

Michigan Journal of Race and Law

Volume 5

2000

Protecting Native Americans: The Tribe as *Parens Patriae*

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

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PROTECTING NATIVE AMERICANS:
THE TRIBE AS *PARENS PATRIAE*

*Cami Fraser**

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INTRODUCTION

In his treatise, *Federal Jurisdiction*, Erwin Chemerinsky advocates protection for citizens through litigation on their behalf by sovereign entities under *parens patriae*¹ standing.² “[I]n a society in which litigation costs are enormous and the protection of constitutional rights is imperative, allowing the government to sue on behalf of its citizens can provide essential safeguards that otherwise might be lacking.”³ This is especially true for Native Americans, as Lawrence Baca, President of the American Indian Bar Association, notes with regard to racial discrimination:

Where racial issues and civil rights are concerned, the national conscience has largely passed over American Indians. Indians are trapped in a national consciousness that perceives [them] as historical relics and western movie backdrops. Indian people often perceive that the very institutions of government that were established to fight race based discrimination have failed to include American Indians among the protected classes.⁴

The economic situation in which most Native American people live only reinforces the problematic nature of strictly individual assertions of rights.⁵

1. *Parens patriae* is often defined as:

literally parent of the country, refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (internal quotes and citations omitted).

The Supreme Court has held that the State must be acting as an advocate for the injured party. See *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 219 (1990).

2. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3, at 114 (3d ed. 1999) (arguing for expanded *parens patriae* standing for governments).

3. *Id.* (specifically arguing for federal *parens patriae* standing).
4. Lawrence Baca, *One Color Short of a Rainbow*, 44 *FED. LAW.* 12, 15 (1997).
5. For example:

The 1990 census reports that 31 percent of all Indians live below the poverty level. That figure is up from 1980, when 24 percent of all Indians, and 29 percent of reservation Indians, were living below poverty level. Per capita income for Native Americans was slightly more than \$8,300, the lowest of all racial groups in the U.S., and less than half the

Within the federal system, three types of sovereigns exist: Federal, State, and Native American Tribal governments. The Federal government has restricted the legal definition of Native American to members of federally recognized Tribes.⁶ Native American tribal sovereignty is often split into two categories: internal and external.⁷ Internal sovereignty includes the expansion of tribal law governing institutions, as well as economic and social infrastructure.⁸ Native American Tribes also fight external incursions on their sovereignty from both State and Federal Governments.⁹ More recently, indigenous peoples from around the globe have joined forces to create international protections for their people and institutions.¹⁰ Native American Tribes struggle to retain their sovereign internal and external rights in order to protect their members.¹¹

The Eighth, Ninth, and Tenth Circuits, as well as several Federal District Courts, have accepted Tribes litigating under the doctrine of *pariens patriae*, although without analysis.¹² When Courts have dealt with the

level for the entire population. As of 1991, the Indian unemployment rate was 45 percent. That was a 3 percent decrease since 1989, but still 37 percent higher than the average unemployment rate for the United States as a whole.

DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 15 (4th ed. 1998).

6. See *Morton v. Mancari*, 417 U.S. 535 (1974); 25 C.F.R. § 83.1 (1999) ("Indian Tribe . . . means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.").

Although this is the definition used in Federal Indian Law, Native communities are far more accepting than the Federal Government of those not enrolled in a federally recognized Tribe as Native American. For a variety of reasons, many individuals have fallen through the cracks of enrollment procedures; thus Native American identity in Native communities is functionally defined by association with a community, in addition to self-identification, as well as by membership. See generally M. Annette Jaimes, *Some Kind of Indian: On Race, Eugenics, and Mixed-Bloods*, in AMERICAN MIXED RACE 133-153 (Naomi Zack ed., 1995) (arguing for a reconception of Indian identity based on traditional indigenous methods).

7. See Robert Clinton, Panel at the University of Michigan Native American Law Students Association's American Indian Law Day (Mar. 26, 1999).

8. See *id.*

9. See *id.*

10. See generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).

11. The concept of seven generations is common among Native Americans. An individual's actions affect the next seven generations as well as the past seven generations. The individual has the responsibility to act accordingly. Generally, Tribal governments focus their projects on providing services or protection for their members.

12. See *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996) (litigating on behalf of tribal members); *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994); *Navajo Nation v. Dist. Court for Utah County*, Fourth

question of tribal *parens patriae* standing, they have held that in certain circumstances Tribes have *parens patriae* standing to instigate litigation on behalf of their members.¹³ The current problem lies in the application of the *parens patriae* doctrine to Tribes. Specifically, in five Federal District Court cases the Courts misinterpreted the requirements for *parens patriae* standing laid down by the Supreme Court. According to the Supreme Court's decisions on *parens patriae*, the Tribes in these cases should have been recognized as having *parens patriae* standing, since they were litigating on behalf of a significant segment of their population. However, the Tribes in each of the cases were found not to have standing since they were not litigating on behalf of *all* of their members.¹⁴

This Note argues that Tribes have *parens patriae* standing to protect their citizens through litigation on their behalf, even if not *all* of their citizens are engaged in the litigation. Part I examines the current requirements of *parens patriae* standing, as articulated by the Supreme Court. Part II briefly examines the nature of tribal sovereignty within American jurisprudence and concludes that *parens patriae* standing is a retained right of the Tribes. Part III examines the way in which the Federal District Courts have incorrectly handled tribal *parens patriae* standing. This section

Judicial Dist., 831 F.2d 929 (10th Cir. 1987) (litigating on behalf of an "Indian child" under the Indian Child Welfare Act); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1984) ("Similarly, the Tribe could have brought an action challenging Arizona's vehicle taxes as a representative of or as *parens patriae* for its individual members, in order to vindicate their individual rights.") (Fletcher, J., dissenting); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1137 (8th Cir. 1974) (litigating on behalf of members to recover state taxes illegally collected from its members); *Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841, 842 (D. Minn. 1994) (litigating on behalf of tribal members to collect improperly collected state taxes); *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1503 (D.S.D. 1989) (litigating on behalf of members); *Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966).

The issue has been raised in other cases, but courts have avoided the question. See, e.g., *Pueblo of Isleta ex rel Lucero v. Universal Constructors, Inc.*, 570 F.2d 300, 302 n.2 (10th Cir. 1978) ("We need not decide whether the Tribe could bring the action because of its *parens patriae* relationship to its members."); *Village of Chalkyitsik v. M.S.F.*, 690 P.2d 10, 19 n.15 (Alaska 1984) ("There is . . . no reason to reach Chalkyitsik's elaborate arguments concerning its sovereign right to intervene and its *parens patriae* relationship to [the Native American child in question].") (internal quotations omitted).

13. See *Navajo Nation v. Super. Ct. of the State of Washington for Yakima County*, 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 651-652 (W.D. Tex. 1999); *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1327 (E.D. Tex. 1993) (mem.); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990).

14. See *Navajo*, 47 F. Supp. 2d at 1240; *Chacon*, 46 F. Supp. 2d at 651-52; *Big Sandy*, 817 F. Supp. at 1327; *Lujan*, 728 F. Supp. at 795.

argues for a reexamination of Supreme Court doctrine when applying *parens patriae* standing to Tribes. Part IV briefly examines permissible defendants under Tribal *parens patriae* standing.

I. THE DOCTRINE OF *PARENS PATRIAE*

Parens patriae is the legal doctrine that provides standing for sovereign entities to bring suit on behalf of their citizens.¹⁵ Derived from British common law, the doctrine of *parens patriae* grew out of the royal prerogative.¹⁶ The King, as “father of the country,” fulfilled the role of guardian over individuals with legal disabilities—those who could not protect themselves, such as “infants, idiots, and lunatics.”¹⁷

American jurisprudence recognizes *parens patriae* standing only in sovereign entities, such as States, Native American Tribes, and the Federal Government.¹⁸ Although the Supreme Court recognizes *parens patriae*

15. See *infra* note 1.

16. See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (“*Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants.”); George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent of Tyrant?*, 25 DEPAUL L. REV. 895, 896–907 (1976) (laying out the legal history and evolution of *parens patriae*); Scott Kerin, *Alaska Sport Fishing Association v. Exxon Corporation Highlights the Need to Take a Hard Look at the Doctrine of Parens Patriae When Applied in Natural Resource Damage Litigation*, 25 ENVTL. L. 897, 920 (1995); Michael Malina & Michael Blechman, *Parens Patriae Suits for Treble Damages Under Antitrust Laws*, 65 NW. L. REV. 193, 197–202 (1970); Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 684 (1998).

17. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982); *Hawaii v. Standard Oil Com. of California*, 405 U.S. 251, 257 (1972) (“This concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the ‘royal prerogative.’ These powers and duties were said to be exercised by the King in his capacity as ‘father of the country.’ Traditionally, the term was used to refer to the King’s power as guardian of persons under legal disabilities to act for themselves.”) (citations omitted); 3 WILLIAM BLACKSTONE, COMMENTARIES *47 (“He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom.”) (citations omitted); Curtis, *supra* note 16, at 896; Kerin, *supra* note 16, at 920; Malina & Blechman, *supra* note 16, at 197–202; Ryan & Sampen, *supra* note 16, at 684.

18. Political subdivisions, like municipalities, have been held to lack *parens patriae* standing since they are not sovereign entities. See Ryan & Sampen, *supra* note 16, at 686 (citing *Board of Educ. v. Illinois State Bd. of Educ.*, 810 F.2d 707, 711–712 (7th Cir. 1987); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973)).

Foreign governments do not have *parens patriae* standing to litigate on behalf of their “citizens and their American descendants.” *Estados Unidos Mexicanos v. Decoster*, 59 F. Supp. 2d 120, 124–125 (D. Me. 1999). This holding does not bar Tribal *parens*

standing in the Federal Government,¹⁹ the Court chooses to speak in terms of States' rights and responsibilities, further noting that the "*parens patriae* functions of the King passed to the States."²⁰ When Puerto Rico litigated under *parens patriae*, the Supreme Court chose to read the sovereignty requirements for *parens patriae* standing broadly.²¹ The Court explained that since "Puerto Rico is similarly situated to a State . . . [it] has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State."²²

The doctrine of *parens patriae* has been significantly expanded under American common law.²³ As under British common law, the current

patriae standing, within this jurisdiction, though, since the Supreme Court has specifically found that Tribes are not foreign nations. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) ("The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution.").

19. See Curtis, *supra* note 16, at 911 n.71 (citing *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)). See also *Northern Paiute Nation v. United States*, 10 Cl. Ct. 401 (Cl. Ct. 1986) ("It is established that . . . the Federal Government or any Federal agency . . . [can] represent [citizens] as *parens patriae* in their relation to the Federal Government. Since the Tribe, in relation to the Federal Government, is lower in the hierarchy of governments, somewhat akin to a state, it would seem reasonable to conclude that the Tribe cannot litigate as *parens patriae* against the Federal Government on behalf of its members.") (internal cites and quotations omitted). Cf. CHEMERINSKY, *supra* note 2, § 2.3, at 113 ("The ability of the federal government to sue in a *parens patriae* capacity is much more uncertain.").

20. *Hawaii*, 405 U.S. at 257. *Accord Snapp*, 458 U.S. at 608 n.15; BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) ("In the United States, the *parens patriae* function belongs with the states."); Kerin, *supra* note 16, at 920 ("Early common law held that . . . *parens patriae* is inherent in the supreme power of every State . . . [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.") (citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)); Malina & Blechman, *supra* note 16, at 197 ("With the American Revolution, these powers of the English King passed to the governments of the several States and, after the adoption of the Constitution, in part to the federal government of the new Republic.") (citations omitted).

21. See *Snapp*, 458 U.S. at 608 n.15.

22. *Id.*

23. See *Hawaii*, 405 U.S. at 257-58.

The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana v. Texas*, a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana merchants from sending goods into Texas. This Court recognized that Louisiana was attempting to sue, not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. While the Court found that *parens patriae* could not properly be invoked in that

doctrine of *parens patriae* allows sovereign entities to bring suit for the protection and well-being of their citizens, but representation is not limited to those who are legally disabled.²⁴ In the United States, a sovereign can sue on behalf of those who cannot sue for themselves and on behalf of some or all of its citizens in order to protect its quasi-sovereign interests.²⁵

Although the Supreme Court first recognized the doctrine of *parens patriae* in 1900, it did not significantly elaborate upon it until the 1982 *Snapp* decision.²⁶ The Court, dealing with the claims brought by States, has developed two conditions for sovereigns to claim *parens patriae* standing when not suing on behalf of those who cannot sue for themselves.²⁷ First, the sovereign entity "must express a quasi-sovereign interest."²⁸ The Court specifically distinguished quasi-sovereign interests of a State from sovereign and non-sovereign interests.²⁹ First:

[S]overeign interests are easily identified: First, the exercise of sovereign power over individuals and entities with the relevant jurisdiction—this involves the power to create and enforce a legal code [S]econd, the demand for

case, the propriety and utility of *parens patriae* suits were clearly recognized.

Id. (citations omitted).

24. The traditional functions of the King, that of protector of individuals, "has relatively little to do with the concept of *parens patriae* standing that has developed in American law." Instead:

At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.

Snapp, 458 U.S. at 600 (citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

25. See *Hawaii*, 405 U.S. at 258 (recognizing "the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi sovereign' interests"); Ryan & Sampen, *supra* note 16, at 684–85.

26. See Ryan & Sampen, *supra* note 16, at 684–85 (referencing *Snapp* and *Louisiana v. Texas*).

27. See, e.g., *Snapp*, 458 U.S. at 601–07 (1982); see also Ryan & Sampen, *supra* note 16, at 684–685.

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

29. See *id.* at 601 ("Its nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue.").

recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.³⁰

The Court then distinguishes quasi-sovereign interests from two types of non-sovereign interests:

First, like other associations and private parties, a State is bound to have a variety of proprietary interests Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest.³¹

The Court stated that quasi-sovereign interests “consist[] of a set of interests that the State has in the well-being of its populace.”³² Although the Court has not defined quasi-sovereign interest, it has articulated two categories of quasi-sovereign interests that trigger *parens patriae* standing.³³ “[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”³⁴ The Court also allows standing when “a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”³⁵ For example, in *Snapp*, Puerto Rico filed suit against “numerous individuals and companies engaged in the apple industry in Virginia,” asserting the rights of Puerto Rican migrant farmworkers who were denied work in violation of the Wagner-Peyser Act.³⁶ The Court found that

30. *Id.*

31. *Id.* at 601–02.

32. *Id.* at 602.

33. See CHEMERINSKY, *supra* note 2, at § 2.3, at 112–13.

34. *Snapp*, 458 U.S. at 607. In *11 Cornwell*, the State of New York filed suit on behalf of its mentally retarded citizens for being denied the opportunity to have a community residence in a particular house. See *New York v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983). The Second Circuit stated:

Both retarded persons and community residents are deprived of being able to live in integrated communities. The analogy to racial discrimination is close indeed. Thus, the State of New York’s interest in “the health and well-being . . . of its residents in general, the primary category of quasi-sovereign interests, is clearly implicated here.

Id. at 39 (internal citations omitted).

35. *Snapp*, 458 U.S. at 607. The *Snapp* Court explained: “we find that Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth’s full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. *Id.* at 609.

36. *Id.* at 597.

Puerto Rico had *parens patriae* standing that fell into both categories: Puerto Rico was acting in the interest of its citizens' health and well-being,³⁷ and on behalf of its citizens' rights to participate in the federal system and have all federal rights applied to them.³⁸

The second requirement for *parens patriae* standing is that the State's litigation be on behalf of a "substantial portion of the State's population."³⁹ The Court first articulated this requirement in 1923, in a suit on behalf of citizens using natural gas: "[t]he private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population."⁴⁰ The Court in *Snapp* rephrased this requirement to "sufficiently substantial segment of its population."⁴¹

The Court has refrained from defining the exact proportion of the population required to create standing.⁴² However, the Court has said that a court must consider the "indirect effects of the injury" in addition to the direct impact "in determining whether the State has alleged injury to a sufficient substantial segment of its population."⁴³ For example, regardless of the fact that only 787 jobs were specifically at issue in *Snapp*, the Court found that Puerto Rico met the burden since "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting."⁴⁴

II. TRIBES AS SOVEREIGN ENTITIES HAVE RETAINED *PARENS PATRIAE* STANDING

Parens patriae standing exists only in sovereign entities.⁴⁵ The Court explains the link between sovereignty and *parens patriae* standing as the

37. See *id.* at 609.

38. See *id.* at 609–10.

39. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

40. *Id.*

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

42. See *id.* ("The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.").

43. *Id.*

44. *Id.* at 609 (quotations omitted).

45. See *supra* text accompanying note 2; Ryan & Sampsen, *supra* note 16, at 686; see also *Board of Educ. v. Ill. State Bd. of Educ.*, 810 F.2d 707, 711–12 (7th Cir. 1987) (holding that the Illinois State Board of Education lacks standing to seek a remedy for racial discrimination by a local school board because it lacks the statutory and constitutional authority and because the State's Attorney General can sue to vindicate children's rights); *In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973) (holding that the Federal Government and the States may sue as *parens patriae* but that political subdivisions, such as cities, cannot).

right to represent quasi-sovereign interests.⁴⁶ This Part addresses the nexus between tribal sovereignty and tribal ability to represent quasi-sovereign interests as defined in *Snapp*. First, this Part examines the nature of tribal sovereignty. Second, this Part argues that the relationship between the Federal Government and Tribes is not a bar to *parens patriae* standing. Third, this Part asserts that although the framework of tribal sovereignty as a retained right is problematic, modern *parens patriae* standing exists within this paradigm. Finally, this Part recognizes that the States do not adequately represent individual Native Americans as *parens patriae* because States are often at odds with individual Native Americans and Tribes over the nature of tribal sovereignty and property rights.

A. The Nature of Tribal Sovereignty

As Frank Pommersheim notes, “[a] substantial amount of the adversity and difficulty present throughout the history of Indian law stems from the fact that the tribal sovereign is consistently marginalized, if even discussed, in the context of our constitutional democracy.”⁴⁷ Although the Federal Government recognizes the inherent sovereign rights of Tribes, acceptance and enforcement of tribal sovereignty is difficult given the lack of general education and understanding of tribal rights.⁴⁸ To give context and understanding to tribal *parens patriae* standing, a brief discussion of the sovereign powers retained by Tribes is warranted.

As Felix Cohen recognized in the first edition of his frequently-cited handbook, each Tribe has the right to self-government:

The most basic of all Indian rights, the right of self-government, is the Indian’s last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man’s-land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-

46. See *Snapp*, 458 U.S. at 608 n.15.

47. Frank Pommersheim, “Our Federalism” in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 127 (2000). Professor Pommersheim continues, “[a]ny survey, however cursory, of federal courts’ texts and casebooks reveals the complete lack of any discussion of tribal courts within the federal system.” *Id.* at 129.

48. See generally *id.*

government is thus the Indians' only alternative to rule by a government department.⁴⁹

The basis for federal recognition of Tribes' governmental rights resides not in the Constitution but in three Supreme Court decisions, commonly known as the Marshall Trilogy.⁵⁰ These cases provide the foundation upon which sovereign and property relationships between Tribes, States, and the Federal government are understood.⁵¹ In addition, the sovereign rights of indigenous Tribes are not granted by the United States Constitution or by the Federal Government, but are rights retained from pre-contact.⁵² The Supreme Court has stated:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of

49. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1st ed. 1945).

50. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). As part of the Marshall trilogy, the Supreme Court has held that the Indian Commerce Clause restricted State interactions with and jurisdiction over Tribes. See *Worcester*, 31 U.S. (6 Pet.) at 580–81, 590–92. Since State jurisdiction over Indian land is limited, whether or not a piece of land is considered Indian Country has become extremely important. See, e.g., *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (involving a dispute over whether tribal land constituted "Indian country," which would give the Tribe power to tax nonmembers of the Tribe); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (regarding a dispute over whether federal environmental regulations apply to unallotted, non-Indian land that falls within the reservation's original 1858 boundaries); *Indian Country in Alaska: The Venetie Decision*, JUSTICE, Spring 1997; *U.S. Supreme Court Issues Ruling in Alaska Tribal Sovereignty Case*, NARF LEGAL REVIEW, Winter/Spring 1998, at 5–7. Indian country is defined at 18 U.S.C. § 1901 (1978).

A federal right, as opposed to a state's right, to deal with Native Tribes, is, however, founded in Constitutional provisions. See U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with . . . the Indian Tribes"); *Worcester*, 31 U.S. (6 Pet.) at 559 ("[T]his article . . . confers on congress the powers . . . of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.") (emphasis in original).

51. See *Worcester*, 31 U.S. (6 Pet.) at 590–92 (holding that the Federal Government had the exclusive right, as opposed to States, to deal with Native American Tribes); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("[Tribes] may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.") (emphasis added); *McIntosh*, 21 U.S. (8 Wheat.) at 587 (holding that the Federal Government had the exclusive right to extinguish aboriginal title).

52. The term "contact" refers to the first interactions between Europeans and indigenous peoples in the Western hemisphere. "Discovery" and other commonly used terms, beside being Euro-centric, ignore the reciprocal impacts between continents and multiple groups of people. "Contact" more accurately reflects the nature of the meetings of these peoples and the subsequent impacts.

Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.⁵³

The Federal Government has repeatedly acknowledged and supported Tribes' "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general."⁵⁴ According to Cohen:

Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indian's choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.⁵⁵

Today, Tribes have retained criminal jurisdiction over member and non-member Indians,⁵⁶ as well as civil jurisdiction over a wide range of

53. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (holding that the Double Jeopardy Clause does not apply when a criminal defendant is tried by both Tribal and federal courts, since sovereignty does not derive from the same source). Cohen notes:

Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

COHEN, *supra* note 49, at 122.

54. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (describing the quasi-sovereign interests required for *parens patriae* standing).

55. COHEN, *supra* note 49, at 122.

56. See, e.g., *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 82 (1999); *Wheeler*, 435 U.S. at 313; *Ex Parte Crow Dog*, 109 U.S. 556 (1883); see also Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey*

subjects.⁵⁷ Tribes have a great amount of control over child custody,⁵⁸ hunting and fishing,⁵⁹ gaming on the reservations,⁶⁰ health services,⁶¹ human remains and other sacred and funerary objects,⁶² language use,⁶³ educational programs,⁶⁴ and other governmental powers. In addition, many Tribes have signed compacts with the Federal Government to take control over services for their members that the Federal Government previously had provided, including administration of hospitals and other health clinics.⁶⁵ Several Tribes have created tribal community colleges,⁶⁶ while others have taken over public schools,⁶⁷ economic development programs,⁶⁸ and housing.⁶⁹

Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503 (1976) (surveying the chaotic allocation of law enforcement authority over Indian lands between Federal, State, and Tribal Courts).

57. See, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959) (finding that Tribes retained subject matter jurisdiction over transactions between Native Americans and non-Native Americans on the reservation); *Oglala Sioux Tribe Develops Environmental Review Code*, NARF LEGAL REVIEW, Summer/Fall 1998, at 7-8 (discussing how the Oglala Sioux Tribe has developed several programs to implement tribal health and environment laws).

58. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-88 (1976) (finding that Tribes retained exclusive jurisdiction to determine custody of a child when all parties were members and lived on the reservation).

59. See, e.g., *Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974); *United States v. Michigan*, 471 F. Supp. 192, 280 (W.D. Mich. 1979) ("[Fishing rights do] not belong to individual tribal members who exercise it, although the rights were reserved for every individual Indian, as though named in the treaty. It is exercised by members of the plaintiff tribes under extensive tribal regulation.").

60. See Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (1988).

61. See Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638.

62. See Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001-3011 (1991).

63. See Native American Language Act, 25 U.S.C. §§ 2901-2905 (1990).

64. See Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638; Tribally Controlled Schools Act of 1988, Pub. L. No. 100-297; Johnson-O'Malley Act of 1934, 25 U.S.C. § 1458.

65. See Bristol Bay Native Association, *BBNA Programs* (visited May 18, 2000) <<http://www.bbna.com/programs.htm>>.

66. See, e.g., *Hagen v. Sisseton-Wahpeton Community College*, 2000 U.S. App. LEXIS 3372, at *11 (8th Cir. 2000) (holding that a Tribal community college had sovereign immunity).

67. See Melody L. McCoy, *Education and Tribal Sovereignty*, 25 FED. BAR ASSOC. INDIAN LAW CONF. COURSE MATERIALS 253 (2000).

68. See Bristol Bay Native Association, *supra* note 65.

69. See *id.*

B. *The Federal Government as the "Great Father" is Not a Bar
to Tribal Parens Patriae Standing*

The United States Supreme Court has recognized the relationship between Tribes and Congress as "resembl[ing] that of a ward to his guardian."⁷⁰ Based upon this notion, the trust and plenary power doctrines define the relationship between the Federal Government and indigenous nations.⁷¹ The Federal Government has a fiduciary duty to protect Tribes, but at the same time it preserves unilateral authority to divest Tribal Governments of their sovereign and property rights.⁷² Given

70. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

71. See *Passamaquoddy v. Morton*, 528 F.2d 370, 375 (1st Cir. 1975) ("The general notion of a 'trust relationship,' often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes."); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942):

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the more exacting fiduciary standards.

Id. Recently, Justice Stevens noted:

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of native Americans and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples.

Rice v. Cayetano, 120 S. Ct. 1044, 1063 (2000) (Stevens, J., dissenting).

72. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("This aspect of tribal sovereignty [here, sovereign immunity], like all others, is subject to the superior and plenary control of Congress."); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion) ("The power of Congress over Indian affairs may be of plenary nature; but is not absolute.").

Black's Law Dictionary defines "plenary" as "[f]ull, complete; entire." BLACK'S LAW DICTIONARY 1175 (7th ed. 1999). *Black's* further defines "plenary power" as "[p]ower that is broadly construed; esp., a court's power to dispose of any matter properly before it." *Id.* at 1189. See generally Robert Laurence, *Learning to Live With the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 413 (1988); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and 'The Actual State of Things,'* 30 ARIZ. L. REV. 459 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L.

the nature of the federal responsibility and the confined nature of tribal powers allowed by the Federal Courts, the question arises whether a Tribe maintains a sovereign relationship such that it can protect its citizens.⁷³

First, the Federal Government's higher position in the hierarchy in the federal system is not a bar to tribal *parens patriae* standing. The Supreme Court has held that States have *parens patriae* standing despite their relative status to the Federal Government.⁷⁴

Second, regardless of the relationship between the Tribe and the Federal Government, the Tribe is a sovereign entity over its individual citizens.⁷⁵ The basic understanding of citizenship boils down to a social contract theory, where individuals take on rights and responsibilities in order to gain "protection, rights, and privileges" from the sovereign.⁷⁶ The relationship between the tribal entity and the individual members does not stray from this model. For example, many Tribes try to address juvenile delinquency and other problems faced by child members of the Tribe through traditional dispute resolution.⁷⁷ Tribal Governments also provide rights to their citizens, often through IRA constitutions⁷⁸ or tra-

REV. 219 (1986); Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence's 'Learning to Live With the Plenary Power of Congress Over the Indian Nations,'* 30 ARIZ. L. REV. 439 (1988).

73. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) ("Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'").

74. See *Ryan & Sampen*, *supra* note 16, at 686. However, *parens patriae* standing is not clear when claims are brought against the Federal Government. See *id.*; see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("[I]t is the United States, and not the State, which represents them as *parens patriae*."). For further discussion on the implications of sovereign defendants, see *infra* Part IV.

75. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that the Santa Clara Pueblo had the sovereign right to adjudicate whether their membership criteria discriminated based upon gender); *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (holding that individual Native Americans were not citizens of the United States because of their tribal citizenship) (overturned by legislation in 1924); *Ex Parte Crow Dog*, 109 U.S. 556, 571-72 (1883) (holding that a Tribe had exclusive jurisdiction over the crimes of members) (subsequent legislation has affected this holding).

76. Kevin Pimentel, Note, *To Yick Wo, Thanks for Nothing!: Citizenship for Filipino Veterans*, 4 MICH. J. RACE & L. 459, 460 (1999) (citing Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 352 (1994)).

77. See *Ada Pecos Melton, Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995) (arguing for a return to traditional institutions and methods of redress for Indigenous communities).

78. See *Indian Reorganization Act of 1934*, 25 U.S.C. § 461 (1934).

ditional means of governing.⁷⁹ The privileges that Tribes provide to their members varies greatly.⁸⁰

The relationship between the Federal Government and indigenous Tribes should not bar tribal *parens patriae* standing. Although the relationship between States and the Federal Government differs from that between Tribes and the Federal Government, the judicial construction of both as lower in the federal hierarchy should not bar standing. In addition, the relationship between the member and the Tribe is that of a citizen and a sovereign. As such, not only should a Tribe have the ability to litigate on behalf of its citizens, but it has a duty to protect them.

C. *The Problem of Framing Tribal Sovereignty as Retained*

In *United States v. Wheeler*, the Supreme Court held that tribal sovereign rights are retained from pre-contact.⁸¹ The Court constructed the source of tribal governing rights as inherent rather than derived from federal designation as an answer to whether concurrent criminal trials, in both Federal and Tribal Courts, amounted to Double Jeopardy.⁸² The Court found no Double Jeopardy violation since tribal sovereign rights were retained rather than constructed from the same source as federal sovereignty.⁸³

By framing tribal sovereignty as retained, the Court problematically left open the potential for the term retained to limit Tribal government practices to those utilized prior to contact rather than to what is necessary in the modern context.⁸⁴ This would make it difficult for Tribal governments to assert *parens patriae* standing, as the *parens patriae* doctrine was not conceived of, let alone exercised, prior to litigation in United States Courts.

79. For example, most Tribes allow members to vote and run for public office, but others allow religious leaders in the community to appoint public officials. Since the Bill of Rights does not limit the actions of Tribal Governments, Congress enacted the Indian Civil Rights Act, 25 U.S.C. § 1301 (1968), which applies most provisions of the Bill of Rights (but not separation of Church and State) to Native American Activities. *See id.*

80. Many Tribes provide governmental services, *see supra* Part II.B, as well as college scholarships and other similar programs. Tribes also provide tradition, culture, and identity to their members, partially through cultural outreach programs. For example, many Tribes offer language, dance, or arts and crafts workshops to their members.

81. *See* 435 U.S. 313, 324 (1978).

82. U.S. CONST. amend. V. *See Wheeler*, 435 U.S. at 324.

83. *See Wheeler*, 435 U.S. at 324.

84. The Court has used prior Tribal practices to limit property rights. *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

However, tribes have sovereign immunity,⁸⁵ which they also did not have, of course, prior to contact. Thus, the term retained has not been used to limit tribal sovereign immunity.⁸⁶ For example, in *Martinez*, a suit brought by a tribal member against her Tribe, the Court recognized that the Indian Civil Rights Act did not abrogate sovereign immunity regardless of whether the Tribe exercised this right prior to the Federal Constitution.⁸⁷ Thus, the term retained is merely a descriptive phrase, not a limitation on Tribes' ability to exercise modern sovereign powers.⁸⁸

D. *The State is Insufficient as Parens Patriae*

Parens patriae standing for Tribes does not bar the State from litigating on behalf of its Native American citizens. Filing suit under *parens patriae* is within the sovereign's prerogative, after all; it is not mandatory. By not providing Tribes the right to litigate on behalf of their citizens, a substantial number of Native Americans are left unprotected.

The relationship between Native Americans and the State differs from that of other citizens, especially when in Indian Country.⁸⁹ Whether

85. See *Turner v. United States*, 248 U.S. 354, 357–58 (1919):

The Creek Nation was recognized by the United States as a distinct political community, with which it made treaties and which within its own territory administered its internal affairs. Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace. Such liability is frequently imposed by statute upon cities and counties (see *City of Chicago v. Pennsylvania Co.*, 119 Fed. Rep. 497); but neither Congress nor the Creek Nation had dealt with the subject by any legislation prior to 1908.

Id. (internal citations omitted). See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (affirming Tribal sovereign immunity); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172–73 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512–13 (1940); see also *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997) (detailing the requirements to be considered a “Tribe” to plead sovereign immunity). See generally *GETCHES ET AL.*, *supra* note 4, at 383–88.

86. See, e.g., *Martinez*, 436 U.S. at 58–59.

87. See *id.* at 58. The Court held that the Indian Civil Rights Act only abrogated sovereign immunity in habeas corpus claims against Tribes. See *id.*

88. “Indian tribes retain attributes of sovereignty over both their members and their territory to the extent that sovereignty has not been withdrawn by federal statute or treaty.” *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (internal citations and quotations omitted).

89. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Tribes do not have criminal jurisdiction over non-Indians unless authorized by Congress); *Fisher v. District Court*, 424 U.S. 382 (1976) (affirming exclusive jurisdiction of Tribes

a Federal, State, and/or Tribal law governs over an individual depends upon Tribal membership⁹⁰ and the type of law applied.⁹¹ Further, the Court has noted that “[Tribes] owe no allegiance to the States, and receive from them no protection. Because of local ill feelings, the people of the States where they are found are often their deadliest enemies.”⁹² Although the relationship between Tribes and States has evolved over time, the nature of the relationship tends to be adversarial, and disputes over jurisdiction, retained sovereignty, and treaty rights are common.⁹³ Not only is it often problematic for States to advocate on behalf of Tribal interests, it is common for States’ own sovereign interests to be directly opposed to tribal members’ well being.⁹⁴ In most cases, the State would not well serve the *parens patriae* function for the Native American citizens residing within its borders.

III. TREATMENT OF TRIBAL *PARENS PATRIAE* STANDING IN THE FEDERAL DISTRICT COURTS

This Part examines the incorrect application of *parens patriae* standing to tribal entities. First, this Part discusses the seminal *Assiniboine* case,⁹⁵ which first applied the wrong standard for *parens patriae* standing. The nature of the misinterpretation will be examined by looking to current Supreme Court holdings on *parens patriae*. Second, this Part considers each of the four subsequent District Court cases in light of the Court’s *parens patriae* rulings. Third, this Part advocates the application of current Supreme Court rulings on *parens patriae* to Tribal sovereigns.

over adoption proceedings when all parties are members of the Tribe and residing on the reservation).

90. For example, membership within the forum Tribe is not required for criminal cases, although membership within a federally recognized Tribe is mandatory. *See, e.g., United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 82 (1999).

91. *See generally* Clinton, *supra* note 56.

92. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

93. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Alaska v. Venetie*, 522 U.S. 520 (1998); *South Dakota v. Yankton Sioux*, 522 U.S. 329 (1998); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979).

94. For example, *Yankton Sioux*, a case determining the boundaries of a reservation, arose out of a dispute over who had the power to regulate a landfill site. 522 U.S. at 329. It was in the State’s interests to regulate the landfill, while it was in the tribal members’ interests not to allow a landfill on or next to their reservation. *See id.*

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

A. *Assiniboine & Sioux Tribes v. Montana*

The State of Montana collected motor vehicle property and new car taxes from members of the Assiniboine and Sioux Tribes, even though members were exempt from the taxes if domiciled on the reservation.⁹⁶ The Tribes brought suit as *parens patriae* in the United States District Court of Montana on behalf of their members living within the reservation for a return of the taxes collected plus interest.⁹⁷ The District Court granted summary judgment in favor of the State on several grounds, including that the Tribe had not met the standard for *parens patriae* standing.⁹⁸

The District Court held that in order to sue as *parens patriae*, the Tribe was required to file on behalf of every member of the Tribe,⁹⁹ since it was "convinced . . . that the entity purporting to advance the [*parens patriae*] claim must be acting on behalf of the collective interests of *all* of its citizens."¹⁰⁰ In coming to this conclusion, the *Assiniboine* Court did not look to recent Supreme Court cases, but relied primarily on dicta in *Louisiana v. Texas*,¹⁰¹ a one hundred-year-old case that stated that "the state of Louisiana presents herself in the attitude of *parens patriae* [sic], trustee, guardian, or representative of all of her citizens."¹⁰²

The *Assiniboine* court misinterpreted the Supreme Court's enunciation of the *parens patriae* doctrine as requiring suits to be brought on behalf of *all* citizens.¹⁰³ The Supreme Court had clarified that entirety was not required, as it applied the terms "substantial portion of the State's population."¹⁰⁴ In fact, the year prior to the District Court's decision in *Assiniboine*, the Supreme Court further articulated that:

96. *See id.*

97. *See id.*

98. *See id.* at 280.

99. *See id.* at 277.

100. *Id.* ("[I]t can hardly be said that this lawsuit is on behalf of the interests of the entire Fort Peck constituency.") (emphasis added).

101. 176 U.S. 1, 19 (1900).

102. *Id.*

103. *See Assiniboine*, 568 F. Supp. at 277.

104. *Pennsylvania v. West Virginia* 262 U.S. 553, 592 (1923).

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

The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficient substantial segment of its population.¹⁰⁵

Thus, the additional requirement of litigating on behalf of all citizens should not be applied to States or other sovereigns seeking standing under *parens patriae*; rather, the lesser standard of litigation on behalf of a significant portion of the population is required. For example, in *Snapp* the Commonwealth of Puerto Rico was able to litigate on behalf of its citizens working as migrant farm-workers.¹⁰⁶ The State of New York was allowed to file suit on behalf of its mentally retarded citizens.¹⁰⁷ States have also filed anti-discrimination suits as *parens patriae* on behalf of a portion of their citizens.¹⁰⁸ By looking to *Louisiana v. Texas* and not any contemporary *parens patriae* cases, the *Assiniboine* Court incorrectly required litigation on behalf of every member of the Tribe. This mistake barred the Tribe's standing to protect its citizens.

B. *The Assiniboine Line of Cases*

More problematic than the mistake in *Assiniboine* is the repeated reliance on its holding. The District Courts have not investigated the Supreme Court's elaboration of the *parens patriae* doctrine, but merely have reiterated the holding of *Assiniboine*. In the four subsequent Federal District Court cases, Tribes have been incorrectly barred from litigating as *parens patriae*.

1. Kickapoo Tribe of Oklahoma v. Lujan¹⁰⁹

Under the Texas Band of Kickapoo Act of 1983,¹¹⁰ Congress separately recognized the Texas Band of Kickapoo as a subgroup of the

Id. (emphasis added). *Accord* Malina & Blechman, *supra* note 16, at 206–07.

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

106. *See id.*

107. *See* New York v. 11 Cornwell Co., 695 F.2d 34, 39 (2nd Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2nd Cir. 1983).

108. *See, e.g.*, New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809 (N.D.N.Y. 1996).

109. 728 F. Supp. 791 (D.D.C. 1990).

110. 25 U.S.C. §§ 1300b-11–1300b-16 (1983).

Kickapoo Tribe of Oklahoma.¹¹¹ The Texas branch submitted a constitution under the name "Kickapoo Traditional Tribe of Texas" to the Bureau of Indian Affairs in order to separate from the Oklahoma Tribe.¹¹² The Oklahoma Tribe then appointed a new Council for the Texas Band, and the new council objected to the Bureau of Indian Affairs' election to seek ratification of the Tribal Constitution (which is part of the recognition process).¹¹³ Nonetheless, the Tribal Constitution was passed by a vast majority of the Texas members.¹¹⁴ The Oklahoma Kickapoo Tribe sued, attempting to enjoin the Federal Government from establishing separate government-to-government relations with the Texas branch.¹¹⁵

Citing *Assiniboine*, the District Court denied standing to the Kickapoo Tribe of Oklahoma, holding that "a sovereign tribe must be acting on behalf of all of its members in order to litigate as *parens patriae*."¹¹⁶ The Court used the *Assiniboine* misinterpretation, instead of looking at current Supreme Court opinions on *parens patriae*, to bar standing, even though the litigation was on behalf of a "substantial segment of its population."¹¹⁷ The *Lujan* Court noted that "[w]hile all members of the Tribe may in some way be affected by the Band's reorganization, the Tribe would not be representing the interests of all members as the doctrine of *parens patriae* requires."¹¹⁸ In this statement, the District Court made two fundamental mistakes based upon the *parens patriae* doctrine laid out by the Supreme Court. First, the Court did not take into account indirect effects to determine whether the litigation was on behalf of a significant segment of the population.¹¹⁹ Second, the Court failed to acknowledge that whether the sovereign "is doing more harm than good to her own citizens[] is for her to determine."¹²⁰ By seeking to intervene in the reorganization of the Texas branch of the Kickapoo Tribe, the Kickapoo Tribe of Oklahoma had the right to decide what was in the best interests of its membership; the District Court did not. If the *Lujan* Court had

111. See *id.* With federal recognition comes all the retained rights to self-government as well as federal services provided to Native American Tribes.

112. See *Lujan*, 728 F. Supp. at 792.

113. See *id.* at 792-793.

114. See *id.*

115. See *id.*

116. *Id.* at 795.

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

118. *Lujan*, 728 F. Supp. at 795.

119. See *Snapp*, 458 U.S. at 607.

120. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 239 (1907).

correctly applied the *parens patriae* doctrine, the Tribe would have had standing to bring this suit.¹²¹

2. Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District¹²²

The *Big Sandy* case arose out of a dispute over a school dress code, which restricted male students' hair length.¹²³ Specifically:

Boys' hair should be of reasonable length and style so as not [to] interfere with the instructional program. Boys' hair should [be] no longer than the top of a standard dress collar.¹²⁴

To members of the Alabama and Coushatta Tribes, though, long hair has religious significance.¹²⁵ The *Big Sandy* Court noted the common impact of the School's rule upon the Tribe's religious beliefs:

It was a common Native American belief that the hair, similar to other body parts, was sacred, and that to cut the hair was a complicated and significant procedure. A hair cut was considered the equivalent of dismemberment of a body part. Generally, hair was to be cut only as a sign of mourning a close family member's death. Southeastern tribes believed that, to cut the hair at any other time, without the safeguards of tribal ritual, would disrupt the 'oneness' of the person's spirit and subject that person's body to invasion by witchcraft.¹²⁶

At the time of the lawsuit, eighty-nine members of the student body were Tribal members.¹²⁷ The prohibition was enforced only against

121. Although the Kickapoo Tribe of Oklahoma would have had *parens patriae* standing, the Court found that the Kickapoo Traditional Tribe of Texas was an indispensable party, and thus was immune from suit. See *Lujan*, 728 F. Supp. at 796-97. Therefore, the suit would likely have been dismissed anyway, but on different grounds.

122. 817 F. Supp. 1319 (E.D. Tex. 1993) (mem.).

123. See *id.* at 1320.

124. *Id.* at 1323 (citing dress code).

125. See *id.* at 1324-1325 (citing Professor Hiram Gregory's testimony on behalf of the Tribe).

126. *Id.* at 1323-1325. Accord Timothy S. Zahniser, Note, Alabama & Coushatta Tribes v. Big Sandy School District: *The Right of Native American Public School Students to Wear Long Hair*, 19 AM. INDIAN L. REV. 217, 228 (1994).

127. See *Big Sandy*, 817 F. Supp. at 1324.

Native American students.¹²⁸ Four students, under threat of expulsion, chose to cut their hair.¹²⁹ Another six refused and were taken out of class and placed in in-school detention.¹³⁰ Although those students were given the same homework assignments as other students in their classes, they were denied access to classroom instruction.¹³¹ Generally, the students fell behind in their school work.¹³²

Adult members of the Tribe and Tribal administrators endeavored to intervene on the students' behalf, appearing at school board meetings in an unsuccessful attempt to have the dress code revised.¹³³ At one meeting, a member of the school board told a Tribal member that long hair had gone out with the hippies, after the member addressed the board about the religious significance of wearing long hair.¹³⁴

The *Big Sandy* Court did not cite any current *parens patriae* Supreme Court cases. Instead, the Court cited the misinterpretation in *Assiniboine* and *Lujan*, and held that the Tribe did not have *parens patriae* standing since "the Tribe is not representing the interests of *all its members* in this case, as the doctrine of *parens patriae* requires."¹³⁵ Like the *Lujan* Court, the District Court recognized that "the application of the hair restriction may in some way affect members of the Tribe other than the Native American students at Big Sandy and their families,"¹³⁶ but the *Big Sandy* Court did not take this into account, even though it was required to do so to determine whether the litigation was for the benefit of a significant segment of the population.¹³⁷ While the *Big Sandy* Court ruled on the merits of the individual plaintiffs' claims, the misapplication of the *parens patriae* doctrine incorrectly barred standing for the Alabama and Coushatta Tribes.

3. Kickapoo Traditional Tribe of Texas v. Chacon¹³⁸

On March 2, 1999, emergency personnel received a phone call that Norma Rodriguez was having trouble breathing.¹³⁹ By the time they

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* at 1326.

134. *See id.*

135. *Id.* at 1323.

136. *Id.*

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

138. 46 F. Supp. 2d 644 (W.D. Tex. 1999).

arrived, she was already dead.¹⁴⁰ Martha Chacon, the Justice of the Peace, was notified of the death by Sheriff's deputies. Since Norma Rodriguez was a known inhalant abuser, they assumed that was the cause of death.¹⁴¹ Chacon found no signs that this was the actual cause of death on the body.¹⁴² When Rodriguez's mother, Ms. Elizondo, arrived, she repeatedly stated that "someone killed her, I know someone killed her."¹⁴³

Chacon decided that an autopsy was necessary to determine whether Ms. Rodriguez had been murdered, and she obtained permission from Rodriguez's mother.¹⁴⁴ While preparing an autopsy order, Chacon received a phone call from the funeral home stating that Tribal members and the Tribe's Chief had requested that the autopsy not be performed.¹⁴⁵ Chacon agreed to meet with Tribal members at the Tribal offices that night, after receiving numerous calls from Tribal members and county officials.¹⁴⁶ At the meeting, Chacon informed the Tribe that she intended to have the autopsy performed, regardless of their wishes.¹⁴⁷

Later that night, Ricardo Calderon, an attorney for the Tribe, called Chacon to explain the Tribe's religious objection to having an autopsy performed upon Ms. Rodriguez, but Chacon did not change her mind.¹⁴⁸ The funeral home, at some point that night, turned the body over to the Tribe, which buried her on Tribal lands.¹⁴⁹ Chacon, furious and recalcitrant, demanded that Rodriguez' body be disinterred.¹⁵⁰

The Texas Kickapoo Tribe immediately filed suit, seeking a declaratory judgment on two claims.¹⁵¹ First, that the order for "disinterment and autopsy of Rodriguez's body is void because it does not comply with the Native American Graves Protection and Repatriation Act."¹⁵² Second, that disinterment was a violation of the Tribes' First Amendment right to free exercise of religion.¹⁵³

139. *See id.* at 646.

140. *See id.*

141. *See id.*

142. *See id.*

143. *Id.*

144. *See id.*

145. *See id.* at 647.

146. *See id.* at 646–647.

147. *See id.* at 647.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *Id.* at 649.

153. *See id.* at 651.

Assistant Attorney General Michael Winget-Hernandez wanted the autopsy performed as well as a ruling on the merits.¹⁵⁴ The State wanted the District Court to interpret the Native American Grave and Repatriation Act not to bar current murder investigations.¹⁵⁵ In order to gain a ruling on the merits, the State waived a challenge to *parens patriae* standing when the Court raised the issue in oral argument.¹⁵⁶ In addition, neither side of the litigation briefed the issue of *parens patriae* standing.¹⁵⁷

In holding that the Tribe did not have *parens patriae* standing on the First Amendment question, the *Chacon* court stated that “cases in which the *parens patriae* doctrine applies have been limited to those involving the rights of the Tribe members as a whole, and not those of just one or several members.”¹⁵⁸ Thus, the Court could “not agree that the Tribe ha[d] demonstrated that it ha[d] standing under the *parens patriae* doctrine . . . because the rights which it seeks to assert are primarily those of a small group of Tribe members[] and not those of *the Tribe as a whole*.”¹⁵⁹ The District Court cited *Big Sandy*, *Lujan*, and *Assiniboine* in support of this holding, rather than looking at current Supreme Court rulings on *parens patriae* standing.¹⁶⁰ Again, a District Court applied the wrong standard; *parens patriae* standing requires litigation to be on behalf of only a significant segment of the population rather than on the entire membership.¹⁶¹ The Court also did not take into account the indirect effect of the injury. Similar to *Snapp*, the disregard of a Tribe’s members’ religious beliefs “carr[ies] a universal sting.”¹⁶² If the District Court had applied the *parens patriae* doctrine correctly, the Kickapoo Traditional Tribe of Texas would have had *parens patriae* standing.¹⁶³

154. See Telephone Interview with Michael Winget-Hernandez, Assistant Attorney General for Texas (July 15, 1999).

155. See *id.*

156. See *id.*

157. See *id.*

158. *Chacon*, 46 F. Supp. 2d at 652.

159. *Id.* (emphasis added).

160. See *id.* at 652.

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

162. *Id.* at 609 (quotations omitted).

163. The *Chacon* Court chose to rule on the merits given the possibility that the Court “misconstrued the *parens patriae* doctrine or that the Tribe as a whole has otherwise suffered injury sufficient to confer Article III standing.” *Id.* at 651. The Court found no constitutional violation. See *id.*

4. Navajo Nation v. Superior Court of Washington for Yakima County¹⁶⁴

Navajo, concerning the adoption of a Native American child, focused on whether or not the Superior Court correctly followed the procedure delineated in the Indian Child Welfare Act of 1975 ("ICWA").¹⁶⁵ K.H. was born of Navajo, Yakama, and Nez Perce ancestry.¹⁶⁶ Her parents had been living on the Yakama reservation, but moved to Yakima, Washington to hide the pregnancy from their families.¹⁶⁷ K.H.'s parents gave her up for adoption in State court, signing documents stating that K.H. was not an Indian child. Thus, neither the Yakama nor Navajo Tribes were notified of the adoption, as required by ICWA.¹⁶⁸ Years later, K.H.'s birth mother informed her family about the child, and the families later informed both Tribes.¹⁶⁹ The Navajo Nation filed suit to challenge the adoption, and the Yakama Nation filed to intervene.¹⁷⁰

The *Navajo* court found that the Navajo Nation did not have *parens patriae* standing to file suit, stating that the "Navajo Nation ha[d] failed to prove it [wa]s acting on behalf of all of its members."¹⁷¹ Once again, a District Court cited *Assiniboine*, *Lujan*, and *Big Sandy* in support of its holding rather than current Supreme Court cases.¹⁷² Thus, a District Court again misapplied the standard for *parens patriae* standing.

The court also failed to recognize Tribes' traditional usage of *parens patriae*. The court found that the Tribe was representing only the grandparent's rights;¹⁷³ but the Tribe does, in fact, have an interest in the well-being of its children.¹⁷⁴ Today, States, under their *parens patriae*

164. 47 F. Supp. 2d 1233 (E.D. Wash. 1999).

165. 25 U.S.C. §§ 1901–1921.

166. *See Navajo*, 47 F. Supp. 2d at 1236.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.* at 1236–37.

171. *Id.* at 1240.

172. *See id.*

173. *See id.* at 1240 ("[T]he Navajo Nation does not have standing to assert claims and rights of the grandparents that are so personal to individual to the Strongs.").

174. *See* Indian Child Welfare Act, 25 U.S.C. § 1901(3) (1978) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."). Moreover, under the British common law origins of the *parens patriae* doctrine, the sovereign unquestionably had an interest in the well-being of the children. *See* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); *see also* Curtis, *supra* note 16, at 898–907 ("English children who received royal protection had not violated the norms of society; rather, they had summoned the case of the realm because of their dependent and property status."); Christine Steib Stickler, Note, *In re S.G.: Parens Patriae and Wardship*

responsibilities, continue to work in the interests of their children.¹⁷⁵ Similarly, the Tribe should have been able to litigate under the *parens patriae* doctrine on behalf of its child.

C. Courts Should Look to Current Supreme Court Rulings on *Parens Patriae*

The additional misguided requirement placed on Tribes asserting *parens patriae* standing—that litigation must be on behalf of *all* members—has been used to bar standing repeatedly. *Assiniboine* has been cited often, without regard to the correct Supreme Court interpretation of *parens patriae* requirements, to support findings that Tribes lack standing.¹⁷⁶ In the future, Courts looking at Tribal *parens patriae* standing should examine how the Supreme Court has laid out the *parens patriae* doctrine. There is simply no reason why Tribes should be required to meet a higher standard than other sovereignties when litigating on behalf of their citizens.

The five aforementioned district courts never reached the question of Tribes' quasi-sovereign interests, since standing was barred because the litigation was not brought on behalf of the entire tribal memberships. In a footnote in *Snapp*, the Supreme Court noted that Puerto Rico had *parens patriae* standing because it was "similarly situated to a State," as "[i]t has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State."¹⁷⁷ Applying this rationale to Tribes, the question is therefore whether a Tribe has "at least as strong" of "a claim to represent its quasi-sovereign interests" as States.¹⁷⁸

Quasi-sovereign interests fall into two categories: protecting the well-being of citizens and preserving the benefits that flow to citizens through participation in the federal system.¹⁷⁹ First, like other sovereign entities, Tribes care about the well-being of their citizens.¹⁸⁰ In *Navajo*, the Tribe filed suit to ensure that the Indian Child Welfare Act was followed, so that connections between Native American children and their

Proceedings—Exactly Who in the State Should Determine the Best Interests of the Child, 7 WIDENER J. PUB. L. 377, 379–82 (1998).

175. See generally Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Parents*, 7 ISSUES IN L. & MED. 283 (1991); Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519 (1996); Stickler, *supra* note 174.

176. See *Navajo*, 47 F. Supp. 2d at 1240; *Chacon*, 46 F. Supp. 2d at 651–52; *Big Sandy*, 817 F. Supp. at 1327; *Lujan*, 728 F. Supp. at 795.

177. *Snapp*, 458 U.S. at 608 n.15.

178. *Id.*

179. See *id.*, at 607–08.

180. See, e.g., *Big Sandy*, 817 F. Supp. at 1327.

Tribes would not be severed;¹⁸¹ maintaining those connections benefit both the child and the Tribe. In *Chacon*, the Tribe attempted to protect its members' religious rights, as well as their well-being.¹⁸² Similarly, the Tribes in *Big Sandy* asserted the religious rights of their juvenile members by bringing suit against the School District.¹⁸³ There is little question that the Tribes were acting on behalf of their members' "health and well-being—both physical and economic."¹⁸⁴

Second, as in *Snapp*, the Tribe has a quasi-sovereign interest in ensuring its citizens and it are not discriminatorily denied the benefits of the federal system.¹⁸⁵ The Kickapoo Traditional Tribe of Texas, in *Chacon*, filed to enforce Constitutional rights on behalf of its members,¹⁸⁶ as did the Alabama and Coshatta Tribes of Texas in *Big Sandy*.¹⁸⁷ Tribes have shown that they have legitimate quasi-sovereign interests under both categories.

IV. PERMISSIBLE DEFENDANTS

Given that the *parens patriae* cases before the Supreme Court have been limited to State and Federal government plaintiffs, the discussion of permissible defendants has been limited. Although States, local governments, and private defendants have been called before the Courts under *parens patriae*, Eleventh Amendment¹⁸⁸ and other immunity defenses have not been significantly raised since the plaintiffs have been either States or the Federal government.¹⁸⁹

Parens patriae standing does not trump a sovereign entity's immunity from suit, and although suits against States are allowed if brought by other States or the Federal government, suits brought by Tribes under *parens patriae* standing pose significant immunity problems. Specifically, the Supreme Court has read the Eleventh Amendment to bars suits brought by

181. See 47 F. Supp. 2d at 1233.

182. See 46 F. Supp. 2d at 644.

183. See 817 F. Supp. at 1319.

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

185. See *id.*

186. See 46 F. Supp. 2d at 644.

187. See 817 F. Supp. at 1319.

188. U.S. CONST. amend. XI.

189. See, e.g., *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972); *Missouri v. Illinois Sanitary Dist. of Chicago*, 180 U.S. 208 (1901); *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963).

foreign nations¹⁹⁰ and Tribes.¹⁹¹ Although there are exceptions to the Eleventh Amendment bar,¹⁹² *parens patriae* standing does not *per se* circumvent sovereign immunity.¹⁹³

190. See *Monaco v. Mississippi*, 292 U.S. 313 (1934).

191. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); see also *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1139–41 (8th Cir. 1974).

192. See generally *CHEMERINSKY*, *supra* note 2, at §§ 7.5–7.7.

193. Although Chemerinsky argues that States ought to be able to bring suit against the Federal Government as *parens patriae*, see *id.* at 113 (Allowing states to sue the federal government on behalf of its citizens might provide essential protection, just as such suits are often important against private parties.), the Supreme Court has not agreed. The Court stressed this point in *Snapp*: “a State does not have standing as *parens patriae* to bring an action against the Federal Government.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982). Similarly, the Court of Claims has remarked, “[s]ince the Tribe, in relation to the Federal Government, is lower in the hierarchy of governments, somewhat akin to a state, it would seem reasonable to conclude that the Tribe cannot litigate as a *parens patriae* against the Federal Government on behalf of its members.” *Northern Paiute Nation v. United States*, 10 Cl. Ct. 401, 406–08 (Cl. Ct. 1986). The Northern Paiute Nation attempted to sue the Federal Government for breaching its duty to the members for not providing an irrigation system under the Indian Claims Commission Act. See *id.*; see also Larry W. Yackle, *A Worthy Champion For Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 Nw. U. L. REV. 111 (1997) (arguing that the executive branch ought to have *parens patriae* standing in Fourteenth Amendment cases absent specific congressional authorization).

The Court of Claims stated that it considers the Federal government’s relationship toward individual Native Americans trumps that of Tribes to their members. Native American citizenship in the United States can be revoked simply by Congressional repeal of the Citizenship Act of 1924. The Supreme Court, in *Elk v. Wilkins*, denied United States citizenship to an individual Native American, despite the Fourteenth Amendment, because of the relationship to his Tribe. 112 U.S. 94, 100 (1884):

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or those members who chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life.

Id. Congress overturned this ruling through the Citizenship Act of 1924, 8 U.S.C. § 1401(a) (2), which granted United States citizenship to all Native Americans. See *id.* If the Citizenship Act is revoked, under *Elk v. Wilkins* Native Americans would no longer be citizens of the United States because of the Tribal citizenship. See Robert B. Porter, *The Demise of Ongewehowen and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 175–82 (1999). Given the nature of Native American citizenship, it is problematic to assume the Federal government is “Father of the Country” with regard to Native Americans.

In fact, most courts have accepted this as an absolute prohibition.¹⁹⁴ However, other courts have held that an exception exists, allowing *parens patriae* standing in suits filed against the Federal government when "seeking to enforce the provisions" of a federal statute.¹⁹⁵ Separate doctrines of *parens patriae* for States and Tribes should not exist. In jurisdictions that apply this exception, Tribes should be able to litigate under *parens patriae* to enforce federal statutes.¹⁹⁶

CONCLUSION

Without Tribal *parens patriae* standing, American jurisprudence leaves a gulf between protections provided for Native American citizens and non-Native American citizens. Relying on the States to champion the rights of individual Native American citizens is insufficient. Tribes have long protected their members and wish to fulfill this role in the modern legal context. This Note recommends that Federal and State courts recognize *parens patriae* standing in Tribes without the "all members" requirement, thus bringing *parens patriae* doctrine, as applied to Tribes, in line with current Supreme Court holdings. The additional requirement currently applied to Tribes, that litigation be on behalf of *all* members, must be dropped in favor of the "substantial segment of [the] population"¹⁹⁷ requirement.

194. See, e.g., *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990), *cert. denied*, 500 U.S. 945 (1994) ("Our earlier cases . . . must, of course, give way to the Supreme Court's clear statement in *Snapp*.") (internal citations omitted).

195. See, e.g., *Kansas ex. rel. Hayden v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990), *dism'd on other grounds on reconsideration*, 751 F. Supp. 1495 (D. Kan. 1990).

196. Although there is not an exact symmetry between the sovereign rights of States and Tribes in American jurisprudence, there is no justification for creating a separate and more restrictive doctrine of *parens patriae* for Tribes.

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