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State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae

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On November 23, 1998, a master settlement agreement settled the lawsuits of forty-six states against the tobacco industry. The settlement brings about historic public health initiatives, such as the end to outdoor advertising, the ban on using cartoon characters in advertisements, and the creation of public education trusts. It also provides that the settling tobacco manufacturers will pay over $200 billion over the next twenty-five years. Some of the legal theories upon which states relied have implications beyond the tobacco litigation. Of particular importance is the application of the theory of parens patriae *in the tobacco litigation. That theory may prove useful and important in the other kinds of attorney general actions discussed in this Article and in actions not yet contemplated.* Parens patriae *is a theory that plainly concerned the tobacco industry because the settlement agreement between the industry and the states expressly covers* parens patriae *actions. But the principles developed and precedents considered in shaping the* parens patriae *doctrine for the tobacco litigation have important implications for other potential actions by attorneys general, such as the gun and lead paint litigations. This Article briefly overviews the doctrine of* parens patriae *and then discusses its doctrinal background and scope in great detail. The Article shows that* parens patriae *principles are accepted by state courts and addresses the specific benefits and limitations on uses of the doctrine.*

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I. INTRODUCTION

The attorneys general litigation against the tobacco industry broke ground on several fronts. The scope of interstate attorney general cooperation was unprecedented. The size of the settlement was unprecedented. Obtaining such massive relief against a previously undefeated litigant was unprecedented.

The impact of the tobacco litigation transcended the states' own cases. The shift in public and juror attitudes toward an industry was also unprecedented. Before the states' litigation, the tobacco industry had not lost a smoking case[1] and polling data showed that prevailing before juries would be difficult.[2] After the settlement, the industry suffered major trial defeats in California,[3] Oregon,[4] and Florida.[5]

1. *See* Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18, 18 (noting the unsuccessful efforts of plaintiffs in the first 45 years of tobacco litigation, but reporting that plaintiffs won four of seven tobacco case trials tried after June 1998). Plaintiffs previously had won only two trials of 813 filed claims against tobacco companies, with the two trial victories reversed on appeal. *See* Erin Myers, Note, *The Manipulation of Public Opinion by the Tobacco Industry: Past, Present, and Future*, 2 J. HEALTH CARE L. & POL'Y 79, 80 (1998).

2. Indeed, Mississippi's critical first action initially was structured to avoid trial by jury. *See* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 894 (1999) (stating that because polls revealed the public opposed the lawsuits two to one, the State of Mississippi filed in Chancery, where there would be no jury).

3. *See* Whiteley v. Raybestos-Manhattan, No. 303-184 (Cal. App. Dep't Super. Ct. Mar. 20, 2000); Henley v. Philip Morris Inc., No. 995172, 1999 WL 221076, at *1 (Cal. App. Dep't Super. Ct. Apr. 6, 1999).

Whether those plaintiff victories survive after appeal remains to be seen. But these losses, against a nearly perfect prior trial record, suggest that the states' litigation affected private cases. If private litigants, the federal government, foreign countries,[6] or others do succeed against the tobacco industry, it will be in part because of the paradigmatic shift in attitude towards the industry resulting from the state litigation brought by the attorneys general.

Several factors made this litigation special and especially threatening to the tobacco industry. Part of the story rests in the quality, resources, and risk taking of attorneys general and of the private lawyers representing the states. The tobacco industry not only faced the legal authority of states, but it also faced private lawyers, who, unlike those the industry had tried to bankrupt before, would be difficult to drive away through delaying tactics and other maneuvers designed to break adversaries. Part of the story rests in the ability of these attorneys to provide protection to the whistle-blowers who the industry sought to vilify, as fictionalized in the movie *The Insider*. Yet another part of the story rests in the industry's fear that Louisiana's direct action against the tobacco industry's insurers would ultimately pit the insurance industry against the tobacco industry.[7]

In addition, much of the success was based on the fact that the attorneys general acted in concert. The pressure of one state alone could be resisted. But when Mississippi, Florida, West Virginia, Massachusetts, and Louisiana acted jointly in March 1996 to secure the first Liggett settlement, the power of joint action was established. That settlement opened access to tobacco industry documents, secured Liggett's cooperation, and encouraged many more states to file actions during the next year. By June 1997, a national settlement was reached, and the master settlement agreement (MSA), reached in November 1998, followed from it.

Most of this is now reasonably well known. What may not be so well known, but especially apropos of this Symposium, are the details

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4. *See Trapped by Their Own Records*, NAT'L L.J., Feb. 28, 2000, at C8 (summarizing the industry's defeat in Williams v. Philip Morris Inc., No. 9705-03957 (Or. Cir. Ct. 1999)).

5. *See* Daynard & Gottlieb, *supra* note 1, at 20.

6. *See* Bob Van Voris, *New Attack on Big Tobacco*, NAT'L L.J., Feb. 22, 1999, at A1 (listing several foreign governments that have filed suit against the tobacco industry in U.S. courts).

7. *See* Dan Lonkevich, *Tobacco Cos. Offer Olive Branch to Insurers in Coverage War*, NAT'L UNDERWRITER, Mar. 31, 1997, at 2. The master settlement agreement of November 23, 1998 (MSA) released the tobacco industry's insurers from liability. *See* Master Settlement Agreement § II(oo) (visited May 24, 2000) <http://www.naag.org/tobac/index.html>.

of the legal theories upon which some states relied. For it is these legal theories, together with the precedent of concerted attorney general action, that have the greatest implications for joint action on other fronts. These theories varied from state to state and would be revealed at different stages of the litigation, as dictated by local variations in pleading rules. In Louisiana, for example, the legal theories on which a party relies need not be stated in the petition.[8]

Although the MSA terminated the litigation before Louisiana's legal theories were fully tested, some of the theories have implications beyond the tobacco litigation. Of particular importance is the Louisiana legal team's application of the theory of *parens patriae* to the tobacco litigation. That theory may prove useful and important in the other kinds of attorney general actions discussed in this Article and in actions not yet contemplated. The State of Louisiana's petition for damages against the tobacco industry contained several causes of action that would be available to any litigant; however, the *parens patriae* theory is uniquely available to states.

Louisiana's trial team developed the theory of *parens patriae*, as applied to the tobacco litigation, to a degree beyond that of any other state. It is a theory that plainly concerned the tobacco industry because the MSA between the industry and the states expressly covers *parens patriae* actions.[9] This is not the place to argue that the particulars of Louisiana's *parens patriae* theory would have prevailed in the tobacco litigation. The states' litigation with the industry is over. But the principles developed and the precedents considered in shaping the *parens patriae* doctrine for the tobacco litigation have important implications for other potential actions by attorneys general.

Part II of this Article gives a brief overview of the doctrine of *parens patriae* and then discusses its doctrinal background and scope in greater detail. Part III shows that *parens patriae* principles are accepted by state courts. Part IV addresses the specific benefits to the state of using the *parens patriae* doctrine in the context of the tobacco litigation and discusses the limitations on uses of the doctrine.

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8. Whether a petition states a cause of action turns solely on construing the facts alleged in the petition. *See* Montalvo v. Sondes, 637 So. 2d 127, 131 (La. 1994); Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So. 2d 1234, 1235-38 (La. 1993); Kuebler v. Martin, 578 So. 2d 113, 114 (La. 1991). There is no requirement that the petition contain a list of legal theories supported by the facts plead. "The court must accept well pleaded allegations of fact as true, and the issue at the trial of the exception [of no cause of action] is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought." *Montalvo*, 637 So. 2d at 131.

9. *See* Master Settlement Agreement, *supra* note 7, § II(pp)(2).

II. *PARENS PATRIAE* ACTIONS AND THE INTERESTS THEY PROTECT

A. *Overview of the Doctrine of* Parens Patriae

A state's interests that may suffer damages can be sovereign, quasi-sovereign, or proprietary. As explained more fully below, the state has a sovereign interest in seeing that its laws are obeyed and enforced. Behavior that violates criminal laws, civil laws, or other regulatory provisions compromises the very sovereignty of the state and can be the subject of a civil action brought in the state's name.[10] But the state does more than merely enforce its laws. The state exists to "promote the health, safety . . . and welfare of the people."[11] A state's quasi-sovereign interests include its interest in its citizens' health, safety, and welfare as well as in a healthful environment.[12] A state's proprietary interests are those that the state asserts on its own behalf as might any other legal entity.[13]

Actions to vindicate states' sovereign and quasi-sovereign interests are sometimes referred to as *parens patriae* actions,[14] though the Latin label is not always used.[15] *Parens patriae* literally means "parent of the country."[16] Whatever the label, a state may recover costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state's citizenry. In the tobacco litigation, for example, the state's duty to protect the public health, safety, and welfare is part of what led it to act against the health hazard created by the tobacco industry and the consequences of that hazard.

Everyone has an ongoing duty to refrain from impinging upon the state's sovereign and quasi-sovereign interests. These interests are only infrequently the object of civil litigation. This is probably

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10. *See infra* text accompanying notes 25-27.
11. LA. CONST. pmbl.
12. *See* discussion *infra* Part II.C-D.
13. *See infra* text accompanying note 28.
14. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1982).
15. The doctrinal labels used to support states' actions on behalf of their citizenry vary. Sometimes no doctrinal labels are used. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 193 (1967) (allowing the United States to sue to "protect its interests" in a cause of action for costs of cleanup). Sometimes the state's action is framed as one brought by the trustee of property for the benefit of the public. *See, e.g.*, State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (allowing a cause of action for damages to the environment). Sometimes cases to protect the public are labeled actions brought under the state's power as *parens patriae*. *See, e.g.*, *Snapp*, 458 U.S. at 607-08 (allowing Puerto Rico to proceed as *parens patriae* in a suit to protect the economic interests of a class of workers); Maine v. M/V Tamano, 357 F. Supp. 1097, 1099 (D. Me. 1973) (allowing a cause of action for damages to the environment based on Maine's interest in its coastal waters and marine life).
16. *See Snapp*, 458 U.S. at 600.

because, fortunately, breaches of duty on a scale that warrants civil state involvement are rare. *Parens patriae* actions are not necessarily appropriate for isolated acts of misbehavior and harm. Because *parens patriae* interests are infrequently litigated, this Part presents the background and scope of *parens patriae* actions and the interests they protect.

American courts uniformly recognize a state's authority to sue, as *parens patriae*, to vindicate the state's and its citizens' interests.[17] Viewed as a *parens patriae* action, the theory of many possible attorney general cases, including the tobacco cases, is simple. The state alleges misbehavior by defendants that harmed the state's sovereign and quasi-sovereign interests.[18] These interests include the state's interest in enforcement of its civil and criminal laws and its interest in protecting and vindicating the health, safety, and welfare of its people. In the tobacco cases, these interests are separate from the state's interest in recovering its medical costs, though the state's vast tobacco-related medical costs might have assisted in measuring the minimum harm the industry imposed on the state.

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.[19] Federal doctrine is therefore a natural starting place for describing the *parens patriae* doctrine.

The United States Supreme Court reviewed *parens patriae*'s modern history in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.[20] In that case, Puerto Rico sought to bring suit in its capacity as *parens patriae* against defendants for violations of federal law.[21] Puerto Rico sued numerous individuals and companies engaged in the apple industry in Virginia.[22] The complaint alleged that the defendants had violated federal statutes and regulations "by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more

17. *See, e.g., infra* notes 56-63 and accompanying text.

18. "[J]udicial relief sometimes may be granted to a *quasi*-sovereign state under circumstances which would not justify relief if the suit were between private parties." Florida v. Mellon, 273 U.S. 12, 16 (1927). But, in general, the cases involve misbehavior by defendants that likely would give rise to liability under some nuisance or other tort theory. And it "must appear that the state has suffered a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement." *Id.* at 16-17.

19. *See, e.g.*, State *ex rel.* Ieyoub v. Bordens, Inc., 684 So. 2d 1024, 1026 (La. Ct. App. 4th Cir. 1996) (citing *Snapp*, 458 U.S. at 592).

20. 458 U.S. at 600-06.

21. *See id.* at 598-99.

22. *See id.* at 597.

burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers."[23] Puerto Rico alleged that

> this discrimination against Puerto Rican farmworkers deprived "the Commonwealth of Puerto Rico of its right to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and thereby caused irreparable injury to the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth."[24]

Puerto Rico's action prompted the Supreme Court to review the entire line of *parens patriae* cases.

B. Sovereign Interests

The Court stated that, to have *parens patriae* standing, the state must assert an interest related to its sovereignty.[25] An "easily identified" sovereign interest consists of "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves *the power to . . . enforce a legal code*, both civil and criminal."[26] Thus, the state's power to enforce civil and criminal codes is an interest that may be protected through *parens patriae* actions.[27]

Parens patriae standing cannot be based on two other interests, which the Court called (1) proprietary interests and (2) private interests pursued by the state as a nominal party.

> Not all that a State does, however, is based on its sovereign character. Two kinds of nonsovereign interests are to be distinguished. First, like other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court. Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply

23. *Id.* at 598 (footnote omitted).
24. *Id.*
25. *See id.* at 601.
26. *Id.* (emphasis added).
27. *See id.* at 600-01. The Court recognized a second sovereign interest of less relevance here—"the demand for recognition from other sovereigns," which usually "involves the maintenance and recognition of borders." *Id.* at 601.

> by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party.[28]

The tobacco litigation plainly did not involve interests ineligible for *parens patriae* protection. The states did not seek relief as proprietors of any enterprise. Nor did the states pursue the interests of private parties "*only* for the sake of the real party in interest."[29] Any recovery by the state in the tobacco litigation would not inure directly to the benefit of private interests. And the state's health-, safety-, and welfare-based reasons for bringing an action against tobacco manufacturers are obvious.

C. Development of the Concept of Quasi-Sovereign Interests

In addition to sovereign interests, the Court recognized "quasi-sovereign" interests.[30] These, too, can support *parens patriae* actions, but what counts as a quasi-sovereign interest is less clear than what counts as a sovereign interest. Quasi-sovereign interests "are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party."[31] The Court developed the concept of quasi-sovereign interests through example and counterexample rather than through deductive reasoning. Quasi-sovereign interests consist of a set of interests that the state has in the well-being of its populace.[32] "A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases."[33]

In *Louisiana v. Texas*, Louisiana unsuccessfully sought to enjoin a quarantine maintained by Texas officials, which had the effect of limiting trade between Texas and the Port of New Orleans.[34] The Court labeled Louisiana's interest as that of *parens patriae* and distinguished it from the state's sovereign and proprietary interests:

> Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek

28. *Id.* at 601-02.
29. *Id.* at 602 (emphasis added).
30. *See id.* at 601-02.
31. *Id.* at 602.
32. *See id.*
33. *Id.*
34. 176 U.S. 1, 22-23 (1900).

> relief in this way because the matters complained of affect her citizens at large.[35]

Although Louisiana was denied relief, a line of cases developed in which states were permitted to represent the interests of their citizens in enjoining public nuisances, including discharge of sewage,[36] flooding,[37] water pollution,[38] diversion of water,[39] and air pollution.[40]

In the first of these cases, *Missouri v. Illinois*, the Court expressly tied *parens patriae* standing to protecting the health and comfort of a state's citizens.[41] "[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."[42] In *Georgia ex rel. Hart v. Tennessee Copper Co.*, a state's quasi-sovereign interest was extended beyond the general concepts of the health and comfort of its citizens to specifically include interests in the land on which they reside and in the air that they breathe.[43] "[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[44]

The Court has stated that these early nuisance cases were premised on the threat of injury to the public health and comfort. After surveying many *parens patriae* cases, the Court summarized the doctrine as follows:

> In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, *a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in*

35. *Id.* at 19.
36. *See* Missouri v. Illinois, 180 U.S. 208, 248 (1901).
37. *See* North Dakota v. Minnesota, 263 U.S. 365, 373-74 (1923).
38. *See* New York v. New Jersey, 256 U.S. 296, 298-302 (1921).
39. *See* Kansas v. Colorado, 206 U.S. 46, 99-105 (1907); Kansas v. Colorado, 185 U.S. 125, 141-42 (1902).
40. *See* Georgia *ex rel.* Hart v. Tennessee Copper Co., 206 U.S. 230, 236-39 (1907).
41. 180 U.S. at 241.
42. *Id.*
43. 206 U.S. at 237.
44. *Id.*

> *general.* Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[45]

Inclusion of public health interests is all that is necessary for purposes of many possible attorney general cases, but the interests qualifying as quasi-sovereign interests "extend well beyond the prevention of such traditional public nuisances."[46] In *Pennsylvania v. West Virginia*, Pennsylvania was deemed a proper party to represent its residents' interests in maintaining access to natural gas produced in West Virginia:

> The private consumers in each State ... constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.[47]

The state's quasi-sovereign interest in its citizens' economic well-being was also recognized in *Georgia v. Pennsylvania Railroad.*[48] Georgia alleged that railroads had conspired to fix freight rates in a manner that discriminated against Georgia shippers in violation of the federal antitrust laws.[49] The Court equated unlawful trade barriers with the pollution and nuisance cases:

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. ... [Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams.[50]

The defendants' alleged wrong "limits the opportunities of [the state's] people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."[51]

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45. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982) (emphasis added).
46. *Id.* at 605.
47. 262 U.S. 553, 592, *aff'd*, 263 U.S. 350 (1923).
48. 324 U.S. 439, 450 (1945).
49. *See id.* at 443-44.
50. *Id.* at 450.
51. *Id.* at 451.

D. *Quasi-Sovereign Interests Include Health, Safety, and Welfare*

State and federal courts deem several state interests to be quasi-sovereign interests. These interests clearly include the health, welfare, and safety of a state's citizens.

Even early in the development of *parens patriae* doctrine, concerns about pollution were considered to be more general concerns about health. For example, in *Georgia ex rel. Hart v. Tennessee Copper Co.*, the State of Georgia alleged that a Tennessee company was emitting polluting chemicals that were harming Georgia's interests.[52] Georgia owned little of the affected lands, but its limited ownership did not preclude the existence of a cause of action.[53] In an opinion written by Justice Oliver Wendell Holmes, Jr., the Court determined that Georgia had established that the private company's industrial pollutants "threaten[ed] damage on so considerable a scale to the forests and vegetable life, *if not to health*, within the plaintiff State as to make out a case."[54]

Justice Holmes's reference to "health" is made in a context that establishes health as an interest that a state may clearly defend through *parens patriae* actions. If harm to "the forests and vegetable life" could be defended through such actions, it followed, a fortiori, that health could be protected by *parens patriae* actions.[55] Thus, although pollution often does aesthetic damage and is a common trigger for *parens patriae* actions, the underlying reason for recognizing causes of action against polluters is that pollution threatens the health and safety of the citizenry.

The state's interest in protecting its environment is either part of its greater interest in protecting the health and safety of its citizenry or a separable interest that the state may protect. State and federal courts recognize a state's authority to sue as *parens patriae* for many threats to public health, safety, and welfare. These include damage to coastal or harbor waters and marine life,[56] discharge of sewage into public waters,[57] the diverting of water from an interstate stream,[58] changes in

52. 206 U.S. 230, 236 (1907).
53. *See id.* at 237-39.
54. *Id.* at 238-39 (emphasis added).
55. *See id.*
56. *See* Maine v. M/V Tamano, 357 F. Supp. 1097, 1098-1101 (D. Me. 1973); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1065-67 (D. Md. 1972); State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 758 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).
57. *See* New York v. New Jersey, 256 U.S. 296, 314 (1921); Missouri v. Illinois, 180 U.S. 208, 241 (1901).
58. *See* Kansas v. Colorado, 206 U.S. 46, 99-105 (1907).

drainage that increase the flow of water in an interstate stream,[59] the threat of being forced to accept low-level radioactive waste,[60] refusal of medical clinics to provide sign language interpreters at medical examinations of deaf patients,[61] schemes constituting common-law fraud,[62] and restraints on the commercial flow of natural gas.[63] States thus may sue, on behalf of their citizenry, for damages to the environment, damages to the health, safety, and welfare of their residents, damages to identifiable groups, and economic harms.

Although many states filed actions against the tobacco industry, only one tobacco case expressly analyzes a state's authority, as sovereign, to maintain a cause of action for harm to the health, safety, and welfare of its people. In *Texas v. American Tobacco Co.*, the court sustained the state's authority.[64] One of the key questions in this case was whether the state could maintain a common-law *parens patriae* action without any statutory authority.[65] Relying on *Alfred L. Snapp & Son, Inc.*, Judge David Folsom concluded that it could maintain such an action.[66]

Judge Folsom first noted that the Supreme Court had approved actions by states to protect quasi-sovereign interests and that these "interests can relate[ ] to either the physical or economic well-being of the citizenry."[67] He then found that the state had a sufficient interest to maintain an action in its quasi-sovereign capacity:

> First, it is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the welfare of its people have suffered at the hands of the Defendants. It is clear to the Court that the State can

59. *See* North Dakota v. Minnesota, 263 U.S. 365, 373-74 (1923).

60. *See* Nebraska *ex rel.* Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1210-11 (D. Neb. 1993), *aff'd*, 26 F.3d 77 (8th Cir. 1994).

61. *See* New York *ex rel.* Vacco v. Mid Hudson Med. Group, P.C., 877 F. Supp. 143, 146-49 (S.D.N.Y. 1995).

62. *See, e.g.*, State v. First Nat'l Bank, 660 P.2d 406, 421 (Alaska 1982) (collecting cases).

63. *See* Pennsylvania v. West Virginia, 262 U.S. 553, 591-92, *aff'd*, 263 U.S. 350 (1923).

64. 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997).

65. *See id.*

66. *See id.*

67. *Id.*

> maintain this action pursuant to its quasi-sovereign interests found at common law.[68]

The *American Tobacco* ruling has implications for other attorney general actions. Under this case, a defendant's alleged wrongdoing can give rise to a viable cause of action absent any statutory authorization. The state's quasi-sovereign interests, standing alone, give it authority to prosecute an action.

III. *PARENS PATRIAE* DOCTRINE IN STATE COURTS

The *parens patriae* principles developed primarily in federal court litigation and approved by the Supreme Court have been endorsed by the states.[69] For obvious reasons, we discuss Louisiana's approach to *parens patriae* doctrine in greater detail than that of other states.

A. Louisiana

The Louisiana Constitution authorizes the attorney general to bring actions asserting the State's *parens patriae* interests. Louisiana case law recognizes this authority.

1. The Attorney General's State Constitutional Authority to Bring *Parens Patriae* Actions

The attorney general's authority to bring *parens patriae* actions stems from Louisiana's constitutional text. The Louisiana Constitution states in relevant part:

> As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.[70]

Thus, the Louisiana Constitution explicitly and implicitly vests the attorney general with broad authority to conduct litigation on behalf of

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68. *Id.* at 962-63 (citation omitted) (footnote omitted).

69. *See, e.g.*, State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 758-59 (N.J. Super. Ct. App. Div. 1975) (discussing federal cases), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).

70. LA. CONST. art. IV, § 8.

the State. The constitution emphasizes the attorney general's independent authority to conduct litigation by providing for direct election of the attorney general, by designating the attorney general to be the State's chief legal officer, and by vesting in the attorney general authority to enforce the State's laws and to represent the State.[71]

Most importantly for purposes of this discussion, the constitution's text expressly authorizes the attorney general "to institute" a "civil action" "[a]s necessary for the assertion . . . of *any* right or interest of the state."[72] The sweep of the attorney general's litigation authority could hardly be broader. Article IV's text and structure also show that the attorney general's power to institute civil proceedings to vindicate the State's rights is among his broadest powers. His power to initiate civil proceedings is probably limited only by his good faith, his discretion, express legal constraints, or behavior that would be contrary to public policy. This broad power to initiate civil proceedings is a direct logical inference from Article IV's text. The attorney general's authority to intervene in criminal proceedings or to supersede an attorney who has initiated a civil or criminal action is limited by clauses (2) and (3). His power to institute civil legal proceedings on the State's behalf is not so limited.

The Louisiana Supreme Court recognizes the attorney general's broad discretion to act for the State in civil cases. In *State v. Texas Co.*, the defendant challenged the attorney general's authority to bring an action to cancel a mineral lease because the legislature had vested the State Mineral Board with full supervision over all mineral leases.[73] The defendant thus argued for an implied limitation on the attorney general's authority to represent the State.[74] The court rejected the argument, stating:

> The Attorney General has unquestionably the right to file a suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administrative officer or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution.[75]

Since the attorney general may bring an action to vindicate *any* interest of the State, the attorney general may bring actions on behalf of the State as *parens patriae*. Indeed, if the attorney general cannot

71. *See id.*
72. *Id.* (emphasis added).
73. 199 La. 846, 850, 7 So. 2d 161, 162 (1942).
74. *See id.*
75. *Id.* at 851, 7 So. 2d at 162.

bring such actions, then no State official appears to have such authority.

2. Louisiana Case Law Recognizes *Parens Patriae* Actions

Louisiana's courts recognize both the principles of *parens patriae* actions developed by the United States Supreme Court and the attorney general's authority to bring *parens patriae* actions.[76] For example, the state courts have allowed *parens patriae* actions for violations of antitrust and consumer protection laws. In *State ex rel. Ieyoub v. Bordens, Inc.*, the court recognized the attorney general's authority to proceed as *parens patriae* for antitrust violations in order to protect its quasi-sovereign interests (i.e., the State's general economy).[77] In doing so, the court referred to *Alfred L. Snapp & Son, Inc.*[78] Likewise, in *State ex rel. Ieyoub v. Classic Soft Trim, Inc.*, the court recognized the attorney general's capacity to proceed as *parens patriae* under the Louisiana Unfair Trade Practices and Consumer Protection Law.[79]

Even when Louisiana courts have deemed the State not to have a *parens patriae* cause of action based on a particular legal theory, they have recognized the State's authority to sue as *parens patriae*. In *State v. Time, Inc.*, the State sued Time, Inc. for defamation.[80] The action was brought on the State's "own account and for account of its citizens."[81] Although the court decided that a state is not a person for purposes of defamation law, the court recognized that a state may bring a *parens patriae* action for certain types of alleged wrongs.[82] Since a state could not be libeled, however, it had no interest distinct from that of its citizens.[83]

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76. *See, e.g.*, State *ex rel.* Ieyoub v. Bordens, Inc., 684 So. 2d 1024, 1026 (La. Ct. App. 4th Cir. 1996) (recognizing the authority of the attorney general to bring a *parens patriae* action for antitrust violations); State *ex rel.* Ieyoub v. Classic Soft Trim, Inc., 663 So. 2d 835, 836-37 (La. Ct. App. 5th Cir. 1995) (stating that the attorney general can seek redress under *parens patriae* for private parties); State v. Time, Inc., 249 So. 2d 328, 333-34 (La. Ct. App. 1st Cir. 1971) (recognizing the validity of *parens patriae* actions but finding no cause of action for defamation).

77. 684 So. 2d at 1026.

78. *See id.*

79. 663 So. 2d at 836 (rejecting the defendants' argument that "the State does not have any interest in the litigation as *parens patriae*").

80. 249 So. 2d at 328.

81. *Id.*

82. *See id.* at 333.

83. *See id.*

B. Other States

In *State ex rel. Humphrey v. Ri-Mel, Inc.*, Minnesota alleged wrongdoing by health clubs and their owners.[84] In approving the state's standing as *parens patriae*, the state appellate court stated:

> Although there is no express statutory authority for the attorney general's action for restitution on behalf of injured club members, common law has recognized that under the doctrine of *parens patriae* a state may maintain a legal action on behalf of its citizens, where state citizens have been harmed and the state maintains a quasi-sovereign interest. It is also established that Minnesota has a quasi-sovereign interest in protecting the economic health of its citizens.[85]

The Minnesota court identified a factor supporting *parens patriae* actions not emphasized in the United States Supreme Court's review of cases. Citing *Minnesota ex rel. Humphrey v. Standard Oil Co.*,[86] the court took into account the likelihood of successful lawsuits by individuals.[87] The court viewed *parens patriae* actions as a way for the state to represent a group of harmed citizens whose individual harms might not lead them to bring an action:

> Minnesota has [an] incentive to bring an action on behalf of club members as *parens patriae*, because injured club members may not avail themselves of their remedy under the [state law] because of the economic burden of suing on a small claim. The clubs' closings affected the economic interests of more than 16,000 citizens, and Minnesota does have a quasi-sovereign interest in protecting their economic health.[88]

In *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America*, the State of California alleged that the defendants unlawfully disposed of hazardous waste.[89] The state court held that the State has a legally cognizable property interest in its waters.[90] The state court expressly relied on "a line of cases [that] recognize and protect the State's *parens patriae* interest in the air, land and waters of its territory."[91] In *State v. Jersey Central Power & Light Co.*, a pollution action, the state court noted that "[b]oth parties agree that the State has an interest which gives it standing to sue under the *parens*

84. 417 N.W.2d 102, 104 (Minn. Ct. App. 1987).
85. *Id.* at 112 (citation omitted).
86. 568 F. Supp. 556 (D. Minn. 1983).
87. *See Ri-Mel*, 417 N.W.2d at 112.
88. *Id.*
89. 271 Cal. Rptr. 596, 598 (Ct. App. 1990).
90. *See id.* at 605-06.
91. *Id.* at 605.

patriae doctrine for injunctive relief from pollution in navigable waters which causes injury to fish."[92] Although case law in many states does not directly address *parens patriae* authority to sue, we have found no state in which the principle of *parens patriae* has been deemed not to be a part of the state's law.

In summary, whether brought in state or federal court, the interest sought to be protected in a *parens patriae* action must differ from that of an ordinary owner or tort victim. The facts must show that "the State has an interest independent of and behind the titles of its citizens."[93] The state must have an interest of its own and not merely be seeking "recovery for the benefit of individuals who are the real parties in interest."[94] And the cases all involve behavior that adversely affects a substantial number of the state's citizens.

IV. THE BENEFITS AND LIMITS OF *PARENS PATRIAE* PRINCIPLES

The benefits of the *parens patriae* doctrine depend on the facts of particular cases. In the tobacco litigation, the state's authority to sue in *parens patriae* was of potential importance for several reasons. These include establishing the attorney general's and the state's authority to sue, limiting the scope of potential industry defenses and statutory preemption claims, and establishing an additional basis for monetary and injunctive relief. Whether these specific benefits assist attorneys general in future cases depends of course on the harms they seek to alleviate, the other legal theories available to them, and the defenses that may be available to potential defendants.

A. Authority of the State and the Attorney General to Act

In the tobacco litigation, the *parens patriae* theory strengthened the attorney general's claim to act on behalf of the state. In Louisiana's case, the attorney general's authority to sue, independently of any authority to sue vested in other state agencies, was at issue.[95]

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92. 336 A.2d 750, 758 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).

93. Georgia *ex rel.* Hart v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).

94. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 396 (1938).

95. *See AG's Authority at Issue in Tobacco Suit*, TIMES-PICAYUNE (New Orleans), Nov. 27, 1996, at A6. It was also in issue in other states. *See, e.g.*, Bob Van Voris, *Tobacco Puffing Along*, NAT'L L.J., May 5, 1997, at A6 (stating that tobacco companies filed preemptive suits to enjoin seven states from suing tobacco companies). In February 1996, one month before Louisiana's filing, Mississippi Governor Kirk Fordice sued Mississippi Attorney General Mike Moore to stop the Mississippi suit. *See* Elizabeth Gleick, *Tobacco Blues*, TIME, Mar. 11, 1996, at 54, 58. The action was not resolved in Attorney General Moore's favor until March 13, 1997. *See In re* Fordice, 691 So. 2d 429, 435 (Miss. 1997). In

The tobacco industry consistently asserted that the attorney general lacked the procedural capacity to sue because Medicaid law vested that right in other state agencies.[96] To the extent *parens patriae* actions assert harms to a state's quasi-sovereign interests, as described above, the authority and obligation of a state's chief legal officer to prosecute the action is strengthened. That officer is the natural state official to seek to vindicate rights touching upon a state's sovereignty. The state in *parens patriae* asserts harms independent of the dollar costs of Medicaid.

B. Limiting the Scope of Defenses and Statutory Preemption Claims

Had the case not settled, the courts would have needed to address whether the tobacco industry's defense that any right to recovery flowed through the individual smokers themselves and was not an independent right of the state. To the extent *parens patriae* actions assert harms to the state qua state, defenses that relate to individuals' actions are unavailing. If defendants commit breaches of legal duties that harm a state's quasi-sovereign interests, it is no defense that individuals who might have also suffered may have engaged in behavior that precluded their individual recovery.

Due to the sovereign and quasi-sovereign interests at stake in *parens patriae* actions, courts are reluctant to infer preemption of *parens patriae* actions from the existence of other remedial legislation. *Parens patriae* actions are not necessarily precluded by the existence of specific statutory remedies. In *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America*, the court stated that *parens patriae* actions are not preempted by specific statutory remedies.[97] "This right of [*parens patriae*] recovery is not diminished by the coexistence of express statutory remedies where the legislation does not presume to preempt common law rights."[98] To the extent *parens patriae* actions vindicate sovereign and quasi-sovereign interests that differ from proprietary and private interests, there is little reason to infer denial of authority to bring *parens patriae* actions from the mere existence of other statutory remedies.

West Virginia, one of the four other states to precede Louisiana in filing, Governor W. Gaston Caperton sued West Virginia Attorney General Darrell McGraw to stop the State's suit. *See* Gleick, *supra*, at 58.

96. *See AG's Authority at Issue in Tobacco Suit*, *supra* note 95; *see also* Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (noting that the defendants argued that Medicaid statutes preempted the State's authority to sue under common-law theories).

97. 271 Cal. Rptr. 596, 606 (Ct. App. 1990).

98. *Id.*

Express preemption of actions to vindicate sovereign and quasi-sovereign interests normally is required.[99] The United States Supreme Court mandates that federal courts be extremely reluctant to interpret congressional enactments or constitutional requirements to interfere with states' sovereign prerogatives. For example, in deciding whether federal statutes authorize suits against states in federal court, the Supreme Court has adopted a clear statement rule. The Court asks whether Congress has "unequivocally expresse[d] its intent to abrogate" state sovereign immunity.[100] And the Court finds that a state has waived its immunity only when it does so "'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'"[101]

In the one tobacco case expressly discussing a *parens patriae* theory, the court found that the Texas *parens patriae* action was not supplanted by the Texas Medicaid statutory remedy that defendants argued was exclusive.[102] In the Texas tobacco litigation, Judge Folsom addressed the question "whether the State's common law action has been supplanted by a statutory remedy that should be deemed exclusive."[103] He stated that the "crux of the Defendants' argument is that any common law action the State may have had can no longer be pursued, because the Texas legislature has provided the State with its exclusive remedy" in a Texas Medicaid statute.[104] The court noted that this "principle derives from the rule of statutory construction *expressio*

99. *Cf.* LA. CONST. art. XII, § 13 (prohibiting prescription against the State unless express exceptions exist).

100. Green v. Mansour, 474 U.S. 64, 68 (1985); *see also* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (supporting the clear statement rule).

101. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985) (alteration in original) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909))). In recent years, the Supreme Court has overruled precedents that allowed actions to go forward against States. *See* Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987) (overruling Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184 (1964)).

102. *See* Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962-65 (E.D. Tex. 1997). In some tobacco cases filed by states, courts have relied on state Medicaid statutes to limit causes of action to recover Medicaid costs. *See* Iowa *ex rel.* Miller v. Philip Morris Inc., 577 N.W.2d 401, 406 (Iowa 1998); State v. Philip Morris Inc., No. 96122017, 1997 WL 540913, at *3 (Md. Cir. Ct. May 21, 1997) (stating the "remedy of subrogation [in the statutes] is the exclusive remedy available"). Unlike the Texas and Louisiana cases, these tobacco cases did not expressly put in issue the state's common-law right of action based on its quasi-sovereign interest in the health, safety, and welfare of its people. Only the Texas case expressly discusses such an interest.

103. *American Tobacco*, 14 F. Supp. 2d at 963.

104. *Id.* (footnote omitted) (citing TEX. HUM. RES. CODE ANN. § 32.033).

unius est exlusio alterius. In other words, if one thing is implied, it is implied to the exclusion of all others."[105]

The court concluded that applying *expressio unius* would frustrate, rather than promote, the purpose of state and federal Medicaid recovery statutes:

> [T]he Defendants would have this Court direct that the State bring individual subrogation claims pursuant to [the Texas Medicaid statute]. Although this approach may be preferred in situations where a single tortfeasor inflicts a one-time harm against a single individual who receives Medicaid benefits, the practical consequence of the Defendants' position would be to prohibit a state from ever instituting a suit that alleges a broad based harm to millions of citizens. It would be impractical, if not impossible, for the states to follow the mandates of the Medicaid statute's reimbursement provisions, because proceeding on a claim-by-claim basis would be cost prohibitive and inefficient.
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> . . . To prevent the State from proceeding in the present manner does not further the purpose of the Medicaid reimbursement provisions, rather it hinders it. To adopt the Defendants' position, this Court would have to determine that Congress and the Texas legislature anticipated the reimbursement issues raised by this case, considered the existence of the State's common law cause of action, and determined that a subrogation remedy would be the best way to proceed in all instances. This is too much to ask. The State's position that the presence of a statutory right normally does not extinguish nonstatutory rights is more consistent with the spirit of the reimbursement provisions of the Medicaid statute.[106]

In the tobacco litigation, there would thus be a reduced basis for claiming that any Medicaid-based cause of action was the exclusive cause of action. This benefit of *parens patriae* theory could well apply in other contexts.

C. *Monetary Relief Is Available in* Parens Patriae *Actions*

Parens patriae actions may be brought for monetary relief as well as for injunctive relief.[107] Courts have rejected the argument that damages are not available in *parens patriae* actions.[108] When the

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105. *Id.*

106. *Id.* at 964-65.

107. *See* Maine v. M/V Tamano, 357 F. Supp. 1097, 1101 (D. Me. 1973); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1065-69 (D. Md. 1972). *M/V Tamano* was cited with apparent approval by the United States Court of Appeals for the Fifth Circuit. *See* United States v. Dixie Carriers, Inc., 736 F.2d 180, 186 n.11 (5th Cir. 1984).

108. *See, e.g.*, Hawaii v. Standard Oil Co., 301 F. Supp. 982, 987 (D. Haw. 1969) (finding "no merit in [the] defendants' claim that there can never be a *parens patriae* suit for

Supreme Court has discussed the question of damages in *parens patriae* cases it has indicated that the Eleventh Amendment precludes a state from recovering monetary compensation from another state only when the monetary recovery will clearly be passed on to individual state citizens.[109] In the tobacco case expressly discussing damages under a *parens patriae*-like theory, the court accepted that damages are available. In the Texas litigation, Judge Folsom clearly assumed that damages, to the extent proven, would be available to a state seeking to vindicate its quasi-sovereign interests.[110]

D. *The Limits of the* Parens Patriae *Doctrine*

Deriving modern limits on the *parens patriae* doctrine is difficult because most of the leading cases were decided many years ago. Most of the leading Supreme Court cases date from the early 1900s.[111] It is not coincidental that cases addressing the authority of a state to sue in *parens patriae* followed closely after the industrialization of the United States. Spills into waterways, diversion of water, air pollution, and the like became regional issues in the early industrial era.[112] These early actions in *parens patriae* can be viewed as one method of states controlling the effects of industrialization. It would take Congress decades to address these issues at the national level through measures such as the Clean Air Act.

Active modern use of *parens patriae* principles by attorneys general may be a consequence of the growth of the modern American consumer state. Unfair and deceptive practices laws are a key state weapon in the effort to protect consumers. But the modern consumer state, like the industrial state, includes groups seemingly beyond the reach of traditional state regulation, such as consumer protection laws,[113] and too powerful to be subject to federal regulation. For

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damages"), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of Am., 271 Cal. Rptr. 596, 606 (Ct. App. 1990) ("Where confronted with the issue, the courts have accorded the State the right to seek money damages based upon such interest.").

109. *See* North Dakota v. Minnesota, 263 U.S. 365, 374-76 (1923).

110. *See American Tobacco*, 14 F. Supp. 2d at 964-65. Doubts about the availability of damages in *parens patriae* actions have arisen in cases in which the *parens patriae* action seeks monetary recovery not from an injury to the people of the state but only from specific injuries to specific individuals. *See* Bachynsky v. State, 747 S.W.2d 868, 870 n.8 (Tex. App. 1988).

111. *See* discussion *supra* Part II.C.

112. *See supra* notes 36-44 and accompanying text.

113. However, some state tobacco suits contain viable unfair and deceptive practices claims. *See* State *ex rel.* Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 495-98 (Minn. 1996) (granting an insurance company standing to sue tobacco defendants under consumer

example, the tobacco industry resisted federal and state regulation through massive lobbying as well as lack of candor about the health risks of smoking.[114] Since this modern use of *parens patriae* is in its early stages it may be premature to anticipate what limits should be imposed. The doctrine likely played a role in bringing about the successful tobacco litigation settlement but that settlement pretermitted the opportunity for courts to articulate the doctrine's limits.

The guidelines sketched below for exercise of *parens patriae* power are necessarily imprecise. In assessing the limits of *parens patriae* principles, three kinds of limitations are worth separating: prudential limits, practical limits, and legal limits.

1. Prudential Limits

The power of the state can be daunting. It literally extends to the power over life and death. The first and most important check on overextending that power must come from the prudential acts of the state officials who are authorized to exercise state power. In determining whether to exercise *parens patriae* power, state officials should take into account two principal prudential factors.

First, actions in *parens patriae* should be reserved for substantial and serious harm to the citizenry. Misdeeds directed against individuals or small groups usually do not require use of the doctrine. The tobacco litigation illustrates the kind of alleged massive harm that warrants action though not every instance of harm need be so overwhelming. Louisiana acted in *parens patriae* in the tobacco litigation because of the severe damages allegedly inflicted by the tobacco industry on the State's sovereign and quasi-sovereign interests. The scope of the alleged wrong and the extensiveness of the alleged harm supported the State's decision to initiate the litigation on its own behalf.

Second, other available remedies and doctrines should be wanting or limited in some respect. The tobacco litigation is again illustrative. This was not a battle that individual citizens can or should be expected to fight, one-by-one, against an industry's marketing, scientific, public relations, and legal armies. And the state's suffering of harms independent of those suffered by individual smokers suggests that only action by the state could vindicate its interests.

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protection theories). *But see American Tobacco*, 14 F. Supp. 2d at 970-71 (dismissing Texas's deceptive practices claim).

114. *See* David M. Forman, Note, *Big Tobacco: An Impenetrable Industry Regulators Can Only Hope to Contain*, 31 SUFFOLK U. L. REV. 125, 138 n.73 (1997) (discussing the means by which tobacco companies have avoided regulation).

These prudential considerations vest substantial discretion in state law enforcement officials, especially the attorney general. But broad prosecutorial discretion is the norm in our legal system. Prosecutors' decisions to initiate civil or criminal actions are virtually unreviewable. It should not be surprising that the attorney general's authority to prosecute state interests in *parens patriae* actions is similarly broad.

2. Practical Limits

If the tobacco litigation is a guide, an important practical limit to the use of *parens patriae* will be the willingness of states or attorneys general to act in concert. However powerful one state's use of the *parens patriae* principle might be, the core lesson of the tobacco litigation is that states can be most effective when they act in concert. In hindsight it is easy to forget that the states did not always present such a united front against the tobacco industry.[115] Only after the states were substantially united did serious settlement terms emerge.

Few took the state actions seriously when there was only one or a handful of states suing the tobacco industry. Among the many skeptics were fellow attorneys general who declined to file suit.[116] It was not until after the first Liggett settlement of March 1996 that concerted state action really began to squeeze the tobacco industry.[117] Before the first Liggett settlement, only six states, including Louisiana,

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115. *See* David S. Samford, Note, *Cutting Deals in Smoke-~~Filled~~ Free Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 868-69 (1998-1999).

116. The industry's aggressive defense tactics against attorneys general discouraged Colorado from filing at the time. *See* Joan Beck, *Deadly Defense*, DALLAS MORNING NEWS, Feb. 26, 1996, at 11A. Wisconsin's attorney general stated that he would wait to see how the other states did before filing suit. *See* Paul Norton, *Doyle: Wait, See on Tobacco Suit*, CAPITAL TIMES (Madison), Feb. 26, 1996, at 1A. He stated: "So we've made the decision to wait and see if these cases get through the preliminary stages, and to see how they develop before we really come to terms with a decision on whether or not we're going to invest this kind of money [in the litigation]." *Id.* (internal quotations omitted).

New Hampshire's attorney general may have spoken for many attorneys general when he said that New Hampshire could just sit it out and sign on when and if the states win. *See* Norma Love, *Democrats: New Hampshire Should Sue Tobacco Companies*, AP POL. SERVICE, Apr. 2, 1996, *available in* 1996 WL 5375466. New Hampshire held off "because the other states are taking the lead." *Id.* According to that state's attorney general, "It isn't necessary to bring an action today. There's no reason to spend our resources when it's being competently handled by others." *Id.* (internal quotations omitted). Ohio's attorney general volunteered that "[m]any of the legal theories being used in the lawsuits are untested and unproven." Bob Van Voris, *AGs' Claims Mere Smoke?*, NAT'L L.J., Apr. 28, 1997, at A1 (alteration in original) (internal quotations omitted). In an 88-page report completed in October 1996, the Alabama attorney general's task force concluded that the legal arguments advanced by the state attorneys general are "at best weak and at worst bizarre." *Id.* (internal quotations omitted).

117. *See* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 923 (1998).

had sued.[118] The number grew to thirty-nine by June 1997.[119] A set of local actions had been transformed into a truly national action. National settlements followed. A retrospective article in *The Wall Street Journal* reported that the "surprise 1996 settlement of five states" was "a turning point in the tobacco wars."[120]

3. Legal Limits

Legal limits on *parens patriae* are foremost a question of state law. Within a state's own courts, and subject to federal and state constitutional limitations, state legislatures can authorize as broad a scope for the use of *parens patriae* as they wish. And several kinds of state laws, including unfair and deceptive practices laws, can be viewed as statutory embodiments of *parens patriae* principles.[121] States have the corresponding power, at least through provisions in state constitutions, to limit assertions of that power or judicial recognition of such power.

Assuming states choose to adhere to currently existing *parens patriae* case law, Part II presents the principal doctrinal limitations. As currently articulated, *parens patriae* actions require that the state not be acting in a proprietary capacity. When the state itself is a victim of tortious or contractual misconduct, it can directly vindicate its interests as fully as any other litigant. And states cannot be acting simply as enforcement agencies for small collections of private individuals. There must be a state interest beyond that of private parties to warrant a *parens patriae* action.

The Supreme Court has not set out the precise nature of such state interests. As noted above, "[t]he vagueness of this concept can only be filled in by turning to individual cases."[122] Speculation about what interests will be viewed as supporting *parens patriae* actions in the future may not be fruitful. It suffices to note that the state's interest in the health, safety, and welfare (including economic welfare) of its citizens supports such actions. This broad view of protected interests should support safeguarding nearly all interests that a state might reasonably seek to protect.

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118. *See* Love, *supra* note 116.

119. *See* Mather, *supra* note 117, at 923.

120. Ann Davis, *Cashing In on a Tobacco Bonanza*, WALL ST. J., Dec. 15, 1998, at B1.

121. *See, e.g.*, Louisiana Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. §§ 51:1401-:1418 (West 1987 & Supp. 2000).

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

V. CONCLUSION

The states' tobacco litigation revived use of an important power of state governments: civil actions brought in *parens patriae* to vindicate a state's interests in the health, safety, and welfare of its citizens. The use of such actions is more than a century old and rests on an ample line of precedents.

Although such actions are powerful and uniquely available to governments, they are not a means by which states can avoid other important prerequisites to legal relief. In particular, there remains the requirement that defendants breach some legal duty that harms a state's *parens patriae* interest.[123] *Parens patriae* doctrine helps articulate the state's legal interests. It does not define the defendant's legal duties.[124] Future state litigation relying on *parens patriae* doctrine must both attend the limits on *parens patriae* doctrine and understand the need for a breach of legal duties by potential defendants.

123. *See supra* text accompanying note 18.

124. The states' tobacco litigation complaints generally contain several allegations of breach of legal duties. *See, e.g.*, Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 965-74 (E.D. Tex. 1997) (alleging product liability, RICO, antitrust, consumer, nuisance, and fraud claims).