

1977

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Minn. L. Rev. Editorial Board

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Recommended Citation

Editorial Board, Minn. L. Rev., "Federal Jurisdiction: State Parens Patriae Standing in Suits against Federal Agencies" (1977).

Minnesota Law Review. 3092.

<https://scholarship.law.umn.edu/mlr/3092>

Federal Jurisdiction: State *Parens Patriae* Standing in Suits Against Federal Agencies

Following a June 1972 hurricane that ravaged the mid-Atlantic coastal region, the Small Business Administration (SBA) distributed federal disaster relief directly to qualifying businesses.¹ Alleging that the SBA's designation of Pennsylvania as a Class B disaster area reduced the amount of aid available to Pennsylvania businesses,² the state, claiming standing to sue as *parens patriae* representative of all its aggrieved citizens,³ sought review of the SBA's implementation of the federal relief legislation. The District Court for the District of Columbia dismissed the suit, and the Court of Appeals affirmed, *holding* that long-standing principles of federalism precluded the state's *parens patriae* suit against an agency of the federal government. *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976), *cert. denied sub nom. Pennsylvania v. Kobelinski*, 97 S. Ct. 485 (1977).

Parens patriae originally described the power of the English and American sovereigns to safeguard the interests of the incompetent or indigent.⁴ Since the turn of the century, however,

1. Relief was extended to Pennsylvania upon its designation as a major disaster area pursuant to the Disaster Relief Act of 1970, 42 U.S.C. § 4402 (1) (1970) (repealed by Pub. L. No. 93-288, § 603, 88 Stat. 164 (1974)) and was to be administered by the Small Business Administration under the provisions of 15 U.S.C. § 636 (b) (1970), and 42 U.S.C. § 4451 (1970) (transferred to 15 U.S.C. § 636 (a) (Supp. V 1975)).

2. The "Class B" designation meant that the Pennsylvania relief program would be administered from a regional rather than a national headquarters. The state alleged that the classification indicated a lower priority in the allocation of SBA resources, resulting in less total assistance than would have been available under a "Class A" designation. *Pennsylvania v. Kleppe*, 533 F.2d 668, 670 n.3 (D.C. Cir. 1976).

3. The state also claimed standing to sue on the basis of its proprietary interest in the small businesses. The court, however, concluded that the proprietary count was not a valid basis of standing because: (a) the alleged general harm to the state's economy and welfare clearly implicated the state's *parens patriae* rather than proprietary interests; (b) the disaster relief legislation called for direct loans from the federal government without state participation, and thus, any "impairment" of the state's ability to perform its duties appeared to result from the action or the inaction of the state itself; and (c) the allegation of reduced tax revenues was insufficient in general to support state standing unless, as with taxpayer standing, there was a specific nexus between the state's role as a collector of revenues and the legislative or administrative action being challenged. *Id.* at 671-73.

4. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); *Mormon Church v. United States*, 136 U.S. 1, 56-58 (1890); *Strausberg*,

the Supreme Court has accepted a broader concept of *parens patriae* that allows states to sue private parties or sister states to protect their "quasi-sovereign" interests.⁵ Such interests must be common to the general public, not limited to the special interests of a few.⁶ The state must also demonstrate that the collective injuries to its citizens produced an independent injury to the state's sovereign interests.⁷ This grant of *parens patriae* standing was first recognized in cases where the state sued to protect its natural resources from pollution or depletion. Environmental *parens patriae* suits have arisen in disputes over

The Standing of a State as Parens Patriae to Sue the Federal Government, 35 Fed. B.J. 1, 2-3 (1976).

5. For a detailed discussion of this development, see Strausberg, *supra* note 4, at 2-10; Comment, *Standing of States to Represent the Interests of Their Citizens in Federal Court*, 21 AM. U.L. REV. 224, 232-38 (1971).

6. See Oklahoma *ex rel. Johnson v. Cook*, 304 U.S. 387 (1938) (shareholders' liability statute by which the state bank commissioner could prosecute actions against nonresident shareholders was primarily for the benefit of the creditors; state could not as *parens patriae* seek to enforce the statute under the Supreme Court's original jurisdiction); Oklahoma *v. Atchison, T & S.F. Ry.*, 220 U.S. 277 (1911) (state denied *parens patriae* standing to seek injunction against unreasonable freight rates because the action was brought for the benefit of a limited class of individual shippers). See also Louisiana *v. Texas*, 176 U.S. 1 (1900). Where the defendant in a *parens patriae* suit is a state, the prohibition on special interest representation is required by the eleventh amendment, which bars suits against a state by citizens of another state. In New Hampshire *v. Louisiana*, 108 U.S. 76 (1883), for example, a New Hampshire statute authorized citizens to assign their claims against another state to the New Hampshire attorney general for prosecution in their behalf. The Supreme Court dismissed the suit from its original jurisdiction, holding that since New Hampshire clearly was suing for the benefit of private individuals, the Court would not permit such a dilution of the eleventh amendment.

The same principle was most recently affirmed in Pennsylvania *v. New Jersey*, 426 U.S. 660 (1976), in which Pennsylvania sought *parens patriae* standing to challenge a New Jersey tax on income earned in New Jersey by nonresidents. The Court denied leave to file a bill of complaint under its original jurisdiction, stating:

It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

. . . .

Pennsylvania's *parens patriae* suit against New Jersey represents nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties. No sovereign or quasi-sovereign interests of Pennsylvania are implicated.

Id. at 665-66.

7. The Supreme Court has described the requisite state interest as one "independent of and behind the titles of its citizens," Georgia *v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), and "affect[ing] the general welfare of the State . . . [thus rising] above a mere question

interstate water⁸ and air⁹ pollution and interstate water rights.¹⁰ Environmental concerns are particularly appropriate for classification as quasi-sovereign¹¹ because individual citizens will often lack standing to seek relief from damages to natural resources.¹²

of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). Inherent in these definitions is the proposition that a state's interest is implicated not by the mere collection of a number of individual injuries for which each individual could bring suit, but rather the tendency for such injuries in combination to have reciprocal "multiplier effects." See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 672, 677 (1959). For a discussion of such an independent interest, see Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & Soc. PROB. 411, 414-17 (1970) [hereinafter cited as Note, *State Protection*].

8. The original *parens patriae* case, *Missouri v. Illinois*, 180 U.S. 208 (1901), was a suit within the Supreme Court's original jurisdiction in which Missouri sought to enjoin the Chicago Sanitary District from discharging sewage into the Illinois River and fouling the water supply of Missouri residents. See also *New Jersey v. New York*, 283 U.S. 473 (1931) (New Jersey entitled to an injunction ordering the city of New York to cease dumping garbage off the New Jersey coast; no discussion of standing).

9. *Georgia v. Tennessee Copper Co.*, 206 U.S. 46 (1907) (allegations of injury to forests, crops, and orchards sufficient to confer standing on Georgia in suit to abate the emission of sulphuric acid gas from the defendant's plant in Tennessee).

10. See *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (Connecticut entitled as *parens patriae* to litigate the merits of the contention that in diverting the waters of the Connecticut River, Massachusetts invaded the rights of Connecticut's citizens); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (North Dakota granted standing to seek an injunction against a Minnesota river channelization project that created flood conditions); *Kansas v. Colorado*, 206 U.S. 46 (1907) (Kansas had standing to enjoin the diversion of water from the Arkansas River).

11. Actions concerning air and water pollution would now arise under the federal Clean Air Act, 42 U.S.C. §§ 1857-1857l (1970 & Supp. V 1975) or the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

For injuries to other quasi-sovereign interests, for example, a fish kill caused by an oil spill, the state must continue to rely on the common law *parens patriae* suit. See *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973) (state allowed to sue vessel and its owners for damage to water and marine life caused by large oil spill); Tarlock, *Oil Pollution on Lake Superior: The Uses of State Regulation*, 61 MINN. L. REV. 63, 98-101 (1976).

12. Where the alleged polluter is a state, for example, the eleventh amendment, which precludes federal jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State," U.S. CONST. amend. XI, bars a suit by individual citizens. More important, vagaries of nuisance law and the necessity of showing special damages may also prevent individual suits. See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 88, at 586-91 (4th ed. 1971).

The Court has also accepted states' interests "in the continuing prosperity of their economies"¹³ as grounds for *parens patriae* standing. State suits under federal antitrust laws have been the major source of litigation concerning such economic interests;¹⁴ the states have claimed standing on the ground that the

13. The leading case for this proposition is *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), in which Pennsylvania and Ohio were granted standing as *parens patriae* to challenge a West Virginia statute that could have seriously curtailed the supply of natural gas carried by pipeline from West Virginia. The plaintiff states alleged that the exhaustion of the energy supply would seriously jeopardize the "health, comfort and welfare" of their residents.

14. In antitrust litigation, the state as *parens patriae* seeks recognition as a "person" within the meaning of the federal antitrust laws in order to enjoin the violators. The state in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1944), based its complaint on a restraint of trade, alleging that the railroads had fixed arbitrary and noncompetitive rates that preferred the ports of other states. The Supreme Court held that the state had standing to sue both as a proprietor and as *parens patriae* representative of its citizens affected by the rates. *Id.* at 447-48. Justice Douglas, writing for the majority, offered a broad justification on which to base future state assertions of quasi-sovereign interests.

Discriminatory rates may cause a blight no less severe than the spread of noxious gas. Georgia, as representative of the public, is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position.

Id. at 450.

In *Hawaii v. Standard Oil Co.* 405 U.S. 251 (1972), the Court held that section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), was a statutory grant of standing enabling the state as *parens patriae* to seek an injunction against the gasoline overcharges allegedly harming the state's economy. The Court also held, however, that the state lacked standing under section 4 of the Act to recover treble damages. *Id.* at 260-66. The antitrust laws have since been amended to allow states to recover monetary damages as *parens patriae*. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (to be codified at 15 U.S.C. § 15c).

Similarly, *Burch v. Goodyear Tire Co.*, 420 F. Supp. 82 (D. Md. 1976), involved a suit by Maryland alleging that the defendant tire and oil companies had conspired to restrain competition among tire manufacturers in the sale of tires to the oil companies' dealers. In granting standing to the plaintiffs, the district court relied upon *Hawaii v. Standard Oil Co.* and another recent antitrust action, *Washington v. General Motors*, 406 U.S. 109 (1972). The court, however, felt it appropriate to mention certain "countervailing considerations" to a grant of standing, including: (1) if Congress had intended the states to prosecute the antitrust litigation, it would have explicitly stated so; (2) injury to the state's economy is arguably of less magnitude than injury to the state's environment; and (3) standing policies favor concrete litigation between direct adversaries, and to grant standing to an attorney general is to permit suits by lawyers without clients. See generally Note, *Federal Jurisdiction—Suits by a State as Parens Patriae*, 48 N.C.L. REV. 963 (1970); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964); 82 HARV. L. REV. 1374 (1969).

defendants' illegal practices caused harm to the state economy greater than the sum of the widespread harms to individual citizens.¹⁵

Despite the acceptance of *parens patriae* suits in these contexts, a long-standing rule prevents recognition of *parens patriae* standing where the state sues the federal government or its agencies. The proscription is based on the principle that such suits are inconsistent with the concept of federalism and the division of power between national and state governments. The rule originated in *Massachusetts v. Mellon*,¹⁶ in which the state sued on its own behalf¹⁷ and alternatively as *parens patriae* in order to challenge on tenth amendment grounds the constitutionality of the federal Maternity Act. Without discussing whether the state's economic *parens patriae* claims met the test for valid quasi-sovereign interests that had been developed in the natural resources cases, the Supreme Court denied standing:

[I]t is no part of [the state's] duty or power to enforce [state citizens'] 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.¹⁸

Forty years after *Mellon*, Professor Bickel argued in a similar vein that the rule against *parens patriae* standing to challenge the constitutionality of federal statutes is necessary to preserve "the most innovative principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry."¹⁹

15. See Note, *State Protection*, *supra* note 7, at 414-17 (1970).

16. 262 U.S. 447 (1923).

17. Massachusetts claimed that by imposing an "illegal option either to yield to the Federal plan or lose a share of the money it is otherwise entitled to," *id.* at 479-80, the federal statute usurped powers reserved to the states by the tenth amendment. The Court held, however, that state sovereignty was not infringed because the state had only to reject the proffered money in order to be free of the regulations. *Id.* at 480.

18. *Id.* at 485-86.

19. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89.

Underlying all the *parens patriae* decisions is a concept of federalism based on dual sovereignty. The framers of the Constitution intended to avoid both the anarchy of a weak national government, which the Articles of Confederation had produced, and the tyranny of one all-

Whether the same principles apply in instances of non-constitutional challenges is not answered in *Mellon*.²⁰ Nevertheless,

powerful national sovereign. As described by James Madison, [t]he idea of a national government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things . . . In this relation the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. . . . [T]he proposed Constitution therefore, is in strictness, neither a national nor a federal Constitution, but a composition of both.

THE FEDERALIST No. 39 at 256-57 (J. Cooke ed. 1961). See also Mason, *The Role of the Court*, in FEDERALISM: INFINITE VARIETIES IN THEORY AND PRACTICE 8, 12-13 (V. Earle ed. 1968).

Resolving questions arising from the tension between congressional authority under the supremacy and necessary and proper clauses and reserved state powers under the tenth amendment has, since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), been the particular province of the Supreme Court. See *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). At the turn of the century, the Court delineated state and federal powers by relying on the concept of "dual sovereignty," portraying each sovereign as tenaciously harboring its appointed share of power.

Under this view, the "task of policy-makers was . . . to divine the proper . . . equilibrium point between the two jurisdictions and avoid encroachments by one level on the other." H. LIEBER, FEDERALISM AND CLEAN WATERS 1 (1975). See Elazar, *Federalism and Intergovernmental Relations*, in COOPERATION AND CONFLICT; READINGS IN AMERICAN FEDERALISM 2 (D. Elazar ed. 1969) [hereinafter cited as COOPERATION AND CONFLICT]; Elazar, *Federal-State Cooperation in the Nineteenth Century United States*, in COOPERATION AND CONFLICT, *supra*, at 83; Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

In this century, the Court's model is one of cooperative federalism which views the national and state governments as "mutually complementary parts of a single governmental mechanism." Corwin, *supra*, at 19. Cooperation has been institutionalized through a variety of sharing devices, including contracts to inter-change personnel and services, flat or conditional grants-in-aid, tax offsets, and revenue sharing. See Elazar, *supra*, at 11-18. See also Grodzins, *The Future of the American System*, in COOPERATION AND CONFLICT, *supra*, at 61. Under this theory, the federal zone of influence has been extended through the commerce clause to reach interests which earlier would have been considered the concern of the states. The basic idea of two sovereigns with separate spheres of power, however, remains intact. This was recently affirmed in *National League of Cities v. Usery*, 428 U.S. 833 (1976), in which the Court held that application of minimum wage laws to state government employees infringed the sovereignty of states. "[A] State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, . . . but is itself a coordinate element in the system established by the framers for governing our federal union." *Id.* at 849 (citation omitted).

20. In *New York v. United States*, 331 U.S. 284 (1947), *aff'g* 65 F. Supp. 856 (N.D.N.Y. 1946), the Court, with no discussion of standing, heard and decided an appeal based on a challenge by states to an order of the Interstate Commerce Commission. Strausberg, *supra* note 4, at 19-20,

where that case has been raised as a bar to *parens patriae* standing in suits against federal agencies,²¹ the lower federal courts have generally adhered to a blackletter rule that the *Mellon* prohibition operates in every case involving a federal defendant.²² Recently, however, in *Washington Utilities and Transportation Commission v. FCC*²³ (*WUTC*), the Ninth Circuit held that the *Mellon* rule did not apply where a state agency challenged a federal administrative agency's decision on non-constitutional grounds. In such a case, the court reasoned, the state agency "does not attack the constitutionality of the [federal statute] on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement."²⁴

Although *Kleppe* was also an action against a federal administrative agency, the court declined to adopt the distinction suggested in *WUTC*. On the contrary, based on a concept of "substantial federalism interests," it viewed the suit against the agency as involving the same principles the *Mellon* Court saw in a constitutional suit.

suggests that the issue was not raised before the Supreme Court because, although the lower court had indicated approval of state *parens patriae* standing to sue the agency, other adequate standing grounds were present.

21. There are a few cases in which states apparently have sued as *parens patriae* without a *Mellon* challenge to their standing. See *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) (state may also have had proprietary interest in "being spared the reconstitution of its statutory program"); *Puerto Rico v. Federal Maritime Comm'n*, 288 F.2d 419 (D. C. Cir. 1961) (no discussion of standing); *California v. United States*, 180 F.2d 596 (9th Cir. 1950) (state also had proprietary standing).

22. See *Public Util. Comm. v. United States*, 356 F.2d 236 (9th Cir. 1966) (state denied *parens patriae* standing to challenge order of the Federal Communications Commission); *Minnesota v. Benson*, 274 F.2d 764 (D.C. Cir. 1960) (*Mellon* held to preclude state standing to challenge a milk marketing order of the Secretary of Agriculture that allegedly disadvantaged Minnesota milk producers); *Idaho v. First Security Bank*, 315 F. Supp. 247, 278 (D. Idaho 1970) (state denied *parens patriae* standing to challenge ruling by the Comptroller of the Currency). But see *Guam v. Federal Maritime Comm'n*, 329 F.2d 251 (D.C. Cir. 1964), in which the government of Guam was granted standing to challenge Federal Maritime Commission approval of a rate increase for ocean transportation between the United States and Guam. The court of appeals explicitly distinguished *Mellon* and *Benson* on the ground that in those cases the state disputed an act of the federal government itself, whereas "in utility cases involving private operators a state or municipal government may be a proper party and, if adversely affected as such by an order, is aggrieved." *Id.* at 253.

23. 513 F.2d 1142 (9th Cir.), *cert denied*, 423 U.S. 836 (1975).

24. *Id.* at 1153.

The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each suggests that both units of government act as *parens patriae* within their separate spheres of activity. . . .²⁵

[T]he suit is a direct attempt by a state to insert itself between the national government and the legitimate objects of its administrative authority.²⁶

The court's reasoning in support of its ruling may be set out in a series of propositions drawn from the opinion: (1) any state suit against the federal government raises questions of constitutional allocations of power;²⁷ (2) principles of federalism therefore demand separation of the state and federal *parens patriae* powers;²⁸ (3) disruption of agency processes inherent in a suit by the state undermines those federalism interests;²⁹ (4) the degree of disruption—and therefore the injury to principles of federalism—is no less when the suit is brought on non-constitutional grounds.³⁰

Among lower federal courts that have applied *Mellon* to bar suits against federal agencies, *Kleppe* is unusual in its attempt to provide any reasoned justification of the position. Re-examination of *Mellon* and subsequent cases in which the Supreme Court dealt with claims of *parens patriae* standing, however, indicate that, contrary to the theory of *Kleppe*, the issues which prompted the Court's ban against such suits do not arise in a suit against a federal agency.

The argument against state standing to sue the federal government is most compelling when a state sues on its own behalf and seeks to overturn a federal statute on the ground that supervision of the subject matter of the law is reserved to

25. *Pennsylvania v. Kleppe*, 533 F.2d 668, 676-77 (D.C. Cir. 1976).

26. *Id.* at 679.

27. *Id.* at 680.

28. The court referred to the "federalism interest in keeping separate the state and national *parens patriae* functions, which the Supreme Court has often recognized and never denied . . ." *Id.*

29. *Id.* at 678.

30. While, as a general proposition, it may be that non-constitutional challenges tend to be less disruptive than constitutional ones, which sometimes attack the legitimacy of an entire statute, there is no reason to suppose that this will always be true. Many constitutional challenges attack a statute not on its face, but as applied to a single set of facts, and in that respect are much like many non-constitutional actions. Further, the degree of interference and disruption occasioned by any suit is dependent on a variety of factors, and no single characteristic can logically be looked to as a basis for winnowing out the cases in which state standing should be granted.

Id. at 678 n.56.

the states by the tenth amendment. The state in *Mellon* raised such a claim as its first basis for standing.³¹ The Court dismissed the contention, holding that the state had no standing to raise nonjusticiable political questions concerning allocation of powers between the state and federal governments.³² A contrary ruling would have opened the way for any state to challenge a federal statute by alleging, as did Massachusetts, that the very enactment of the law abridged powers reserved to the states. Such a rule, which would obviate the necessity of showing concrete harm to person or property as a prerequisite to federal jurisdiction, would result in advisory opinions about the legality of statutes never tested in operation.³³

The *parens patriae* count in *Mellon* was simply the tenth amendment claim in another guise. Since it appeared that the state was asserting no more than its citizens' purported interest in not being governed by statutes that usurped the reserved power of the states,³⁴ no interest that could be defined as quasi-sovereign was at stake.³⁵ In *South Carolina v. Katzenbach*,³⁶ a

31. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

32. [T]hese matters . . . call for the judgment of the court upon political questions For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges.

Id. at 483.

33. Bickel, *supra* note 19, at 88-90. Although the Court dismissed the *Mellon* suit for lack of standing, it is evident from the discussion of the "political question" that issues of justiciability were involved in the decision. A disposition in which "the extent and kind of injury suffered by the plaintiff is but one variable in a multivariable equation which leads to a conclusion to render decision or not," has been described as "decision standing." Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 683-85 (1973). Where the Court fails to sort out all the decision factors and expresses its holding only in terms of standing, however, "a refusal to decide a particular case and issue will be seen as denying the plaintiff any judicial remedy for quite different legal issues which affect him in the same way." *Id.* at 687. This seems to be a very apt description of the history of *Mellon* in the lower federal courts, where a rule that states had no standing as *parens patriae* to raise political questions was translated into an absolute bar to all *parens patriae* suits, no matter what the issue presented by the case. See note 22 *supra* and accompanying text.

34. See 262 U.S. at 485-86.

35. In the companion case, *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923), the Court held that a Massachusetts taxpayer also lacked standing to challenge the constitutionality of the statute because she had not suffered any cognizable injury under the statute. The Court, although describing the decision as based on standing, alluded again to the political question problem:

Looking through forms of words to the substance of [the taxpayer's] complaint, it is merely that officials of the executive department of the government are executing and will execute

challenge to the constitutionality of the 1965 Voting Rights Act, the claims were similar to those in *Mellon*. The state first claimed standing on its own behalf, alleging as its injury a violation of its rights under the due process and bill of attainder clauses. The state's second alleged ground of standing was as *parens patriae* representative of its citizens who were similarly injured by the new law. Thus, it appears, as in *Mellon*, that the *parens patriae* claim was simply another attempt by the state to secure a decision on the political issue of infringement on state sovereignty. The Court held that the state lacked standing in either capacity to raise the constitutional challenge.³⁷

*Massachusetts v. Laird*³⁸ presented the mix of standing and political question issues in a slightly different context. There, the Court, in a per curiam opinion, denied leave to file a complaint in which the state, as *parens patriae* representative of its male citizens subject to the military draft, sought to invoke the Court's original jurisdiction in order to secure a ruling that the conduct of the war in Vietnam without a congressional declaration of war was unconstitutional. The suit raised a political question incapable of judicial resolution; a decision on the merits would have required the Court to adjudicate the division of power between the legislative and executive branches of the federal government.³⁹ Moreover, because the suit was on behalf

an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

Id. at 488-89.

36. 383 U.S. 301 (1965).

37. *Id.* at 324. The Court appears nonetheless to have allowed the state to sue as *parens patriae* to represent its citizens' interests under the fifteenth amendment, for, without discussion of standing, it decided the merits of that claim adversely to the state. Commentators have suggested that the decision may indicate that *Mellon* has eroded over time. See C. WRIGHT, *FEDERAL COURTS* 503 (1971); Bickel, *supra* note 19, at 88. The majority in *WUTC*, 513 F.2d at 1152-53, and the dissenting judge in *Kleppe*, 533 F.2d at 682, noted this suggestion as support for their views. The political climate in which the South Carolina case was decided, however, would appear to make it unlikely precedent for a more ordinary case. See Bickel, *supra* note 19, at 80-84.

38. 400 U.S. 886 (1970). Justice Douglas, in his dissent from the denial of leave to file the complaint, noted that the Solicitor General had contended that *Mellon* barred the action. *Id.* at 887.

39. The policy against interfering with matters committed to the other branches of the federal government is as old as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court said:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive of-

of a special segment of the state population rather than the general public, it is unlikely that any valid quasi-sovereign interest was at stake.⁴⁰

Thus, the elements common to *Mellon, South Carolina*, and *Laird* are: (1) an attempt to invoke the original jurisdiction of the Supreme Court, (2) in order to raise essentially political questions, (3) in a constitutional challenge without any foundation in valid quasi-sovereign interests.

When the interests underlying Supreme Court denials of *parens patriae* standing are thus identified, it is apparent that those interests can be served without extending *Mellon* to prohibit suits against federal agencies.⁴¹ First, in a case such as *Kleppe* or *WUTC*, the state does not seek to file a complaint under the Supreme Court's original jurisdiction. Because such suits consume a disproportionate amount of time,⁴² the Court

ficers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 170. Similarly, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that a challenge to the apportionment of the Tennessee state legislature was *not* a nonjusticiable political question on the ground, *inter alia*, that "[w]e have no question decided, or to be decided, by a political branch of government coequal with this Court." *Id.* at 226.

40. It would seem that those men directly affected in Massachusetts by this alleged wrong constitute neither a substantial portion of the population nor a diverse sampling of the State. Rather, they constitute a single group with one particular interest, instead of the required large percentage and divergent interest necessary for standing.

Comment, *supra* note 5, at 239-40.

41. The court in *WUTC* argued as well that suits against federal agencies do not raise many of the difficulties found in ordinary *parens patriae* cases.

[N]one of the considerations that have justified restrictions upon the power of the state to represent the interest of its citizenry *parens patriae* are present here. The original jurisdiction of the Supreme Court is not invoked, and the availability of a remedy need not be restricted by the necessity of husbanding that court's limited resources. Since no state is sued, there is no threat of circumvention of the Eleventh Amendment. . . . Since no damages are sought, there is no risk of duplicating recoveries. . . . Since no absent persons will be barred from a remedy otherwise available if this petition is entertained, the proceeding is not subject to criticism as a substitute for a class action without its safeguards.

513 F.2d at 1152-53 (citations omitted).

42. See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 695 (1959). The commentator suggests that other reasons favoring a restricted access to original jurisdiction are the high costs to parties and the danger that such suits may be inspired more by the political ambitions of state officials than by issues suitable for original consideration by the Court.

traditionally is chary of its original jurisdiction, preferring to fulfill its primary role as a court of last appeal.⁴³ Second, because the suit attempts not to "redefine the relations of the Federal Government to its citizenry," but simply "to protect its citizens from discriminatory or unfair treatment,"⁴⁴ it does not require a federal court to adjudicate a political question for which there are no judicially manageable standards.⁴⁵ Rather, a state *parens patriae* suit raises the same issue that a suit by a private person, corporation, or interest group would raise: whether the agency acted in conformity with its statutory authority. Third, under the definition of quasi-sovereign interests developed in cases involving *parens patriae* suits against other states or private entities, problems of lack of concreteness or the possibility of advisory opinions would be obviated. Valid *parens patriae* standing would require the state to show that the disputed agency action caused identifiable collective harm to state citizens that was in turn translated into an additional, independent injury to the state environment or economy.⁴⁶

In relying on *Mellon* to deny standing to the state of Pennsylvania, the *Kleppe* court did not attempt to analyze these fundamental questions. Instead, it asserted that the disruption resulting from a state suit based on either statutory or constitutional grounds,⁴⁷ undermined the federalism principle of separate state and federal *parens patriae* powers.⁴⁸

43. Even where jurisdiction is otherwise proper, the Court may decline to exercise it where the fact-finding problems in the case are beyond the Court's expertise. See, e.g., *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971) (complex scientific issues in interstate water pollution case inappropriate for the Court to decide as an original matter).

44. Strausberg, *supra* note 4, at 19.

45. See *Baker v. Carr*, 369 U.S. 186 (1962).

46. Logically, the same arguments should lead to the conclusion that *Mellon* does not bar a proper *parens patriae* challenge to the constitutionality of a federal statute. That is, if the general justiciability requirements are satisfied by concrete allegations of valid quasi-sovereign interests and the issues are ones the courts ordinarily decide, the dangers that led to the rejection of *parens patriae* standing in *Mellon* are not present. Whether, despite the logical appeal of this argument, courts will be willing to take the final step in limiting *Mellon* to its facts is questionable. The rule thus far has proven very durable and, in any context, almost impervious to reasoned dissent. The Court's language, see text accompanying note 18 *supra*, is certainly sweeping enough to cover at least all constitutional suits by states and may very well lead lower courts to conclude, with Professor Bickel, that with respect to the constitutionality of federal laws, "the national government is fully in privity with the people it governs, and needs, and should brook no intermediaries." Bickel, *supra* note 19, at 89.

47. See note 30 *supra*.

48. 533 F.2d at 678.

Under prevailing liberalized practice, however, any "person aggrieved" by an agency action has standing under the Administrative Procedure Act⁴⁹ to seek judicial review. The plaintiffs need only allege an injury in fact⁵⁰ that is arguably within the zone of interests protected by the statute.⁵¹ Interest groups may sue on behalf of their members if the members sufficiently allege that they have been injured in fact by agency action.⁵² The *Kleppe* court did not explain why the disruption of agency processes caused by a *parens patriae* suit would be any more detrimental to the exercise of federal powers than a suit by a well-financed public interest group or a giant corporation. Logically, unless an agency action is unreviewable, there is no reason to assume that one plaintiff's suit is quantitatively more disruptive than another's.⁵³

Since quantitative disruption of operations provides no support for an outright ban on suits against federal agencies, the court's argument depends on an assumption that the disruption is qualitatively distinct; that is, any suit against an agency by a state implicates questions of constitutional allocations of power. As the dissenting judge in *Kleppe* points out,⁵⁴ however, in a suit challenging the manner in which a federal statute is administered, the state seeks only to ensure that federal officials act in accord with congressional intent. The state does not, as in *Mellon*, dispute congressional authority to enact the statute or contend that the state, not Congress, has power over the subject of the law. Thus, an administrative challenge does not require a federal court, in order to decide the merits, to resolve abstract questions of sovereignty.

49. 5 U.S.C. § 702 (1970).

50. See *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970).

51. *Id.*

52. See *United States v. SCRAP*, 412 U.S. 669 (1973).

53. The only effect of a grant of standing, by itself, is that some uncertainty may be engendered over the validity and continuation of the government program by the mere fact of the litigation; but the same uncertainty exists to some degree even if the plaintiff in question is turned away, unless the government action is held unreviewable so that no one will have standing. Our conclusion, then, is that the disruptive effect of allowing the suit on the government undertaking in question is not a factor which should carry much weight in the standing determination however pertinent it may be for other purposes.

Scott, *supra* note 33, at 678.

54. 533 F.2d at 682 (Lumbard, J., dissenting). The same distinction was urged by the Ninth Circuit in *WUTC*, see text accompanying note 24 *supra*, and in *Strausberg*, *supra* note 4.

Comparing the interests at stake in a suit such as *Kleppe* with the constitutional policies that prompted the *Mellon* rule reveals that the court of appeals was shadowboxing, attempting to ward off dangers not presented by the case before it. Where the state claim of standing passes muster under the established quasi-sovereign interest standard and the case poses no challenge to congressional policy-making authority, courts should grant *parens patriae* standing and decline to perpetuate the practice of uncritical reliance on an inapposite rule.