actions has long been heralded by scholars.<sup>2</sup> Indeed, the diminishing presence of class actions in the mass tort litigation landscape has been a focus of academic commentary since at least the early 1990s,<sup>3</sup> and the trend appears to have accelerated following recent Supreme Court precedent imposing higher barriers to certification of class actions in federal courts.<sup>4</sup>

Complex litigation scholarship has begun to focus on what will replace class actions in mass tort litigation. Class actions resolve mass tort disputes by binding absent class members through representative litigation.<sup>5</sup> Other forms of aggregation can also accomplish this resolution through different means. For example, multidistrict litigation and private claims facilities have emerged as increasingly important alternatives to class actions.<sup>6</sup> One of the most vibrant alternatives appears to be *parens patriae* actions: civil suits brought by state attorneys general against mass tortfeasors for injuries to the states' citizenry.<sup>7</sup> In fact, such state suits have been experiencing a period of ascendance and expansion.<sup>8</sup>

1. 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, 658 (2012) (describing class actions as being “on the ropes”); 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) (discussing the waning utility of class actions under Rule 23 and the imperfect nature of MDL as a replacement); Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012) (“Mass tort class actions have virtually disappeared . . .”); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346 & n.37 (2014).

2. See, e.g., Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 500 (1991) (applauding judicial consolidation of related suits); Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 102 (1997); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 425–27 (2005); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 828–29 (2013).

3. See Silver, *supra* note 2, at 500 (observing in the early 1990s that it was already true that narrow interpretation of class action rules made it difficult for district judges “to craft tort class actions that survive review”).

4. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (holding that “claims for individualized relief (like the backpay at issue here) do not satisfy [ ] Rule [23(b)(2)].”); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

5. See, e.g., Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1272 (2014) (discussing the increasing importance of private claims facilities); *Morphing Case Boundaries*, *supra* note 1, at 1341 (discussing multidistrict litigation’s role in mass tort litigation).

6. See, e.g., John E. Kennedy, *Digging for the Missing Link*, 41 VAND. L. REV. 1089, 1091 (1988) (reviewing STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (New Haven and Yale University Press 1987)).

7. See Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 U. MINN. L. REV. 2313, 2327–29 (2016).

8. See *id.* (describing consumer protection actions for the past fifteen years); Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1847, 1858 (2000). For a definition of “mass tort,” see *Morphing Case Boundaries*, *supra* note 1, at 1349 n.48 (explaining

Modern *parens patriae* actions generally involve a state (or sometimes several states suing together) bringing claims that belong exclusively to the state—or sometimes, bringing claims in a representative capacity belonging to its citizens.<sup>9</sup> States usually (but not always) base their claims on state or federal statutory authority.<sup>10</sup> Sometimes states invoke a common-law form of *parens patriae* power based solely on their own sovereign interests.<sup>11</sup> The common thread is that the state itself is the plaintiff, asserting a guardianship role to protect itself and its citizens from alleged harm. Some scholars observe that through these actions, states have become the primary governmental enforcers of deceptive advertising and antitrust laws.<sup>12</sup>

In the mid-1990s, use of *parens patriae* powers by state attorneys general accelerated dramatically, with such suits becoming full-fledged alternatives to traditional class actions—with the successful, multibillion dollar state litigation against the tobacco industry reflecting the full potential of such litigation.<sup>13</sup> Prior to that era, *parens patriae* suits had been lightly utilized in antitrust and environmental pollution suits.<sup>14</sup> With class actions fading in mass tort litigation, suits brought by states on behalf of citizens are now an increasingly prominent feature of a wide variety of complex litigation.

*Parens patriae* cases are already distributing massive amounts of money to plaintiffs in mass tort case settlements—sums that previously would have been the subject of class actions. An example can be found in the widely publicized settlement by three large book publishers with state attorneys general over electronic book pricing in 2013, in which publish-

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that the concept of “mass torts” generally “encompass[es] situations where many people are injured either from a single accident or event, or use of or exposure to the same product, and each has a claim for individual damages”).

9. See, e.g., Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495–97 (2012) (observing state and federal statutes granting attorneys general authority to recover damages for state citizens and state attorneys general using *parens patriae* actions to seek damages and other monetary remedies on behalf of their citizens); Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 ST. POL. & POL'Y Q. 1, 1–2 (2010) (“While the overall number of [*parens patriae*] lawsuits as well as the number of states participating has increased over time, some states are much more active participants than others . . . .”) (internal citation omitted).

10. Cox, *supra* note 7, at 2324.

11. Cox, *supra* note 7, at 2327–29.

12. Provost, *supra* note 9, at 1.

13. Ratliff, *supra* note 8, at 1847 (“The success of the tobacco litigation has stimulated new initiatives respecting guns, lead paint, and, most recently, health maintenance organizations.”) (citations omitted); see also Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1883 (2000); William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1902–03 (2000).

14. See Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 193–95 (1970) (discussing an increase in the assertion of antitrust claims by state governments using *parens patriae* power and observing that prior to 1970, only one decision reflected the use of that power in an antitrust case); see also *infra* notes 207–223 and accompanying text (discussing environmental cases).

ers paid over \$166 million to settle the claims.<sup>15</sup> The same litigation also produced roughly \$400 million in liability for Apple.<sup>16</sup> The settlement money largely flowed back to consumers, in the form of credits sent by retailers.<sup>17</sup> Similarly, forty-three states recently reached a partial settlement with Volkswagen worth \$603 million over alleged faulty emissions software in its automobiles.<sup>18</sup> Meanwhile, three states are filing separate suits of their own.<sup>19</sup>

*Parens patriae* is no longer an “up and coming” alternative to class actions. It has already emerged as a fully viable, mature, and effective alternative form of mass tort litigation, capable of resolving multi-state, nine-figure complex claims. Despite this role, the states’ *parens patriae* powers have received little attention from the U.S. Supreme Court in recent years, at least compared to class actions.

In 2014, the Supreme Court finally seemed to acknowledge the role of the states in mass torts in *Mississippi ex rel. Hood v. AU Optronics Corporation*,<sup>20</sup> a decision that seems likely to accelerate the rise of *parens patriae* suits as an alternative to class actions. This decision clarified that these state-brought mass tort actions are not removable to federal court under the Class Action Fairness Act (CAFA) because they are not class actions. They also are not subject to the array of procedural hurdles federal courts have developed as obstacles to class certification using Federal Rule of Civil Procedure Rule 23. The decision implicitly blesses litigating *parens patriae* mass tort suits in state courts,<sup>21</sup> using state procedural rules, even though class actions involving the same torts would be removable to federal court under CAFA and constrained by Rule 23’s rigorous

15. See Andrew Albanese, *Publishers Have Paid \$166 Million to Settle E-Book Claims*, PUBLISHERS WKLY (Jul. 24, 2013), <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/58412-publishers-have-paid-166-million-to-settle-e-book-claims.html> [https://perma.cc/2QL7-QYLB].

16. See James R. Hood, *Appeals court upholds \$400 million e-book price-fixing settlement with Apple*, CONSUMER AFFAIRS, <https://www.consumeraffairs.com/news/appeals-court-upholds-400-million-e-book-price-fixing-settlement-with-apple-063015.html> [https://perma.cc/4LGY-G935].

17. *Id.*

18. David Shepardson, *Three U.S. States Plan Lawsuits over Volkswagen Diesel Pollution*, REUTERS (July 18, 2016), <http://www.reuters.com/article/us-volkswagen-emissions-idUSKCN0ZY2JU> [https://perma.cc/7CND-J7LF].

19. See Complaint, Maryland Dep’t of Env’t v. Volkswagen, No. 24-C-16-004114 (Md. Cir. Ct. July 19, 2016); Complaint, Massachusetts v. Volkswagen, No. 16-2266D (Mass. Super. July 19, 2016); Complaint, New York v. Volkswagen, No. 9040212016 (N.Y. Sup. July 19, 2016).

20. See 134 S. Ct. 736, 739 (2014) (holding that *parens patriae* actions (i.e., where the state is the plaintiff) are not procedurally equivalent to class actions, under the Class Action Fairness Act, despite some surface similarities).

21. See, e.g., Paul Thibodeaux & Danny Dysart, *Supreme Court’s CAFA Decision Changes Law in Fifth Circuit*, A.B.A. SEC. LIT., <http://apps.americanbar.org/litigation/committees/pretrial/articles/spring2014-0614-supreme-courts-cafa-decision-changes-law-fifth-circuit.html> [https://perma.cc/AKL4-E9T7] (“While the practical result of *Hood* is that state *parens patriae* actions are likely no longer subject to CAFA mass-action removal, a broader question is whether *Hood* will encourage the filing of *parens patriae* actions in place of traditional Rule 23 class actions, which have been increasingly difficult to certify.”).

requirements for class certification. In other words, *parens patriae* litigation can evade virtually all of the class action hurdles that have been erected by Congress and the Supreme Court.

*Parens patriae* litigation is already a prominent feature in the legal landscape of consumer, antitrust, environmental, and health law disputes. However, the doctrine's modern contours have long been vague and ill-defined, particularly in regard to states raising claims for injuries to their citizens. By the middle of the twentieth century, the Supreme Court had virtually given up the task of defining the doctrine's contours and simply declared the meaning of *parens patriae* "[was] murky."<sup>22</sup> Despite its amorphousness, the doctrine's modern incarnation appears to be firmly rooted in the pragmatic expansion of aggregate litigation in the mid-twentieth century, developing independently of Rule 23.

The "murkiness" of *parens patriae* power has sometimes resulted in a judicial struggle to articulate and explain when the state has authority to bring mass tort suits for injuries to the state's residents. Although purporting to trace the concept of *parens patriae* back to the "royal prerogative" of the English Crown at common law,<sup>23</sup> the Supreme Court has admitted that the venerable English royal prerogative "has relatively little to do with the concept of *parens patriae* standing that has developed in American law."<sup>24</sup> Those historical roots, however, continue to be invoked in judicial opinions to legitimize the state power to sue in this capacity.

Historical skepticism of the doctrine led critics to call the *parens patriae* powers in mass torts "disturbing"<sup>25</sup> and "loopy."<sup>26</sup> Meanwhile, use of these powers has been both praised for its effectiveness and efficiency in comparison to class actions<sup>27</sup> and critiqued for its potential to create conflicts of interest in the state's representation of citizens, leading to inadequate representation.<sup>28</sup>

Modern academic literature on *parens patriae* has primarily focused on its efficiency and effectiveness in achieving the goals of complex litigation, by comparing *parens patriae* cases to class actions. Several scholars have carefully evaluated the policy costs and benefits associated with a robust *parens patriae* authority, reaching different conclusions about the value of such litigation in the mass tort context.<sup>29</sup> This debate has largely

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22. See Ratliff, *supra* note 8, at 1850–51, 1851 n.18 (citing *In re Gault*, 387 U.S. 1, 16 (1967)).

23. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

24. *Id.*

25. Pryor, *supra* note 13, at 1913.

26. Ratliff, *supra* note 8, at 1851.

27. Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1939 (2000).

28. Lemos, *supra* note 9, at 492.

29. For examples of recent criticism of robust *parens patriae* authority as lacking in adequate procedural protections for public claims, see Lemos, *supra* note 9, at 542; Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1995–96 (2012); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914–16 (2008).

overlooked the structural role of *parens patriae* cases in our constitutional system—a role that fundamentally distinguishes the *parens patriae* power from any other type of complex litigation. This Article contends the policy debate comparing *parens patriae* to class actions ignores the special role of the *parens patriae* power in our constitutional system—a role that reflects different values and a different purpose than Rule 23's class actions.

This Article poses two foundational questions regarding the *parens patriae* doctrine: (1) why does it exist in the American legal system at all, and (2) what, if any, constitutional purpose does it serve? Through these questions, this Article excavates the conceptual foundations of the doctrine's application in complex litigation and demonstrates the doctrine's deep, historical roots in constitutional federalism, particularly in the structural constitutional understanding of the late-nineteenth and early-twentieth centuries.

This Article demonstrates that the modern *parens patriae* doctrine is a feature of American federalism. Liberated from the English common law pedigree and mythological royal roots, the doctrine's American constitutional contours become clearer, and its limits are revealed as an expression of the state's historic police powers. Moreover, modern statutory applications of the doctrine arguably comport with Framing-era understandings of sovereign power. Focusing on the relationship between the *parens patriae* and the state's historic police powers illuminates the deficiency with modern policy debate that compares the power to Rule 23. Despite the surface similarities, class actions under Rule 23 and *parens patriae* actions by state attorneys general rely on different structural values and serve different purposes.

The Supreme Court apparently views the class certification device under Rule 23 as a mere procedural joinder device.<sup>30</sup> By contrast, the *parens patriae* power of states to sue in mass tort actions is a feature of federalism.

This Article proceeds in three parts. Part I summarizes the policy debate regarding modern *parens patriae* suits, in which scholars view *parens patriae* through the lens of class actions in complex litigation. The Article then proceeds to show why that lens offers an incomplete understanding of *parens patriae*.

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For examples of defenses of *parens patriae*'s utility as an efficient, effective form of mass litigation, see Gilles & Friedman, *supra* note 1, at 630, 660; Brunet, *supra* note 27, at 1932–34, 1936; Cox, *supra* note 8, at 2330–31.

30. See *Shady Grove Orthopedic Ass'ns v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (Scalia, J., plurality) (describing Rule 23 as “a species” of “traditional joinder” because it “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits”). The modern form of the class action device was largely created by the 1966 amendments to the Federal Rules of Civil Procedure, though earlier forms of class actions had existed even under the old Equity Rules. See, e.g., Tom Ford, *The History and Development of Old Rule 23 and the Development of the Amended Rule 23*, 32 ANTITRUST L. J. 254, 254–55, 258–62 (1966).



Part II examines the justifications for *parens patriae*'s application in America, including the historical narratives regarding the English roots of the modern *parens patriae* doctrine. The oldest, and most persistent of these narratives, is dubbed her "the Sovereignty Transference theory," which posits that, at the time of the American Revolution, the new states received the prerogatives of the English Crown. This Article reconstructs the history of the doctrine from the Framing Era and identifies historical errors embedded in its development. It identifies historical problems with this theory, based on the understandings of the Framing generation and argues that the Sovereignty Transference theory is untenable. The second possible historical justification for *parens patriae* is dubbed "the Universal Sovereignty theory," under which the *parens patriae* powers asserted by the states are deemed to be inherent, universal powers that any functioning state must possess. This theory emerged at the same time as federal general common law in other areas in the mid-nineteenth century and reflects identical reasoning. It derives general, universal principles and imputes them onto the states to create a common law supervisory power. This Article argues that this federal theory of *parens patriae* did not survive the Supreme Court's abolition of federal common law in 1938,<sup>31</sup> and it cannot offer a solid modern foundation to explain robust state guardianship powers in mass tort litigation.

Part III shows that two variants of these theories invoked by the Supreme Court to justify *parens patriae* are an inadequate foundation for the expansive modern use of the doctrine. It traces the historical expansion of state use of *parens patriae* power and argues that modern confusion about the doctrine flows from the lack of coherence in the doctrine's foundation. None of the classic justifications for *parens patriae*'s existence in America can carry the load of the modern application of the doctrine.

In Part IV, this Article offers a different justification for *parens patriae* power that situates the modern doctrine within our constitutional system. It demonstrates that evolving understandings of the power have reflected then-current contours of the states' historic police powers. Indeed, the power expanded in the early twentieth century in tandem with the scope of the states' police powers. This Article thus situates *parens patriae* as a reflection of the states' historic police powers in our constitutional system. This understanding better explains the outcomes of cases and liberates them from false historical frameworks that only cause confusion.

## I. THE MODERN PARENS PATRIAE CONTROVERSY

A robust academic literature is developing that evaluates the merit of *parens patriae* as a method of litigating mass torts. This literature focuses on *parens patriae* as an alternative to, or replacement for, class actions.

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31. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

For this reason, it emphasizes the same values often used to evaluate the utility of class actions.

Several commentators have emphasized the pragmatic benefits of *parens patriae* actions in the mass tort context. Professor Gilles and Mr. Friedman have called for greater use of *parens patriae* powers to fill the void created by the demise of class actions.<sup>32</sup> They emphasize the efficiency benefits and effectiveness of *parens patriae* as an alternative procedural vehicle. Professor Brunet has also carefully outlined the efficiency benefits flowing from state representation of citizens in damages class actions, including improved overall effectiveness that remedies some of the classic problems with class actions.<sup>33</sup> These scholarly approaches treat *parens patriae* as a substitute procedural vehicle for aggregation.

In contrast, Professor Lemos has critiqued the value of representative suits brought by states *because* they mimic class actions. She suggested that a long-standing, influential law-and-economics critique of private class actions could potentially apply with equal force when states represent their own citizens: namely possible conflicts of interest,<sup>34</sup> lack of client monitoring and control,<sup>35</sup> and incentives to settle cases too cheaply.<sup>36</sup> She also claimed that these problems can create due process concerns when states assert mass-tort claims on behalf of their citizens where the state action can preclude future individual claims that may not have been adequately represented by the state.<sup>37</sup> The force of this critique militates in favor of greater procedural regulation of them, probably along the lines of the closer scrutiny that class actions have experienced. In other words, it tends to suggest that Rule 23's complexity should be grafted onto *parens patriae* actions.

Professor Cox has recently responded by showing the concerns raised in academic critics of *parens patriae* are not borne out in practice and that the critique overstates the risk of preclusion of private claims.<sup>38</sup> He pointed to copious precedent suggesting *parens patriae* litigation gener-

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32. Gilles & Friedman, *supra* note 1, at 630, 660 (“In our view, state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through expanded use of the *parens patriae* powers . . .”).

33. Brunet, *supra* note 27, at 1932–34, 1936.

34. Lemos, *supra* note 9, at 512–13.

35. *Id.* at 518–22.

36. *Id.* at 522–29.

37. *Id.* at 540–41; accord Verity Winship, *Policing Compensatory Relief in Agency Settlements*, 82 U. CIN. L. REV. 551, 552 (2013); Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 45 (2014).

38. Cox, *supra* note 8, at 2336–37 (“The case law is reasonably clear that public compensation generally does not result in preclusion of private claims for monetary relief. Accordingly, concerns about Due Process protections for recipients are misplaced.”); *id.* at 2344–45 (“Because no judicial decision holds that preclusion of private monetary relief claims follows public compensation from a state attorney general action without procedural protections similar to a class action, the Lemos article is plainly wrong about the prevailing view of courts, especially when that assertion is directly contrary to substantial case law and practice patterns.”); *id.* at 2360 (“[U]rging class action procedures only as to public compensation misconstrues the purpose and operation of public enforcement.”).

ally does not preclude later claims for monetary damages by private plaintiffs.<sup>39</sup> Moreover, it would seem that any hypothetical excessive preclusion issues (allegedly flowing from citizens potentially losing claims settled too cheaply by states) would be a matter of fine-tuning *preclusion* doctrine to preserve those claims, and not an inherent defect of *parens patriae* doctrine itself.

Professor Gifford also observed that the settlements created by such litigation, targeting entire industries, act as a form of regulation, without the involvement of any legislature—creating separation of powers concerns at the state governmental level.<sup>40</sup> This contribution is helpful because it emphasizes state governmental values in the critique.

Critiques and defenses largely focus on the practical effects of the doctrine's application in the mass tort context tend to evaluate *parens patriae* litigation by the same metrics used to measure the effectiveness of representative suits under Rule 23. These contributions leave the structural rationale for *parens patriae* in American federalism submerged in the debate.

The murky historical foundation underlying the doctrine has not been challenged or examined in these critiques or defenses of the modern application of the doctrine. Despite the scholarly division about doctrinal contours and utility, there is little doubt that the doctrine is well entrenched and expanding. These scholars fall into two camps: one recommends putting the brakes on that expansion, and the other advocates for continuing the expansion—largely for instrumental reasons.

This Article seeks to move beyond those instrumental reasons (such as efficiency and accuracy), to focus instead on the structural role *parens patriae* actions play in our federal system. Part II thus turns to the history and purpose of state *parens patriae* power as an independent doctrine, with a different systemic function than Rule 23 aggregation.

## II. AMERICAN SOURCES OF PARENS PATRIAE POWER

Two theories of *parens patriae* power dominate the Supreme Court's precedent. The first, and by far the most important, posits that states inherited the English king's prerogatives to act as "guardian of the realm" at the time of the American Revolution, and that these royal prerogatives are the foundation for state *parens patriae* power. This Part argues both premises are false: the states neither inherited royal prerogatives in the manner described in the cases nor were those prerogatives the real source of American *parens patriae* power.

This false theory of the doctrine's origin can be described as the "Sovereignty Transference" theory of *parens patriae*. Part II.A explores the rise of the Sovereignty Transference theory in American jurisprudence

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39. See Cox, *supra* note 8, at 2337–39; see also Hensler, *supra* note 1, at 58–59 (disagreeing with Lemos).

40. See Gifford, *supra* note 29, at 920, 930.

and contrasts it with nature of the king's power in England at the time of the American Revolution, and the conceptual problems with purported transference. It concludes that transference of any power from the English king to the states after the American Revolution was complicated by the existence of English statutory authority constraining the Crown's guardianship power. States received and repealed this statute inconsistently. In fact, cases from the Framing Era showed courts at that time were acutely aware of the problem such statutory reception posed.

Part II.B examines a second theory of *parens patriae* that emerged in the mid-nineteenth century. This second theory asserts that the power was a reflection of inherent sovereignty. This Article dubs this the "Universal Sovereignty" theory of *parens patriae*, based on its claim that the power reflects some feature of universal governance. This theory emerged through the vehicle of general common law in an era when federal courts were still in the business of deriving such law from general principles. This theory was rarely invoked, but it seems to have vanished after the Supreme Court obliterated the federal general law.

#### A. THE SOVEREIGNTY TRANSFERENCE THEORY OF PARENS PATRIAE POWER

##### 1. *The King as Guardian of the Realm*

The *parens patriae* doctrine in America is commonly traced to the role of English Crown as a guardian of realm.<sup>41</sup> Under this view, the power allegedly derived from the king's duty "to take care of his subjects as are legally unable" to care for themselves.<sup>42</sup> This power reportedly encompassed legally protecting subjects lacking mental capacity (including children and those afflicted by mental infirmity), as well as the oversight of charitable trusts.<sup>43</sup> The lord chancellor, as "keeper of the sovereign's conscience," held this power in the king's name and delegated it to English chancery.<sup>44</sup>

The notion of the royal prerogative as the source of *parens patriae* power in America appears to be rooted in Blackstone's *Commentaries on the Laws of England*, describing the king as "the general guardian of all infants, idiots, and lunatics; and has the general superintendence 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."<sup>45</sup> This passage from Blackstone's influential 18th-cen-

41. See, e.g., Ratliff, *supra* note 13, at 1850; George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896 (1976) (discussing Blackstone's view of the power).

42. Curtis, *supra* note 41, at 896 (quoting J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN 155 (1820)).

43. Curtis, *supra* note 41, at 896 & n.5.

44. See George E. Gardner, *Charities and Trusts for Charitable Uses*, in THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 893, 901 (David S. Garland et al. eds., 2d ed. 1897).

45. 3 WILLIAM BLACKSTONE, COMMENTARIES \*47.

ture treatise was quoted in one of the earliest U.S. Supreme Court cases analyzing the power,<sup>46</sup> and it has been repeated ever since.

Faith in the historical power of the English king being the foundation for American *parens patriae* power persisted throughout the twentieth century. For example, in 1972, in *Hawaii v. Standard Oil Company of California*, the U.S. Supreme Court echoed Blackstone and declared the doctrine had its roots in “the ‘royal prerogative,’” which included the responsibility to care for “all infants, idiots and lunatics.”<sup>47</sup> With little explanation, the Court concluded that the old English “royal prerogative” and its attendant *parens patriae* power, belonging to the king, “passed to the States” at the time of the American Revolution.<sup>48</sup>

The *Standard Oil* opinion makes this sweeping historical conclusion without citing any sources or even offering arguments in support of the claim. The Court treats the conclusion as self-evident. American *parens patriae* power is depicted as simply emerging wholly formed from the transference of the Crown’s power to the several states.

The Court’s conclusion regarding the transfer of the king’s prerogatives to the states has not been interrogated by the scholarly literature—or even the Court’s own subsequent opinions.<sup>49</sup> In the leading historical treatment of the doctrine published in 1976, George Curtis offered a detailed account of the doctrine’s use in England and concluded that “[t]he state has assumed [the king’s] mantle.”<sup>50</sup> He offered no analysis to support this conclusion about transference—pointing instead to a handful of Supreme Court decisions relying on the purported royal prerogative, without any independent historical support.

This Article calls this mainstream historical explanation the Sovereignty Transference theory of *parens patriae* because its logic depends on some vestige of the English Crown’s prerogatives transferring to the states at some specific historical moment during the American Revolution. It thus requires two premises to be true: first, that such a royal prerogative existed in England at the time of the American Revolution, and second, that this power flowed through some mechanism to the newly independent states.

Part II.A.2 examines both of these premises and concludes both are dubious at best, and probably outright false.

## 2. *The Mythology of Sovereignty Transference: Misunderstood Prerogatives & the Forgotten English Statutory Scheme*

Although modern American *parens patriae* cases assert that some generalized guardianship role of the English king transferring to the Ameri-

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46. *Trs. of Phila. Baptist Ass’n v. Hart’s Ex’rs*, 17 U.S. 1, 47 (1819).

47. 405 U.S. 251, 257 (1972) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*47).

48. *Id.*

49. Scholars have generally taken the Court’s historical assertions at face value. *See, e.g.*, Lemos, *supra* note 9, at 493 n.22; Malina & Blechman, *supra* note 14, at 197–202.

50. Curtis, *supra* note 41, at 914.

can states at Independence, early American cases discussing *parens patriae* power reflected a more complex narrative. In fact, early cases uniformly rejected the notion of any “prerogative power” vested in the courts of equity in the United States.<sup>51</sup> In fact, the American Revolution was arguably aimed at dispensing with the power of the king and, by implication, the royal prerogatives of the English Crown.<sup>52</sup>

The early American court cases involving *parens patriae* presented only a single form of the alleged royal guardianship prerogative: supervision of charities. Indeed, in the first half of the nineteenth century, this was the *sole* context in which the Supreme Court discussed transference of any royal prerogatives and *parens patriae* power. As will be explained below, the states’ power over charities was the foundational *parens patriae* power in the Framing Era.

Blackstone and other English sources described the king’s supervision of charitable trusts as one of the core royal prerogatives, exercised through the lord chancellor.<sup>53</sup> This particular royal prerogative came up over and over again in early *parens patriae* cases in the first few decades of the American Republic: the first *parens patriae* cases after the Framing involved the need for states to use that discretionary sovereign power to reform charitable bequests. The king’s power over charities is the necessary starting point to test the transference theory because it was the royal prerogative courts focused upon in the Framing Era.

As a matter of first principles, A.V. Dicey observed that the entire “power of the English state is concentrated in the Imperial Parliament.”<sup>54</sup> Parliament is the ultimate sovereign in England,<sup>55</sup> but it is not a singular entity: it consists of the Crown, the House of Lords, and the House of Commons.<sup>56</sup> It acts through all three constituent parts together, in order to enact legislation.<sup>57</sup> The result is that when Parliament acts, the Crown alone lacks discretionary authority over the matter.<sup>58</sup> Executive powers must nearly always be exercised under Acts of Parliament.<sup>59</sup> This fundamental English constitutional feature is a significant (and intentional) constraint on the monarchy.<sup>60</sup> It is thus axiomatic that Parliament can

51. See Garland, *supra* note 44, at 901 (cataloging early state and federal cases).

52. See, e.g., *In re Mun. Suffrage to Women*, 36 N.E. 488, 492 (Mass. 1894) (J. Holmes) (“Hobbes urged his motion in the interest of the absolute power of King Charles I., and one of the objects of the constitution of Massachusetts was to deny it.”).

53. BLACKSTONE, *supra* note 45, at \*427; Curtis, *supra* note 41, at 896 & n.5.

54. A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 86 (8th ed., 1982); see also *id.* at 4 (“The power and jurisdiction of Parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.”) (quoting 4 SIR EDWARD COKE, INSTITUTES OF THE LAWE OF ENGLAND 36 (London, 1644)); *id.* at 25 (“This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution.”).

55. *Id.* at 271.

56. *Id.* at 268.

57. *Id.* at 2.

58. *Id.* at 271.

59. *Id.* at 268.

60. DICEY, *supra* note 54, at 268 (explaining that it “prevents those inroads upon the law of the land which a despotic monarch . . . might effect by ordinances or decrees”).

constrain royal prerogatives.

The parliamentary sovereignty described by Dicey in 1895 was already firmly entrenched in England by the end of the eighteenth century, at the time of the American Revolution.<sup>61</sup> Thus, the Framing generation in the United States would have understood the concept of the King-in-Parliament, where the Crown functioned as merely one of Parliament's three constituent parts. The notion of benevolent, absolutist monarchs serving as guardians of the realm would have likely seemed at best fanciful and at worst downright dangerous to the Framers.<sup>62</sup> Indeed, the idea of it contradicted the core premise of the American Republic, where sovereignty in the constitutional compact flows *from the people* through the Constitution to the states and federal government,<sup>63</sup> and not from the king (or even Parliament) down through the rest of the government.<sup>64</sup>

The concept of parliamentary sovereignty in England necessarily implies that Parliament, acting collectively, has power over the Crown, acting alone.<sup>65</sup> Indeed, Dicey observed that even the King's own "claim to reign depends upon and is the result of a statute."<sup>66</sup> Dicey showed this principle was settled in England by the seventeenth century.<sup>67</sup> By 1610, it was judicially settled that the Crown had no power to make law, and the Crown's power had been checked by Parliament.<sup>68</sup> This had implications for the royal prerogatives.

Continental notions of powerful royal prerogatives, popularized in France, had a short run in England during the Stuart line into the seventeenth century.<sup>69</sup> In a time of religious and political turmoil, the Crown had unprecedented power, ultimately leading to increased power of the dreaded Star Chamber as an expression of the royal prerogative.<sup>70</sup> This

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61. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1644 & n.171 (2011).

62. See Daniel D. Birk, *Marbury, Hayburn's Case, and the Separation of the Judicial and Executive Powers* (July 20, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2811668](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811668) [<https://perma.cc/U7D8-M6NW>].

63. See U.S. CONST. pmbl.

64. An astute observer of the American Republic, Dicey noted that the English parliamentary sovereignty distinguished it from our federal constitutional system, where residual power that is not vested in Congress belongs to the states. See DICEY, *supra* note 54, at 73–74. By contrast England has no such structure. *Id.* Acts of Parliament can be repealed by Parliament (but not by the king alone). *Id.* at xlii.

65. *Id.* at 5 ("True it is, that what the Parliament doth, no authority upon earth can undo.") (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES, \*160–61).

66. *Id.* at 6.

67. *Id.* The reign of Henry VIII and an Act of Parliament granting the Crown power to legislate in parallel in 1529 was the high-water mark of the Crown's power in England, and it was relatively short-lived and soon repealed, according to Dicey, because "of its inconsistency with the whole tenor of English law." *Id.* at 11.

68. *Id.* at 13 (explaining that such proclamations "serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament.").

69. *Id.* at 242.

70. See *id.* at 242–43 (describing Bacon's archaic view that the royal "prerogative was something beyond and above the ordinary law" being akin to French monarchic institutions); see also Pfander & Birk, *supra* note 61, at 1644 n.171 (discussing the end of the "absolutist ambitions of the Stuart kings" being replaced by "parliamentary supremacy").

augmentation of the Crown's authority ultimately failed in the seventeenth century when parliamentary sovereignty emerged as the prevailing ideal and political reality.<sup>71</sup>

Thus, 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. Indeed, there are reasons to doubt the political reality of the version of the prerogatives popularized by Blackstone, who described them as "positive substantial parts of the royal character and authority."<sup>72</sup> Indeed, English legal scholars have long observed the wide gulf between Blackstone's idealized theory of the monarchy and the real King's powers.<sup>73</sup> This disconnect has been described as flowing from "two different senses in which the word King is employed."<sup>74</sup> One refers to a theory of the ideal of the King, and the other is a real King operating in a political reality of shared governance.<sup>75</sup>

Blackstone referred to the King in the idealized sense, when he theorized that the guardianship prerogative reflected the King as "the fountain of justice, always present in all his courts, the fountain of honor."<sup>76</sup> Indeed, John Allen, writing in the early nineteenth century, recognized this was a fictionalized King for the theory of monarchy, not the "real King of the constitution."<sup>77</sup>

For purposes of the Sovereignty Transference theory of *parens patriae* power in America, the King's *real* power at the time of independence is key, as the theory relies on a premise of actual transference of power. However, by 1601, Parliament had already taken control of supervision of charities through legislation.

The next Part will show 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.

### 3. *The Statute of Elizabeth of 1601 & Parliament's Supervisory Powers*

Given that Parliamentary sovereignty is the first principle of the English constitutional system, it necessarily follows that Parliament has the power to take control of matters that once were royal prerogatives. Sir Edward Coke famously held in the seventeenth century that "the King

71. DICEY, *supra* note 54, at 245.

72. 1 WILLIAM BLACKSTONE, COMMENTARIES \*239-40.

73. See, e.g., JOHN ALLEN, INQUIRY INTO THE RISE AND GROWTH OF THE ROYAL PREROGATIVE IN ENGLAND 34-35 (1849 ed.) ("Blackstone either contradicts himself . . . or, when he ascribes sovereignty without qualification to the King, he speaks of the ideal King, who is supposed by a legal fiction to represent and possess the whole power and authority of the state, and not the real King, who cannot pass a turnpike act without the advice and consent of his Lords and Commons. The ideal King of the lawyers is a King above law; the real King of the constitution is a King subject to law.").

74. *Id.* at 35.

75. *Id.*

76. Curtis, *supra* note 41, at 896; see ALLEN, *supra* note 73, at 35 ("Perfection is another attribute of royalty, which the lawyers have found a difficulty in transferring from their own fictitious creation to the real King of the constitution.").

77. ALLEN, *supra* note 73, at 35.



hath no prerogative, but that which the law of the land allows him.”<sup>78</sup> Indeed, Sir William Holdsworth asserted that the idea of the primacy of law over the King’s prerogative was a dominant political idea stretching all the way back to the Middle Ages.<sup>79</sup>

Though the royal prerogatives may have been historically “the residue of discretionary or arbitrary authority,”<sup>80</sup> the nature of the prerogative changed in the seventeenth century. Parliament cut away the royal prerogatives in many areas.<sup>81</sup> Indeed, in 1689, the Bill of Rights brought the idea of royal prerogatives expressly under Parliament’s control by clarifying that “Parliament could amend or revoke any prerogative power.”<sup>82</sup> The King also lacked the power to create new prerogatives after this.<sup>83</sup> In other words, the entire universe of potential prerogatives was limited to those existing before 1689, and tolerated by Parliament.<sup>84</sup> Parliament’s control over the prerogative powers in that era also resulted in the relocation of those powers from “the Monarch in person to the Monarch’s advisers or ministers”—in the sense that they simply became powers of the central government, not of the King.<sup>85</sup>

By the time of the American Revolution, royal prerogatives were thus already limited. The question thus becomes what royal guardianship powers existed in 1689 and persisted into the eighteenth century. Long before 1689, the royal prerogative related to charitable trusts had already been taken over by Parliament. In 1601, Parliament passed an act that went to the very heart of the King’s duty to care for those who could not care for themselves. The Statute of Elizabeth of 1601, “An Acte to redresse the Misemployment of Landes Goodes and Stockes of Money heretofore given to Charitable Uses.”<sup>86</sup> Though this statute has long been the subject of intensive study by scholars of the law of charities,<sup>87</sup> it has been largely overlooked by modern proponents of Sovereignty Transference and

78. Brigid Hadfield, *Judicial Review and the Prerogative Powers of the Crown*, in *THE NATURE OF THE CROWN: A LEGAL AND POLITICAL ANALYSIS* 197, 198 (Maurice Sunkin et al. eds., 1999) (quoting *Case of Proclamations* (1611) 77 Eng. Rep. 1352; 12 Co. Rep. 74, 76).

79. 10 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 358 (Methuen & Co. Ltd. 1975) (1903).

80. DICEY, *supra* note 54, at 282; *see also* Hadfield, *supra* note 78, at 200.

81. Hadfield, *supra* note 78 at 198–99; *see also* HOLDSWORTH, *supra* note 79, at 340 (“[T]hrough the King was personally above the law, his prerogative was subject to it.”).

82. Hadfield, *supra* note 78, at 199; HOLDSWORTH, *supra* note 79, at 361 (“After 1688 it was clear that the prerogative in all its parts was subject to law.”).

83. Hadfield, *supra* note 78, at 199.

84. *See id.*

85. *Id.*

86. Statute of Charitable Uses 1601, 43 Eliz. 1, c 4 (Eng.)

87. *See, e.g.*, JAMES J. FISHMAN, *THE FAITHLESS FIDUCIARY AND THE QUEST FOR CHARITABLE ACCOUNTABILITY 1200–2005* 85–87 (2007); James J. Fishman, *Charitable Accountability and Reform in Nineteenth-Century England: The Case of the Charity Commission*, 80 CHI.-KENT L. REV. 723, 729 & n.31 (2005); Rupert Sargent Holland, *The Modern Law of Charities as Derived from the Statute of Charitable Uses*, 52 AM. L. REG. 201, 203 (1904); Jill R. Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 4 MICH. ST. L. REV. 989, 996 (2009).

scholars of *parens patriae*, despite the emergence of *parens patriae* in the Founding Era in America in charity cases.

The Statute of Elizabeth had enormous significance in the history of charities in England and America in that it defined the range of acceptable charitable purposes.<sup>88</sup> Colonial law followed these same charitable purposes.<sup>89</sup> It thus had clear substantive dimension. Professor Jill Horwitz observed that this statute was in part inspired by Henry VIII's conflict with the church over property rights, worth one-third to one-half of all the wealth in England.<sup>90</sup> Professor James Fishman also documented the responsiveness of the statute to the economic problems of the 1590s in which forty percent of the English population could not maintain basic subsistence, malnutrition was rampant, and property crimes were escalating.<sup>91</sup> Meanwhile, efforts to provide relief for the poor were unpopular and met stiff resistance.<sup>92</sup>

The Statute of Elizabeth was part of a package of "poor law legislation" from 1597 to 1601 that sought to respond to the economic and social crisis.<sup>93</sup> The statutory scheme was designed to encourage and facilitate private philanthropy to benefit the poor.<sup>94</sup> These "poor laws" persisted in England without meaningful change until 1834.<sup>95</sup>

A core feature of the Statute of Elizabeth was the creation of a system of legal accountability for charitable gifts.<sup>96</sup> This was responsive to a popular perception that trustees of charitable organizations often swindled donors.<sup>97</sup> This perception probably had its roots in Henry VIII's dissolution of church monasteries in the 1530s, based on alleged ecclesiastical misuse of charitable assets,<sup>98</sup> and the subsequent attempts by patrons to reclaim their past donations to the church.<sup>99</sup> In this environment, even after the Reformation, complaints to the chancellor (who acted on the King's behalf) often went unremedied, as the Chancery typically failed to offer any relief to claimants, responding instead with jurisdictional objections.<sup>100</sup> Indeed, Professor Fishman contends that before 1597, there was no adequate procedure in the Chancery for the Crown to protect charitable assets, and endless judicial delays were common.<sup>101</sup> Worse, under the English system, a charity beneficiary petitioning for relief could have

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88. Horwitz, *supra* note 87, at 996.

89. *Id.* at 1001.

90. *Id.* at 995.

91. FISHMAN, *supra* note 87, at 86.

92. *Id.* at 86, 97.

93. *Id.* at 87, 94, 96.

94. *Id.* at 88–89.

95. *Id.* at 87.

96. *Id.* at 99–100.

97. *Id.* at 100–01.

98. Fishman, *supra* note 87, at 29–30.

99. *Id.* at 30. Fishman describes accounts of "forcible seizure" of such donations, ranging from a widow retrieving a cow, to cities making large expropriations. *Id.*

100. FISHMAN, *supra* note 87, at 99–100 (describing hyper-technical procedural objections that doomed such claims and prevented relief).

101. *Id.* at 100.

been forced to pay legal costs if the claim was unsuccessful, resulting in financial ruin.<sup>102</sup>

Prior to the Statute of Elizabeth, the King's agents thus effected little actual guardianship with regard to charity supervision, despite whatever residual, historical royal prerogatives may have theoretically existed. The royal prerogative and beneficence that existed in Blackstone's ideal theory of the monarchy probably rarely protected real victims of mismanaged or plundered charities. This was the social context for Parliament's creation of a new oversight scheme to ensure effective charitable supervision so that the public would have confidence that donations would be used for their intended purpose.<sup>103</sup>

The statute created new procedures to investigate theft or misuse of assets and clarified the chancellor's role.<sup>104</sup> These new procedures included the appointment of commissioners to investigate improper use of assets.<sup>105</sup> The preamble also enumerated the permissible charitable uses under the statute's ambit, focusing particularly on relief of poverty.<sup>106</sup> Importantly, the statute also gave direction to the chancellor about enforcing and reforming bequests.<sup>107</sup>

Parliament's exercise of power over the supervision of charities makes it impossible to treat such supervision as a pure royal prerogative by the time of the Revolution. Indeed, even Blackstone is understood to have defined prerogatives as exclusive and unique to the Crown, not shared with Parliament.<sup>108</sup> Once a power became authorized by, defined by, and controlled by Parliament, it ceased to be a true "prerogative."<sup>109</sup>

By 1601, any historical royal prerogative regarding charities had become constrained by a statutory scheme. In other words, charitable supervision became a creature of parliamentary control, no longer possessed by the Crown alone. By the time of the American Revolution, any sovereign "guardianship power" over charities thus had statutory constraints. Charitable supervision thus cannot properly be considered a true prerogative after this period.<sup>110</sup> There was therefore no true royal

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102. *Id.*

103. *Id.*

104. *Id.* at 101.

105. Holland, *supra* note 87, at 203.

106. FISHMAN, *supra* note 87, at 102; Horwitz, *supra* note 86, at 999.

107. *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1, 30–31 (1819).

108. Sir William Wade, *The Crown, Ministers and Officials: Legal Status and Liability*, in *THE NATURE OF THE CROWN, A LEGAL AND POLITICAL ANALYSIS* 23, 30 (Maurice Sunkin et al. eds., 1999) ("Blackstone pointed out that 'prerogative' power should, properly speaking, mean power which is unique to the Crown—for example, the power of pardon, the power to create a peer and the power to summon and dissolve Parliament—as distinct from powers which the Crown shares with its subjects . . . . But the courts lost sight of this distinction and took to using 'prerogative' indiscriminately for any act of the Crown that was not authorised by statute.").

109. *See id.*

110. *Id.* (discussing Blackstone's definition of a royal prerogative as meaning "power which is unique to the Crown" and not shared).

prerogative to transfer in this area at the time of American Independence.

This history makes the Sovereignty Transference theory untenable because charitable supervision was the *core* area of parens patriae litigation in early eighteenth century America. The next Part will show that the Framing generation understood the relationship between Parliament and the Crown and the importance of Acts of Parliament being received (or rejected) by the new states. Indeed, there was considerable disagreement about the effect of English legislation about charities in the new states in the early years of the Republic—and that disagreement meaningfully impacted the American understanding of the states' parens patriae power in the decades that followed. This disagreement manifested in a stunning reversal by the Supreme Court on the effect of one of those “received” Acts of Parliament with regard to the parens patriae power.<sup>111</sup>

#### 4. *The American States' Reception of the English Statute of Elizabeth*

Prior to the American Revolution, colonial law already recognized many of the charitable uses defined by the Statute of Elizabeth.<sup>112</sup> After Independence, the statute was recognized by six states, and was re-enacted by two more.<sup>113</sup> Pennsylvania additionally recognized “principles that properly emanate from it,” without actually adopting it.<sup>114</sup> Nevertheless, it was eventually repealed or rejected by twelve states and the District of Columbia.<sup>115</sup> Reception of any uniform American parens patriae power through the statute would thus be impossible to establish, given the statute's widespread rejection by various states.

In 1819, this problem of inconsistent reception reached the U.S. Supreme Court when a case came out of Virginia, a state that expressly repealed the Statute of Elizabeth. Chief Justice Marshall's opinion considered the exercise of parens patriae power of the new American states in the context of the enforcement of charitable bequests.<sup>116</sup> The case concerned a will made in Virginia in 1790, bequeathing property to perpetually fund the education of Baptist youths in Philadelphia interested in becoming ministers.<sup>117</sup> Two years after the will was created, the Virginia Legislature repealed all English statutes, including the Statute of Eliza-

111. *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1, 47–50 (1819), *overruled by* *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 192–96 (1844).

112. Horwitz, *supra* note 86, at 1001.

113. Holland, *supra* note 87, at 207 (listing Maine, Massachusetts, Illinois, Kentucky, Missouri, and North Carolina as recognizing the Statute of Elizabeth, while Connecticut and Rhode Island re-enacted it).

114. *Id.* (quoting *Wright v. Linn*, 9 Pa. 433, 435 (1848)); *see also* *Miller v. Porter*, 53 Pa. 292, 299 (1866); Gardner, *supra* note 44, at 899–900.

115. Holland, *supra* note 87, at 207 (listing California, Delaware, the District of Columbia, Indiana, Maryland, Michigan, Mississippi, New York, New Jersey, South Carolina, Tennessee, Virginia, and West Virginia, as rejecting the Statute of Elizabeth); Gardner, *supra* note 44, at 900 (listing the same states).

116. *Phila. Baptist Ass'n*, 17 U.S. at 2.

117. *Id.* at 2–3.

beth.<sup>118</sup> Shortly thereafter, the testator died.<sup>119</sup> The informal Baptist Association in Philadelphia had not yet incorporated, so the estate's executor refused to convey the property because, at the time of the testator's death, the individuals who composed the association were not legally authorized to collect and the association itself had no legal existence.<sup>120</sup> Without a lawful beneficiary, the bequest technically failed, and the question was whether the bequest could be reformed by the state using the state's *parens patriae* power.<sup>121</sup>

As an initial matter, the opinion identified the state attorney general as the proper party to take up any residual *parens patriae* power.<sup>122</sup> 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.<sup>123</sup> For this reason, the opinion required the attorney general to be made a party.<sup>124</sup> This mechanical observation had monumental importance for the development of an American form of *parens patriae* doctrine—it designated state attorneys general as the proper parties to assert *parens patriae* power.

Chief Justice Marshall approached the problem regarding the Statute of Elizabeth in Virginia by looking at the Chancery's power in England over charitable devises.<sup>125</sup> He concluded that the English case law established that "bequests are void, independent of the [Statute of Elizabeth], and good under it."<sup>126</sup> In other words, the power of the Chancery to enforce vague or indefinite bequests depended on the statutory power.<sup>127</sup>

Since Virginia had repealed the Statute of Elizabeth, the petitioner argued that the Court could reform the will by exercising the prerogative of the King as *parens patriae* that had existed *before* the Statute of Elizabeth.<sup>128</sup> Such an approach would have simply pretended Parliament had never passed the statute, by looking at the Crown's power before the statute's enactment. In other words, it would have arrogated to Virginia power that had not actually existed in England since 1601. Without remarking on the contra-factual nature of the request, the Court found no cases supporting that power, and indeed, observed that while such power existed under the Civil Law in European nations, England had not adopted any civil code on charitable devises and had many rules at odds with civilian principles.<sup>129</sup> Indeed, Justice Marshall found ample support

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118. *Id.* at 2.

119. *Id.*

120. *Id.* at 2–3, 28.

121. *Id.* at 2.

122. *Phila. Baptist Ass'n*, 17 U.S. at 39.

123. *Id.*

124. *Id.* at 50.

125. *Id.* at 32–33.

126. *Id.* at 33.

127. *Id.* at 43.

128. *Phila. Baptist Ass'n*, 17 U.S. at 3–4, 43.

129. *Id.* at 43–44; *see also id.* at 46 ("[T]he doctrines of the court of chancery, peculiar to charities, originated not in the civil law, but in the statute of Elizabeth.").

in English cases for a conclusion that the Chancery understood its power to supervise charitable bequests as defined and limited by the statute.<sup>130</sup>

While acknowledging that some form of royal prerogative had existed to enforce charities “in very early times,” the boundaries of that prerogative were lost in the mist of time prior to the Statute of Elizabeth.<sup>131</sup> Justice Marshall thus read Blackstone’s description of the King’s broad power over charities as being historical and theoretical.<sup>132</sup>

Justice Marshall appears to have understood that whatever power the King may have had in ancient times became bounded by statute once Parliament acted.<sup>133</sup> The prerogative power had already become statutory through Parliament’s enactment of the Statute of Elizabeth. This Framing Era understanding undermines a key premise of the Sovereignty Transference theory.<sup>134</sup> At least from an Originalist perspective, Sovereignty Transference fails.

This conclusion is strengthened by another case, decided a few years later in 1830, in which a concurrence observed the correctness of *Baptist Association’s* understanding of the statute.<sup>135</sup> Justice Johnson went even further, observing that “[t]he plain object of the act of 43 Eliz. is to place in commission a troublesome branch of the royal prerogative . . . .”<sup>136</sup> The Statute of Elizabeth had “swallowed up” the royal prerogative.<sup>137</sup> Thus, the chancellor’s own authority thereafter flowed from the statute, not from the royal prerogative.<sup>138</sup>

Johnson was not alone in agreeing with Marshall. Justice Story revealed in 1830 that he too had been satisfied with Marshall’s opinion in the *Baptist Association* case.<sup>139</sup> As Part II.B explains, Justice Story later changed his mind and eventually wrote an opinion overruling *Baptist Association*. His opinion inaugurated a new era of *parens patriae* power based on

130. *Id.* at 45 (discussing *Morice v. The Bishop of Durham*, 9 Ves. 399, *aff’d* 10 Ves. 540); *id.* at 46 (“[T]he chancellor says, ‘it is the duty of the trustees, or of the crown, to apply the money to charity, in the sense which the determinations have affixed to the word in this court: viz., either such charitable purposes as are expressed in the statute, or to purposes analogous to those.’”).

131. *Id.* at 47.

132. *Phila. Baptist Ass’n*, 17 U.S. at 48–50.

133. *Id.* at 48–49 (“This superintending power of the Crown, therefore, over charities, must be confined to those which are valid in law.”).

134. The opinion also made an important point by observing that even if some hypothetical powers of the king might have transferred independent of the statute, exercising them would require the state’s attorney general to be a party. *Id.* at 50. As Virginia’s attorney general was not joined, there was no possibility of even considering the matter. *Id.* at 50.

135. *Inglis v. Trs. of Sailor’s Snug Harbour*, 28 U.S. 99, 139 (1830) (Johnson, J., concurring) (“The correctness of the decision of this court therefore in the *Baptist Association* case cannot, I think, be disputed.”).

136. *Id.*

137. *Id.* (“This controlling power being absolute and final, soon swallowed up its parent, and became original and absolute.”).

138. *Id.* (“[N]o other authority for its exercise has ever been claimed by the chancellor but the 43d Elizabeth.”).

139. *Id.* at 149–50 (Story, J., concurring).

common law alone,<sup>140</sup> which eventually led to a “general law of charities.” The Supreme Court’s reversal planted the seed for current confusion over the source of the *parens patriae* power.

#### B. THE UNIVERSAL SOVEREIGNTY THEORY OF AMERICAN PARENS PATRIAE POWER

In the mid-nineteenth century, a different historical narrative emerged from the Supreme Court to justify *parens patriae* power in the American states. It appeared just as the federal general law was expanding in the *Swift v. Tyson* era,<sup>141</sup> and it was in fact closely related to the general law. This alternative theory eventually derived *parens patriae* power from universal principles of sovereignty. Under the new theory, the power flowed not from prerogatives of the English Crown, but rather from universal principles about what it means to be a functioning government.

Following a mode of reasoning remarkably similar to the derivation of the federal general law of negotiable instruments deduced in *Swift*, the Court in this era eventually looked to Roman law and history to derive “general principles” of state power to explain *parens patriae* powers of American states.<sup>142</sup>

##### 1. *Rejecting the Statute of Elizabeth in Favor of Common Law to Justify American State Power over Charities*

The American states’ supervisory powers over charities reached the Supreme Court again in 1844.<sup>143</sup> This is precisely the same subject in which Blackstone had posited that a theoretical royal prerogative existed, but Justice Marshall had found depended on an act of Parliament in *Baptist Association*; however, Justice Story chose to approach the matter differently.<sup>144</sup>

*Vidal v. Girard’s Executor* involved a massive fortune devised to the city of Philadelphia.<sup>145</sup> A very wealthy citizen of Philadelphia bequeathed a fortune to the city to (among other things) improve a neighborhood in

140. *Vidal v. Girard’s Ex’rs, et al.*, 43 U.S. 127, 192–95 (1853).

141. 41 U.S. 1, 19 (1842) (developing a federal common law of contracts and commercial transactions based on “general principles and doctrines of commercial jurisprudence”).

142. *See id.* (“The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*”).

143. *See Vidal*, 43 U.S. at 127–128.

144. *Id.* at 192–93.

145. *Id.* at 128–29. The case loosely implicated the English Statutes of Mortmain, eleventh-century statutes that once prevented land from passing into the possession of the Church or religious corporations. *See id.* at 144–45. They came to be understood as precluding estates from passing to corporations without royal assent. *See id.* Nevertheless, Philadelphia’s charter allowed it to take ownership of real and personal property by devise, as the relevant English statute was not in effect. *Id.* at 185–87.

order to promote the health of its citizens,<sup>146</sup> found a college,<sup>147</sup> and educate orphans.<sup>148</sup> The testator identified the mayor, aldermen, and citizens of Philadelphia as beneficiaries.<sup>149</sup> The fortune was so enormous that the Pennsylvania Legislature passed an act in 1832 specifically to enable the city to accept the bequest.<sup>150</sup> The testator's heirs then sued to invalidate the bequest.<sup>151</sup> They argued the bequest was void.<sup>152</sup>

The heirs made two important arguments for the failure of the bequest: (1) the city's representatives were incapable of legally executing the purported trust or holding the property for the benefit of others, and (2) the trust's charitable purposes and beneficiaries were too indefinite under the common law of Pennsylvania.<sup>153</sup> The Statute of Elizabeth was not in effect in Pennsylvania, as had been true of Virginia in *Baptist Association*.<sup>154</sup> Story acknowledged that, in *Baptist Association*, Justice Marshall had found no English common law authority to establish the legal entity necessary to further the testator's intentions, where the case involved a donation to a trustee who lacked legal capacity to take the property and indefinite beneficiaries.<sup>155</sup> Nevertheless, the Court in *Vidal* reached the opposite result and upheld the lower court's decision to allow the state to establish the charitable trusts in Pennsylvania.<sup>156</sup> In other words, Pennsylvania had the power that Virginia lacked, though it too had not received the Statute of Elizabeth. The difference for the Court was not state law, but rather a reinterpretation of English legal history.

Relying on an English case in which the Court of Chancery had reviewed a charitable bequest for a school and upheld the charitable use, Justice Story's opinion declared that it was clear that the Chancery had the power to create and enforce charities (and charitable trusts) even where the Statute of Elizabeth did not extend to the use.<sup>157</sup> From this, he concluded that there was a common law power in the Chancery that was independent of the statute.<sup>158</sup> He relied on the "dicta of eminent [Chancery] judges" to conclude that "charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 of Elizabeth."<sup>159</sup> Justice Story then concluded that the statute was purely jurisdictional, creating commissions to oversee charities,

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146. *Id.* at 129.

147. *Id.* at 130.

148. *Vidal*, 43 U.S. at 129, 132.

149. *Id.* at 129.

150. *Id.* at 138, 190–91.

151. *Id.* at 139–43.

152. *Id.* at 143, 186.

153. *Id.* at 192–93.

154. *Vidal*, 43 U.S. at 192. The Court concluded that the Supreme Court of Pennsylvania had rejected the statute for *procedural* reason, but it acknowledged the statute's list of charitable uses, as well as others that had been supported in chancery before the statute, were recognized in Pennsylvania. *Id.*

155. *Id.* at 192–93.

156. *Id.* at 201–02.

157. *Id.* at 193.

158. *Id.*

159. *Id.* at 194.



without creating “new law” or altering *parens patriae* power of the King.<sup>160</sup> Thus, the state could use *parens patriae* powers to ensure the property went to the intended charitable use.

In Justice Story’s view, English common law *parens patriae* power existed separately from the Statute of Elizabeth, so it was as though the statute never existed. This view is antithetical to the English constitutional value of parliamentary sovereignty and erroneously treats the common law as being on equal footing with parliamentary acts. It is also undercut by historical work by charities scholars regarding the abject failures of the Chancery in the area of charity supervision and the historical reasons why Parliament chose to constrain equitable discretion and codify the subject. Finally, the opinion perhaps accepted the Chancery’s own self-serving pronouncements of its own power *viz-a-viz* Parliament, despite historical allegations that English equity subverted the rule of law and caused cases to turn on the length of the chancellor’s foot.<sup>161</sup>

Justice Story also overlooked the fact that the English common law on point was irrelevant. Pennsylvania’s Supreme Court in 1827 had declared that, “by force of *our own* common law,” relief of the sort requested here could be given because its common law adopted the “principles” of the statute, as applied by the Chancery.<sup>162</sup> Pennsylvania’s courts had *themselves* recognized that the Chancery “applied” the legislative principles from Parliament. Story’s musing about English common law, that may or may not have existed before the statute’s passage, was nothing more than irrelevant dicta, as far as the state’s own courts were concerned, since Pennsylvania’s own common law applied the principles of the Statute of Elizabeth.

Given that Justice Story was also the author of *Swift v. Tyson* (another case disregarding state common law in favor of the Supreme Court’s own derivation of law),<sup>163</sup> the disregard for a state supreme court’s judicial pronouncements on the content of its own state common law in *Vidal* seems emblematic of Justice Story’s broader legal philosophy (an archaic Supreme Court approach that met its end in *Erie Railroad Company v. Tompkins*).<sup>164</sup>

Read from a modern perspective, the case should have turned on Pennsylvania’s own common law as a foundation for the state’s power to

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160. *Vidal*, 43 U.S. at 194–95.

161. See, e.g., H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7, 7 (1993) (quoting John Selden’s articulation of the “Chancellor’s foot”).

162. See *Witman v. Lex*, 17 Serg. & Rawle 88, 88 (Pa. 1827) (emphasis added) (“The statute 43 Eliz. ch. 4, of charitable uses, is not extended to Pennsylvania, but still the principles of it, as applied by chancery, in England, obtain here, by force of our own common law, and relief will be given so far as the power of the courts will enable them.”); see also *Miller v. Porter*, 53 Pa. 292, 299 (1866) (“[T]his [S]tatute [of Elizabeth] was not extended to Pennsylvania, though its principles have been often recognised and declared to be part of our common law.”).

163. See generally 41 U.S. 1, 9 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938).

164. See 304 U.S. 64, 79–80 (1938).

create charitable trusts.<sup>165</sup> This key legal difference distinguished Pennsylvania in *Vidal* from Virginia in *Baptist Association*. Pennsylvania's common law recognizing *its own* state power thus distinguished the case from *Baptist Association*, where Virginia had repealed the Statute of Elizabeth but had not yet replaced it with common law of its own (or a legislative enactment) that would have created an alternative source of positive power.

The confusion Justice Story sowed with his frolic into old English Chancery cases that preceded the Statute of Elizabeth opened the door for a much bolder move on the part of the Supreme Court a few decades later. By claiming the Chancery had independent, inherent powers separate from the statute, Justice Story had mistakenly hinted that this power might have an existence that Parliament could not affect. As explained in the next Part, this became the seed for the Universal Sovereignty theory of *parens patriae*.

## 2. *Inherent, Universal State Power as a Source Parens Patriae Doctrine*

In 1890, the Supreme Court applied the *parens patriae* doctrine to resolve a dispute over the ownership of land belonging to the Church of Jesus Christ of Latter-Day Saints, seized by the United States in order to enforce a federal polygamy statute in the Utah territory.<sup>166</sup> As the property had been held by the corporation for charitable uses, the Court invoked “those principles of reason and public policy which prevail in all civilized and enlightened communities” to justify the federal government’s oversight of those charitable purposes.<sup>167</sup> In so doing, it relied on the government’s *parens patriae* power to oversee charities. The court made no distinction between the prior cases which had focused exclusively on the *parens patriae* power of the states and this case involving the power of the federal government.

The Court reasoned that this power to oversee charities “prevail[ed] in all civilized countries pervaded by the spirit of Christianity,” and then traced these principles from Roman law through Continental Europe to England.<sup>168</sup> The Court’s historical account began with the third century, in the Pandects of Justinian, referring to the government’s power as *parens patriae* to oversee the disposition of charitable property for a par-

165. See *Witman*, 17 Serg. & Rawle at 88 (“The statute 43 Eliz. ch. 4, of charitable uses, is not extended to Pennsylvania, but still the principles of it, as applied by chancery, in England, obtain here, by force of our own common law, and relief will be given so far as the power of the courts will enable them.”).

166. *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 8–9 (1890). The U.S. Attorney General sought to seize a vast amount of real and personal property held by the church’s corporate trustee (as the church had been incorporated under Utah law). *Id.* at 9. Upon the death of the church’s trustee, the government asserted there was “no person lawfully authorized to take charge of, manage, preserve, or control said property,” so it sought to appoint a receiver to hold the property of the corporation and wind up the corporation’s affairs. *Id.* at 10.

167. *Id.* at 50–51.

168. *Id.* at 51–56.

ticular use as property given to the public.<sup>169</sup> Tracing instances of the doctrine through the French and Spanish Civil Codes, the Court found the same principles were widely used in England by the seventeenth century.<sup>170</sup> It concluded the power was nothing more than the “ordinary power of the court of chancery over trusts, and in part from the right of the government or sovereign, as *parens patriae*, to supervise the acts of public and charitable institutions in the interest of those to be benefited [sic] by their establishment . . . .”<sup>171</sup>

The *Latter-Day Saints* opinion became foundational to modern American *parens patriae* doctrine, appearing at a critical moment when the doctrine was about to begin expanding. It departs from earlier attempts to connect the doctrine to English statutory or common law,<sup>172</sup> claiming instead a much more venerable—and universal—history. This purported universal history is critical, as the Court was engaging in a very specific kind of reasoning: it was deriving a general law of charities from the essence of sovereignty (*i.e.*, what it means to be a government).

The opinion’s broad language is emblematic of nineteenth century declaratory legal philosophy, invoking general, universal principles and customs to “find” common law.<sup>173</sup> The many historical instances the Court cited were described as mere “*indicia* of the general principle underlying them.”<sup>174</sup> This statement reveals that the application of the *parens patriae* doctrine here was a reflection of general principles which the Court called “a general law of charities.”<sup>175</sup> This “doctrine of charities” that it had derived from universal principles of sovereignty was then applied in the Utah territory.<sup>176</sup>

The Court’s language echoes similar language used in opinions describing the federal general law of *Swift v. Tyson*, though it had no specific connection to that body of mercantile common law. The federal general law was abolished in 1938 as a constitutional matter in *Erie Railroad Company v. Tompkins*.<sup>177</sup> There is little left of the old federal general law (including any “general law of charities”). *Erie* returned that body of substantive law to the states, as a constitutional matter.<sup>178</sup> Thus, a *federal*

169. *Id.* at 52 (discussing instances of the doctrine under Roman law).

170. *Id.* at 52–56.

171. *Id.* at 56.

172. See, e.g., Curtis, *supra* note 41, at 895–96; Ratliff, *supra* note 13, at 1850.

173. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 121 (1992) (discussing late-nineteenth century invocation of custom as a standard of justice); *id.* at 202–03 (discussing the “discovery” and “finding” metaphors of nineteenth century classical legal thinking).

174. *Latter-Day Saints*, 136 U.S. at 51.

175. *Id.* at 61–62 (“Coming to the case before us, we have no doubt that the *general law* of charities which we have described is applicable thereto.”) (emphasis added); *id.* at 63 (“The foregoing considerations place it beyond doubt that the *general law of charities*, as understood and administered in our Anglo-American system of laws, was and is applicable to the case now under consideration.”) (emphasis added).

176. *Id.* at 61–62.

177. 304 U.S. 64, 79–80 (1938).

178. *Id.*

common law power to declare the parens patriae power of the state attorneys general cannot be grounded in pre-*Erie* notions rooted in the federal general law, or the values that spawned that body of law.

The general law of charities invoked in *Latter-Day Saints* had another dimension apart from the federal common law it purported to create. It contained a powerful narrative about the fundamental power of states: the Court concluded that parens patriae power is intrinsic to the nature of government “whether that power is lodged in a royal person, or in the legislature.”<sup>179</sup> It reasoned this power is essential to protect “the interests of humanity” and avoid “injury to those who cannot protect themselves.”<sup>180</sup> In other words, states (and the federal government) have the power by virtue of their mere existence—and federal courts had the right to declare that power.<sup>181</sup>

Three justices dissented from this view of inherent power, observing that Congress possesses only a limited, not inherent, power in our constitutional system.<sup>182</sup> Despite the obviousness of Article I’s structural limitations, their critique had little traction in the years that followed. Instead, the Universal Sovereignty narrative, rooted in Roman law and the practices of European monarchies, was deemed to have been transmitted to America through England. The Supreme Court had reified the monarchical royal prerogative into an inherent, extra-constitutional power of the federal government—without regard to the purpose of the American Revolution or the constitutional objectives of the Framing Era.<sup>183</sup>

The nineteenth century principles embedded within *Latter-Day Saints* resurfaced in modern cases in other substantive areas, as recently as 1982. For example, *Latter-Day Saints* was cited with approval in *Alfred A. Snapp & Sons v. Puerto Rico*, a modern leading case on parens patriae power, in an employment discrimination case brought by Puerto Rico on

179. *Latter-Day Saints*, 136 U.S. at 57.

180. *Id.*

181. The Court also invoked the Sovereignty Transference theory, reaching back to the power of the English king and reasoned that the “beneficent function” of the King as protector survived the American Revolution and became vested in the new nation’s governmental entities—particularly the legislature and its judiciary. *Id.* at 58–59 (“The state, by its legislature or its judiciary, interposes to preserve [charity funds] from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed.”); *id.* at 60 (“By the Revolution, the state of Vermont succeeded to all the rights of the crown as to the unappropriated as well as appropriated glebes.”) (quoting *Town of Pawlet v. Clark*, 13 U.S. 292, 334–35 (1815)) (internal quotation marks omitted). The Court took it as self-evident that whatever intrinsic power the King had as guardian of the realm transferred to the states, and Congress, in the new federal system. *Id.* at 56–57. It thus connected to the Sovereignty Transference theory of parens patriae power. *Id.*

182. *Id.* at 67–68 (Fuller, J., dissenting).

183. By contrast, in this same era, Justice Holmes, while on the bench of the Supreme Court of Massachusetts, understood the irreconcilable contradiction between the power of the old monarchies and the American Revolution. See *In re Mun. Suffrage to Women*, 36 N.E. 488, 492 (Mass. 1894) (J. Holmes) (“Hobbes urged his motion in the interest of the absolute power of King Charles I., and one of the objects of the constitution of Massachusetts was to deny it.”).

behalf of its citizen workers.<sup>184</sup>

The rationale of *Latter-Day Saints* remained influential well into the modern expansive era of the doctrine. It has cast a very large shadow over modern mass tort litigation, despite its roots in a form of federal common law that no longer exists.

Universal Sovereignty deserves to be interred as a justification for *parens patriae* in the modern era, along with the rest of *Swift's* progeny, at least in so far as it reflects a *federal* common law doctrine purporting to define the state's own powers and duties over a substantive area constitutionally assigned to the state (i.e., charitable bequests). Resting upon the rotten foundation of an imaginary federal general law of charities, such federal common law lacks any coherence in the post-*Erie* era. This is not to say, however, that a state's *own* common law is similarly constrained: state common law can evolve through any set of principles fitting to the state's own jurisprudence. Indeed, state common law was one of the earliest legal sources of *parens patriae* power in the Framing Era.<sup>185</sup>

The universal principles of charity governance that gave rise to the federal common law doctrine of *parens patriae* vanished as a constitutional matter in 1938. Without those principles, the "inherent powers" that are derived from ancient experience vanish, and the federal common law they created crumbles. Instead, we are left with a constitutional system in which Congress has limited powers, states make the substantive laws of charities (by statute or by common law), and federal courts are out of the business of finding universal principles to declare state substantive common law.

Moreover, the Universal Sovereignty theory's birth in a case about *federal* *parens patriae* power makes the theory dubious as an explanation for the development of that doctrine as it relates to *state power*. It obfuscates the difference between the *limited* constitutional power of the federal government and the *residual* power of the state governments.

Unlike the Sovereignty Transference theory, the Universal Sovereignty theory was not widely replicated in subsequent cases, though *Latter-Day Saints* has been cited with approval in the modern era. Part III will explore the manner in which the shaky historical foundations of *parens patriae* power morphed into the foundation for modern multi-billion mass tort litigation, repackaging the old Sovereignty Transference notion.

### III. MASS TORTS & THE MODERN QUASI-SOVEREIGNTY THEORY OF AMERICAN PARENS PATRIAE POWER

In the late-nineteenth century, the *parens patriae* doctrine began its evolution from power over charities toward all-purpose "guardianship power." A decade after *Latter-Day Saints*, in *Louisiana v. Texas*, a case invoking the Supreme Court's original jurisdiction, *parens patriae* was in-

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184. 458 U.S. 592, 600 (1982).

185. See discussion *supra* note 165 and accompanying text.

voked in a new context.<sup>186</sup> In 1899, Texas enacted quarantine regulations to prevent the spread of yellow fever and placed an embargo on all interstate commerce between the city of New Orleans and the state of Texas—blocking the flow goods and people from the Port of New Orleans, which was then one of the nation’s largest ports.<sup>187</sup> Texas stationed armed guards to prevent goods produced in New Orleans from crossing the border.<sup>188</sup> Apparently, only one isolated case of yellow fever had been reported, and people in Louisiana suspected the Texans were using the quarantine as a ruse to steal shipping traffic from New Orleans for the benefit of the port of Galveston.<sup>189</sup>

Louisiana sued as *parens patriae* to enjoin the Texas embargo, asserting a role as “trustee, guardian, or representative of all her citizens.”<sup>190</sup> The Court interpreted the state’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.<sup>191</sup> As such, it declined to extend the Court’s original jurisdiction, as the case presented no controversy between the states themselves.<sup>192</sup> An injury to Louisiana’s citizens alone was insufficient for purposes of the Court’s original jurisdiction.<sup>193</sup> However, the opinion broke new ground by implicitly recognizing Louisiana’s sovereign interest in the dispute affecting its citizens—an interest later cases denominated a “quasi-sovereign” interest.<sup>194</sup>

Louisiana’s sovereign interest here was not a version of the royal prerogative (which focused on the king as guardian to a limited class of vulnerable subjects). It was something entirely new in the area of economic torts. This novel use of *parens patriae* expanded far beyond the guardianship notions described in the early charity cases. It quickly replicated itself in other cases.

#### A. THE EMERGENCE OF THE QUASI-SOVEREIGN THEORY IN ENVIRONMENTAL SUITS IN THE EARLY TWENTIETH CENTURY

The early 1900s were a time of enormous importance for the development of modern *parens patriae* doctrine.<sup>195</sup> Professors Ieyoub and Eisenberg opine that the development of the doctrine closely traced American

186. See generally *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (“[T]he state of Louisiana presents herself in the attitude of *parens patriae* [a] trustee, guardian, or representative of all her citizens.”); see also U.S. CONST. art. III, § 2, cl. 1 (conferring jurisdiction over “Controversies between two or more States . . .”).

187. *Louisiana*, 176 U.S. at 3–5.

188. Malina & Blechman, *supra* note 14, at 204.

189. *Id.*

190. *Louisiana*, 176 U.S. at 19.

191. *Id.*

192. *Id.*

193. *Id.* at 22.

194. Ratliff, *supra* note 8, at 1851.

195. Ieyoub & Eisenberg, *supra* note 13, at 1879 (“Most of the leading Supreme Court cases date from the early 1900s.”).

industrialization—the state guardianship power reached air and water pollution just as those matters were issues of public importance in this era of rapid industrialization.<sup>196</sup>

Professor Thomas Lee has persuasively argued that the emergence of state-as-plaintiff suits in the post-bellum period was closely connected to the influence of the doctrine of espousal in international law.<sup>197</sup> Espousal in international law allowed an aggrieved foreigner's government to adopt the foreigner's private legal claim (such as a debt) and advance that claim in his stead, typically through diplomatic action or international judicial proceedings.<sup>198</sup> In other words, the foreign government would stand in as the plaintiff for its citizen, in a legal proceeding asserting rights belonging to that citizen. However, the foreign government had the power to use whatever means it chose to enforce this claim of its citizen, "including the waging of war, regardless of the provision of a private judicial remedy in the American national courts."<sup>199</sup> This power was understood to be a function of sovereignty.<sup>200</sup> Professor Lee points out that the espousal doctrine has deep historical roots, going back to the Framing Era,<sup>201</sup> and that it forcefully re-emerged at the end of the nineteenth and the beginning of the twentieth centuries.<sup>202</sup> However, the Supreme Court in that era rejected the doctrine of espousal between American states in *New Hampshire v. Louisiana*.<sup>203</sup> The Court held that espousal rights belong only to nations and the American states surrendered them to the federal government.<sup>204</sup> Lee contends that the constitutional grant of original jurisdiction to the Supreme Court in state vs. state controversies was a substitute for espousal rights.<sup>205</sup>

Professor Lee suggested that *parens patriae* power (in which a state sues to vindicate claims for a class of its citizens) is a "weaker, domestic cousin" of espousal rights under international law.<sup>206</sup> Indeed, the demise of espousal power for the states in 1872 seems to have ushered in the rise of *parens patriae* as a separate, distinct doctrine in the decades that followed. The temporal connection suggests that *parens patriae* became a substitute for espousal.

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196. *Id.*

197. Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1862–66 (2004).

198. *Id.* at 1855.

199. *Id.*

200. *Id.* at 1857.

201. *Id.* at 1858 (discussing *Chisolm v. Georgia*, 2 U.S. 419, 429 (1793) (Iredell, J.)).

202. Lee, *supra* note 197, at 1855–56.

203. *Id.* at 1858 & n.403 (discussing *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883)); 1863 (observing that New Hampshire would have had a claim of espousal under international law against Louisiana in 1872 for the nonpayment of debts owed to New Hampshire citizens, but that the American states had no such espousal rights against one another).

204. *Id.* at 1863.

205. *Id.*

206. *Id.* at 1855 n.393.

Consistent with this theory, there is a second, related potential causal trigger for the rise of the new breed of *parens patriae* in the late-nineteenth century: the expansion of state police powers.<sup>207</sup> For example, just one year after recognizing Louisiana's interest in opposing a quarantine affecting its citizens, the Court expanded the concept of legitimate state interests in *Missouri v. Illinois* to include environmental torts.<sup>208</sup> Missouri filed a bill of complaint asserting the Court's original jurisdiction in a dispute with Illinois over pollution of the Mississippi river.<sup>209</sup> The suit's gravamen was public nuisance.<sup>210</sup>

Illinois had allowed Chicago to construct a canal to send virtually all its sewage to the Des Plaines River, which emptied into the Illinois River, and ultimately into the Mississippi River.<sup>211</sup> Missouri complained that this new sewage plan would make it the recipient of 1,500 tons per day of Chicago's filth, including industrial waste from stock yards, distilleries, and manufacturing industries, all of which would otherwise have flowed into Lake Michigan.<sup>212</sup> Illinois would thereby have allegedly poisoned the drinking water for Missouri's own communities.<sup>213</sup>

The Court concluded that Missouri had the power to sue to protect the health and welfare of its citizens, and indeed an adequate remedy could only be found through such a *parens patriae* suit.<sup>214</sup> It found the state to be the "proper party" to represent its inhabitants when those inhabitants' health and welfare was threatened.<sup>215</sup> It likened Missouri to a sovereign nation that would have the right to seek redress through negotiation or ultimately war to protect its citizens. As the several states have neither diplomatic nor war-making powers in our constitutional system, the Court reasoned that its own original jurisdiction must be the constitutional solution.<sup>216</sup>

The Court thus was not relying on any royal prerogative to sue.<sup>217</sup> Rather, the state's power to sue was instead treated as a substitute in our federal system for a *different kind of sovereign right* any nation-state would have had. This was thus a revision of the Universal Sovereignty theory: instead of inheriting specific prerogatives from England, the

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207. See HORWITZ, *supra* note 173, at 27 ("By the 1870s, police power had become the standard legal category for talking about the state's regulatory power over health, safety, and morals of its citizens.").

208. 180 U.S. 208, 248 (1901).

209. *Id.* at 209.

210. *Id.* at 214.

211. *Id.* at 211.

212. *Id.* at 212.

213. 180 U.S. at 212–13.

214. *Id.* at 241.

215. *Id.*

216. *Id.* The Court limited *Louisiana v. Texas* to its peculiar facts—causing Justice Fuller, who wrote that opinion, to dissent from the result in *Missouri*. See *id.* at 249 (Fuller, J., dissenting).

217. See Malina & Blechman, *supra* note 14, at 202 ("The significant point is that, despite the reliance of several States on the precedents we have discussed, the law governing the royal prerogative of the English King has no bearing on our problem.").



states impliedly had different, unique powers that were analogs to the powers of sovereign nations, transformed to comport with constitutional limits.

This transition is crucial to understanding the failure of the Sovereignty Transference narrative as a foundation for American *parens patriae* power: according to Blackstone, public nuisance could be nothing more than a delegation of the *individual's right* to abate a nuisance.<sup>218</sup> However, these nineteenth century American courts understood the exercise of state's own police power in these suits to be grounded upon a common law of nuisance, and the nuisance was a *public right*.<sup>219</sup> As historian Morton Horwitz explained, in police power cases in the 1870s, "the law of nuisance provided the categories for determining when it was legitimate for the state to regulate on behalf of the health, safety, and morals of its citizens."<sup>220</sup> These categories became the boundaries of *parens patriae* authority for the state to sue in that era.

Over the next two decades, a state's "quasi-sovereign" power to sue to protect its environment on behalf of its citizens was upheld in other contexts, including diverting stream water,<sup>221</sup> cross-border air pollution from an industrial plant,<sup>222</sup> natural gas,<sup>223</sup> and drainage of waterways.<sup>224</sup> Professor Lee's research has shown a significant increase in such state-as-plaintiff cases involving the Supreme Court's original jurisdiction in this era between 1870–1919 (in which the Supreme Court issued forty-nine such dispositions), whereas there had only been six in the twenty-five-year period preceding the Civil War.<sup>225</sup>

The suits also soon escaped from the murky confines of original jurisdiction, with states beginning to sue private out-of-state tortfeasors. In *Georgia v. Tennessee Copper Company*, Georgia sued a foreign corporation allegedly discharging noxious gases into Georgia from a plant in Tennessee.<sup>226</sup> Justice Holmes found that the discharge implicated Georgia's quasi-sovereign capacity because there was a state interest "independent of and behind the titles of its citizens, in all the earth and air within its domain."<sup>227</sup> A distinction had thus fully emerged between the interests of citizens affected within a state and the state's own public interest in the welfare of its citizens collectively.<sup>228</sup>

The distinction between citizen interests and sovereign interests was important for the Court's original jurisdiction, though not necessarily for

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218. HORWITZ, *supra* note 173, at 27–28 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*219).

219. *Id.* at 27–28.

220. *Id.* at 28.

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

222. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907).

223. *Pennsylvania v. West Virginia*, 262 U.S. 553, 581 (1923).

224. *North Dakota v. Minnesota*, 263 U.S. 365, 371 (1923).

225. Lee, *supra* note 197, at 1870.

226. 206 U.S. at 236.

227. *Id.* at 237.

228. Malina & Blechman, *supra* note 14, at 206, 207.

other cases in the lower courts. *Parens patriae* became part of the Court's original jurisdiction out of necessity, in order to allow states to protect the general welfare—where they had no other constitutional means of doing so.<sup>229</sup> Individual interests could be protected through individual suits so there is no argument of necessity supporting original jurisdiction in mass torts,<sup>230</sup> but nor was there an argument forbidding it in lower courts. State suits on behalf of the interests of citizens instead were eventually justified through the expansive quasi-sovereignty theory of *parens patriae*.

By this point in the doctrine's development, there could be no possible claim that this authority to sue to protect the environment derived from any English doctrine of royal prerogatives, or even universal, inherent powers generally found in ancient European history. The research of Professors Woolhandler and Collins has demonstrated that there was no state power at common law to bring federal public nuisance suits on behalf of citizens as opposed to those suits brought on behalf of the state's own particular injury.<sup>231</sup> The evolution of the *parens patriae* power in public nuisance suits thus cannot be connected to any transferred power from England, or even universal sovereignty rights. It was a new feature of the American system.

At the dawn of the twentieth century, *parens patriae* was no longer tethered to any historical antecedents in England, medieval Europe, or ancient Rome. It was *sui generis* in America, a quasi-sovereign right implied by the constitutional structure. This branch of the doctrine appears to be properly understood as an offshoot of Universal Sovereignty through the right of espousal in international law (commencing from the premise that all sovereign nations have the power to go to war to protect their interests from incursions), translated through the lens of the emerging state police powers to morph it into a new, different kind of power in the American federalist structure.

Nevertheless, as will be seen in the next Part, the modern doctrine continued to be mired in the false history of Sovereignty Transference.

#### B. THE MID-TWENTIETH CENTURY EXPANSION OF THE QUASI-SOVEREIGNTY THEORY

By the mid-twentieth century, the public guardianship notion expanded to encompass states' assertion of antitrust and related price-fixing claims.<sup>232</sup> Indeed, just as air and water pollution were issues of public interest during the early industrial period of the early 1900s, price-fixing

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229. *Id.* at 209.

230. *Id.*

231. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 432–33, 474 (1995) (observing the nuisance and water rights suits deviated from common law but operated “squarely within the area of health, safety, and welfare encompassed by even limited views of state regulatory power”); see also HORWITZ, *supra* note 173, at 27–28 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*219).

232. *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 443–44 (1945).

and market manipulations became a regulatory focus for the consumer state in the mid-twentieth century—particularly following criminal price-fixing convictions in the electrical equipment industry in 1961.<sup>233</sup>

In the late 1960s, several states attempted to bring treble-damages anti-trust claims either on behalf of citizen-consumers, based on purported injuries to the whole economy of the state.<sup>234</sup> The most important of these was an antitrust action by Hawaii against Standard Oil, “on behalf of consumers” and for alleged injury to the state’s economy and prosperity.<sup>235</sup> It included a class action claim, as well as a *parens patriae* claim.<sup>236</sup> The case reached the Supreme Court, forcing the Court to evaluate the quasi-sovereignty doctrine in the context of market injury.

The case offers an important example of a state relying purely on a common law form of *parens patriae* power to seek damages and injunctive relief in antitrust.<sup>237</sup> The Court allowed the state to seek injunctive relief, but not damages on behalf of its citizens.<sup>238</sup> The Court vaguely invoked the Sovereignty Transference theory, based on the *parens patriae* doctrine’s alleged “deriv[ation] from the English constitutional system.”<sup>239</sup> In so doing, it shored up what has now become the modern mythology of American *parens patriae* doctrine: the states acting as quasi-sovereign heirs of the English King’s duty to act as guardian of the whole realm, without any hint that any of the King’s representatives ever engaged in mass-tort litigation.<sup>240</sup> An alleged prerogative to supervise charities (later constrained by Parliament), here morphed into mass-tort litigation, conferring a false historical pedigree that never really existed.

The Court again bypassed the opportunity to examine the history of transference during the Framing Era. It overlooked the complex history of the charity cases discussing what statutory or common law powers were actually received. It instead replicated the mythological origin from nineteenth century cases. Modern U.S. courts continue to assert that, in the absence of a royal person to serve as *parens patriae*, states in our federal system “received” the guardian function of the King.<sup>241</sup>

233. See Malina & Blechman, *supra* note 14, at 193 (discussing “the avalanche of litigation” that followed the convictions).

234. *Id.* at 193–94 & n.7 (cataloging cases filed by Hawaii, Michigan, California, Kansas, New Jersey, Illinois, and New York in 1969).

235. *Id.* at 196 (quoting *Hawaii v. Standard Oil Co.*, 301 F. Supp. 980, 984 n.4 (D. Hawaii 1969)).

236. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 255 (1972).

237. Cox, *supra* note 8, at 2329–30.

238. *Id.* Professor Cox observes that Congress responded to the decision by amending the Clayton Act, “to authorize state attorneys general to ‘bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State. . .to secure monetary relief.’” *Id.* (quoting 15 U.S.C. § 15c (2012)).

239. *Standard Oil*, 405 U.S. at 257.

240. See *id.*

241. *Id.*; accord *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 (9th Cir. 1973) (“It is true that in the United States this royal prerogative function of the king has passed to the states.”).

In this way, courts treat quasi-sovereignty in *parens patriae* doctrine as a modern, fictionalized reworking of the Sovereignty Transference theory.<sup>242</sup> In *Standard Oil*, the Court correctly recognized that *parens patriae* had morphed in American courts far beyond any historical application in eighteenth century England.<sup>243</sup> It did not, however, recognize that this morphed quasi-sovereign power has *nothing whatsoever* to do with whatever royal prerogative may have once existed in England prior to the Statute of Elizabeth—or question why any sovereign power over *charities* would imply a power to bring mass-tort litigation of all varieties.

By the mid-twentieth century, *Louisiana v. Texas* had been reinterpreted by the Court to stand for the proposition that *parens patriae* suits on behalf of a state's citizens are a proper state function.<sup>244</sup> A state's right to sue as *parens patriae* to protect its quasi-sovereign interest had become an unquestionable feature of statehood, though the Court struggled with whether any particular injury at issue was compensable to the state itself, as opposed to the citizens.<sup>245</sup>

Despite its historical trappings, the modern American *parens patriae* doctrine appears to have virtually no genuine connection to any royal prerogative.<sup>246</sup> Indeed, in *Alfred L. Snapp & Sons v. Puerto Rico* in 1982, the Court finally seemed to concede that the English power of the Crown at common law is disconnected from the modern American applications of *parens patriae*.<sup>247</sup> The Court nevertheless asserted that the sovereignty narrative still has force through “a ‘quasi-sovereign’ interest, which is a judicial construct that does not lend itself to a simple or exact definition.”<sup>248</sup> This is the closest the Court has come to admitting that the early-twentieth century cases had invented the historical foundation of quasi-sovereignty narrative and its historical antecedents are a fiction. The historical mythology nevertheless persists in the lower courts.<sup>249</sup>

The idea of the quasi-sovereign interest is difficult to separate from its historical mythology: it is supposed to reflect the interest a sovereign power (king) would have had, made quasi only because the states are not truly sovereign in our constitutional federal system. Stripped of the historical trappings related to the guardianship of charities, infants, idiots,

242. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (“This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature . . .”).

243. See *Standard Oil*, 405 U.S. at 257.

244. *Id.* at 258–59.

245. *Id.*

246. See Curtis, *supra* note 41, at 907–08 (noting that when acting in a quasi-sovereign capacity, a state's purpose is the protection of the well-being of its entire populace and its economy, not just the protection of a dependent class).

247. 458 U.S. at 600 (“This common-law approach [the King's prerogative], however, has relatively little to do with the concept of *parens patriae* standing that has developed in American law.”).

248. *Id.* at 601.

249. See, e.g., *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (discussing the King's royal prerogative in an antitrust suit while concluding the doctrine has “expanded considerably”).

and lunatics, the problem becomes defining the remaining content of the quasi-sovereignty.

Ultimately, the Court pointed out that the quasi-sovereign interest to litigate runs parallel to the state's interest in legislation: the state's power to sue is determined, at least in part, by "whether the injury [to the health and welfare of its citizens] is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."<sup>250</sup> The state's amorphous interest includes "the health and well-being—both physical and economic—of its residents in general," as well as an interest "in not being discriminatorily denied its rightful status within the federal system."<sup>251</sup>

The nature of the state's quasi-sovereign interest concept has confounded courts attempting to distinguish permissible state interests from impermissible citizen interests. This has drawn criticism from scholars and practitioners.<sup>252</sup> The recognition of a public interest distinct from the private citizen one, though, is precisely what separates the American *parens patriae* from the doctrine known to Blackstone—this is the uniquely American feature of *parens patriae* that could not have been inherited from England.<sup>253</sup>

*Parens patriae* actions have become commonplace features of mass tort litigation, especially in consumer protection and antitrust cases.<sup>254</sup> The past decade has experienced an explosion of litigation brought by state

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

251. *Id.*

252. Lemos, *supra* note 9, at 492–93 (describing the "fuzzy line" between forms of *parens patriae* litigation); Ratliff, *supra* note 8, at 1851 ("'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."); *id.* at 1852 (discussing the "blurry" outline of quasi-sovereignty); *id.* at 1857 (concluding that the doctrine is "too vague to permit any predictability"); Malina & Blechman, *supra* note 14, at 214 (describing state *parens patriae* actions under this doctrine as "Robin Hoods" who are "misled by the ambiguity of the term 'parens patriae' and are propounding a legal theory based on a confusion of the disparate notions of the royal prerogative and quasi-sovereignty"); Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 687 (1998) ("There is clearly tension, if not outright inconsistency, among some of the cases allowing and disallowing individual relief in *parens patriae* suits."); Curtis, *supra* note 41, at 914 (describing the confusion regarding American precedent discussing quasi-sovereign interests).

253. See *supra* note 230 and accompanying text.

254. See, e.g., 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, 362–64 (1999) (describing broad range of *parens patriae* antitrust suits involving automobiles, automotive products, food processors, real estate, milk, consumer electronics, footwear, toys, cemetery plots, petroleum products, garbage carting, and cable television services); Jay L. Himes, *State Parens Patriae Authority: The State Attorney General's Authority*, INST. FOR LAW & ECON. POLICY SYMPOSIUM 12–14 (2004), <https://web.archive.org/web/20160203081715/http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf>; see generally *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (antitrust); *California ex rel. Lockyer v. Safeway, Inc.*, 371 F. Supp. 2d 1179 (2005), *aff'd in part, rev'd in part, remanded sub. nom. to* 651 F.3d 1118 (9th Cir. 2011) (antitrust); *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012) (consumer fraud); *California v. General Motors LLC*, 69 F. Supp. 3d 404 (S.D.N.Y. 2014) (vehicle ignition defects); Trial Motion, Memorandum and Affidavit, *New Mexico v. Volk-*

attorneys general on behalf of consumers, dramatically affecting the nature of product regulation.<sup>255</sup> *Parens patriae* litigation has become routine in environmental protection, and even civil rights enforcement.<sup>256</sup> All of these forms of *parens patriae* actions now frequently obtain money damages awards as well as injunctive relief—making it quite clear that *parens patriae* is no longer a creature of equity (deriving its legitimacy from the historical power of Court of Chancery in England).<sup>257</sup>

While states now sue as plaintiffs to enforce more varied forms of public rights than they did in the nineteenth century, they also continue to use the power to bring actions for public nuisance that echo the kinds of claims brought in the post-bellum period. For example, on June 20, 2016, New Mexico sued Colorado, invoking the Supreme Court's original jurisdiction, for a public nuisance claim based on a major spill of toxic fluid from the Gold King Mine in southwestern Colorado into the Animas River.<sup>258</sup> The spill allegedly sent 880,000 pounds of arsenic, lead, cadmium, copper, mercury, and zinc, and three million gallons of mine wastewater into the waterway, where it then flowed into northern New Mexico, fouling drinking water.<sup>259</sup> The state alleges the spill will cause long-term health risks to its own citizens, including farmers, ranchers, and recreational users of the river, and harm the river's ecosystem.<sup>260</sup> It expressly includes a public nuisance claim, along with other statutory claims.<sup>261</sup> This suit is very much in the tradition of the post-bellum *parens patriae* public nuisance cases. It is also consistent with the modern trend of seeking both equitable relief and monetary damages.<sup>262</sup>

This modern version of the old-fashioned public nuisance *parens patriae* litigation can be contrasted with a different breed of modern litigation having no nineteenth-century analog: consumer litigation brought by state attorneys general against private defendants for economic injuries to citizens. For example, states sued several book publishers and Apple

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swagen Group of America, Inc., No. 3:16-CV-03007, 2016 WL 4059280 (N.D. Cal. July 5, 2016) (vehicle emissions litigation).

255. Gifford, *supra* note 29, at 914.

256. Himes, *supra* note 254, at 13 & n.66 (discussing state authority to sue under federal anti-discrimination statutes).

257. *Id.* at 13–14 & n.67 (the “state’s interest in preventing harm to its citizens by anti-trust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction”) (discussing e.g., Insurance Antitrust Litigation, 938 F.2d 919, 927 (9th Cir. 1991, *aff’d in part, rev’d in part sub. nom.* Hartford Fire Ins. Co. v. California, 509 U.S.764 (1993)); Maine v. M/V Tamano, 357 F. Supp. 1097, 1101-02 (D. Me. 1973) (recovering damages for environmental injury); Selma Pressure Treating Co., v. Osmose Wood Preserving Co. of America, Inc., 221 Cal. App. 3d 1601, 271 Cal. Rptr. 596, 606 (1990) (affirming right to pursue money damages award)).

258. Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support of Motion for Leave to File Complaint at 1–2, New Mexico v. Colorado, No. 22O147 ORG (2016), <https://www.env.nm.gov/wp-content/uploads/2016/01/160604-for-filing.pdf> [<https://perma.cc/UUA7-ZKER>].

259. *Id.* at 2.

260. *Id.* at 3.

261. *Id.* at 45–48.

262. *See id.* at 51 (seeking compensatory, consequential, and punitive damages, as well as equitable relief).

over electronic book price manipulation in 2013, obtaining over \$500 million in settlements for the benefit of consumers.<sup>263</sup> A new litigation regulatory structure has emerged from a patchwork of settlements with manufacturers, and sometimes entire industries, in the wake of *parens patriae* actions.<sup>264</sup> Such suits have transformed regulation of products as disparate as cigarettes, firearms, automobiles, consumer goods, and pharmaceutical drugs.<sup>265</sup> State quasi-sovereign interests built a new business regulatory system based on mass tort litigation.

What began in *Louisiana v. Texas* as an inquiry into the Supreme Court's original jurisdiction in a dispute between two states has evolved into an all-purpose state power used to sue private defendants for mass tort claims, even aggregating the claims of individual victims.<sup>266</sup>

### C. THE TWENTY-FIRST CENTURY "ALL PURPOSE" STATE POWER TO LITIGATE MASS TORT CLAIMS ON BEHALF OF CITIZENS

By 2000, scholars had observed that state and federal courts "uniformly recognize a state's authority to sue, as *parens patriae*, to vindicate the state's and its citizens' interests."<sup>267</sup> This was the result of rapid evolution of the doctrine toward the end of the twentieth century.

*Parens patriae* went through a remarkable transformation in the multi-state tobacco litigation in the 1990s, in which many states brought novel tort claims to sue cigarette manufacturers for harm to the common good, through aggregated harm to their citizen smokers resulting in increased health costs for the states themselves.<sup>268</sup> In this model, the physical harm that was sustained by the smokers then transmitted to the state through financial costs.<sup>269</sup>

Causation requirements often make recovery for individual victims of products like cigarettes impossible—indeed, individual plaintiffs lost virtually every personal injury case brought against tobacco companies prior to the states' *parens patriae* litigation.<sup>270</sup> The states were fairly successful suing to recover financial costs incurred from smokers' addiction though. Professors Ieyoub and Eisenberg have argued that the states' involvement in tobacco litigation turned the tide against the defendants, resulting in the first plaintiff-verdicts in California, Oregon, and Florida.<sup>271</sup>

263. See Albanese, *supra* note 15; Hood, *supra* note 16.

264. Gifford, *supra* note 29, at 914–15.

265. *Id.*; see also *id.* at 930 ("Regulatory litigation is an attempt on the part of the state attorney general to expand the boundaries of the common law with the explicit purpose of regulating an industry . . .").

266. See *id.* at 931.

267. Ieyoub & Eisenberg, *supra* note 13, at 1864.

268. Gifford, *supra* note 29, at 931–32.

269. *Id.* at 932–33.

270. Ieyoub & Eisenberg, *supra* note 13, at 1860 ("Before the states' [*parens patriae*] litigation, the tobacco industry had not lost a smoking case . . ."); *id.* at 1860 n.1 ("Plaintiffs previously had won only two trials of 813 filed claims against tobacco companies, with the two trial victories reversed on appeal.")

271. *Id.* at 1860.

This highlights that states have been able to win recoveries through *parens patriae* that individual citizens often could not win on their own.<sup>272</sup> This is true even in the absence of statutory authority for the *parens patriae* power: lower courts continue to rely instead on the common law sovereignty narrative articulated by the Supreme Court when statutory authority fails.

For example, in *Texas v. American Tobacco Company*, the district court understood the Supreme Court's sovereignty narrative to create a common law right for states to bring suit to protect their quasi-sovereign interests.<sup>273</sup> The state sued the cigarette maker for strict products liability, breach of warranty, negligence, fraud, and misrepresentation.<sup>274</sup> Unconstrained by the mythological royal prerogative, the district court reasoned that these quasi-sovereign interests "evolve and change with time," permitting a case-by-case definition of the scope of those interests.<sup>275</sup> The only limit this lower court perceived was that states could not use this power as mere nominal parties asserting interests belonging to someone else.<sup>276</sup>

*Parens patriae* is now operating unfettered by any constraints related to its mythological historical origin. A purely judicial construct, state interests can apparently now be anything courts deem worth protecting. Nevertheless, the false historical trappings continue to be invoked to confer legitimacy to the concept, even when they lack any meaningful connection to it.<sup>277</sup>

Against this tide, there has been a stream of resistance to this common law expansion of *parens patriae* authority. In the early 1970s, for example, the Ninth Circuit rejected permitting a state to bring an antitrust suit based on such common law in *California v. Frito-Lay*.<sup>278</sup> The court reasoned that legislation authorizing a state to sue as a plaintiff was essential to expand the limited historical reach of the *parens patriae* doctrine at common law.<sup>279</sup> In other words, expansion required a source of positive law. Although not noticed by the lower court, this notion impliedly reflects the old spirit of Marshall's opinion in *Baptist Association*, looking for a source of positive law for the power. It is, however, entirely out-of-step with the common law development of the *parens patriae* doctrine in

272. *See id.*; *see also* Gifford, *supra* note 29, at 933.

273. 14 F. Supp. 2d 956, 962–63 (E.D. Tex. 1997).

274. *Id.* at 965.

275. *Id.* at 962 ("It is without question that these interests can evolve and change with time, and as such, the Court made very clear its desire to maintain a definition that is conducive to a case-by-case analysis.").

276. *Id.*

277. *See, e.g., id.* at 962–63 ("It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interests *found at common law.*") (emphasis added).

278. 474 F.2d 774, 777–78 (9th Cir. 1973).

279. *Id.* at 777. In the wake of the Ninth Circuit's rejection of the state's power to bring an antitrust claim on behalf of its citizens, Congress amended the Clayton Act to expressly permit *parens patriae* actions. *See* H.R. REP. NO. 94-499, at 6–8 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575–78; *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1025 & n.1 (5th Cir. 1983) (discussing legislative history).



the post-bellum period.<sup>280</sup>

More recently, the Fifth Circuit questioned Louisiana's quasi-sovereign interest in a *parens patriae* suit against insurers who allegedly manipulated the state's insurance market to inflate premiums after Hurricane Katrina.<sup>281</sup> The insurers disputed Louisiana's quasi-sovereign interest.<sup>282</sup> The state's standing to sue was not at issue in the case, as the only dispute before the court was the removability of the suit to federal court under the Class Action Fairness Act (CAFA).<sup>283</sup> The court analyzed removability through the lens of the quasi-sovereignty narrative in *Snapp*.<sup>284</sup> As the Fifth Circuit concluded the state was only a nominal party to the insurance litigation, with the policyholders as the real parties in interest, it treated the matter as aggregate litigation presenting claims of the citizens themselves, not any quasi-sovereign interest of the state.<sup>285</sup> Other circuits disagreed with this approach, refusing to convert *parens patriae* actions into aggregate litigation with the citizens as real parties in interest.<sup>286</sup> Ultimately, the CAFA question was settled in 2014 by the Supreme Court, which unanimously held *parens patriae* actions are not removable under CAFA as "mass actions."<sup>287</sup> The Court, however, based its analysis on CAFA's jurisdictional language, not the nature of *parens patriae* (and had nothing to say about the state's quasi-sovereign interest in the case).<sup>288</sup>

One scholarly approach suggests that a proper understanding of the quasi-sovereign interest paradigm results in a conclusion that "the state's interest may be parasitic on the interests of individual citizens."<sup>289</sup> In other words, a state can sue in its *parens patriae* capacity to redress private interests that are widespread enough to implicate the state's interest in the welfare of its citizens.<sup>290</sup> This principle has maximum force where the individual harms may otherwise go unredressed.<sup>291</sup> Indeed, the core precedent defining the doctrine from the turn of the century illustrated the problem during the industrialization of the economy: regional pollu-

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280. See discussion *supra* Part II.A.

281. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 422–23 (5th Cir. 2008), *overruled by Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014).

282. *Id.* at 425–26.

283. *Id.* at 423.

284. *Id.* at 425–26 (quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982)).

285. *Id.* at 428–29.

286. See *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 209 (2d Cir. 2013); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 773–74 (7th Cir. 2011).

287. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 745–46 (2014). (reversing Fifth Circuit's mode of analysis).

288. See *id.* As Professor Lemos has aptly observed, the nominal party issue has no relevance to the *parens patriae* question. Lemos, *supra* note 9, at 495 n.38. It is pertinent to subject matter jurisdiction in federal court (for purposes of original jurisdiction and diversity jurisdiction), and thus goes to *where* the suit may be brought, not *whether* the state has the power to bring it at all. *Id.*

289. Lemos, *supra* note 9, at 494.

290. *Id.* at 495.

291. See Ieyoub & Eisenberg, *supra* note 13, at 1874, 1880.

tion and rights to clean air and waterways could not have been adequately redressed on an individual level, even though individuals might have had private claims.<sup>292</sup> The *parens patriae* litigation from that era reflected state attempts to regulate these widespread, regional effects in the absence of action from Congress.<sup>293</sup> The fulcrum of these suits has shifted in the modern era to markets, particularly consumer markets, which are often themselves regional or even national,<sup>294</sup> as reflected by the modern tactic of banding together multiple states as joint plaintiffs to pursue such litigation.<sup>295</sup>

Many state statutes now make the state's interest explicit by authorizing attorneys general to sue on behalf of state citizens for particular torts.<sup>296</sup> For example, California's Unfair Competition Law (UCL) is typical in that it expressly contemplates enforcement by the Attorney General bringing suit on behalf of injured citizens for, among other things, false advertising and fraudulent business practices.<sup>297</sup> However, the states have not approached such statutory authority uniformly.<sup>298</sup>

These statutes often implicate the state's standing to assert the claims of citizens, but the federal courts have sometimes treated standing to bring *parens patriae* suits as a question of prudential standing (meaning not of constitutional magnitude, such that limits are open to revision by Congress).<sup>299</sup> This appears to be no longer viable, in light of the Supreme Court's recent retreat from prudential standing.<sup>300</sup> Moreover, where

292. *Id.* at 1879.

293. *Id.*

294. *See id.*

295. *Id.* at 1881–82 (discussing thirty-nine states acting jointly in litigation against the tobacco industry).

296. Lemos, *supra* note 9, at 495–96.

297. *See* CAL. BUS. & PROF. CODE § 17204 (conferring power to bring suit for injunctive relief); *see also* CAL. BUS. & PROF. CODE § 16760 (conferring *parens patriae* authority to sue for monetary relief for injuries sustained by the people of California).

298. As of 2002, in multidistrict litigation involving suits by all fifty states, one district court observed that forty-two states and the District of Columbia have some form of *parens patriae* power:

Fourteen . . . states—California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Massachusetts, Nevada, Ohio, Oregon, Rhode Island, South Dakota, Utah, and West Virginia—have expressly conferred *parens patriae* authority. Sixteen states—Alaska, Arizona, Florida, Illinois, Kansas, Maryland, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, Wisconsin, and Wyoming—have express statutory authority to represent consumers in a capacity which is the functional equivalent of *parens patriae*. Thirteen states—Alabama, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, Tennessee, Texas, and Washington—have had state and/or federal courts interpret statutory provisions to effectively grant *parens patriae* authority or have determined that their attorney general has such authority under state common law.

*In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386–87 (D.D.C. 2002) (citations omitted). The other eight states can apparently bring representative suits on behalf of their citizens under Federal Rule of Civil Procedure 23. *Id.* at 387.

299. Lemos, *supra* note 9, at 497 & nn.42–43.

300. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1381–82 (2014).

there is a federal statute conferring such authority (such as the Clayton Act), Congress has already spoken and named state attorneys general as proper parties to bring suit under that statute. In the absence of such a federal statute, however, the common law *parens patriae* doctrine (with its sovereignty narrative) has traditionally filled in the gap.

There appears to be little meaningful difference in the doctrine between state and federal courts. Indeed, state courts appear to have appropriated the quasi-sovereignty narrative, with its historical mythology.<sup>301</sup>

Part IV offers an alternative narrative to explain the American development of the doctrine based on the states' historic police powers.

#### IV. EXCAVATING AN AMERICAN CONSTITUTIONAL FOUNDATION FOR THE STATES' PARENS PATRIAE POWER

Although the Supreme Court has conceded the contours of *parens patriae* common law authority are judge-made, cases legitimize the doctrine by invoking the mythology of the royal prerogative, allegedly transmitted to the states following the American Revolution.<sup>302</sup> As explained in Parts II and III, the historical narratives ultimately fail to account for the modern form of the doctrine. This Part reconstructs the doctrine independent of any royal prerogatives or ancient European traditions. It argues the *parens patriae* power is best understood with reference to the evolution of the states' historic police powers in the American constitutional structure.

The expansion of *parens patriae* in the late-nineteenth century reflects the expansion of state police powers: they move in tandem, with *parens patriae* mirroring then-extant views of police powers. Stripped of the sovereignty narratives connecting *parens patriae* with powers of the Crown at common law, the doctrine can be reconstructed as a direct reflection of evolving understandings of the state's police powers in our constitutional system. States possess the power to sue to enforce norms within the sphere of their police powers, and as the substantive police powers evolved, so did their related *parens patriae* powers.

##### A. OVERVIEW OF THE STATES' POLICE POWERS

It is axiomatic that our constitutional structure contains a sphere of authority where Congress has declined to impose federal lawmaking power, even where Article I might allow it to do so. In this unclaimed area of governance, the states have residual power.<sup>303</sup> This space exists in

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301. See Ieyoub & Eisenberg, *supra* note 13, 1864 ("Parens patriae doctrine in the United States generally follows the same principles in federal and state courts. State court cases discussing *parens patriae* regularly rely on federal precedents. Federal doctrine is therefore a natural starting place for describing the *parens patriae* doctrine.").

302. See *supra* notes 238–239 and accompanying text.

303. See, e.g., *Calder v. Bull*, 3 U.S. 386, 387 (1798) ("It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, dele-

the gaps between federal lawmaking, where “[s]tates [have] great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”<sup>304</sup>

Soon after the Framing, the Court recognized that some state legislation might be “contrary to the great first principles of the social compact,” and thus not merit being called a “law” at all.<sup>305</sup> These first principles included the people of the United States creating their constitutions and forms of government “to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence.”<sup>306</sup> These purposes, according to Justice Chase, determine the terms of the social compact and the foundation of legislative power.<sup>307</sup>

In the early years of the Republic, there was scant Supreme Court concern with state legislation largely because the Marshall Court had shielded state legislation from rigorous review under the Bill of Rights, leaving the states relatively free to legislate.<sup>308</sup> The Court’s jurisprudence on police powers thus took many decades to emerge. Our constitutional jurisprudence developing the concept of the state’s historic police powers finally coalesced in the middle nineteenth century.<sup>309</sup>

According to Professor Morton Horwitz, prior to the 1850s, “jurists did not generally derive the regulatory powers of the state over health, safety, and morals from notions of inherent state power.”<sup>310</sup> This changed quickly between 1850–1870,<sup>311</sup> about the same time the Universal Sovereignty theory emerged in the *parens patriae* context.<sup>312</sup> Horwitz observed that “[b]y the 1870s, police power had become the standard legal cate-

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gated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States. The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures . . . .”); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1385 (2001); Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 187, 236–37 (2013).

304. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks omitted).

305. *Calder*, 3 U.S. at 388.

306. *Id.*

307. *Id.* The social compact premise that was fundamental to the Framing era reveals a fatal flaw in the sovereignty narrative of *parens patriae* precedent: the states did not inherit royal prerogatives or guardianship roles of any King; rather, the people through the state and federal constitutions, conferred power to govern. The people were the ultimate source of power, not the Crown. See *id.* at 387. The source of the *parens patriae* power thus has to flow from the constitutional structures created through this social compact. See *id.* at 387–88.

308. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 48–49 (1993).

309. *Id.* at 46–47; HORWITZ, *supra* note 173, at 27 (discussing the emergence of the concept of state police powers in the 1850s).

310. HORWITZ, *supra* note 173, at 27.

311. *Id.*

312. See discussion *supra* Part II.B.

gory for talking about the state's regulatory power over the health, safety, and morals of its citizens."<sup>313</sup> Initially, the concepts for these early police powers derived from common law concepts of nuisance.<sup>314</sup> That changed around the turn of the century, as the police power concept matured. Part IV.B will show that as the understanding of police powers evolved, so too did the *parens patriae* litigation.

#### B. PARENS PATRIAE AS A MANIFESTATION OF THE STATE'S HISTORIC POLICE POWERS

The canon of state-as-plaintiff cases from the early twentieth century is a virtually perfect mirror of the then-extant legal understandings of the states' police powers. Rather than reflecting some imaginary English prerogative of the king regarding charities that was received at the time of the Revolution, all of the cases demonstrate examples of state police powers firmly rooted in our constitutional federalism, at particular moments of social history.

This linkage can be illustrated by re-examining the emergence of state involvement in mass tort litigation in the early twentieth century. Commencing with *Louisiana v. Texas* in 1900, a state attempted to defend its own economy against an embargo of commerce and travel.<sup>315</sup> *Georgia v. Tennessee Copper*, a suit about a copper plant's discharge of sulfuric acid from a smoke stack flowing into Georgia, shows a state protecting public health and welfare against poisonous fumes.<sup>316</sup> *Missouri v. Illinois*, a dispute over Chicago's discharge of sewage down-river, similarly emphasizes a state's power to protect the health and welfare of its people.<sup>317</sup>

In this era, a judicial constitutional construct emerged that focused on the relationship between states and their polity: state police powers depended upon articulation of a "relat[ionship] to the welfare of the community as a whole," rather than advancement of "purely 'private' interests."<sup>318</sup> In 1904, Professor Ernst Freund articulated the nature of this power, as it had evolved in the cases, in two key aspects: the state police power "aims directly to secure and promote the public welfare, and it does so by restraint and compulsion."<sup>319</sup> He reasoned that the power was elastic in that it reflects social, economic, and political conditions.<sup>320</sup> Maintaining minimal standards of physical well-being was under-

313. HORWITZ, *supra* note 173, at 27; *see also* GILLMAN, *supra* note 308, at 49 ("An exercise of legislative powers would be considered valid only if it could reasonably be justified as contributing to the general welfare.").

314. HORWITZ, *supra* note 173, at 27-28.

315. 176 U.S. 1, 2, 4 (1900).

316. 206 U.S. 230, 236 (1907).

317. 180 U.S. 208, 211-12, 214 (1901).

318. GILLMAN, *supra* note 308, at 49, 55 (observing this doctrine was already well entrenched in the nation's courts by the time of the Civil War).

319. ERNST FREUND, *THE POLICE POWER PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3 (1904).

320. *See id.* at 3, 7 (summarizing the primary social interests at stake as including safety, order, morals, economic interests, and non-material and political interests).

stood to be a core element of the public welfare.<sup>321</sup> This kind of police power vested in the states as a fundamental duty of government.<sup>322</sup>

Professor Freund identified a related duty within the police powers to care for fundamental social interests, particularly “the care and control of dependent classes, especially of minors.”<sup>323</sup> This aspect of the state’s police powers obviously echoes the ancient royal prerogative to care for “infants, idiots, and lunatics” in the sovereignty theory of *parens patriae* authority.<sup>324</sup> The location of this duty of guardianship in the state’s historic police powers hints at the direct relationship between *parens patriae*, in all its manifestations, and those police powers in our constitutional system.

Other historic police powers foreshadow the controversial growth of *parens patriae*. For example, Professor Freund further identified a controversy surrounding the extension of the state’s police powers to protect economic interests.<sup>325</sup> Writing in 1904, almost contemporaneously with the dawn of the *Lochner* era, he concluded that government intervention to exercise “care and control of economic interests” would be a form of “favoritism or oppression.”<sup>326</sup> A year later, the Supreme Court decided *Lochner v. New York*, striking down New York’s law limiting bakers to ten hours of work per day.<sup>327</sup> The Court rejected the state’s argument that the law protected the health of the bakers (a core function of the state’s historic police power) and famously concluded the law was an “unreasonable, unnecessary and arbitrary interference with the right [and liberty] of the individual to [contract].”<sup>328</sup> Freund’s skepticism of economic intervention in his discussion of police powers in the treatise was thus sensitive to the emerging *zeitgeist*. Foreshadowing *Lochner*, Freund argued that “the idea of due process is freely applied to legislation, and means with regard to it conformity to the settled maxims of free government.”<sup>329</sup>

Against the economic tampering on behalf of favored classes, he distinguished other less controversial forms of police power over economic in-

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321. *Id.* at 7.

322. THOMAS McINTYRE COOLEY & VICTOR H. LANE, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 831 (7th ed., 1903) (observing the police power “has been left with the individual States”); *id.* at 837 (describing the police power as being limited to the regulation of “comfort, safety, or welfare of society”).

323. FREUND, *supra* note 319, at 7.

324. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*47.

325. FREUND, *supra* note 319, at 8 (“That the organized community should afford its members protection against physical danger and moral scandal, is generally admitted, and only the question to what extent this protection should go, is controverted. It is otherwise as to economic interests.”); accord COOLEY & LANE, *supra* note 322, at 856 (describing the distinction between lawful police regulation and “interference with commerce” as “exceedingly dim and shadowy”).

326. FREUND, *supra* note 319, at 8.

327. 198 U.S. 45, 64–65 (1905).

328. *Id.* at 56.

329. FREUND, *supra* note 319, at 14 (internal quotation marks omitted).

terests.<sup>330</sup> The wave of *parens patriae* suits in the early twentieth century to combat out-of-state air and water pollution fouling areas within state borders fit comfortably within even the most restrictive view of police powers of the *Lochner* era.<sup>331</sup> These were classic “health, safety, and welfare” matters at the core of the state’s police powers.<sup>332</sup>

That era’s embrace of the state’s role protecting public health, safety, and welfare became the foundation for modern health-related *parens patriae* suits, like the states’ tobacco litigation, propelling the doctrine far beyond common law public nuisance. In *Jacobson v. Massachusetts*, in 1905,<sup>333</sup> the Supreme Court upheld a state’s compulsory vaccination law.<sup>334</sup> *Jacobson* was the doctrinal ancestor of tobacco *parens patriae* suits in the 1990s by states bringing claims for injuries to their citizens. In upholding Massachusetts’ vaccine law in *Jacobson*, the Court ruled that “[t]he mode or manner [of exercising the state’s police power] is within the discretion of the state” so long as the Constitution of the United States is not contravened.<sup>335</sup>

*Jacobson*’s recognition of police powers justifying compulsory vaccination should be read in the context of the *Lochner v. New York* decision, which was handed down the same year.<sup>336</sup> *Lochner* famously stands as the high-water mark in *constraining* state police power.<sup>337</sup> To reconcile the tension, the Court relied on a categorical distinction between “true” exercises of police powers and illegitimate ones—never mind that New York’s legislature had health concerns about the effect long work weeks had on its bakers in *Lochner*. Professor Morton Horwitz’s analysis of the analytic reasoning mode in this era suggests a legal process dominated by rigid, categorical thinking: “[C]lear, distinct, bright-line classifications of legal phenomena.”<sup>338</sup> Rather than thinking about police powers on a continuum, nineteenth century reasoning divided them into “differences of kind.”<sup>339</sup> Massachusetts’ interest in vaccinating its citizens implicated a kind of public interest that differed from New York’s interest in the private working conditions of its bakers. One was allowed, and the other was not.

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330. *Id.* at 9.

331. Woolhandler & Collins, *supra* note 231, at 474 (“When the Court inaugurated what we have identified as police power standing in [original jurisdiction] nuisance and water rights cases, it . . . operated squarely within the area of health, safety, and welfare encompassed by even limited views of state regulatory power.”).

332. *See id.*

333. 197 U.S. 11, 11 (1905); *see also* *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) (reaffirming *Jacobson*).

334. *Jacobson*, 197 U.S. at 35.

335. *Id.* at 25.

336. 198 U.S. 45, 45 (1905).

337. *Id.* at 64 (“It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”) (emphasis added).

338. HORWITZ, *supra* note 173, at 17.

339. *Id.*

This understanding of police powers in the *Lochner* era translated to the states' *parens patriae* power, and the Court rejected the *parens patriae* cases implicating economic interests benefiting particular favored classes. In other words, the Court was suspicious if a state exercised guardianship of select, privileged citizens rather than the general public interest. For example, *New Hampshire v. Louisiana* involved a dispute over assignment of overdue bonds issued by Louisiana but held by residents of New Hampshire and New York.<sup>340</sup> The latter states had enacted laws enabling their citizens to assign the bonds to the state attorney general so that he could sue in the state's name to recover the money owed, evading the Eleventh Amendment's constitutional protection for Louisiana.<sup>341</sup> Although the Court's reasoning turned on the precision of its own limited original jurisdiction, the act of "assuming the prosecution of debts owing by the other state to its citizens,"<sup>342</sup> fell outside the framework of the core police powers, as the concept was then understood. In Freund's helpful terms, New York and New Hampshire were working for the benefit of a particular group of bondholders, an area he understood to be outside the police powers in that era.<sup>343</sup>

Similarly, when the Court held that Massachusetts lacked *parens patriae* authority to sue to declare an Act of Congress unconstitutional,<sup>344</sup> the holding ultimately reflected a judgment about the state's police powers not encompassing any authority to interfere with its citizens' relationship with the federal government.<sup>345</sup> Such a power would obviously contravene the constitution's structure, and thus would not fall within the state's own police powers

After the Court's eventual repudiation of *Lochner's* restrictive view of police powers, the states' police powers quickly expanded.<sup>346</sup> Rapid social change challenged the viability of the era's rigid categories, and they began to fall apart.<sup>347</sup> By the 1990s, the states' tool of choice to protect public health against nicotine addiction was litigation. Both the early vaccine laws and the modern tobacco litigation reflect the same species of police power: the states simply used different tools to accomplish the public health ends. Indeed, the states' police powers have historically been especially strong in this area. Professor Edward Richards has pointed out that by the late 1990s, in the area of public health, in "almost all cases where the extent of police power has been at issue, the state and federal

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340. 108 U.S. 76, 78 (1883).

341. *Id.* at 76.

342. *Id.* at 91.

343. FREUND, *supra* note 319, at 743–44.

344. *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923).

345. *See id.*

346. *Woolhandler & Collins*, *supra* note 231, at 474 ("With the demise of *Lochner*, however, the Court largely abandoned the attempt to set limits on the appropriate ends of government.").

347. HORWITZ, *supra* note 173, at 30 ("[A]ny categorical distinction between the health of a worker and the conditions of industrial life became ever more difficult to maintain.").



courts [ ] found in favor of the state.”<sup>348</sup> The states’ success with expanding *parens patriae* power to mass torts in the tobacco litigation is thus not surprising when framed in the context of health-related police powers.

This expansion of police powers occurred both in the context of the Supreme Court’s original jurisdiction (state suing state) and in the context of traditional litigation (state suing private defendants). For example, in *Pennsylvania v. West Virginia*, Pennsylvania acted to protect its consumers by bringing suit over a neighboring state’s restriction on natural gas distributions.<sup>349</sup> Similarly, Georgia sued railroads for conspiring to economically discriminate against the state.<sup>350</sup> The Supreme Court also approved Puerto Rico’s use of the power to sue employers for discriminating against its citizens in *Snapp*.<sup>351</sup>

*Snapp*’s approach to trying to define quasi-sovereign interests in the *parens patriae* context ultimately devolves into a recitation of police powers, though the Court did not call them that: “[T]he health and well-being—both physical and economic—of its residents in general.”<sup>352</sup> When the Court tried to identify the sovereign interest by suggesting it ought to be the kind a state could address through legislative power,<sup>353</sup> it was again nodding toward the police powers that are the essence of the state lawmaking domain. The Court’s focus on the generality of the effects of the state action similarly echoes the *Lochner* era understanding of the police power described by Freund: namely, relating to the good of the community, as opposed to the benefit of favored classes.<sup>354</sup>

The evolution of the *parens patriae* power to encompass antitrust and consumer deception reflects the evolution in the twentieth century of an understanding of the market as a community good. After *Lochner*’s demise during the New Deal era, state regulation of economic interests became routine. By the 1970s, courts began extending the *parens patriae* power to antitrust. In the 1990s, when they extended it to consumer protection, state regulation in those areas pursuant to the police powers was universally accepted. The expansion of *parens patriae* power thus can be seen as running in tandem with the social context defining contemporary understanding of police powers regarding economic markets.

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348. Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 201 (1999); see also *id.* at 206 (“[T]he United States Supreme Court has not substantially limited the police power as it relates to public health disease control.”). Professor Richards observes that police powers related to public health had deep roots in the colonial experience with widespread disease, particularly yellow fever. *Id.* at 204–05.

349. 262 U.S. 553, 591–92 (1923).

350. *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 444, 450 (1945).

351. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607–08 (1982).

352. *Id.* at 607.

353. *Id.*

354. See *id.* at 607–08; FREUND, *supra* note 319, at 5.

The regulatory aspect of *parens patriae* observed by Professors Gillman and Cox reflects state commitments to exercising police powers for specific kinds of harm to the public welfare (in the sense of harm to markets, health, and collective economies).<sup>355</sup> Litigation became a form of corporate censure by state governments, and the resulting settlement agreements became a form of governmental control.

The Court has sometimes discussed the police powers in the context of creating *standing* to bring suit in federal court.<sup>356</sup> In reality, though, these powers have less to do with standing to bring a matter before a federal court than they do with the state's power to bring suit *at all*. They relate to the scope of the state's powers in its own regulatory sphere, and for *parens patriae*, they are a reflection of law *enforcement* powers.<sup>357</sup> Restriction of *parens patriae* power would therefore not be a procedural reform comparable to Federal Rule of Civil Procedure 23; it would be a *substantive* curtailment of state regulatory authority in the sphere of its own police powers. Such a reform would be a major shift in the balance of federalism.

### C. RECONSTRUCTING MODERN PARENS PATRIAE DOCTRINE THROUGH THE POLICE POWER

This Article has argued that *parens patriae* has little basis in the historical narrative that courts have often invoked to justify the doctrine's existence, and state assertions of the power instead evolved to reflect changing understandings of state police powers. Nevertheless, there is one feature of modern *parens patriae* practice that still contains a faint echo of the Framing era's disputes over the power to supervise charities transferred from England. Many scholars have observed that the practice has become largely statutory—meaning state and federal statutes define most state powers to seek public compensation in modern practice,<sup>358</sup> so that common law *parens patriae* actions have become exceedingly rare.<sup>359</sup> Professor Cox has observed that common law assertions of *parens patriae* power have simply become unnecessary in light of expansive modern statutory authority for states to sue to protect the public interest.<sup>360</sup>

Professor Cox's exhaustive research on modern public compensation practice suggests that a complex web of statutes (state and federal) now tend to define state governmental power to sue as guardian of the citi-

355. See GILLMAN, *supra* note 308, at 48–49; Cox, *supra* note 8, at 2317–22.

356. See *Snapp*, 258 U.S. at 607 (“One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State *standing* to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”) (emphasis added); see also Woolhandler & Collins, *supra* note 231, at 476–77 (discussing police powers and standing in federal court).

357. See Woolhandler & Collins, *supra* note 231, at 477.

358. Cox, *supra* note 8, at 2329–30, 2335–36.

359. *Id.* at 2328 (“Government enforcers rarely rely on common law *parens* doctrine for public compensation.”).

360. *Id.* at 2328–29.

zens' health, safety and welfare.<sup>361</sup> Defining the state's guardianship role in statutes arguably more accurately reflects the English structure of power received by the states at the time of Independence in the early charity cases: a system of statutory powers that creates a legislative framework for courts. England transmitted not the prerogatives of an absolutist monarchy, but the complex powers of King-in-Parliament, where legislation shaped the government's power and was supplemented through common law.

Modern statutory iterations of the *parens patriae* power embody this spirit. Nevertheless, some states also still rely on their own common law as a source of this power. Additionally, Congress has also conferred federal statutory power to state attorneys general to sue on specific matters with a federal right of action. All of these sources of modern state *parens patriae* power are uncontroversial in areas where the historic police powers are assumed. There is one source, however, that does not fit this mold—federal common law.

The topology of sources of power can be illustrated as follows:

<b>1</b>	<b>2</b>
<b>State Statutes</b> <i>(conferring power on the state Attorney General)</i>	<b>State Common Law</b> <i>(conferring power on the state Attorney General)</i>
<b>3</b>	<b>4</b>
<b>Federal Statutes</b> <i>(conferring power on the state Attorney General)</i>	<b>Federal Common Law</b> <i>(conferring power on the state Attorney General)</i>

Figure 1

The top row represents sources in which we expect states to express their understanding of their own police powers. Indeed, the Framing Era cases showed states developing their own legislative and common law sources of authority in the early charity cases.<sup>362</sup> Modern examples include state Unfair Competition Law and false advertising statutes.<sup>363</sup> These reflect state laws about state powers in areas of state concern—classic forms of law-making about areas constitutionally entrusted to the states. The bottom row of the chart is different. In the third box, Congress confers *parens patriae* powers upon state attorneys general through federal legislation with regard to particular subjects, in areas where federal and state power coexists (for example, in the Clayton Act of 1914).<sup>364</sup> Here, Congress creates a federal right to sue on an area within its Article I powers, but it assigns the right to sue to state attorneys general (i.e.,

361. *See id.* at 2331.

362. 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53.

363. *See, e.g.*, CAL. BUS. & PROF. CODE § 17200 (prohibiting “unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue, or misleading advertising”); *id.* § 17204 (giving Attorney General power to seek relief for such acts).

364. *See discussion supra* Part II.B.1.

giving the states the opportunity to bring enforcement suits, should they choose to do so). There is nothing controversial about such an exercise of Article I power by Congress. All three of these sources of parens patriae power thus have a firm constitutional basis.

The fourth box is historically troublesome. It purports to ground state parens patriae power in federal common law. Nineteenth-century federal cases such as *Latter-Day Saints* derived inherent powers from the federal general law that *Erie* abolished. The federal common law cases could be reformed simply by recognizing the states' historic police powers as the source of their parens patriae powers (as in the early environment and public health suits). This would imply, however, that *Latter-Day Saints* erred by assuming the federal government's parens patriae power was equivalent to that of the states'.

If the history of parens patriae power in the early cases means anything for the vast modern practice of state involvement in mass tort cases, it ought to be read as reflecting the Framing Era's insight that common law police powers were subject to legislative constraints. Regardless whether the Statute of Elizabeth was or was not received by a particular state, its existence in England transformed ancient royal prerogatives into matters subject to parliamentary sovereignty and laid the groundwork for the modern regulatory litigation scheme. State and federal legislative control over the executive exercise of public litigation still largely reflects a distribution of power that comports in a very general sense with that structural heritage. However, the parens patriae power in all its iterations (statutory or common law) flows from the federalism built into our constitutional structure through the state police powers. The power has its firmest historical foundation where the states define it for themselves in the context of their own regulatory priorities.

Reconstructing the foundation for modern parens patriae power as a function of state police power hints at why that doctrine ought not to be reduced to a mere analog of class actions under Federal Rule of Civil Procedure 23. Different values animate the two forms of litigation. The parens patriae doctrine lacks the constraints of Rule 23 because it reflects a fundamental form of state power in which those constraints simply have no historical, structural, or functional constitutional purpose. From the earliest days, the *manner* in which states exercise their police powers is flexible, open, and unconstrained by federal policy choices where there is no preemption. Indeed, the flexibility of the doctrine reflects the value of states as experimental innovators and independent regulators.<sup>365</sup> The variations in the expression, utilization, and extent of parens patriae among the several states creates space for local policy choices, experimentation, and varying expressions of enforcement priorities. For this reason, converging class action rules and parens patriae would undercut the core val-

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365. *Constraining the Federal Rules of Civil Procedure*, *supra* note 303, at 224 (discussing "the Jeffersonian view of states as experimental actors capable of innovative policy approaches that can be implemented on a small scale to test their efficacy").

ues underlying *parens patriae* as an expression of the police powers. Shoehorning *parens patriae* actions into the procedural mold of the Federal Rules of Civil Procedure creates convenient symmetry for scholars and practitioners acculturated to Rule 23, but it eviscerates the historical relationship between *parens patriae* and the states' police powers.

#### CONCLUSION

The *parens patriae* doctrine has had the misfortune of being draped in the mythological trappings of royalty. The fiction of its English common law roots connecting it to the guardianship of "infants, idiots, and lunatics" has led to confusion as to its contours and has sometimes made the precedent seem unhinged from the doctrine's purpose.

Reconstructing the doctrine with an American history connected to the social compact of the Constitution and the states' historic police powers offers a better foundation for understanding its development, use, and limitations. The cases reflect the elasticity of the police powers and the evolution of the social mores regarding the role of the state in regulating economic interests. Situating the cases within such contemporary understandings of the police powers yields better predictability and explains the vast changes the doctrine has experienced in the last two decades.

The murkiness of states' *parens patriae* powers can become transparent only when those powers have a historical and structural foundation. The aim of this Article was not to resolve all of the uncertainties that exist around the doctrine's contours. Rather, the Article's clarification of the history and purpose of the doctrine may open up space for future work that accomplishes this goal.