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Tribal Governments Should Be Entitled to Special Solitude: The Overarching Sentiment of the Parens Patriae Doctrine

Hae-June Ahn*

The parens patriae doctrine provides an alternative route for a state to establish standing when it seeks to protect its quasi-sovereign interests. Parens patriae suits are particularly appropriate for environmental cases where the injury is inflicted on the general population and individuals bringing separate suits cannot obtain the proper relief. This doctrine inherently recognizes a state’s entitlement to “special solicitude,” a concept articulated by the Supreme Court in Massachusetts v. EPA. This Note argues that tribal governments should also be entitled to special solicitude when seeking to protect their quasi-sovereign interests. This need is particularly pressing in environmental cases, because Native Americans are uniquely vulnerable to environmental issues such as climate change. Like states, tribal governments should also be permitted to bring parens patriae suits against the federal government, because they are often preempted by federal regulation and the only recourse is to sue the relevant federal agency.

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* LL.M. Candidate, U.C. Berkeley School of Law, 2010; J.D., Cornell Law School; B.A., Stanford University. Many thanks to Professor Robert Infelise, Sara Gersen, and Professor Holly Doremus for their helpful comments, and to Sara Clark, Jessica Hollinger, and the ELQ staff for their editorial advice.

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INTRODUCTION

Environmental harms can affect the physical and economic well-being of the general public, implicating sovereign and quasi-sovereign interests that states and tribal governments should protect, even if it means seeking recourse with the federal government. States and tribal governments are often unable to regulate environmental harms, because the source of harm is not necessarily within their jurisdiction or the pollution may be so permeating that regulating local sources is not enough. Moreover, states and tribal governments sometimes do not have the power to regulate environmental harms because they are preempted by the federal government, in which case the only recourse is to sue the responsible federal agencies to enforce environmental regulations.

A recent D.C. Circuit decision unfortunately limits the ability of states and tribes to challenge federal actions impacting their constituencies. In *Center for Biological Diversity v. U.S. Department of Interior*,¹ the Native Village of Point Hope, Alaska,² challenged the Department of Interior's (DOI) approval of a five-year leasing program in the Outer Continental Shelf (OCS) for oil and gas exploration off the coast of Alaska ("leasing program") under the Outer Continental Shelf Lands Act (OCSLA).³ Petitioners claimed, inter alia, that the leasing program violated OCSLA because the DOI failed to consider the effects

1. *Ctr. for Biological Diversity v. Dept. of Interior*, 563 F.3d 466 (D.C. Cir. 2009).

2. The other petitioners in this case were Center for Biological Diversity, Alaska Wilderness League, and Pacific Environment.

3. Submerged Lands Act, 43 U.S.C. §§ 1331–1356a (2006).

of greenhouse gas emissions associated with the leasing program and the effects of climate change on the OCS.

Petitioners offered two theories of standing for this claim: a substantive theory that the leasing program would cause additional climate change, which would disturb the ecosystems of the OCS areas and infringe on petitioners' enjoyment of these areas; and a procedural theory that the DOI's failure to consider the economic costs of greenhouse gas emissions and the effects of climate change on the OCS areas is an omission of procedural requirement under OCSLA, which threatens petitioners' particular interests.⁴ The court ruled that petitioners had standing under the procedural theory,⁵ but not under the substantive theory because they failed to establish the injury or causation elements required to establish standing.⁶ Although petitioners had standing, a review under procedural standing confines the court's review to the adequacy of the DOI's decision-making process. Establishing standing on a substantive basis would have allowed the court to evaluate whether a leasing program was even appropriate at all.

In denying petitioners standing under the substantive theory, the court erroneously reasoned that Point Hope would not meet standing requirements even if it were accorded "special solicitude" as a sovereign,⁷ as was the case for the state of Massachusetts in its suit against the Environmental Protection Agency.⁸ Interestingly, Judge Judith Rogers, in her concurring opinion in *Center for Biological Diversity*, left open the possibility that the tribal government could establish standing if it could show a particularized harm to its culture due to climate change.⁹ In this Note, I argue that the court misconstrued and misapplied the *parens patriae* standing doctrine by requiring a proprietary interest. Under this misconception, even the state of Alaska would not have been able to establish standing. Moreover, the *parens patriae* doctrine provides states, as special litigants, with an alternative means to establish standing in federal court, and does not require states to meet the injury, causation, and redressability elements of the *Lujan* test.¹⁰ The sentiment of special solicitude, which the Supreme Court afforded Massachusetts in

4. *Ctr. for Biological Diversity*, 563 F.3d at 475–79.

5. Establishing standing on procedural grounds is somewhat easier. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

6. *Id.*

7. See *Ctr. for Biological Diversity*, 563 F.3d at 477.

8. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

9. *Ctr. for Biological Diversity*, 563 F.3d at 489.

10. *Lujan*, 504 U.S. at 560–61.

Massachusetts v. EPA,¹¹ is inherent in the *parens patriae* doctrine. Tribal governments should also be given special solicitude and allowed to bring *parens patriae* suits to protect their quasi-sovereign interests. Moreover, I argue that the court incorrectly failed to consider Point Hope's potential standing as an organization or association under the separate doctrine of organizational standing.

I. STANDING DOCTRINE

A. *General Theory and Purpose*

Standing is a jurisdictional prerequisite that at least one plaintiff must meet to bring a suit in federal court. The fundamental purpose of standing is to ensure that petitioners have a “personal stake in the outcome” sufficient to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”¹² There are two different types of standing: constitutional and prudential. Constitutional standing refers to the requirement imposed by Article III of the U.S. Constitution¹³ that only “cases and controversies” be decided by federal courts, and that “the Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”¹⁴ “If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.”¹⁵ Prudential standing refers to requirements derived by courts as a means of judicial management and, because they are discretionary, they may be changed or eliminated altogether by congressional action.

The body of case law on standing provides conflicting and inconsistent rulings.¹⁶ A number of scholars have argued that courts, in determining standing, are often motivated by ulterior motives, such as

11. *Massachusetts v. EPA*, 549 U.S. at 520.

12. *Lujan*, 504 U.S. at 583 (1992) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

13. U.S. CONST. art. III, § 2.

14. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

15. *Id.*

16. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3, at 57 (2003) (“The Court has not consistently articulated a test for standing; different opinions have announced varying formulations for the requirements for standing in federal court.”); 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 16.1, at 1107 (4th ed. 2002) (“[S]tanding law suffers from inconsistency, unreliability, and inordinate complexity.”); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1452 (1992) (“Doctrinal inconsistencies in the Supreme Court’s law standing are now so commonplace that they have become relatively uninteresting.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (chiding the “apparent lawlessness of many standing cases” and their “wildly vacillating results”).

avoiding the merits of certain issues or trying to achieve a particular result in certain cases.¹⁷ This disposition, unfortunately, has been especially troubling in environmental cases.¹⁸ Often court decisions on standing are tailored so particularly to the facts of each case that it is difficult to infer whether other similar claimants would have standing, and the cases lead to confusing and varied interpretations and analyses.¹⁹ Even within any particular case, judges often disagree not only as to whether a plaintiff has standing, but also as to the theory or rationale for the same holding.²⁰

B. Constitutional Standing

The Court in *Lujan* articulated what has become a standard test for constitutional standing.²¹ The case stemmed from a change in regulation promulgated by the Secretary of the DOI interpreting section 7(a)(2) of the Endangered Species Act (ESA).²² The regulation originally applied to actions taken in the United States or in foreign nations, but was later narrowed to actions taken in the United States or on the high seas.²³ Plaintiff environmental groups sought to reinstate the original regulation and presented affidavits from members who had traveled abroad,

17. Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 293 (2007) (citing Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988)); see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (discussing the political motives behind Supreme Court standing decisions).

18. See generally Philip Weinberg, *Are Standing Requirements Becoming a Great Barrier Reef against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1 (1999).

19. See Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 814 (discussing how *Massachusetts v. EPA*, 549 U.S. 497 (2007), “left scholars befuddled and lower courts without instruction.”); see also *id.* at 814 n.103 (noting that some courts have cited *Massachusetts* to suggest that the purpose of standing is to ensure adversarialism and not to maintain separation of powers; some courts have used *Massachusetts* to evaluate quasi-sovereign interests in parens patriae suits; other courts have relied on *Massachusetts* to apply a less stringent standing analysis to states with quasi-sovereign interests. *Massachusetts* has even been cited to distinguish parens patriae cases where a federal statute does not provide a procedural right to protect citizens’ interests.).

20. The case that is most often cited as a leading precedent on standing requirements, *Lujan v. Defenders of Wildlife*, was decided by a highly divided court. 504 U.S. 555 (1992). Only Chief Justice Rehnquist and Justices White and Thomas joined in Justice Scalia’s opinion in its entirety, while Justices Kennedy and Souter, who concurred in the result, rejected the plurality’s argument that an injury that is broadly shared should only be redressed by the political branches of the government. *Id.* at 580 (Kennedy, J., concurring in part). Justice Kennedy further argued that even if many individuals share an injury, it is enough that the plaintiff is injured “in a concrete and personal way.” *Id.* at 581.

21. *Id.* at 555 (majority opinion).

22. *Id.* at 557; 16 U.S.C. § 1536(a)(2) (2006).

23. *Lujan*, 504 U.S. at 557–59.

observed endangered wildlife, and intended to do so again.²⁴ In evaluating and ultimately denying standing in this case,²⁵ the Court enumerated three elements as the “irreducible constitutional minimum” that a plaintiff needs to satisfy to establish constitutional standing.²⁶ First, the plaintiff must have suffered an “injury in fact” that is both “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”²⁷ Second, the injury must be “fairly traceable” to the challenged conduct of the defendant.²⁸ Third, it must be likely that the injury will be “redressed” by a favorable court decision.²⁹

Probably the most difficult hurdle of this three-prong test is the injury-in-fact requirement, especially in the context of climate change.³⁰ The difficulty in showing injury due to climate change is that everybody is affected by it, albeit to different degrees. Courts have ruled inconsistently on whether plaintiffs alleging general injuries to the public, such as climate change, should have standing.³¹ Justice Scalia, who authored the majority opinion in *Lujan*, is a staunch believer that if an injury affects the general public, no one has standing; instead, the political branches are the proper place to redress such injuries.³²

A case that illustrates the difficulty in establishing standing when the injury is sustained by many is *Duke Power Co. v. Carolina Environmental Study Group, Inc.*³³ In this case, environmental organizations and residents of the area near a planned nuclear power facility challenged the constitutionality of the Price-Anderson Act,³⁴ which limited the aggregate liability of the industry. The Court stated that “the harm asserted

24. *Id.* at 563–64.

25. The Court found that the plaintiffs could not establish imminent injury or redressability. *Id.* at 557–78.

26. *Id.* at 560–61.

27. *Id.* at 560.

28. *Id.* at 560–61.

29. *Id.* at 561.

30. See Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 945 (2008) (observing that “after many decades of effort, the Court cannot forge a consensus regarding the nature of the injury requirement”); *id.* at 952 (“Each of standing’s three canonical requirements . . . has caused great confusion. . . . The most intractable problems, however, have revolved around determining what sorts of injury should suffice for standing.”); see also Blake R. Bertagna, Comment, *Standing Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU L. REV. 415, 435–46 (2006) (discussing the difficulty of showing a concrete and particularized injury); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005).

31. Mank, *supra* note 30, at 21; see also Murphy, *supra* note 24, at 952 (“Justices have struggled over whether separation-of-powers principles permit generalized grievances to qualify.”).

32. Mank, *supra* note 30, at 29.

33. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978).

34. 42 U.S.C. § 2210 (2006).

amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure,”³⁵ and it denied standing.³⁶

Conversely, in *United States v. Students Challenging Regulatory Agency Procedures*,³⁷ an environmental group was deemed to have standing to enjoin enforcement of Interstate Commerce Commission orders, which the group claimed failed to include a detailed environmental impact statement as required by the National Environmental Policy Act.³⁸ The Court stated that “to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody.”³⁹

In *Federal Elections Commission v. Akins*,⁴⁰ the Court further clarified the circumstances under which standing could be allowed even if the injury is widely shared. In *Akins*, voters challenged the Federal Election Commission’s decision not to classify a certain lobbying group as a “political committee” under the definition of the Federal Election Campaign Act of 1971,⁴¹ thereby not requiring the group to disclose its donors, contributions, or expenditures.⁴² The Court allowed the plaintiffs standing, because they had suffered injury in fact from their inability to obtain important information that would help them evaluate candidates for public office.⁴³ Justice Breyer’s majority opinion stated that “an injury . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as ‘injury in fact.’”⁴⁴ The Court explained that widely shared, generalized injuries could qualify for standing if the harm is concrete, but not if the injury is abstract and indefinite.⁴⁵

Where the injuries affect members of an organization or an association, the Court has devised an alternative route to establish standing.⁴⁶ An organization or association has standing to sue on behalf of

35. *Duke Power Co.*, 438 U.S. at 80.

36. *Id.*

37. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

38. 42 U.S.C. § 4332(2)(C); *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 688.

39. *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 688; *see also* *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (holding that a plaintiff could have standing “even if it is an injury shared by a large class of other possible litigants”).

40. *Federal Elections Comm’n v. Akins*, 524 U.S. 11 (1998).

41. *Id.* at 13; 2 U.S.C. § 431 (2006).

42. *Akins*, 524 U.S. at 13.

43. *Id.* at 19–26.

44. *Id.* at 24.

45. *Id.* at 24–25.

46. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).

its members if: (1) at least one member would have standing to sue in his own right, (2) the interests sought by the association are germane to its purpose, and (3) it is not necessary for an individual member to participate in the lawsuit to assert the claim or the relief.⁴⁷ Generally, if a lawsuit seeks prospective relief, such as a declaration or injunction, then individual members are unlikely to be required to participate in the lawsuit, but if a lawsuit seeks damages for particular injuries, then each member must participate to prove both the fact and extent of injuries claimed.⁴⁸

II. STATE STANDING

States can bring suit in federal court in three different capacities.⁴⁹ First, states can bring “proprietary suits in which the state sues much like a private party suffering a direct, tangible injury.”⁵⁰ When a state asserts proprietary interests, such as ownership in land or business ventures, it has to satisfy the *Lujan* test for standing just as any other private party.⁵¹ Second, states may bring “sovereignty suits requesting adjudication of boundary disputes or water rights.”⁵² States’ sovereign interests generally include the “exercise of sovereign power over individuals and entities,”⁵³ including the power to enact and enforce civil and criminal laws and the right to demand recognition from other sovereigns.⁵⁴ Third, states may bring *parens patriae* suits to protect their quasi-sovereign interests, as discussed below.⁵⁵ Under a *parens patriae* suit, a state not only seeks to protect its quasi-sovereign interests, but also represents the general interest of its citizens and provides an alternative means of bringing suit where individual suits would not provide adequate relief.⁵⁶

47. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

48. *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

49. *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000).

50. *Id.*; see, e.g., *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (concerning South Carolina’s suit for payment of defaulted North Carolina bonds); *Texas v. New Mexico*, 482 U.S. 124 (1987) (concerning the enforcement of an interstate compact between Texas and New Mexico).

51. Calvin Massey, *State Standing after Massachusetts v. EPA*, 61 FLA. L. REV. 249, 261 (2009).

52. *Connecticut*, 217 F.3d at 97.

53. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

54. *Id.*

55. *Connecticut*, 217 F.3d at 97.

56. Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1085 (1977).

A. Parens Patriae Doctrine

It has been established that states, in appropriate circumstances, may sue as *parens patriae* on behalf of their citizens to protect their quasi-sovereign interests. *Parens patriae* literally means “parent of his or her country,”⁵⁷ and stems from the common law concept of “royal prerogative,” which authorized the monarch, as the parent of the nation, to undertake legal proceedings on behalf of the mentally incapacitated.⁵⁸ The Supreme Court recognized this concept of *parens patriae* as “inherent in the supreme power of every state . . . to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”⁵⁹ This common law concept, however, has very little to do with the current doctrine of *parens patriae* standing, and in fact this doctrine, as it now stands, would deny a state standing if the state serves only as a nominal party without a real interest of its own.⁶⁰

The scope of the *parens patriae* doctrine is still vague and uncertain, but there are three general requirements that a state must meet to gain *parens patriae* standing.⁶¹ First, the state must be able to “articulate an interest apart from the interests of particular private parties” and not merely serve as a nominal party.⁶² Second, the state “must express a quasi-sovereign interest.”⁶³ Quasi-sovereign interests are difficult to define and “the vagueness of this concept can only be filled in by turning to individual cases,”⁶⁴ but they must be concrete enough to create actual controversy and thereby meet the constitutional standing requirements.⁶⁵ Third, the state must be acting on behalf of a substantial number of its citizens and not just a special interest group.⁶⁶

In an early example of *parens patriae* standing—*Missouri v. Illinois*⁶⁷—Missouri sought to enjoin Illinois from polluting the Mississippi River. The Supreme Court analogized this conflict to a situation involving two countries instead of two states, and noted that if “Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force.”⁶⁸ The Court held that

57. BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

58. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

59. *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1, 57 (1890).

60. *See, e.g., Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911).

61. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–08 (1982).

62. *Id.*

63. *Id.*

64. *Id.* at 602.

65. *Id.*

66. *Id.*

67. *Missouri v. Illinois*, 180 U.S. 208 (1901).

68. *Id.* at 241.

“the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri.”⁶⁹ The Court thereby recognized that the health and comfort of the inhabitants of a state are quasi-sovereign interests, and that the state is the proper party to bring suit to protect such interests. The Court further observed that “suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate.”⁷⁰

The Supreme Court further clarified the *parens patriae* doctrine in *Georgia v. Tennessee Copper Co.*,⁷¹ a suit not between two states, but by a state against a private party. Georgia sought to enjoin a plant in Tennessee that was discharging noxious gases over the border into Georgia. The Court noted that Georgia “owns very little of the territory alleged to be affected”⁷² and that *parens patriae* is “a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”⁷³ The state’s interest is therefore separate from the interests of its citizens and any “alleged damage to the state as a private owner is merely makeweight.”⁷⁴

The Supreme Court provided the most complete explanation of the *parens patriae* doctrine in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*,⁷⁵ a case brought not by a state, but by a territory. Puerto Rico sued apple growers in Virginia for discriminating against Puerto Rican workers and not extending the employment benefits due to Puerto Rican workers as domestic workers.⁷⁶ The Court noted that Puerto Rico is “similarly situated to a State” and that it has “a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.”⁷⁷ This case expanded the *parens patriae* doctrine, not only by allowing a non-state to bring suit to protect its quasi-sovereign interest, but also by allowing such suits where a limited number of citizens are directly affected. The Court held that although the number of workers affected could not have a substantial effect on the Puerto Rican economy, states and territories have an interest in protecting residents from discrimination.⁷⁸ The absolute number of affected citizens was small, but the effect on the state as a whole could be substantial, because

69. *Id.*

70. *Id.*

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

72. *Id.* at 237.

73. *Id.*

74. *Id.*

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

76. *See generally Snapp*, 458 U.S. at 592.

77. *Id.* at 608 n.15.

78. *Id.* at 609.

“[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting.”⁷⁹

The *Snapp* Court provided a comprehensive explication of quasi-sovereign interests, but conceded that articulation of such interests “is a matter for case-by-case development”⁸⁰ since “neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract.”⁸¹ The Court, however, recognized certain characteristics of such interests, which it split into two general categories. First, a state has quasi-sovereign interest in the physical and economic health and well-being of its residents.⁸² Second, a state has a quasi-sovereign interest in securing its rightful status within the federal system.⁸³ A general guideline articulated by the *Snapp* Court is “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”⁸⁴ Justice Brennan, in his concurring opinion in *Snapp*, went further to suggest that a state should be allowed to decide its own quasi-sovereign interests, because “a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.”⁸⁵

B. *Parens Patriae Doctrine in Relation to the Lujan Test*

It is not clear how the *parens patriae* doctrine relates to the traditional standing doctrine set forth in *Lujan*.⁸⁶ The main cases that propounded the standards for *parens patriae* suits predate *Lujan* and did not discuss standing beyond ensuring that sufficient controversy existed for the claim to be justiciable. It is therefore commonly argued that the *parens patriae* doctrine provides states an alternative means of establishing standing, and that as long as a state is able to show a quasi-sovereign interest sufficiently concrete to create an actual controversy, no further showing of standing is required.⁸⁷

Some scholars argue that *parens patriae* provides an alternative channel for states to satisfy only the injury prong of the *Lujan* test;

79. *Id.* (quoting Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980)).

80. *Id.* at 607.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 612 (Brennan, J., concurring).

86. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338 (2d Cir. 2009).

87. See Christie Henke, *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*, 35 *ECOLOGICAL L.Q.* 385, 389 (2008); see also Sara Zdeb, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 *GEO. L. J.* 1059, 1074 (2008).

therefore, the state would still have to show causation and redressibility.⁸⁸ Professor Thomas Merrill has made this argument, even though he concedes that *parens patriae* cases such as *Missouri* and *Tennessee Copper* afforded states standing by right. In suggesting that states satisfy the *Lujan* requirements, he states that these *parens patriae* cases would likely meet the other two prongs of the *Lujan* test. Other scholars have suggested that states bringing *parens patriae* suits are subject to more lenient *Lujan*-like requirements. However, the *Lujan* test for standing did not appear until 1992, and some commentators have even argued that *Lujan* is a misinterpretation of Article III.⁸⁹

C. State Suits against the Federal Government

Although states have been successful in bringing *parens patriae* suits, they can be severely limited in their ability to pursue *parens patriae* suits against the federal government. It is possible for a state to bring an action against the federal government on its own behalf, but not on behalf of its residents in a *parens patriae* suit.⁹⁰ In *Massachusetts v. Mellon*,⁹¹ the state of Massachusetts and a taxpayer challenged the constitutionality of a federal government aid program, claiming that the program usurped powers reserved to the state. The Supreme Court held that the state did not have standing because:

[I]t is no part of [the State's] duty or power to enforce [its 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.⁹²

The *Mellon* Court did not altogether rule out the possibility of a state action against the federal government when it stated that the Court “need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of

88. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 305 (2005).

89. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) (“[T]he very notion of ‘injury in fact’ is not merely a misinterpretation of the Administrative Procedure Act and Article III but also a large-scale conceptual mistake.”); see also *id.* at 178 (“There is no affirmative evidence of a requirement of a ‘personal stake’ or an ‘injury in fact’—beyond the genuine requirement that some source of law confer a cause of action.”); see also Richard Murphy, *supra* note 30 (arguing that “an injury requirement to limit access to the federal courts has been misguided and should, as many scholars have long insisted, be abandoned”).

90. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

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

92. *Id.* at 485–86.

Congress,”⁹³ but many cases have relied on *Mellon* to bar states from challenging the federal government in *parens patriae* actions.⁹⁴

Subsequent to *Mellon*, but prior to *Snapp*, the Ninth Circuit allowed the state of Washington standing in *Washington Utilities & Transportation Commission v. Federal Communications Commission (FCC)*⁹⁵ to seek review of an order of the FCC determining that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.⁹⁶ The Ninth Circuit reasoned that *Mellon* only barred state *parens patriae* suits that challenged the constitutionality of a federal statute, and not those that sought to enforce a statute.⁹⁷ However, the Supreme Court in *Snapp*, in a footnote, seemingly affirmed the *Mellon* position that a “state does not have standing as *parens patriae* to bring an action against the federal government.”⁹⁸ In a subsequent case,⁹⁹ the Ninth Circuit, relying on *Snapp*, set aside the *FCC* holding and reaffirmed the *Mellon* bar on suits against the federal government.

Other lower courts have interpreted *Mellon* inconsistently. Some have barred all state actions against the federal government, regardless of whether the claims involve a constitutional challenge to a federal statute.¹⁰⁰ Other courts have effectively treated the *Snapp* footnote as dicta and granted standing to states in *parens patriae* suits against the federal government seeking to enforce their rights under federal statutes.¹⁰¹ Even Justice Scalia, while serving as a judge on the D.C. Circuit, allowed a state *parens patriae* standing against a federal agency.¹⁰² He reasoned that limitations on *parens patriae* suits against the federal government is only a prudential limitation that can be changed

93. *Id.* at 486.

94. Comment, *supra* note 56, at 1085; *see, e.g.*, *Citizens against Ruining the Env't v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008); *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 268 (D.C. Cir. 2002).

95. *Wash. Utils. & Transp. Comm'n v. Fed. Comm'n Comm'n*, 513 F.2d 1142 (9th Cir. 1975).

96. *Id.*

97. *Id.*

98. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

99. *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990).

100. Wildermuth, *supra* note 17, at 309.

101. Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1770 (2008). Some examples given by Professor Mank include: *Connecticut ex rel. Blumenthal v. U.S. Dep't of Commerce*, 369 F. Supp. 2d 237 (D. Conn. 2005); *P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797 (D. Kan. 1990); *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984).

102. *Md. People's Counsel v. Fed. Energy Regulatory Comm'n*, 760 F.2d 318 (D.C. Cir. 1985).

through legislation under certain circumstances.¹⁰³ For example, “where the subject of challenge is Executive compliance with statutory requirements in a field where the federal government and the states have long shared regulatory responsibility; we have no doubt that congressional elimination of the rule of *Massachusetts v. Mellon* is effective.”¹⁰⁴

Although the circumstances have been limited, states have successfully sued the federal government under the *parens patriae* doctrine, and there are reasonable bases to eliminate the prudential limitation on such suits. Allowing *parens patriae* suits against the federal government is all the more crucial in environmental cases. Environmental injuries typically affect the population at large and can jeopardize a state’s quasi-sovereign interests, such as the health and well-being of its residents. In such cases, the state is the most appropriate party to bring suit to protect its residents and its own quasi-sovereign interests. Moreover, much of environmental law is regulated by federal statutes that preempt state regulation. In such cases, a state’s only recourse is to sue the federal government.

III. STATE STANDING WITH SPECIAL SOLICITUDE IN *MASSACHUSETTS V. EPA*

*Massachusetts v. EPA*¹⁰⁵ created new uncertainties in an already uncertain area of law.¹⁰⁶ In *Massachusetts v. EPA*, Massachusetts joined other petitioners, including eleven other states, in an action to seek review of the EPA’s rejection of a rulemaking petition. This petition asked EPA to regulate the emission of greenhouse gases from new motor vehicles¹⁰⁷ under the Clean Air Act.¹⁰⁸ The majority found that Massachusetts had standing, discussing both the *parens patriae* doctrine and the three-prong *Lujan* test, and even introduced a seemingly new concept of “special solicitude” that state plaintiffs are to be afforded.¹⁰⁹

To further complicate matters, the Court appears to have amalgamated the *parens patriae* analysis and the *Lujan* test by considering Massachusetts’s proprietary interest as a quasi-sovereign interest and loosely applying the *Lujan* test. It is therefore difficult to discern the actual basis of standing, and hence the influence this case will have on future standing analyses. Commentators have put forward

103. *Id.* at 321.

104. *Id.* at 322.

105. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

106. See Massey, *supra* note 51, at 249–50.

107. *Massachusetts v. EPA*, 549 U.S. at 504.

108. 42 U.S.C. § 7401 (2006).

109. *Massachusetts v. EPA*, 549 U.S. at 520.

varying conjectures as to the majority's intended standing theory, but all agree that the standards have been loosened for states when they sue to protect their quasi-sovereign interest in the health and welfare of their citizens.¹¹⁰ The remaining questions are how and to what degree?

The Court, while obscuring the two theories, provided no further elucidation of the special solicitude concept, which it relied on to give states more leeway in establishing standing.¹¹¹ Massachusetts's *parens patriae* standing, however, should not require special solicitude, because this concept of providing special solicitude to states is embodied in the *parens patriae* doctrine. The Court would have been more effective if, instead of introducing a vague new concept of special solicitude, it had unequivocally clarified that in *parens patriae* suits, a state has standing by right to protect its quasi-sovereign interests. This clarification would have achieved what the Court seems to have wanted to achieve by affording Massachusetts special solicitude.

A. Application of the *Parens Patriae* Doctrine

As mentioned above, a state can bring suit in different capacities, but it is unclear in which capacity Massachusetts brought suit in *Massachusetts v. EPA*. The majority first noted the significance of Massachusetts's status as a sovereign state and not a private individual, as was the case in *Lujan*.¹¹² The Court then proceeded to discuss Massachusetts's stake in protecting its quasi-sovereign interests and compared this case to prior *parens patriae* cases such as *Missouri*, *Tennessee Copper*, and *Snapp*.¹¹³ In its discussion of Massachusetts's quasi-sovereign interests, however, the Court found it significant that Massachusetts actually owns much of the affected territory,¹¹⁴ even though ownership in land was classified by the *Snapp* Court as a proprietary interest and not a quasi-sovereign interest.¹¹⁵ For a state to protect its proprietary interest, it would have to meet the same standing requirements under the *Lujan* test, just like any other individual private plaintiff.¹¹⁶

The Court did not explicitly mention any other injury that would qualify as a quasi-sovereign interest, but that is not to say that

110. Mank, *supra* note 101, at 1785 ("The Massachusetts decision announced a new rule of law that gives states preferential standing."); Massey, *supra* note 51, at 252 ("[*Massachusetts v. EPA* softens both causation and redressability.>").

111. *Massachusetts v. EPA*, 549 U.S. at 520.

112. *Id.* at 518.

113. *Id.* at 519–20.

114. *Id.* at 519.

115. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

116. Massey, *supra* note 51, at 261.

Massachusetts did not have any in this case. The Court may have presumed the existence of Massachusetts's quasi-sovereign interests in protecting the physical and economic well-being of its residents from the consequences of coastal property loss. Moreover, protecting the health and well-being of the state residents from the harms of climate change may also qualify as quasi-sovereign interests.¹¹⁷ The Court affirmed Massachusetts's quasi-sovereign claim when it stated that “[s]tates are not normal litigants for the purposes of invoking federal jurisdiction,”¹¹⁸ and that this, like *Tennessee Copper*, was a suit “for an injury to it in its capacity of quasi-sovereign”¹¹⁹ which is proper for federal jurisdiction.¹²⁰ Perhaps the Court was taking the view expressed by Justice Brennan in his concurring opinion in *Snapp* that each state can assess for itself what its quasi-sovereign interests are,¹²¹ and that Massachusetts had properly determined that its quasi-sovereign interests included the protection of its coastal properties. Assuming that these are valid quasi-sovereign interests, since Massachusetts is not merely a nominal party, virtually all residents are affected by climate change, and the state's quasi-sovereign interests are different from the interests of the state residents, Massachusetts would meet the requirements for *parens patriae* standing.¹²²

The discussion of Massachusetts's proprietary interest does not detract from its *parens patriae* standing. It is possible for a state to bring a proprietary claim and a *parens patriae* claim simultaneously. In *Georgia v. Pennsylvania R.R. Co.*¹²³ and *Tennessee Copper*, the state plaintiffs sought both quasi-sovereign interests and proprietary interests. The Court in each case stated that the injury to the state as proprietor is merely “makeweight” and disregarded the proprietary claims in assessing the *parens patriae* claims.¹²⁴ Likewise, Massachusetts's proprietary interest in the coastal property, which according to the Court, “reinforces the conclusion that its stake in the outcome of this case is sufficiently

117. See also *id.* at 263 (suggesting that there are at least two possible quasi-sovereign interests: an interest in protecting the physical and economic health and well-being of its residents from the harms of climate change, and an interest in asserting its rightful status within the federal system and securing the benefits afforded by participating in the federal system).

118. *Massachusetts v. EPA*, 549 U.S. at 518.

119. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

120. *Massachusetts v. EPA*, 549 U.S. at 519.

121. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring).

122. See *Snapp*, 458 U.S. at 592; *Tenn. Copper*, 206 U.S. at 230; *Missouri v. Illinois*, 180 U.S. 208 (1901).

123. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

124. *Id.* at 450 (holding that “we treat the injury to the State as proprietor merely as a ‘makeweight’”); *Tenn. Copper*, 206 U.S. at 237 (holding that “[t]he alleged damage to the state as a private owner is merely a makeweight”).

concrete to warrant the exercise of federal judicial power,” can be regarded as makeweight without affecting Massachusetts’s *parens patriae* standing.¹²⁵

B. Application of the Lujan Test

As long as Massachusetts meets the requirements enumerated in the *parens patriae* doctrine, it should have standing by right and not need to further satisfy the *Lujan* test. The application of the *Lujan* test was unnecessary and misleading. If the Court had been considering proprietary interests only, there would not have been so much discussion of quasi-sovereign interests and prior *parens patriae* cases. Unfortunately, because the majority erroneously characterized Massachusetts’s proprietary interest as a quasi-sovereign interest and applied the *Lujan* test, many, including the dissent, have misconstrued the *parens patriae* doctrine. Some commentators have taken the discussion to mean that a state in a *parens patriae* action still needs to satisfy a *Lujan*-type test, albeit a less stringent version.¹²⁶ A better argument may be that the Court’s purpose in discussing quasi-sovereign interests was to justify giving states special solicitude even in a proprietary suit. This special solicitude would explain the Court’s application of what the dissenting justices characterized as a watered-down version of the *Lujan* test.¹²⁷

Massachusetts v. EPA arguably relaxed all three prongs of the *Lujan* test for the purposes of establishing state standing. Since global warming potentially affects everyone, it is difficult to show particularized harm.¹²⁸ As mentioned in Part II, Courts have ruled inconsistently where there is a widely shared injury, but *Massachusetts v. EPA* affirmed the more lenient view expressed in *Akins*, that “where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”¹²⁹ The Court in *Massachusetts v. EPA* also construed leniently the requirement that the injury be actual or imminent. The asserted injury to Massachusetts was loss of coastline and the imminent harm was projected almost a hundred years into the future.¹³⁰ *Massachusetts v. EPA* also accepted a weaker

125. *Massachusetts v. EPA*, 549 U.S. at 519.

126. See Massey, *supra* note 51 (arguing that *EPA* creates a two-tiered system of standing: individuals and states claiming proprietary interest would still be subject to the stringent *Lujan* test, but states as *parens patriae* claiming a quasi-sovereign interest would be able to assert an interest that is loosely related to the injury and seek judicial action that may only partially redress the injury).

127. *Massachusetts v. EPA*, 549 U.S. at 536 (Roberts, C.J., dissenting).

128. Mank, *supra* note 30, at 6.

129. Fed. Elections Comm’n v. *Akins*, 524 U.S. 11, 24 (1998).

130. Massey, *supra* note 51, at 255–56.

chain of causation and allowed only partial redressability.¹³¹ Only part of the greenhouse gas emissions were attributable to the EPA's non-regulation of new vehicles, and the bulk of the emissions were attributable to independent actions of third-parties, but this contribution to global warming was regarded as "fairly traceable" to the EPA's actions.¹³² The redress sought would not reverse global warming and any coastline property already lost would not be recoverable. Nevertheless, the Court considered it adequate that the redress sought would at least slow or reduce global warming.¹³³

Although the Court did not explicitly hold that every state is entitled to the same special solicitude, the absence of any discussion as to Massachusetts's particular circumstances would imply that all states would be entitled to special solicitude by virtue of being a sovereign. Massachusetts was one of twelve states¹³⁴ among the group of plaintiffs, but because Judge Tatel of the D.C. Circuit had focused on Massachusetts's standing, the Supreme Court also focused on Massachusetts. Obviously, not all states are affected equally by global warming, and Massachusetts, as a coastal state, would be more at risk in some respects, including the claimed injury due to rising water levels. The Court could have limited the application of special solicitude to states that are at particular risk, but it did not.

C. *The Ability of States to Sue the Federal Government*

The one aspect of standing that *Massachusetts v. EPA* clarified is that *Mellon* does not completely bar a state from suing a federal agency. *Massachusetts v. EPA* confirmed the position that the Ninth Circuit had once taken and set aside,¹³⁵ and the position that some of the lower courts have been taking in treating the *Snapp* footnote as dicta.¹³⁶ When an action does not challenge the constitutionality of a federal statute and

131. This looser standard applies not just to states, but sometimes to other plaintiffs too. In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), owners of lands and property along the Mississippi Gulf coast were allowed standing to bring putative class action against oil companies and energy companies whose operation allegedly caused emission of greenhouse gases that contributed to global warming and added to ferocity of Hurricane Katrina which destroyed their property.

132. *Massachusetts v. EPA*, 549 U.S. at 524–25.

133. *Id.* at 525.

134. The other eleven states were California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Id.* at 505 n.2.

135. *Wash. Utils. & Transp. Comm'n v. Fed. Comm'n Comm'n*, 513 F.2d 1142 (9th Cir. 1975).

136. See Mank, *supra* note 101, at 1770 ("[S]everal lower court decisions have treated the *Snapp* footnote as dicta and allowed states to file parens patriae suits against the federal government to require the government to enforce rights in a federal statute on behalf of their citizens.").

instead seeks to have it enforced or affirmed, the state can sue the federal government. According to the Court, “there is a critical difference between allowing a state ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a state to assert its rights under federal law (which it has standing to do).”¹³⁷

In *Massachusetts v. EPA*, the Court’s discussion of Massachusetts’s quasi-sovereign interests, citing *Snapp*, seems to suggest that the right of a state to bring *parens patriae* suits, and especially those against the federal government, is rooted in the fact that when a “[s]tate enters the Union, it surrenders certain sovereign prerogatives,” which are now “lodged in the [f]ederal [g]overnment.”¹³⁸ However, given that Puerto Rico was afforded the same right in *Snapp*, the *parens patriae* standing must not be a consequence of a sovereignty tradeoff. In fact, the *Snapp* Court noted in a footnote that the discussion focused on *parens patriae* questions in the context of a suit brought in original jurisdiction of the Court, which may be granted under more limited circumstances than jurisdiction in federal district courts.¹³⁹ Justice Brennan’s concurring opinion in *Snapp* further discussed this footnote and stated that the Court’s ability to accommodate a *parens patriae* action with the original jurisdiction of the Court may require “a more circumspect inquiry” to ensure that “the provisions of the Eleventh Amendment are not being too easily circumvented.”¹⁴⁰ *Parens patriae* suits brought against the federal government in lower federal courts would not be subject to the same limitations.¹⁴¹

Despite the confused and mixed theories discussed in the opinion, the Court in *Massachusetts v. EPA* did not change the *parens patriae* doctrine and in fact validated the rationale and requirements as set forth in *Snapp* and prior *parens patriae* cases. Moreover, the Court essentially expanded states’ standing rights as sovereigns by lending the concept of special solicitude, which is inherent in the *parens patriae* doctrine to claims that are not traditionally regarded as quasi-sovereign interests. If Massachusetts had brought a claim for its proprietary interests only, there would have been no issue regarding a state’s ability to sue the federal government. The Court in *Massachusetts v. EPA*, however, clarified that there are circumstances where it is appropriate to allow states to bring

137. *Massachusetts v. EPA*, 549 U.S. at 520 n.17. This footnote also discusses *Nebraska v. Wyoming*, 515 U.S. 1 (1995), where Wyoming was allowed to bring a cross-claim against the federal government.

138. *Massachusetts v. EPA*, 549 U.S. at 519.

139. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 604 n.12 (1982).

140. *Id.* at 610–11 (Brennan, J., concurring).

141. *Id.*; see also *Zdeb*, *supra* note 87, at 1081–82.

parens patriae suits against the federal government to protect its quasi-sovereign interests.

IV. TRIBAL GOVERNMENT STANDING: *CENTER FOR BIOLOGICAL DIVERSITY V. DEPARTMENT OF INTERIOR*

A. *Tribal Sovereignty and Alaska Native Tribes*

Native American tribes retain sovereign powers that predate the formation of the United States and are recognized in federal law, including treaties, acts of Congress, executive branch policies and regulations, and federal court decisions.¹⁴² Tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.”¹⁴³ However, until Congress acts, “tribes retain sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”¹⁴⁴ The federal government recognizes tribes as sovereign governments¹⁴⁵ and federal agencies must seek timely input by tribal officials where there are tribal implications in regulatory policies.¹⁴⁶ The Supreme Court has upheld tribal sovereign immunity even when a tribe is engaged in commercial activities outside the reservation.¹⁴⁷

Alaska Natives are politically organized into 228 federally recognized tribes.¹⁴⁸ As part of the Alaska Native Claims Settlement Act (ANCSA) in 1971, Alaska Natives received clear title to approximately 45 million acres of land in exchange for relinquishing claims to 360 million acres of land.¹⁴⁹ However, in *Alaska v. Native Village of Venetie Tribal Government*,¹⁵⁰ the Supreme Court held that most of the 45 million

142. Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RESOURCES & ENV'T 45, 45 (2008) (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al., eds., 2005)).

143. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

144. *Id.*

145. See Exec. Order No. 13175 § 3(a), 65 Fed. Reg. 67,249 (Nov. 6, 2000) (“Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”).

146. *Id.* § 5(a).

147. *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 760 (1998).

148. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 70 Fed. Reg. 71,194–71,201 (Nov. 25, 2005). The Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4792 (1994), requires the Secretary of the Interior to keep a list of federally recognized tribes. 25 U.S.C. § 479a-1(a) (2006).

149. Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 109 (2008).

150. *Alaska v. Native Village of Venetie Tribal Gov.*, 522 U.S. 520 (1998).

acres conveyed through ANCSA do not qualify as “Indian Country.”¹⁵¹ “While there are some 10,000 allotments in Alaska, these form only a small percentage of Native lands in the state, and their patchwork pattern prevents a coherent exercise of tribal jurisdiction.”¹⁵² Nevertheless, the Court in *Venetie* held that ANCSA did not extinguish tribal sovereignty and that Alaska tribes were “sovereigns without territorial reach.”¹⁵³ A subsequent case stated that “tribal sovereignty stems from two intertwined sources: tribal membership and tribal land.”¹⁵⁴ The “key inquiry” for purposes of establishing sovereignty “is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance.”¹⁵⁵ However, Alaska Native Villages are entitled to a number of important rights and privileges as federally recognized tribes.¹⁵⁶

B. Tribal Challenge to OCSLA Leasing Program

The OCSLA¹⁵⁷ authorizes the DOI to grant oil and gas leases on the submerged lands of the OCS.¹⁵⁸ The point of contention in *Center for Biological Diversity v. U.S. Department of Interior* was the DOI’s approval under OCSLA of a five-year leasing program in the OCS for oil and gas exploration off the coast of Alaska.¹⁵⁹ This leasing program would expand previous lease offerings in the Beaufort, Bering, and Chukchi Seas, home to many species of wildlife, including several endangered species.¹⁶⁰ Other species of wildlife are also known to feed and migrate through each of these seas.¹⁶¹

151. *Id.* at 532–34. “Indian country” refers to all lands within reservation boundaries, as well as dependent Indian communities and Indian allotments. *See* 18 U.S.C. § 1151.

152. Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 5 (2005).

153. *Village of Venetie*, 522 U.S. at 526.

154. *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999).

155. *John*, 982 P. 2d at 756.

156. Strommer & Osborn, *supra* note 152, at 2–10.

157. 43 U.S.C. §§ 1331–1356 (2006).

158. As defined under 43 U.S.C. § 1331(a), “the term ‘outer Continental Shelf’ means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”

159. *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 471 (D.C. Cir. 2009).

160. *Id.* at 472 (An endangered marine mammal, the North Pacific right whale, is known to inhabit the Bering Sea. The Beaufort and Chukchi Seas are populated by two polar bear species.).

161. *Id.* (Bowhead whales feed and migrate through each of these three seas, and other species of whales, seals, the Pacific walrus and several species of seabirds are indigenous to these seas.).

The leasing program involves four stages, designed to “forestall premature litigation regarding adverse environmental effects that . . . will flow, if at all, only from the latter stages of OCS exploration and production.”¹⁶² The first stage is the preparation of a leasing program with a five-year schedule of proposed lease sales.¹⁶³ Second is the lease sale stage, when the DOI accepts bids and issues leases.¹⁶⁴ Third, the DOI reviews and approves lessees’ more extensive exploration plans.¹⁶⁵ During the fourth and final stage, the DOI reviews and approves development and production plans.¹⁶⁶

The leasing program at issue in *Center for Biological Diversity* had completed the first stage, which requires the DOI to include in the program “a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity . . . which will best meet national energy needs.”¹⁶⁷ Under the enabling statute, the leasing program must be conducted in a manner that considers relative environmental sensitivity and marine productivity, and shares the benefits and environmental risks equitably.¹⁶⁸

Petitioners in *Center for Biological Diversity*, including the Native Village of Point Hope, Alaska (Point Hope), a federally recognized tribal government¹⁶⁹ whose members rely on the Chukchi Sea coast for subsistence,¹⁷⁰ challenged the DOI’s approval of the leasing program. Petitioners claimed, inter alia, that the leasing program violates OCSLA because DOI failed to consider the effects of greenhouse gas emissions associated with the leasing program on climate change and the effects of climate change on the OCS.¹⁷¹ Petitioners offered two theories of standing for this claim: a substantive theory that the leasing program causes climate change, which disturbs the ecosystems of the OCS areas and therefore infringes on petitioners’ enjoyment of these areas, and a procedural theory that DOI’s failure to consider the economic costs of greenhouse gas emissions and the effects of climate change on the OCS areas is an omission of a procedural requirement under OCSLA that would threaten petitioners’ particular interests.¹⁷² The court ruled that

162. *Id.* at 473 (quoting *Sec’y of Interior v. California*, 464 U.S. 312, 341 (1984)).

163. 43 U.S.C. § 1344 (2006).

164. *Id.* § 1337(a).

165. *Id.* § 1340.

166. *Id.* § 1351.

167. *Id.* § 1344(a).

168. *Id.* § 1344(a)(2)(B), (G).

169. *See* The Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a-1 (2006).

170. *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 472 (D.C. Cir. 2009).

171. *Id.* at 471.

172. *Id.* at 475–80.

petitioners had standing under the procedural theory, but not under the substantive theory, because they failed to establish the injury and causation elements of standing.

In denying standing under petitioners' substantive theory, the D.C. Circuit stated that the holding in *Massachusetts v. EPA* was specific to Massachusetts, because of its status as a state and its loss in coastal property, and that it would not apply to Point Hope even if it were granted special solicitude as a sovereign.¹⁷³ The court reasoned that Point Hope had not alleged its own individual harm apart from the harm to the members of the tribe.¹⁷⁴ The court's reasoning is erroneous, because the tribe has a quasi-sovereign interest in protecting both the health and well-being of its members, who would be affected by the leasing program, and the viability of the tribe, which could be jeopardized by the leasing program. Following this court's mistaken reasoning would suggest that the state of Alaska would also not have standing since the affected property is federally owned and Alaska would not have suffered an individual harm.

C. Application of the *Parens Patriae* Doctrine

Point Hope, as a federally recognized sovereign,¹⁷⁵ should have the right to bring a *parens patriae* suit to protect its quasi-sovereign interests. "It is undisputed that Native American nations retain significant sovereign power."¹⁷⁶ As states within the federal system "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty,"¹⁷⁷ tribal governments likewise retain the dignity of sovereignty. The federal courts should therefore provide an avenue for tribal governments to protect their sovereign and quasi-sovereign interests.¹⁷⁸ The Court in *Snapp* held that a U.S. territory had standing to sue as *parens patriae* since it is

173. *Id.* at 477.

174. *Id.*

175. Final Reply Brief of Petitioners, *Ctr. for Biological Diversity*, 563 F.3d 466 (D.C. Cir. 2009) (Nos. 07-1247, 07-1344), available at 2008 WL 4239380, at *22–23 n.10 ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."); *Okl. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). The Native Village of Point Hope is a Tribe. See 58 Fed. Reg. 54364 (Oct. 21, 1993); 67 Fed. Reg. 46328-01 (July 12, 2002); see also U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS (BIA), TRIBAL LEADERS DIRECTORY 30 (2008), available at <http://www.bia.gov/idc/groups/public/documents/text/idc002652.pdf>.

176. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000).

177. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

178. Final Reply Brief of Petitioners, *Ctr. for Biological Diversity*, 563 F.3d 466 (D.C. Cir. 2009) (Nos. 07-1247, 07-1344), available at 2008 WL 4239380, at *22–23 n.10.

“similarly situated to a [s]tate” and it has “a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any [s]tate.”¹⁷⁹ Given this rationale, a tribal government should have a right equal to a U.S. territorial government to establish *parens patriae* standing.

Point Hope’s claims in *Center for Biological Diversity* also surmount the additional hurdle that the *parens patriae* doctrine poses: states can only sue the federal government under narrow circumstances. In *Center for Biological Diversity*, Point Hope did not question the constitutionality of a federal statute, but sought to assert the rights that flow from the federal system and seek protection under the federal system. *Massachusetts v. EPA* affirmed that in such cases, a state may bring a *parens patriae* action against a federal agency.¹⁸⁰

Although specific quasi-sovereign interests of the tribe were not discussed in *Center for Biological Diversity*, just as they were not brought up in *Massachusetts v. EPA*, it is not difficult to see that a tribal government would have quasi-sovereign interests in protecting the physical and economic well-being of the tribe, including cultural and religious well-being. A “state’s interests in protecting both its natural resources and the health of its citizens have been recognized as legitimate quasi-sovereign interest since the turn of the last century.”¹⁸¹ The tribal government also has a quasi-sovereign interest in asserting its rights and seeking protection within the federal system.¹⁸²

There are many interests that a state or tribe could have, as the *Snapp* Court illustrated,¹⁸³ and these are not limited to territory, as the *Center for Biological Diversity* court seemed to suggest. In *Center for Biological Diversity*, the court distinguished *Massachusetts v. EPA* by clarifying that most of the OCS areas are owned by the federal government and that Point Hope did not allege any diminution of its territory.¹⁸⁴ Proprietary interest in land, however, is not required to establish *parens patriae* standing. As mentioned in Part III, in both *Georgia v. Pennsylvania* and *Tennessee Copper*, proprietary interests were considered ‘makeweight’ and disregarded in the *parens patriae* analyses. Even if Point Hope owned territory, any injury to Point Hope’s proprietary interest would only be considered makeweight and disregarded for *parens patriae* purposes.

179. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 n.15 (1982).

180. *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

181. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 334–35 (2d Cir. 2009).

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

183. *Snapp*, 458 U.S. at 601–02.

184. *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009).

Moreover, tribes can be injured even if they do not own the land that is facing destruction. Historically, Native American tribes were coerced into ceding much of their land to the United States, but the ceded lands continue to be of cultural and religious significance to the tribes.¹⁸⁵ Further, tribal cultures are integrated into the ecosystems of their surroundings, whether or not they own the land.¹⁸⁶ Any destruction of cultural sites and resources in these lands pose a grave and concrete injury to the tribes.

Past cases, unfortunately, have imposed a higher threshold for tribal governments to bring *parens patriae* suits than for other governments.¹⁸⁷ In *Assiniboine & Sioux Tribes v. Montana*,¹⁸⁸ two tribes brought a *parens patriae* suit to recover taxes collected by the state from certain Native Americans who were domiciled on the reservation of the Assiniboine and Sioux Tribes, claiming that the federal law granting tax exemption should apply to all Native Americans residing on the reservation, regardless of actual enrollment in the reservation tribes.¹⁸⁹ The court found that the tribes did not have standing, because not all the members of the tribes were affected,¹⁹⁰ even though the *Snapp* Court held that states could show standing even with relatively few affected citizens.¹⁹¹

In subsequent cases, courts, citing *Assinibione*, have ruled that various tribes lack standing to bring *parens patriae* suits, because they were not representing the interests of all the members of their respective tribes.¹⁹² The courts, however, did not dispute the tribal governments' inherent right to bring a *parens patriae* suit and held only that the requirements were not met in these particular cases. Nevertheless, the courts should have considered *Snapp* in rendering the decisions, and distinguished the affected groups in those cases from the affected group in *Snapp*. The affected workers in *Snapp* represented a small percentage of the population and could not have had a substantial effect on the Puerto Rican economy, but the numbers were substantial enough to allow the territory's participation in the case.¹⁹³

185. James M. Grijalva, *The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through Federal Environmental Citizen Suits*, 12 MICH. J. RACE & L. 33, 55 (2006).

186. Cordalis & Suagee, *supra* note 142, at 45.

187. Allan Kanner, Ryan Casey & Barrett Ristroph, *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resources Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155, 182 (2003).

188. *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269 (D. Mont. 1983).

189. *Id.* at 271–75.

190. *Id.* at 277.

191. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982).

192. See *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990); *Alabama & Coushatta Tribes of Tex. v. Tr. of the Big Sandy Independent School Dist.*, 817 F. Supp. 1319, 1327 (E.D. Tex. 1993).

193. *Snapp*, 458 U.S. at 608–09.

Although prior tribal *parens patriae* suits involved important matters, such as taxes, cultural practices, tribal constitution, and adoption, the injuries were suffered by very specific groups, such as non-members and members of other tribes living within a particular reservation,¹⁹⁴ or a group of male students at one particular school.¹⁹⁵ These interests may not necessarily be quasi-sovereign interests of the tribe and may be more appropriate claims in individual suits. The interests asserted in *Center for Biological Diversity*, however—climate change issues that affect the health and well-being of all the tribe's members and jeopardize not only the livelihoods of individual members but also the survival of the tribe itself—implicate the tribe's quasi-sovereign interests and should be enough to support standing.

D. Citizen Suit as an Association Representing Its Members

In the alternative, Point Hope could have sought standing as an organization. Justice Brennan, in a concurring opinion in *Snapp*, stated that “[a]t the very least, the prerogative of a state to bring suits in federal court should be commensurate with the ability of private organizations.”¹⁹⁶ Under this doctrine, Point Hope would need to show that at least one member of its tribe suffered a cognizable injury and would meet the *Lujan* requirements for standing. Further, Point Hope would need to show that the individual tribe members would not need to participate in the suit and that the interest pursued by Point Hope would be germane to the tribe's purpose. Since Point Hope sought prospective relief and not damages on behalf of individual members, it would not be necessary for individual members to participate in the suit. The interest sought by the tribe—the preservation and enjoyment of the ecosystem—is germane to the tribe's purpose. Hence the remaining issue is whether the injury meets the *Lujan* test.

The court did not dispute the harm claimed by petitioners, namely that the approval of the leasing program perpetuates climate change, which is a known harm to the ecosystems of the affected OCS areas and threatens the petitioners' enjoyment of the OCS areas.¹⁹⁷ This harm is comparable to the injury alleged in *Massachusetts v. EPA*, where the Court accepted the plausible link between manmade greenhouse gas emissions and global warming.¹⁹⁸ The Court in *Massachusetts v. EPA* also

194. *Assinibione*, 568 F. Supp. at 271–72.

195. *Alabama & Coushatta Tribes of Tex.* 817 F. Supp. at 1327.

196. *Snapp*, 458 U.S. at 611.

197. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009).

198. *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007).

accepted the proximate cause analysis, finding that because the EPA did not regulate greenhouse gas emissions, motor vehicles emitted more greenhouse gases than they otherwise would have, thus contributing to global warming. As a result, sea level rise and increased storm ferocity could inundate lands owned by Massachusetts. The Court in *Massachusetts v. EPA* also found redressability, even though the defendants' actions were only one of many contributions to greenhouse gas emissions. Likewise in the *Center for Biological Diversity* case, the leasing program would extract more oil and gas, which would inevitably produce more greenhouse gases, which would, in turn, affect the tribal members' enjoyment of the OCS and their inhabitants.

In *Center for Biological Diversity*, the court's main reason for denying standing was that the tribe did not claim an injury of its own, apart from the injury to the members, as Massachusetts had claimed its own injury in loss of coastal property. However, if Point Hope brought action on behalf of its tribe members not as a sovereign but as an association, it would not be necessary to show an injury to the association, separate from the injury to its members.¹⁹⁹ Had the court correctly applied the standing doctrine, Point Hope would have had standing as an association.

E. Special Solitude for Tribal Governments

As the Court in *Massachusetts v. EPA* granted Massachusetts special solicitude, tribal governments should be entitled to special solicitude. Massachusetts, as a coastal state is more susceptible to climate change effects and may have warranted the Court's special solicitude.²⁰⁰ All the more, Native American tribes deserve courts' special solicitude, as they are more vulnerable to climate change effects. An important concept in Native American life is "subsistence" which many merely understand as a means of eking out a living, but is a much more complex concept.²⁰¹

The traditional economy is based on subsistence activities that require special skills and a complex understanding of the local environment that enables people to live directly from the land. It also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment. To this array of activities and deeply embedded values,

199. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

200. *Massachusetts v. EPA*, 549 U.S. at 523.

201. David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. COLO. L. REV. 1009, 1009 (1989).

we attach the word “subsistence,” recognizing that no one word can adequately encompass all these related concepts.²⁰²

The extent to which Alaska Natives are able to maintain subsistence as a way of life is a measure of their self-determination.²⁰³ Congress recognizes the significance of Alaska Native subsistence by providing expanded protections for subsistence activities.²⁰⁴

Native American tribes are particularly sensitive to climate change due to their dependence on agriculture and natural resources.²⁰⁵ Their culture and spirituality are inextricably connected to the lands they inhabit and the species within those lands.²⁰⁶ Changes to the ecosystem from global warming will not only impact the physical and economic well-being of Native American tribes, but also their cultural, spiritual, and social identities.²⁰⁷ Their traditional method of coping with climate changes—migration—is not available because their treaties and rights are specific to particular parcels of land.²⁰⁸

Climate change is not the only environmental hazard to which Native Americans are particularly vulnerable. Many hazardous waste sites, including nuclear waste sites, are located within Indian country.²⁰⁹ Many factors have contributed to this problem, including weak financial and political power, much like other minority communities.²¹⁰ An additional factor that aggravates the situation for the Native Americans is the jurisdictional confusion as to the applicability of environmental regulations on Indian reservations.²¹¹ In some states where Native American tribes are located, there is much jurisdictional friction between the tribal government and the state, and often the interests of the states

202. T. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 51 (1985) (quoted in Case, *supra* note 201, at 1009).

203. Case, *supra* note 201, at 1010.

204. See, e.g., Endangered Species Act, 16 U.S.C. §1539(e) (2006) (exempting Alaska Natives from take provisions “if such taking is primarily for subsistence purposes”); Marine Mammal Protection Act, 16 U.S.C. § 1371(b) (exempting Alaska Natives from Act’s take provisions if take “is for subsistence purposes”); Migratory Bird Treaty Act, 16 U.S.C. § 712(1) (enabling Secretary of Interior to permit Alaska Natives to take migratory birds and collect their eggs for seasonal subsistence use); Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3114 (establishing subsistence preference for fish and wildlife uses on public lands).

205. Jacqueline P. Hand, *Global Climate Change: A Serious Threat to Native American Lands and Culture*, 38 *Envtl. L. Rep.* (Envtl. Law Inst.) 10329 (2008).

206. *Id.*, at 10329.

207. ALAN PARKER ET AL., INDIAN APPLIED RESEARCH INST., CLIMATE CHANGE AND PACIFIC RIM INDIGENOUS NATIONS (2006), available at <http://academic.evergreen.edu/g/grossmaz/IndigClimate.pdf>.

208. NANCY G. MAYNARD, NATIVE PEOPLES – NATIVE HOMELANDS CLIMATE CHANGE WORKSHOP, FINAL REPORT (1998).

209. Kanner et al., *supra* note 187, at 156.

210. *Id.*

211. *Id.*

and tribal governments will conflict.²¹² For example, in *Center for Biological Diversity*, it is clear that oil and gas exploration may be economically beneficial to the State of Alaska, which is most likely why Alaska would not bring suit; these activities, however, are detrimental to Point Hope. It is therefore more appropriate that the courts grant tribal governments special solicitude.

CONCLUSION

It is imperative that states and tribal governments be allowed to advocate for their citizens. The *parens patriae* doctrine provides an effective way to bring suit in federal court to protect their quasi-sovereign interests. The *parens patriae* doctrine already encompasses all that the Court in *Massachusetts v. EPA* tried to accomplish by affording Massachusetts special solicitude as a sovereign. States are able to bring suit in different capacities, with the *parens patriae* standing available to protect their quasi-sovereign interests. The *Center for Biological Diversity* court misapplied this doctrine by requiring a proprietary interest.

At times, it is necessary for the states to bring suit against the federal government because the federal government, in its efforts to protect the larger populace, can inadvertently harm the residents of certain states.²¹³ Under certain circumstances, the federal government can be the one causing harm, rather than protecting its citizens.²¹⁴ The federal-state dynamics have changed significantly since *Mellon*, particularly with the evolution of the administrative state,²¹⁵ and even *Mellon* may not be decided the same way if it were litigated today. Federal agencies are given broad authority and discretion, and are not subject to state politics.²¹⁶ Confounding though its opinion is, the Court in *Massachusetts v. EPA* was correct to conclude that sovereigns should have greater standing rights to protect the physical and economic well-being of its citizens, as well as their natural resources.²¹⁷

Moreover, the policies of the OCSLA need to be reviewed, whether it is of the DOI's own initiative or in response to concerns raised by petitioners such as Point Hope, so that any development of the OCS is undertaken with thorough assessment of environmental and natural

212. Cami Fraser, *Protecting the Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665, 682 (2000).

213. Wildermuth, *supra* note 17, at 309.

214. Gary I. Strausberg, *The Standing of a State as Parens Patriae to Sue the Federal Government*, 35 FED. BAR J. 1, 15 (1976).

215. Wildermuth, *supra* note 17, at 310.

216. Massey, *supra* note 51, at 267.

217. Mank, *supra* note 101, at 1773.

resources concerns.²¹⁸ Given the new developments and priorities surrounding energy sources and the environment, and the additional knowledge accumulated since the OCSLA was enacted in 1978, it is irrational and insensible to pursue the program without a reevaluation.²¹⁹ The limited amount of oil and gas which might be recovered from the OCS only furthers our reliance on fossil fuels and cannot possibly solve the energy issues we face.²²⁰ But the damages to sensitive coastal areas and other environmental resources are real and permanent, and should be prevented.²²¹

218. John K. Van de Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73, 131 (1990) (discussing the lack of state input in the leasing process and the ineffectiveness of the process in protecting the environment).

219. *Id.* at 129.

220. *Id.* at 132.

221. *Id.* at 129–30.

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