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ENDING TAX REVENUE STANDING

JUSTIN PIDOT[†] AND MEGAN MOSES^{*}

INTRODUCTION

States often act to protect those that live within their borders by passing laws and regulations, enforcing criminal codes, and providing social services. On occasion, they also file suit in federal court to vindicate their residents' rights.

Just like private plaintiffs, states must prove standing pursuant to case law interpreting Article III of the Constitution.¹ But states also stand apart from traditional plaintiffs. The Supreme Court has instructed that states receive "special solicitude," entitling them to a degree of leeway in asserting standing.² Federal courts also allow states to sue as *parens patriae*—meaning that they can sue to protect the welfare of their residents—even when they are not directly injured.³ And courts sometimes allow states to sue because of claimed threats to their tax base,⁴ a theory this essay terms "tax revenue standing."

Having named the theory, this essay argues that tax revenue standing should be eliminated. Every loss of tax revenue can be described as an injury falling within the *parens patriae* doctrine, and every injury falling within the *parens patriae* doctrine implicates tax revenue. The redundancy and inefficiency of two theories with precisely the same effect justifies abolishing tax revenue standing. But there is more. On occasion, states invoke tax revenue standing to avoid the rule that states may not sue the United States as *parens patriae*.⁵ Because the equivalency between the two doctrines remains unacknowledged, those states may yet succeed.

I. PARENS PATRIAE STANDING

Federal courts traditionally disfavor lawsuits brought by one party on behalf of another. These suits are usually dismissed for lack of standing because the plaintiff is not herself injured.⁶ Federal courts do recognize an exception for states, called the *parens patriae* doctrine, which allows states to litigate in circumstances where private parties cannot.

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1. See *Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007).

2. *Id.* at 520.

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

4. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

5. See, e.g., *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220 (10th Cir. 2012).

6. See *Singleton v. Wuff*, 428 U.S. 106, 113–14 (1976).

The *parens patriae* doctrine has its origins in the English common law rule that the crown had particular responsibility for and authority over children and the mentally incompetent.⁷ At the turn of the Twentieth Century, the United Supreme Court embraced a broader meaning of the doctrine, suggesting that a state might seek redress in federal court where it “has no pecuniary interest” but “the wrongs complained of are such as affect the public at large.”⁸ Since that time, states have sued as *parens patriae* in an array of contexts, including where the state alleges that violations of anti-trust, employment, and environmental laws have harmed its residents.⁹

Three cases nicely illustrate *parens patriae* standing. In *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, the Commonwealth of Puerto Rico sued apple growers in Virginia for violating federal employment laws, alleging that these violations injured Puerto Rican residents by denying them employment.¹⁰ In *Georgia v. Pennsylvania Railroad*, Georgia alleged that a railroad company violated federal anti-trust laws. The Court explained that “[t]he rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia.”¹¹ And in *Pennsylvania v. West Virginia*, two states (Pennsylvania and Ohio) alleged that the law of a second state (West Virginia) violated the dormant commerce clause by restricting exports of natural gas.¹² The Court found that the “health, comfort, and welfare [of the plaintiff’s residents] are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream . . . [and that] the state, as the representative of the public, has an interest apart from that of the individuals affected.”¹³

These cases stand in stark contrast to the treatment afforded private parties bringing suit in federal court. The state suffers no direct, concrete injury—it possesses no “sovereign interests, proprietary interests, or private interests” implicated in the challenged conduct.¹⁴ Rather, the state

7. See Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978). Custer provides a concise and interesting account of the origins of the *parens patriae* doctrine in the seventeenth century common law. At the beginning of that century, common law courts viewed the crown’s authority over children and the mentally infirm as arising out of different doctrines. But a scrivener’s error in 1610, which substituted the word “enfant” for “ideot” in reciting a decision by the King’s Bench, led a judge in 1722 to merge the two doctrines. *Id.* at 202–03.

8. *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (quoting *In re Debs*, 158 U.S. 564, 586 (1895)).

9. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609–10 (1982); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971). See also 13B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.11.1 (3d ed. 2013).

10. *Snapp*, 458 U.S. at 597–99.

11. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945) (italics added).

12. 262 U.S. 553, 581–85 (1923).

13. *Id.* at 592.

14. *Snapp*, 458 U.S. at 602.

has a different, somewhat amorphous interest in the “well-being—both physical and economic—of its residents in general.”¹⁵

The *parens patriae* doctrine possesses, however, an important limitation. States cannot invoke the doctrine to sue the federal government. States may, of course, file such suits based on traditional injuries to their proprietary interests.¹⁶ But states have no power to sue the United States based on injuries to the state’s residents because “[i]n that field it is the United States, and not the State, which represents them as *parens patriae*.”¹⁷

The relationship between *parens patriae* and more traditional interests is captured by the D.C. Circuit’s decision in *Kansas v. United States*.¹⁸ Kansas challenged a federal law restricting air traffic at Dallas’s Love Field airport. Before rejecting the claims on the merits, the court addressed the question of standing. Kansas could not sue as *parens patriae* because the federal government was the defendant. The state had standing nonetheless because its employees sometimes flew to Dallas, and flying through Love Field would consume less of these employees’ time, and therefore cost Kansas less.¹⁹ In other words, Kansas could not sue to protect the welfare of its residents, but the state sustained an injury, just as would a private employer, because the federal law increased its costs of doing business.

II. TAX REVENUE STANDING

States sometimes sue to protect their tax revenue, rather than their residents’ general well-being. The allegations in such suits superficially mirror those that might be advanced by private parties. Tax revenue resembles income, and courts routinely grant private parties standing to protect economic interests. Even so, courts sometimes find that states lack standing where only tax revenue is at stake.

The Supreme Court’s decision in *Wyoming v. Oklahoma* is a good example of a state successfully establishing tax revenue standing. Wyoming brought a dormant commerce clause challenge to an Oklahoma law requiring utilities to burn coal mined within Oklahoma’s borders.²⁰ The law would reduce demand for Wyoming coal, and, therefore, reduce the amount of severance taxes Wyoming could collect on coal mining. The

15. *Id.* at 607.

16. *Id.* at 601–02.

17. *Id.* at 610 n.16 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)). *See also* 13B WRIGHT, *supra* note 9.

18. 16 F.3d 436 (D.C. Cir. 1994).

19. *Id.* at 439.

20. 502 U.S. 437, 442–43 (1992).

Supreme Court granted Wyoming standing and proceeded to strike down the Oklahoma law.²¹

States do not always fare so well. Courts have refused to grant standing to states because of lost tax revenue, finding such losses overly speculative or too generalized.

In *Pennsylvania v. Kleppe*, Pennsylvania sued the Small Business Administration for classifying parts of the state as a class B disaster area in the wake of Hurricane Agnes.²² Pennsylvania alleged the classification deprived the state of tax revenue because a class A designation would have benefited the state's economy. The D.C. Circuit rejected that argument, concluding that the allegations constituted merely a "generalized grievance" that could not support standing.²³

The Tenth Circuit's *Wyoming v. Department of Interior* decision represents another line of cases denying standing to states based on allegations of lost tax revenue.²⁴ Wyoming challenged a rule restricting the number of snowmobiles allowed in Yellowstone and Grand Teton National Parks, arguing that those restrictions would reduce sales tax revenue. The court declined to decide whether reduced sales taxes constituted an adequate basis for standing in theory. Rather, the court found that Wyoming lacked standing because of the speculative nature of its allegations.²⁵

III. RECONSIDERING TAX REVENUE AND *PARENS PATRIAE* STANDING

Despite the theoretical distinctions between tax revenue and *parens patriae* standing, the two are different sides of the same coin. Courts have, however, not made that equivalency explicit. Nor have they acknowledged that an independent tax revenue standing doctrine threatens to undermine the prohibition on states suing the United States as *parens patriae*.

To understand the illusory nature of the distinction between tax revenue and *parens patriae* standing, consider differences between a state alleging lost tax revenue and a private party alleging lost income or reduced sales. Where tax revenue is concerned, states sit in the unique position of having unfettered power to fully ameliorate any injury they suffer. The state can, quite simply, raise taxes. Private parties lack this abil-

21. *Id.* at 447, 461.

22. 533 F.2d 668, 670 (D.C. Cir. 1976).

23. *Id.* at 672.

24. 674 F.3d 1220 (10th Cir. 2012).

25. *Id.* at 1233–34.

ity: A business cannot demand more customers, and an employee cannot demand a raise.²⁶

Because states can always raise more tax revenue, the state itself faces no imminent injury. Instead, the state really seeks to protect its residents and businesses from increased taxes or decreased services. In other words, the state seeks to protect the “well-being—both physical and economic—of its residents in general,”²⁷ and that is a quintessential assertion of *parens patriae* standing.

The equivalency between *parens patriae* and tax revenue standing is borne out by the cases. In both *Pennsylvania v. West Virginia* and *Wyoming v. Oklahoma*, states alleged legislation designed to restrict trade in natural resources violated the dormant commerce clause. Both cases could be analyzed as manifestations of tax revenue standing or *parens patriae* standing. Wyoming framed its case as involving lost tax revenue. It alleged that the Oklahoma law limited the amount of out-of-state coal Oklahoma utilities could purchase, which caused the utilities to purchase less coal from Wyoming, which caused Wyoming coal companies to mine less coal, which caused Wyoming to receive fewer severance taxes. While Pennsylvania framed its case as involving injuries to its residents’ welfare, it could have relied on tax revenue standing instead, alleging that the West Virginia law reduced the amount of natural gas that West Virginia gas companies sold to Pennsylvania, which caused Pennsylvania companies to purchase natural gas from elsewhere at a higher price, which caused those companies to engage in less economic activity, which caused Pennsylvania to collect less taxes. Wyoming’s lawsuit can similarly be recast in terms of *parens patriae* standing, with the state filing suit to protect the general welfare of its residents who would be harmed by the economic effects of the Oklahoma law.

This equivalency is not limited to the natural resources context. In *Snapp*, Puerto Rico fought for out-of-state employment opportunities for its residents. The denial of those opportunities likely resulted in fewer Puerto Ricans with earnings that could be spent on taxed goods within the territory, thereby affecting Puerto Rico’s tax base. In *Georgia v. Pennsylvania Railroad*, Georgia alleged that anti-competitive behavior directly harmed the state’s economy. Such harm necessarily implicates tax revenue generated by economic activity within the state.

Tax revenue standing, then, may provide a means by which states can circumvent the well-established rule that prevents suits against the federal government as *parens patriae*. As the D.C. Circuit recognized in *Pennsylvania v. Kleppe*, “virtually all federal policies” cause “unavoida-

26. At the margins, this distinction may collapse. Businesses facing a sufficiently inelastic demand for their goods or services may be able to raise prices to offset losses in revenue. On the other hand, tax rates can be raised only so much before business and people move to other states.

27. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

ble economic repercussions.”²⁸ In other words, whenever a state wants to impermissibly sue the United States on behalf of its residents, it can easily recast its interest as one of tax revenue.

So, courts do not need two standing doctrines addressing generalized injuries to states. *Parens patriae* alone should govern these suits.²⁹ Eliminating tax revenue standing recognizes the appropriate relationship between the states and the United States. It would also avoid duplicative and unnecessary legal argumentation that consumes the resources of courts, the states, and the parties that states sue.

28. 533 F.2d 668, 672 (D.C. Cir. 1976).

29. Where the federal government directly regulates states’ taxation power, the state possesses a sovereign interest that independently supports standing without the need for a tax-revenue theory.