STATE PARENTS PATRIAE STANDING TO CHALLENGE THE FEDERAL GOVERNMENT: OVERRULING THE MELLON BAR

David M. Howard*

*Associate at Baker Botts L.L.P. in New York, NY. J.D. 2017, University of Texas School of Law. The opinions expressed herein are the author's own and do not necessarily reflect those of Baker Botts L.L.P. The Author would like to dedicate this Article to his loving and supportive wife Jingjing Liang. The Author would like to thank Dean Lawrence G. Sager for his incredible support and encouragement. He has been a wonderful mentor and friend, and this Article stemmed from Dean Sager's ideas. The Author is grateful for his assistance and guidance on this project, and the use of “our” and “we” refers to Dean Sager's contributions to this Article.
INTRODUCTION

States represent their citizens; their citizens’ interests are the states’ interests.¹ Our country was created on this idea of federalism,² both the states and the federal government acting as a restraint on one another.³ With the growth of federal government and the administrative state due to the complexities of modern society, this restraint on the expansion of each sovereign government continues to be essential. In the past few years, the number of instances where states have brought suit against the federal government has significantly increased.⁴ Generally, a state has the right to sue as parens patriae to prevent or repair harm to its quasi-sovereign

¹ See Printz v. United States, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.”).
² While federalism often refers to states’ rights and freedom independent from federal control and creating a “division of power,” this article defines “federalism” generally as the decentralized system of checks and balances between the states and federal government specifically for the enforcement of state autonomy and their distinctive interests. See Jessica Bulman-Pozen, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 Yale L.J. 1920, 1931 (2014).
⁴ See, e.g., Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir.), cert. denied, 138 S. Ct. 448 (2017); Massachusetts v. EPA, 549 U.S. 497, 504 (2007); Gonzales v. Oregon, 546 U.S. 243, 243 (2006); Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015); Indiana v. EPA, 796 F.3d 803, 804 (7th Cir. 2015); Crane v. Johnson, 783 F.3d 244, 247 (9th Cir. 2015) (denying Mississippi standing to challenge the federal Executive's Deferred Action for Childhood Arrivals program); Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 266 (4th Cir. 2011), cert. denied, 567 U.S. 951 (2012); Oregon v. Legal Servs. Corp., 552 F.3d 965, 967 (9th Cir. 2009); Wyoming v. United States, 539 F.3d 1236, 1239-41 (10th Cir. 2008); Connecticut v. U.S. Dep’t of Commerce, 204 F.3d 413, 414-15 (2d Cir. 2000); Michigan v. EPA, 581 F.3d 524, 525 (7th Cir. 2009); Wyoming v. U.S. Dep’t of Interior, 674 F.3d 1220, 1223-24, 1238 (10th Cir. 2012) (denying state standing to challenge federal regulations governing snowmobile use); Connecticut ex rel. Blumenthal v. United States, 369 F. Supp. 2d 237, 239, 244-48 (D. Conn. 2005) (upholding state standing to challenge, only on Tenth Amendment grounds, a federal statute and regulations governing the fishing industry).
interests—a category of interests we shall discuss later. Although states can often sue on the grounds of harm to its sovereign, quasi-sovereign, or its proprietary interests, there exists a bar—which we will refer to as the Mellon bar—to parens patriae state standing to sue the federal government. But the question is whether this Mellon bar is still viable, and if not, what are the remaining limitations on states parens patriae standing to sue the federal government?

Some scholars, since Massachusetts v. EPA, have advocated for the expansion of state parens patriae standing to sue the federal government, but only under certain limited circumstances, such as in the context of federal agency inaction or the federal preemption of state law. But other scholars, most prominently Professors

---


6 These terms will be defined more throughout the Article, but it would be beneficial to provide a general definition at the outset. “Parens patriae” refers to the ability of the state or federal government to sue on behalf of its citizens for a grievance general to the population. “Quasi-sovereign interest” refers to “a set of interests that the State has in the well-being of its populace.” However, as described in section II, this term has changed in the past century.


Woolhandler and Collins, argue for the significant limitation of overall state standing on the belief that prohibiting state governments from litigating on behalf of citizens’ interests actually reinforces both federalism and separation of powers principles. Despite Massachusetts v. EPA, Professor Woolhandler maintains the argument for restrictive state standing against the federal government. Historically, however, the Framers envisioned a country built on the principles of federalism. Due to the increasing growth of the federal government, state-initiated judicial review over

the federal government may be necessary to continue this federalism ideal.\textsuperscript{12}

This Article argues something conceptually distinct from other scholars: states should—and in our analysis now do—have broad standing on parens patriae grounds to sue the federal government based on the quasi-sovereign interest of protecting the welfare and vital interests of their citizens.\textsuperscript{13} To support this assertion, this Article contends that the recent decision in \textit{Massachusetts v. EPA} implicitly overruled, or at least made inapt where federal constitutional rights are being asserted against unconstitutional or unlawful federal executive action or inaction, the \textit{Mellon} bar to preventing states from suing the federal government on parens patriae standing. By acknowledging and advocating the expansion of the parens patriae standing of states to challenge alleged violations of affirmative federal statutory or constitutional obligations, this approach stands in contrast to those of many prominent scholars.

Before we delve into our discussion, we feel it necessary to underline the importance of state parens patriae standing against the federal government. Often, states will assert a combination of proprietary interests, quasi-sovereign interests, and sovereign interests to support their standing.\textsuperscript{14} For a recent example of the interoperability of these multiple interests, the Ninth Circuit in

\begin{flushright}
\begin{itemize}
  \item \textsuperscript{12} Seth Davis, \textit{Implied Public Rights of Action}, 114 COLUM. L. REV. 1, 82-83 (2014) (arguing that state challenges to federal authority in court “may substitute for the structural check of state autonomy that passed away with the death of dual sovereignty.”).
  \item \textsuperscript{13} But see, \textit{e.g.}, Grove, supra note 9, at 855 (arguing that “it is hard to see how States have a special interest—over and above that of private parties, localities, or even Congress itself—in the federal executive’s compliance with federal statutes.”).
  \item \textsuperscript{14} See Hae-June Ahn, \textit{Tribal Governments Should Be Entitled to Special Solicitude: The Overarching Sentiment of the Parens Patriae Doctrine}, 37 ECOLOGY L.Q. 625, 640 (2010) (“It is possible for a state to bring a proprietary claim and a parens patriae claim simultaneously.”).
\end{itemize}
\end{flushright}
Washington v. Trump found state standing on the third-party standing doctrine and injuries to the states’ proprietary interests. Yet, because the court found standing on the state’s proprietary interests, it did not reach the discussion of the state’s parens patriae standing. Similarly, the district court in Hawai’i v. Trump found standing on proprietary interests, but did not reach the argument for standing on parens patriae. Likely, this was to avoid grappling with the rights of a state to sue the federal government on parens patriae standing and the effect of Massachusetts v. EPA on the Mellon bar.

So why is parens patriae standing so vital if states can usually assert other interests to satisfy standing? There are situations in which states do not have a sovereign interest at stake and when individual or proprietary remedies are either unavailable or inadequate. Individuals do not have standing to bring suits for injury in some indefinite way that is common with other people. One such example of this is racial discrimination, as in the Alfred L. Snapp decision. Thousands of citizens from Puerto Rico were allegedly discriminated against, and individualized remedies would have been costly to procure and difficult to obtain against another state. Luckily, Puerto Rico had a quasi-sovereign interest in “securing

---

15 Washington v. Trump, 847 F.3d 1151, 1160-61 (9th Cir. 2017).
16 Id. at 1161 n.5.
18 Amelia C. Waller, Note, State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae, 16 GA. L. REV. 865, 866 (1982). See also Bethany R. Pickett, Note, Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement, 110 NW. U. L. REV. 439, 466 (2016) (“It is uncertain whether an individual private plaintiff could sue over nonenforcement because the injury would be a generalized grievance shared by the rest of the population.”).
residents from the harmful effects of discrimination” and therefore had parens patriae standing to sue.21

According to modern scholars, an oft-asserted benefit of parens patriae standing is the ability to sue the federal government over administrative agency action or inaction,22 which is generally immune to judicial review.23 But when states have standing to bring an enforcement suit, such as in Massachusetts v. EPA, this issue of judicial review of agency inaction is not implicated.24 Even though the executive branch of the federal government is charged with executing the laws of the United States,25 it often selectively fails or refuses to do so.26 But in this context, as Mellon so famously declared: “[w]hile the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of [a state's] duty or power to enforce their rights in respect of their relations with the federal government.”27 This is the origin of the Mellon bar.

So, what happens when the federal government has not or refuses to act in its parens patriae capacity? Who is left but the state to protect the interests of its citizens? States are in the best—and oftentimes only—position to vindicate the public rights of their citizens. Citizens themselves are unable to bring claims of a “case or controversy” under Article III standing for a general public right. As

21 Id. at 609.
22 See, e.g., Gillian Metzger, Administrative Law as the New Federalism, 57 DUKE L.J. 2023, 2039 (2008).
24 Id.
25 U.S. CONST. art. II, § 3, cl. 4 (“[H]e shall take Care that the Laws be faithfully executed”).
the fiduciaries of their citizens, states essentially have a duty to bring suit based on parens patriae, and in doing so, maintain our system of government. Federalism is a base tenet of our constitutional system, designed to prevent the authoritarian potential of the federal government. This is the core rationale of broader parens patriae standing against the federal government, and the reason it is so avidly asserted in this Article.

I. HISTORY OF PARENTS PATRIAE: FROM MASSACHUSETTS V. MELLON THROUGH MASSACHUSETTS V. EPA

The expansion of parens patriae has occurred incrementally over time, and has significantly expanded the century following the decision in Mellon. Contrary to what some scholars believe, the Court has not always been faithful to the Mellon bar. First, to understand our assertion that Massachusetts v. EPA overturned the Mellon bar, we must start with a somewhat brief history of the parens patriae doctrine.

28 Massey, supra note 8, at 253-54.
31 See, e.g., Heather Elliott, Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine, 87 Ind. L.J. 551, 580 (2012) (“But it has long been settled that states may not sue the federal government in parens patriae”); Steven Vladeck, The Perils of State Standing, Revisited, JOTWELL (Feb. 2, 2016), http://classic.jotwell.com/the-perils-of-state-standing-revisited (“Since Massachusetts v. Mellon in 1923, if not before, the Supreme Court had steadfastly held to the rule that a state may not sue the federal government as parens patriae of its citizens”).
A. ORIGIN OF PARENTS PATRIAE DOCTRINE

Originally, the concept of parens patriae derived from the English constitutional system, an outgrowth from the feudal system, giving the King certain duties and powers. This authority was to be exercised by the King in his capacity as the “father of the country.” Blackstone referred to the sovereign, or his representative, as the superintendent of “all charitable uses in the kingdom.” After the Founding of this country, the parens patriae function of the King passed to the States. But since then, the nature of the parens patriae suit has been greatly expanded in the United States beyond that which existed in England.

As early as 1892, the Supreme Court recognized that states were different than private parties when bringing suit against other states or the federal government. But since the very beginning of this doctrine, the Court has been uncertain in its scope. An explicit parens patriae theory was originally identified by the Supreme Court in Louisiana v. Texas, but was first upheld a year later in Missouri v. Illinois. In Missouri v. Illinois, the Court determined that even though there was no actual property rights at stake, “it must surely

33 3 WILLIAM BLACKSTONE, COMMENTARIES 47.
35 Id.
36 See: United States v. Texas, 143 U.S. 621, 646 (1892) (“Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states.”).
37 Missouri v. Illinois, 180 U.S. 208, 241-42 (1901) (admitting that as early as 1901 that it was unable “to anticipate by definition” the precise scope of the doctrine).
38 Louisiana v. Texas, 176 U.S. 1, 19 (1900).
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.” Even in these few years before Mellon, the Court recognized the right of the states, standing on their quasi-sovereign interests as a state, to sue the federal government.

B. BEGINNINGS OF THE MELLON BAR

A little more than two decades later, the decision in Massachusetts v. Mellon, penned by Justice Sutherland, gave this oft-cited quote:

It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity sue for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Under this interpretation, Mellon denied the state standing to challenge the constitutionality of a statute that authorized the federal

40 Id.
41 Missouri v. Holland, 252 U.S. 416, 430-31 (1920) (“The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State.”) (emphasis added). See also Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 355-56 (1908) (relying on state’s quasi-sovereign standing to protect resources irrespective of private ownership).
42 Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923) (internal citation omitted).
government to spend money on maternal welfare programs.\textsuperscript{43} The foundation of this \textit{Mellon} bar rests on the statement that it is no duty of the states to enforce citizens’ federal rights, but rather it is the responsibility of the federal government to do so.\textsuperscript{44}

Yet no argument and no support was given for this general statement, and there seems to be no reason the state is a less appropriate representative of its citizens against the federal government than against a different party.\textsuperscript{45} Furthermore, in light of how often citizens prove the contrary in litigation, the argument that the federal government can be presumed to protect the federal rights of all citizens better than the states is generally not persuasive.\textsuperscript{46} For example, when the federal government fails or refuses to enforce a law, it “is not acting as the ultimate protector” of the people but instead “is the one causing the harm;” a harm that can be addressed by the states directly through litigation.\textsuperscript{47} But ever since this somewhat general and vague conclusion in \textit{Mellon}, courts and scholars have argued over the limits to state standing when suing the federal government.

Following this bar, particularly after the \textit{Lochner} era, the courts abandoned their attempts to limit the “appropriate ends of government.”\textsuperscript{48} Since the early twentieth century, state standing significantly expanded, at least partly due to the rise of the

\textsuperscript{43} Id.
\textsuperscript{44} Melville Fuller Weston, \textit{Political Questions}, 38 HARV. L. REV. 296, 324 (1925) (“This sets out the whole substance of the opinion.”).
\textsuperscript{48} Woolhandler & Collins, \textit{ supra} note 10, at 474-75.
administrative state and the expanded field of governmental interests.\textsuperscript{49} And since \textit{Mellon}, the bar to state standing against the federal government on parens patriae grounds has been substantially weakened, and now—argued in this Article—is essentially abolished.\textsuperscript{50} Interestingly, only one week after \textit{Mellon} was decided, the Court decided \textit{Pennsylvania v. West Virginia},\textsuperscript{51} allowing a state to sue on its own behalf and as the representative of its citizens to raise a constitutional challenge to another state's legislation restricting pipeline companies from removing natural gas from the state.\textsuperscript{52} In distinguishing its discussion from the decision in \textit{Mellon}, the Court asserted that West Virginia suffered a more concrete harm because it was proprietor of the public institutions whose natural gas would be limited and representative of the public similarly injured.\textsuperscript{53} As Professors Woolhandler and Collins note, because parens patriae standing was not available to states to challenge the federal government but was available when challenging that of another state, this means the Court relied on “something other than a consistent common-law baseline in resolving questions of state standing.”\textsuperscript{54} Therefore, something else must have been driving the Court to adhere to the \textit{Mellon} bar.

Only a year later, the Supreme Court allowed Missouri to bring an action against the national bank on the basis of a state statute.\textsuperscript{55} Justice Vandevanter vigorously dissented, arguing that the state was

\textsuperscript{49} See Id.
\textsuperscript{51} Pennsylvania v. West Virginia, 262 U.S. 553 (1923).
\textsuperscript{52} Id. at 592.
\textsuperscript{53} Id. at 610-11.
\textsuperscript{54} Woolhandler & Collins, supra note 10, at 469-70.
not entitled to bring this proceeding against an instrumentality of the national government, citing the Mellon bar to state standing.56 However, the Court returned to prohibiting state parens patriae standing against the federal government a few years later in Florida v. Mellon.57 But continuing the line beginning before Tennessee Copper, the Court still recognizes today the states’ interest as parens patriae against other states.58

C. WEAKENING OF MELLON BAR

By 1945, the Court seemed to have altered its stance regarding state parens patriae standing. In Georgia v. Pennsylvania Railroad Co.,59 despite the claim’s focus against a private party rather than the federal government, the Court implicitly rejected the idea that only the federal government could act as parens patriae for citizens when there are violations of federal law.60 This exclusive right to enforce federal rights as parens patriae—as espoused in Mellon—was no longer solely that of the federal government. Instead, the Court allowed a state to sue as parens patriae in original jurisdiction against a private party, specifically for violations of federal laws.61

In South Carolina v. Katzenbach,62 the foundation of the Mellon bar was further weakened. There, the Court denied state standing to assert a claim under the Bill of Attainder Clause of Article I and the

---

56 Id. at 666-67 (Vandevanter, J., dissenting).
60 See Roesler, supra note 9, at 667-68.
principle of separation of powers, yet allowed South Carolina to challenge the Voting Rights Act of 1965 as beyond congressional power under the Fifteenth Amendment. Even though the Court explicitly cited the Mellon prohibition against parens patriae state standing, it allowed South Carolina to assert its claim in the continuing operation of the state election laws. This decision sparked the many writings of scholars forcefully arguing against this state standing outcome, including Professor Bickel’s well-known article against the result.

Coming to the early 1970s, states began challenging the U.S. entrance into the war in Vietnam, claiming injury to state citizens from this undeclared war. However, the Supreme Court denied Massachusetts the opportunity to litigate in the Court’s original jurisdiction against the federal government. Without discussion, the Court invoked a well-penned dissent by Justice Douglas. In his dissent, Justice Douglas outlined the weakening of Mellon, and its companion case Frothingham v. Mellon, up to the 1980s, noting that “Mellon, too, has been eroded over time.” In the 1923 decision Frothingham v. Mellon, the Court denied taxpayer standing, which was later permitted in 1968 in Flast v. Cohen. As the erosion of Frothingham required a fresh look at taxpayer standing, the foundation in Mellon was severely weakened just a few years prior in

---

63 Id. at 324-25.
64 Id.
65 See, e.g., Bickel, supra note 10, at 89; Vladeck, supra note 10, at 845.
67 Id. at 886 (Douglas, J., dissenting).
68 Id. at 889-90.
70 Flast v. Cohen, 392 U.S. 83, 103-05 (1968) (allowing taxpayer standing to contest spending alleged to violate specific constitutional prohibition in the Establishment Clause).
Katzenbach, and Justice Douglas suggested it was time to reexamine Massachusetts v. Mellon.\textsuperscript{71}

After Massachusetts v. Mellon, the next seminal case regarding parens patriae standing was Alfred L. Snapp & Son, Inc. v. Puerto Rico.\textsuperscript{72} Puerto Rico brought an action as parens patriae against a private company for alleged violations of federal law, claiming their citizens were discriminated against, thereby injuring the Puerto Rican economy.\textsuperscript{73} This was truly the first time the Court attempted to discern a definition for quasi-sovereign interests—the interests necessary for parens patriae standing. As discussed above, state parens patriae standing is vital because there are situations in which states do not have a sovereign interest at stake and when individual or proprietary remedies are either unavailable or inadequate. The Court noted that there was no “simple or exact definition,” yet distinguished quasi-sovereign interests as “not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. [Quasi-sovereign interests] consist of a set of interests that the State has in the well-being of its populace.”\textsuperscript{74} While these interests would be articulated case-by-case, they fall within two categories: “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”\textsuperscript{75} This second category included a state’s interests in securing observance of federal laws.\textsuperscript{76}

\begin{thebibliography}{9}
\bibitem{71} Laird, 400 U.S. at 889 (Douglas, J., dissenting).
\bibitem{73} Id. at 594.
\bibitem{74} Id. at 600-01, 602.
\bibitem{75} Id. at 607.
\bibitem{76} See id.
\end{thebibliography}
quasi-sovereign interest will be discussed more in the following section.

In *Alfred L. Snapp*, the recognized quasi-sovereign interest was the state’s desire to secure for its citizens the benefits of federal laws. As the 20th century progressed, the federal government grew tremendously, leading to the inference that this “doctrinal shift” by the Court supported state standing on parens patriae to enforce federal laws without the state having to wait for the federal government to vindicate its interests. Going back to *Mellon* and *Georgia v. Tennessee Railroad*, the Court in *Snapp* implicitly rejected the assertion in *Mellon*, particularly its foundational line: “While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government.” Even before *Snapp*, states had sometimes been able to enforce federal rights. *Snapp* therefore affirmatively confirmed this power. In essence, this reflected a new attitude by the Court to expand the general interests on which a state could assert parens patriae standing. *Snapp*’s explicit rejection of the premise of the *Mellon* bar—that the states could not sue to enforce federal rights—deprives the *Mellon* bar of any rational basis for support. If the Court has repeatedly allowed states to sue to enforce the federal rights of their citizens, why then should it matter who specifically the state

---

enforces those federal rights against? This is the line later followed by the Court in Massachusetts v. EPA.

Before Massachusetts v. EPA however, lower courts had noted that the Supreme Court’s jurisprudence on state parens patriae standing had been, at best, unclear. The Ninth Circuit even interpreted the dicta of Snapp to mean the continuing validity of Mellon, a reading that has been characterized as incorrect. Meanwhile, even before the decision in Snapp, other circuit courts had allowed the circumvention of the Mellon bar, including against the federal government.
Finally, we move to Massachusetts v. EPA, the case we argue ended this Mellon bar to state parens patriae standing against the national government. It is clear that Massachusetts v. EPA was a parens patriae case in all but name. By allowing Massachusetts to challenge the failure of the EPA to act, a challenge the state should be entitled to bring in exchange for its forfeiture of some sovereign rights in the creation of this union, the Court implicitly overruled the Mellon bar.

D. Massachusetts v. EPA Implicitly Overruled the Mellon Rule

Even in 1977, several years before Snapp, some commentators questioned the viability of the Mellon bar to state parens patriae actions against the federal government. Today, this is almost certainly the case. As we argue in this Article, the decision in Massachusetts v. EPA implicitly overruled the Mellon rule, or at the very least made that bar to state standing inapt where federal constitutional rights are being asserted against unconstitutional or illegal federal executive conduct.

86 Massey, supra note 8, at 263 (“By relying on a string of parens patriae cases, particularly Georgia v. Tennessee Copper Co., the Court in EPA appeared to conclude that Massachusetts was suing as parens patriae”); Bradford C. Mank, Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?, 34 COLUM. J. ENVTL. L. 1, 68 (2009).
88 See, e.g., Comment, State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine, 125 U. PA. L. REV. 1069, 1088 (1977) (“Indeed, Mellon’s validity as a bar to state parens patriae suits against the federal government generally, including suits alleging the unconstitutionality of an act, is questionable under existing case law.”).
89 See Gillian E. Metzger, Federalism and Federal Agency Reform, 111 COLUM. L. REV. 1, 63-64 (2011) (“The recent decision in Massachusetts v. EPA calls this limit on such suits into question, however, with the Court there not only upholding a state’s suit against
The majority opinion in *Massachusetts v. EPA* mentioned *Mellon* only once, in a footnote, simply to refute its applicability in this instance. In citing *Mellon*, the majority emphasized that the 1923 decision was not to be read broadly; specifically because the *Mellon* opinion provided it was “called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, *not quasi sovereign rights actually invaded or threatened*.” Because of this limited reading, there is a crucial difference between a state suing “to protect her citizens from the operation of federal statutes—which *Mellon* prohibits—and a state asserting its rights under federal law—which it has standing to do and did in *Massachusetts v. EPA*.”

Because Massachusetts only sought to assert its rights under federal law and did not challenge the application of the law to its citizens, the *Mellon* rule did not apply in this case.

As described above, the bar in *Mellon* and the proscription in its companion case were slowly eroded over time, parallel to the expansion of federal government power and increased administrative authority. Because of the growing prerogative of the administrative state, the balance of power between the states and federal government has moved strongly in favor of the national

---

91 *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 484-85 (1923)).
92 *Id.* (citing *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995)).
93 *Id.*
government. The Court in *Massachusetts v. EPA* may have recognized this fact, as they allowed the state to force the federal government to act according to the law, in spite of the language in *Mellon*, seemingly dismissing the 1923 decision.⁹⁴ Since then, states have continued to assert their standing against the federal government, including on parens patriae grounds, yet the Supreme Court has refused, thus far, to further address this question.

Even the dissent in *Massachusetts v. EPA* declined to rely on *Mellon*, simply citing the decision once for the claim that “our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government.”⁹⁵ This is hardly a firm statement. Casting significant doubt is drastically different than enforcing a prohibition on standing, imparting this sentence with the appearance of mere afterthought. The dissent does cite *Snapp*, quoting *Mellon*, again for the assertion that a state cannot bring a suit as parens patriae against the federal government.⁹⁶ However, the importance of this cite should not be overstated; not only was the dissent quoting *Snapp’s* dicta, but this dicta was placed in a footnote. If the dissent in *Massachusetts v. EPA* refused to rely on the *Mellon* bar, one can plausibly question the continuing vitality of its prohibition to state parens patriae actions against the federal government.

Yet due to recent political struggles and the Court’s willingness to dodge this issue, we recently lost at least three significant opportunities to examine the state parens patriae expansion after

---

⁹⁴ See Gillian Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2039 (2008) (“Perhaps the majority’s emphasis on state status is a signal of the Court developing a deeper understanding of the role that states can play in overseeing federal program administration.”)


⁹⁶ *Id.* at 539–40 n.1.
Massachusetts v. EPA. These opportunities included Virginia ex rel. Cuccinelli v. Sebelius, United States v. Texas, and Washington v. Trump. Any of these three cases would have presented, at the very least, a decent discussion of state parens patriae standing against the federal government. Yet with a member of the Court missing for the latter two cases, and the unwillingness of the Court to address this issue, these opportunities passed us by.

Even when the Court took to this issue, opportunities were lost. In Connecticut v. American Electric Power Co., several states asserted parens patriae standing against power companies. The Second Circuit actually questioned “whether Massachusetts v. EPA’s discussion of state standing has an impact on the analysis of parens patriae standing.” It was unclear— not just to the Second Circuit— whether a state under parens patriae had to satisfy the Lujan test as well. Yet, when the Supreme Court took this case, the standing issue was equally split: four Justices held for state standing while four Justices held no standing; therefore, the Second Circuit’s finding of state standing was affirmed.

Simply put, these missed opportunities by the Court leave the current status of state parens patriae standing in question. Professor Mank has argued that American Electric Power Company resulted in an expansion of the Court’s standing analysis from Massachusetts v.

---

98 United States v. Texas, 809 F.3d 134 (5th Cir. 2015), aff’d by an equally divided court, 136 S. Ct. 2271 (2016).
101 Id. at 338.
102 Id.
EPA, particularly because the decision did not require a statutory procedural right as the basis for state standing.\textsuperscript{104} While this analysis is not necessarily true, as a split decision by the Supreme Court simply affirms the lower court holding and provides no precedential authority,\textsuperscript{105} the decision does raise a serious question regarding the current status of parens patriae requirements for state standing.\textsuperscript{106} Because the Court failed to address this in light of the potentially broader implications of this decision, lower courts may interpret this to mean the Massachusetts decision did broaden state parens patriae standing.

This is exactly what has happened. Several recent district court cases noted that upholding the Mellon bar as a broad ban on state standing would contradict the holding in Massachusetts v. EPA.\textsuperscript{107} Essentially, the district court in Aziz v. Trump concluded that a state was not categorically barred from asserting parens patriae standing and that the Mellon bar has been significantly limited by Massachusetts v. EPA.\textsuperscript{108} One interesting item to note is that the

\textsuperscript{108} Aziz, 231 F. Supp. 3d at 31; see also Challenge v. Moniz, 218 F. Supp. 3d 1171, 1178 (E.D. Wash. 2016) (finding Mellon inapplicable because the judicial bar is a prudential limit and can be overridden by Congressional authorization); contra W. Expl., LLC v. U.S. Dep't of the Interior, 250 F. Supp. 3d 718, 731 (D. Nev. 2017) (citing the dicta in Alfred L. Snapp for the broad ban on state parens patriae standing against the federal
district court claimed that Mellon did not address whether a state could challenge executive actions, only congressional actions.\textsuperscript{109} While this is an interesting assertion, the Supreme Court has never specifically limited its Mellon decision to congressional actions. Regardless, the conclusion here is that Massachusetts \textit{v.} EPA essentially disregarded the conclusion in Mellon,\textsuperscript{110} and no longer prevents state parens patriae standing against the federal government in most circumstances.

\section*{II. Definition and History of Quasi-Sovereign Interests}

Necessary for parens patriae standing is the quasi-sovereign interest of the state. When we discuss “quasi-sovereign” interests today, they are assumed to be different from sovereign interests.\textsuperscript{111} But this was not the case at the time of Mellon.\textsuperscript{112} While the Court first recognized that a parens patriae action could be sustained on a quasi-sovereign interest in 1900,\textsuperscript{113} the term “quasi-sovereign interest” originated in \textit{Georgia v. Tennessee Copper Company}.\textsuperscript{114} The Court in \textit{Tennessee Copper Co.} explicitly expressed: “This is a suit by a state for government); \textit{Indiana v. IRS.}, 38 F. Supp. 3d 1003, 1008 (S.D. Ind. 2014) (same); \textit{Organized Vill. of Kake v. U.S. Dep't of Agric.}, 795 F.3d 956, 978 (9th Cir. 2015) (same), \textit{cert. denied sub nom. Alaska v. Organized Vill. of Kake}, 136 S. Ct. 1509, 194 L. Ed. 2d 585 (2016).
\textsuperscript{109} Aziz, 231 F. Supp. 3d at 30.
\textsuperscript{112} \textit{See Matthew Melamed, A Theoretical Justification for Special Solicitude: States and the Administrative State}, 8 \textit{Cardozo Pub. L. Pol'y \\& Ethics J.} 577, 597-98 (2008) (“Quasi-sovereignty falls between these two [sovereign interests and proprietary interests]: an action based on a state’s quasi-sovereignty is one that seeks to protect or assert the rights of its citizens en masse.”).
\textsuperscript{113} \textit{Alfred L. Snapp}, 458 U.S. at 602.
\textsuperscript{114} \textit{Georgia v. Tennessee Copper Co.}, 206 U.S. 230 (1907).
an injury to it in its capacity of quasi-sovereign.”\textsuperscript{115} This line was repeated in \textit{North Dakota v. Minnesota}\textsuperscript{116} just six months after \textit{Mellon} was decided, emphasizing the states’ capacity of quasi-sovereign.\textsuperscript{117} In \textit{Tennessee Copper Co.}, Justice Holmes determined that the State could litigate in its capacity as quasi-sovereign interest because the state had an interest “independent of and behind the titles of its citizens, in all the earth and air within its domain.”\textsuperscript{118} This origination of the term referred specifically to the role of the state in the Union as a quasi-sovereign itself, more appropriately described as a sovereign interest today.\textsuperscript{119}

Almost sixteen years later in \textit{Massachusetts v. Mellon},\textsuperscript{120} Justice Sutherland writing for the Court cited to \textit{Georgia v. Tennessee Copper Co.}\textsuperscript{121} and \textit{Missouri v. Holland}\textsuperscript{122} for precedential authority on when the Supreme Court will exercise jurisdiction under Article III.\textsuperscript{123} The interests described as quasi-sovereign in these two cases can be more accurately described as the sovereign interests of the states. Nevertheless, the term quasi-sovereign was used at that time to more precisely describe the role of the states, as they were not fully

\textsuperscript{115} \textit{Id.} at 237.
\textsuperscript{116} \textit{North Dakota v. Minnesota}, 263 U.S. 365 (1923).
\textsuperscript{117} \textit{Id.} at 373. This reference to the state’s “capacity of quasi-sovereign” was again addressed over a decade later in Hopkins Fed. Sav. & Loan Ass’n v. Cleary, 296 U.S. 315, 340 (1935).
\textsuperscript{118} \textit{Tennessee Copper Co.}, 206 U.S. at 237 (1907).
\textsuperscript{119} Grove, supra note 9, at 865-66.
\textsuperscript{120} \textit{Massachusetts v. Mellon}, 262 U.S. 447 (1923).
\textsuperscript{121} \textit{Tennessee Copper Co.}, 206 U.S. at 237 (determining that the right of dominion of the state over the air and soil within its dominion was affected).
\textsuperscript{122} \textit{Missouri v. Holland}, 252 U. S. 416, 431 (1920) (determining that there was an invasion of the quasi-sovereign right of the state to regulate the taking of wild game within its border).
\textsuperscript{123} \textit{U.S. CONST.} art. III, § 2 (providing that the judicial power extends “to controversies . . . between a state and citizens of another state” and that the court has original jurisdiction in all cases “in which a state shall be a party.”).
sovereign in relation to the federal government. These now litigable interests came from the states’ police power to regulate for the common public good. Thus, injury to the state’s interest in protecting its own citizens became a basis for state standing.\textsuperscript{124}

But it was not until 1982 in \textit{Alfred L. Snapp & Son v. Puerto Rico}\textsuperscript{125} that the Court finally attempted to define the term quasi-sovereign interest.\textsuperscript{126} In delineating the various state interests, Justice White defined quasi-sovereign interests as distinguished from sovereign interests and proprietary interests.\textsuperscript{127} Essentially, quasi-sovereign interests were “a set of interests that the State has in the well-being of its populace.”\textsuperscript{128} Yet unlike the Court in \textit{Tennessee Copper} who used quasi-sovereign to refer to the \textit{capacity} of the state, the Court in \textit{Snapp} used quasi-sovereign to refer to the \textit{interests} of the state.\textsuperscript{129} In fact, the Court in \textit{Snapp}, in distinct comparison to the quotation above, stated: “In this case, the Commonwealth of Puerto Rico seeks to bring suit in its capacity as parens patriae[.]”\textsuperscript{130} When juxtaposed with the \textit{Snapp} Court’s discussion of the quasi-sovereign interests of the state, this remarkably similar phrasing to the wording in \textit{Tennessee Copper} bolsters the inference that the term quasi-sovereign was different for the Court in \textit{Snapp}, including with respect to the roles of the states.

Today, some scholars argue that the distinction between sovereign and quasi-sovereign interests has disappeared.\textsuperscript{131}

\begin{thebibliography}{9}
\bibitem{124} Woolhandler & Collins, \textit{supra} note 10, at 450-51.
\bibitem{127} Alfred L. Snapp, 458 U.S. at 601-02.
\bibitem{128} \textit{Id.} at 602.
\bibitem{129} \textit{Id.}
\bibitem{130} \textit{Id.} at 594.
\bibitem{131} See, \textit{e.g.}, Roesler, \textit{supra} note 9, at 660, 672 (noting that \textit{Massachusetts v. EPA} created “[i]t[his doctrinal shift [that had] essentially erased any distinction between a state's sovereign interest and its quasi-sovereign interest.”); Robert A. Schapiro, \textit{Judicial
However, in comparing the two types of interests after Snapp, it is arguable that the two interests are conceptually discrete: a quasi-sovereign interest is an interest of the state’s and it is derivative of the state’s citizens, while a sovereign interest is a state’s own interests in the state itself rather than its citizens. Yet many scholars, and even courts, still merge the two interests, and the separation between the interests is unclear. One court called this distinction “more or less academic,” as states can assert both interests.

In defining a quasi-sovereign interest, the Court in Alfred L. Snapp agreed that the precise nature of a quasi-sovereign interest was vague, and must be determined on a case-by-case basis. Yet the Court gave two general categories of quasi-sovereign interests: first, a state has a quasi-sovereign interest in the “health and well-being”

---

Footnotes:

132 Robert A. Weinstock, Note, The Lorax State: Parens Patriae and the Provision of Public Goods, 109 COLUM. L. REV. 798, 805 (2009); Crocker, supra note 126, at 2079 (“Sovereign and quasi-sovereign interests are different: the first are held by the state independently, the second in its representational capacity for the protection of its citizens.”).

133 Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming, 102 Nw. U. L. REV. 1029, 1037 (2008) (“[T]he Court’s cases on quasi-sovereign interests always refer to an interest related to a state’s residents rather than simply the state’s own interest.”).

134 See, e.g., Massey, supra note 8, at 260 (“A state may assert its own claims as a sovereign or as a proprietor, or, via the doctrine of parens patriae, it may assert the non-sovereign or “quasi-sovereign” interests of the public it represents.”) (emphasis added).


of its residents in general; second, a state has the same interest in vindicating its “rightful status within the federal system.”¹³⁷ Yet as many have noted, these requirements are decisively unclear,¹³⁸ and, as Professor Ratliff so bluntly asserted, quasi-sovereignty “is a meaningless term absolutely bereft of utility.”¹³⁹

Professor Stephen Vladeck has suggested that the quasi-sovereign interests described in *Alfred L. Snapp* only apply against non-federal defendants, but not against the federal government.¹⁴⁰ As *Alfred L. Snapp* was a case against a non-federal defendant, this would be a plausible assertion on its face. However, the Court in *Massachusetts v. EPA* cited *Alfred L. Snapp* in distinguishing the Mellon bar, referring directly to “a State's standing to assert a quasi-sovereign interest . . . against the Federal Government.”¹⁴¹ When we look to the more recent discussion of *Massachusetts v. EPA*, and the fact that—as described above—that case was more or less based upon parens patriae grounds, citing *Alfred L. Snapp* for the discussion on quasi-sovereign interests shows that there is no such limit. It seems more plausible that there is no such restriction on the assertion of a quasi-sovereign interest against the federal government for a state parens patriae standing. As Professor Vladeck argues, “[t]he Court in *Snapp* nowhere seemed to suggest that anything other than a direct injury to the state as such would support standing to sue the

¹³⁷ Id.
¹³⁹ Ratliff, supra note 5, at 1851.
¹⁴⁰ Vladeck, supra note 10, at 856 (“Snapp's summary of state interests is useful, but comes with a critical caveat: all of the interests *Snapp* identified were in suits against non-federal defendants. The Court nowhere seemed to suggest that anything other than a direct injury to the state as such would support standing to sue the federal government.”).
federal government.” 142 Likewise, the Court only cites the *Mellon* bar in dicta. 143 Nowhere else did the Court suggest that quasi-sovereign interests could not be used for standing against the federal government.

It is accepted that states are independent sovereigns144 and have “different interests and constituencies both from the federal executive branch and from each other.” 145 When the states entered the Union, they delegated some of their power to the federal government, but retained broad police powers to ensure the well-being of their citizens. 146 Often, an injury to a state’s ability to protect its citizens is an injury to its citizens themselves, giving rise to quasi-sovereign interests sufficient for parens patriae standing. 147 Where injuries to a state’s citizens significantly affect those citizens’ economic or physical well-being, the state also suffers injuries, such as those to its own productive capacity.148 Additionally, when the federal government fails to uniformly apply the law, the state’s injury is indistinguishable from the injury suffered to its citizens. Therefore, the states have a recognizable quasi-sovereign interest in federalist principles to ensure their status in the United States, as well as in the enforcement of constitutional federal laws, as a state’s parens patriae

142 Vladeck, supra note 10, at 856.
143 See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 610 n.16 (citing the *Mellon* bar only once in a footnote, and then stating, “[h]ere, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants”) (emphasis added); see also Stenehjem v. Whitman, No. A3-00-109, 2001 WL 1708825, at *1 (D.N.D. June 20, 2001).
146 See Bond v. United States, 134 S. Ct. 2077, 2086 (2014).
147 See Nash, supra note 9, at 206.
interest is derived from its citizens, and injury to its citizens is injury to the state.

III. BROAD PARENTS PATRIAE STANDING IS BENEFICIAL: A RESPONSE TO THE ARGUMENTS BY PROFESSORS VLADECK, BICKEL, WOOLHANDLER & COLLINS

Now that we have seen how Mellon has been rendered inapplicable, it is necessary to understand whether this is actually a beneficial outcome. Many authors have argued against broad state parens patriae standing, most prominently Professors Vladeck, Bickel, Woolhandler, and Collins. These arguments can be summed up in three normative principles: allowing broad state standing would (1) reduce the courts to councils of revision; (2) undermine judicial restraint because of attempted state nullification; and (3) undermine individual standing in constitutional cases.

A. COUNCIL OF REVISION

Several articles by these professors argue extensively against broad state standing for suits against the federal government. Essentially, they assert, as did the language in Mellon, that a state does not have a role in bringing suit against the federal government for its citizens’ interests. This belief is founded on the proposition

149 Bickel, supra note 10, at 85 (asserting that a State lacks standing to assert a sovereign interest “in the continued execution of her own laws without hindrance from national authority”); Woolhandler & Collins, supra note 10, at 396-97 (advocating limits on state standing to pursue “sovereignty interests”); Vladeck, supra note 10, at 849 (arguing against state standing simply to challenge federal preemption).

150 Vladeck, supra note 10, at 872-74.

151 Woolhandler & Collins, supra note 10, at 503-04 (“The state’s role in protecting the rights of its citizens in the federal system ought not to consist in bringing lawsuits to vindicate rights that belong to citizens....”); see also Bickel, supra note 10, at 88 (arguing that, in litigation against the United States, “a state should have no recognizable
that broad state standing would undermine the constitutional limitations on the federal judicial authority, as allowing state standing in such cases would all but remove the constitutional requirement of case or controversy, facilitating automatic state litigation in challenging any federal statute.\(^{152}\) This, to Professors Bickel and Vladeck, would reduce the Supreme Court into a “council of revision.” \(^{153}\) Additionally, this broad state standing would allegedly open the floodgates; letting the states act as the constitutional watchdogs of the federal government’s actions or inactions. Justice Antonin Scalia believed that disregarding this essential element of the separation of powers would result in the “overjudicialization of the processes of self-governance.” \(^{154}\)

The case or controversy requirement is rooted in the separation of powers; it prevents abstract litigation over sovereignty and the judicial challenge by one government to the constitutionality of another’s laws. Admittedly, this is a worthwhile goal. Professor Bickel characterized this separation of powers argument thusly: allowing the state to litigate the constitutional validity of the federal would fundamentally deny the principle that both the federal and state governments are concurrent sovereigns. They preside over the same territory and directly govern the citizenry rather than each other. \(^{155}\)

Yet, our system is similarly grounded on the checks and balances between the branches. As the executive branch grows ever larger, the

\footnotesize

interest in ensuring the fidelity of Congress to constitutional restraints. Only citizens [with personal injuries] have a litigable interest of this sort. . . . “).\(^{152}\)

Vladeck, supra note 10, at 872; Bickel, supra note 10, at 89-90.

\(^{153}\) Vladeck, supra note 10, at 872; Bickel, supra note 10, at 90.


\(^{155}\) Bickel, supra note 10, at 88-89.
judicial challenge is essential to check the federal government against eliminating the sovereign powers of the states. Allowing this type of standing may, as the critics suggest, “open the floodgates” or promote the overjudicialization of constitutional challenges. Regardless, the constitutional benefits of broad parens patriae standing significantly outweigh its practical risks. Respecting states’ fundamental constitutional powers is surely justification enough for this judicial increase.156

Moreover, their argument against a Council of Revision fails to consider that, even in parens patriae cases, the Constitution still requires that an injury be shown. The Supreme Court in *Lujan v. Defenders of Wildlife* provided that standing requires three elements: (1) injury in fact, (2) injury is fairly traceable to the conduct, and (3) injury is redressable by the courts.157 *Massachusetts v. EPA*’s application of the *Lujan* elements confirms the continued relevance of the case of controversy threshold.158 Professor Bickel and Vladeck’s argument simply overlooks the limits of state standing. States can only challenge a federal statute or regulation when that federal enactment undermines state law. States cannot challenge a federal enactment in and of itself.159 Therefore, the fear of the courts becoming councils of revision, solely because states would have standing as parens patriae, is overemphasized and misplaced.

While both a state and the federal government act directly on the people, both are also meant to protect the people. When the state and federal government come into conflict, the state may be more responsive to its people—at least according to Alexander

156 Crocker, *supra* note 126, at 2099.
159 *Grove, supra* note 9, at 884-85.
Hamilton.\textsuperscript{160} The federal government has significantly expanded in both power and scope since the decision in \textit{Mellon}, yet, if Professors Bickel and Vladeck’s argument is correct, the states’ power to challenge it has not. Furthermore, the argument that states lack the standing to sue the federal government for unconstitutional actions or inactions, simply because it threatens federal supremacy or the separation of powers, assumes the national government has a claim to supremacy or legitimate interests outside of the Constitution—which it cannot.\textsuperscript{161}

\textbf{B. STATE NULLIFICATION}

Professor Vladeck described this second argument against broad state standing as state “de facto nullification” of federal actions or statutes.\textsuperscript{162} He specifically wrote this in response to \textit{Virginia v. Sebelius}, which involved a state passing a law for the sole purpose of challenging the Affordable Care Act’s individual mandate.\textsuperscript{163}

According to Professor Vladeck, because the Supremacy clause prevents states from nullifying federal laws, the only purpose of these laws then would be to create pretext for judicial challenges to federal actions.\textsuperscript{164}

Yet, this should not be an issue at all. The Fourth Circuit in \textit{Sebelius} rejected Virginia’s assertion of a sovereign interest in challenging the Affordable Care Act’s individual mandate,
specifically because the law was passed for the sole purpose of challenging federal law.\textsuperscript{165} The law did not regulate anything, and there was no threatened interest in the enforceability of the law.\textsuperscript{166} The passage of a state law whose sole purpose is to challenge a federal act should therefore provoke the same outcome: rejection of that alleged interest and denial of the state’s standing.\textsuperscript{167}

Additionally, there is more required to a showing of standing than simply proving a cognizable interest. The state in parens patriae actions must also show a concrete and particularized violation of that interest, among other elements.\textsuperscript{168} Indeed, the Court in \textit{Massachusetts v. EPA}—effectively a parens patriae decision\textsuperscript{169}—required the state to satisfy the \textit{Lujan} requirements for standing.\textsuperscript{170} Applying these elements would remove the possibility of states passing laws to simply produce litigation challenges to federal actions, as these laws would not constitute concrete or particularized injuries. Allowing states to sue the federal government to induce enforcement of federal requirements, whether it be from action or inaction, hardly seems to damage our system of federalism.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{165} \textit{Virginia ex rel. Cuccinelli}, 656 F.3d at 269-71.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id. at 272. \textit{See also} \textit{Oklahoma ex rel. Pruitt v. Sebelius}, No. CIV-11-30-RAW, 2013 WL 4052610, at *5 (E.D. Okla. Aug. 12, 2013) (rejecting state standing on same grounds); \textit{id.} at *5 n. 15 (quoting \textit{Vladeck}, \textit{supra} note 10, at 868-69).
  \item \textsuperscript{168} \textit{See, e.g.}, \textit{Lujan v. Defs. of Wildlife}, 504 U.S. 555, 560-61 (1992).
  \item \textsuperscript{169} \textit{Massey}, \textit{supra} note 8, at 263 (“By relying on a string of parens patriae cases, particularly \textit{Georgia v. Tennessee Copper Co.}, the Court in \textit{EPA} appeared to conclude that \textit{Massachusetts} was suing as parens patriae, . . . .”); \textit{Mank}, \textit{supra} note 86, at 68.
  \item \textsuperscript{170} \textit{See} \textit{Massachusetts v. EPA}, 549 U.S. 497, 521 (2007); \textit{see also id.} at 538 (Roberts, C.J., dissenting) (providing “a State asserting quasi-sovereign interests as parens patriae must still show that its citizens satisfy Article III”).
\end{itemize}
\end{footnotesize}
C. UNDERMINING INDIVIDUAL CONSTITUTIONAL STANDING

The third argument against broad state parens patriae standing put forth by these scholars is that it would undermine individual standing in constitutional cases. This argument asserts that expansive state standing dilutes individual rights by encouraging legal recognition of state injuries that are derivative of an individual’s claim of right, rather than direct recognition of the individual’s right.\textsuperscript{171} Broader standing to litigate, so the argument goes, may become majority-reinforcing, as it could become beholden to the interests of political majorities rather than those individuals whose standing would otherwise be acted upon.\textsuperscript{172} Prohibiting the states’ representation of general interests may conceptually keep government power and private rights distinct, and therefore, enhance individual rights in suits against the federal government.\textsuperscript{173}

In practice however, it is difficult to see how additive standing for the state would inherently dilute individual standing. Although preventing states from litigating citizens’ rights against the federal government would effectively make litigation of those rights against the federal government the exclusive domain of citizens,\textsuperscript{174} exclusivity does not necessarily mean enhancement. States have resources not normally available to many citizens. While there are arguably ways to overcome this resource barrier, the combination of a lack of monetary remedies and diffuse costs might destroy the incentive to litigate in many constitutional cases.\textsuperscript{175} Without parens

\textsuperscript{171} Woolhandler & Collins, supra note 10, at 482-83.
\textsuperscript{172} Id. at 487-88.
\textsuperscript{173} Id. at 444-45.
\textsuperscript{174} See generally id. at 518-19.
\textsuperscript{175} Id. at 512 n.496.
patriae standing, our system would therefore become more inaccessible to the individual, rather than less. Individual suits by plaintiffs alleging harms caused by specific defendants is not well-suited to challenging federal administrative agencies.176 Instead, “permitting a political community to litigate” federalism issues between states and the national government “does not dilute” individual interests, but rather allows courts to consider that “community’s jurisdictional interests.”177

Additionally, what stops an individual with a cognizable claim from suing alongside the state? While there is some case law that a parens patriae action may bar later private litigants from bringing suit,178 if the later individual claims are purely private interests, which the state as parens patriae cannot raise, then those claims are not barred by the state’s suit.179 So if a state refuses to sue on constitutional grounds, an individual can sue instead. If a state does sue, an individual can either join the suit or bring an additional suit for that individual’s purely private interests.

There are numerous obstacles for relying on individual suits in constitutional contexts, most significantly that those individuals most adversely affected generally cannot afford litigation.180

177 Davis, supra note 12, at 84.
178 See Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 693 n.32, modified sub nom. Washington v. United States, 444 U.S. 816 (1979); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 340-41 (1st Cir. 2000); Satsky v. Paramount Commc’ns, Inc., 7 F.3d 1464, 1470 (10th Cir. 1993) (“When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.”).
179 Satsky, 7 F.3d at 1470.
Additionally, when looking to the practical requirements of constitutional suits, many individuals do not have the time, resources, or capacity to sue the federal government on constitutional grounds. Therefore, forcing states to rely on individuals to bring claims for constitutional deprivations that affect a substantial number of the state’s citizens may, counterintuitively, deprive them entirely of any opportunity to obtain review of the federal government’s action or inaction.  

Finally, as states would be suing on their quasi-sovereign interests as parens patriae—an interest of its own and not for the benefit of particular individuals, an individual’s personal harm generally would not be precluded. Thus, there is little substance in the notion that preventing states from suing would actually enhance individual rights.

D. Federalism Requires Parens Patriae State Actions Against the Federal Government

Under the parens patriae doctrine, states have a recognized interest in the observance of the federal system. Federalism maintains the balance between the state and federal governments; its very structure was designed to prevent the over-accumulation of authority in any one area of government. With the rise of the administrative federal state, the executive branch of the federal

government today exercises more authority than ever.\textsuperscript{185} State actions brought on behalf of citizens, for their well-being and health, can be used to maintain this balance.\textsuperscript{186} Given the so drastically changed federal-state relationship, the \textit{Mellon} bar should not be allowed to prevent states from using their parens patriae capacity.\textsuperscript{187}

Our federal system is based on an overlapping system of checks and balances, and state parens patriae suits actually reinforce this system rather than subvert it. A state challenging federal law as overreaching or federal inaction as not satisfying the federal duty maintains our federal system; states gave up many sovereign powers when joining the union and must ensure that the federal government faithfully wields them.\textsuperscript{188} Additionally, by bringing these challenges to the judiciary, the executive branch can be adequately balanced in its powers. As the power of the executive expands, so too must the judicial scope of review to maintain our governmental system. Who but the states would assert federalism issues as aggressively?\textsuperscript{189}

When the Constitution is silent about a particular power, the federal

\textsuperscript{185} See \textit{New York v. United States}, 505 U.S. 144, 157 (1992) (“The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.”).


\textsuperscript{189} Crocker, \textit{supra} note 126, at 2085.
government is denied that power while the States retain it.\textsuperscript{190} As precedent clearly shows, states can and must raise federalism claims,\textsuperscript{191} in direct contradiction to the Mellon bar.\textsuperscript{192} The states have a direct and substantial interest in maintaining the federalism scheme of this country, significantly more than private citizens alone. The principles of federalism protect the liberties of citizens, as power is diffused throughout the government.\textsuperscript{193} Finally, even as litigation by states against the federal government has increased, the consequences foreseen by Professors Bickel and Vladeck have “hardly come to pass.”\textsuperscript{194}

IV. STATE STANDING TODAY AND ITS FUTURE APPLICATIONS

One of the more recent examples of parens patriae standing was in the challenges to the executive orders instituting the travel ban.\textsuperscript{195} However, the courts did not reach the issue of parens patriae

\textsuperscript{190} New York, 505 U.S. at 156.


\textsuperscript{194} Davis, \textit{supra} note 12, at 82-83. \textit{See also} Vladeck, \textit{supra} note 10, at 847-48.

standing as the state had standing on other grounds. Presumably this was to avoid the parens patriae issue altogether, as the Ninth Circuit may have recognized the recent decisions expanding the doctrine and the uncertainty of its current state. Due to the immediate importance of the decision, this was arguably wise to forego involvement in this evolving area of standing, as the Supreme Court may have taken the case up on that issue. But there have still been several missed opportunities within the past few years to review and clarify parens patriae standing for states.

E. LIMITING PRINCIPLES

The Mellon bar to state parens patriae actions is no longer tenable. Since Massachusetts v. EPA, there have been several suggestions for limiting principles on state parens patriae standing against the federal government. For example, Professor Roesler suggests limiting it to instances in which federal law envisions a role for state governments in the implementation of the law in question. Professor Grove on the other hand, advocates the cabining of this state standing to only one situation: when seeking to enforce or defend state law, specifically when federal law preempts or undermines state law, but not in the context of how the federal government enforces federal law. Both Professor Stevenson and Matthew Melamed however, suggest allowing parens patriae state standing against federal administrative agencies, because, as

196 Washington v. Trump, 847 F.3d at 1161 n.5.
197 Roesler, supra note 9, at 678 (“The argument is simple: when states seek to challenge federal laws and actions, they have Article III standing if the federal law at issue contemplates a role for state governments in its implementation. Federal funding conditioned on state assistance in implementing federal law is enough, as is conditional preemption of state authority in a given area.”).
198 Grove, supra note 9, at 854-55.
Melamed notes, judicial review is necessary to prevent these agencies from becoming a fourth branch of government. Professor Mank contends that the states should be able to file parens patriae suits against the federal government for failure to perform statutory or constitutional duty. Even though Mellon clearly said citizens should look to the federal government for their federal rights, Professor Mank insists that the federal government does not always appropriately enforce its own laws.

Referring back to our discussion of the history above, the doctrine originated from the English common law, where the Crown would act in protection of “those who could not fend for themselves.” While this is no longer a requirement, the quasi-sovereign interest the state must show for parens patriae standing “consist[s] of a set of interests that the State has in the well-being of its populace.” However, the preemption of state law does not necessarily implicate the well-being of the state’s populace. Nor does the action or inaction of an administrative agency purely implicate this foundational interest either. While a state does have a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system, federal action or inaction does not automatically implicate this interest. This simply takes into account the current status of the federal government and the expansion of the administrative state. Modern parens patriae standing must be based on the constitutionality of the action or inaction, as the federal

---

199 Melamed, supra note 112, at 606-07; Stevenson, supra note 8, at 73-74.
200 Mank, supra note 8, at 1771-72.
201 Ratliff, supra note 5, at 1850.
Constitution gives explicit powers to the federal government, but when silent on those powers, retains it in the states and its people.203

Here is the conclusion of this Article: Because the Mellon bar is no longer viable, a state can assert parens patriae standing against the federal government on (1) a showing of a violation of that state’s quasi-sovereign interest, and (2) a showing that the federal government’s action or inaction is alleged to have violated affirmative federal constitutional or statutory obligations. This, in our minds, maintains the basic nature of the parens patriae doctrine as requiring the state to prove a quasi-sovereign interest common to a substantial amount of its citizens, yet still places a limit on the types of cases allowed. These cases are limited to actual federal obligations, such as the obligation of the EPA to address emissions or the Executive Branch to correctly enforce immigration laws, yet does not allow simply a challenge to a federal healthcare law without a showing of unconstitutionality. In these contexts, the federal government is not acting in its own parens patriae capacity in relation to the federal rights of its citizens. Therefore, the states must act as parens patriae in place of the federal government. This maintains the federalism principles of our nation, the principles that most correlate to the purpose of the parens patriae doctrine.204

**CONCLUSION**

The Mellon bar is no more. Both history and precedent have overruled the Mellon bar, and our discussion above argues that

---


204 See, e.g., New York, 505 U.S. at 181 (“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”) (internal quotation marks and citation omitted); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012).
Massachusetts v. EPA was the final erosion of this parens patriae prohibition. Even if the Court did not explicitly overrule it, the decision in Mellon has been dismissed too many times to be a serious prevention of state parens patriae standing against the federal government. The foundation of the Mellon bar has been disregarded, and there is no compelling reason that only the federal government can act as parens patriae for its citizens in the context of federal rights. The purpose of the doctrine was to allow the state to sue in place of its citizens for their well-being. In certain situations, the state is in a much better position than individuals to assert constitutional claims against the federal government. Both states and the federal government act directly on citizens, and both should be able to act as parens patriae in relation to federal rights. Federalism principles and our system of checks and balances require states to have the power to check the authority of the growing federal administrative state. This can—and should—be done through parens patriae actions in the context of federal action or inaction, provided there are affirmative federal constitutional obligations. Mellon no longer prevents states from suing the federal government, and this in our minds is a beneficial outcome.