South Carolina Law Review

Volume 62 | Issue 2 Article 2

Winter 2010

Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines

Donald G. Gifford
University of Maryland

CLIMATE CHANGE AND THE PUBLIC LAW MODEL OF TORTS: REINVIGORATING JUDICIAL RESTRAINT DOCTRINES

DONALD G. GIFFORD*

---

* Edward M. Robertson Research Professor of Law, University of Maryland. Earlier versions of this paper were presented at Northwestern University Law School, the Annual Judicial Symposium of the National Foundation for Judicial Excellence, the Institute for Legal Reform's Climate Change Litigation Roundtable, and a "Half Baked" Faculty Workshop at the University of Maryland School of Law. I thank the participants at each of these sessions for their comments. I also am grateful for the suggestions of Oscar Gray, Richard Boldt, Bob Condlin, Bill Reynolds, and Bill Richman. Finally, I thank Natalie Waryck, Meredith Schreibfeder, and Andrew Murad for their research and editorial assistance.

I. INTRODUCTION

"Faux legislation"[1] is back in fashion. A decade ago, former Secretary of Labor, Robert B. Reich, a progressive scholar and commentator, coined this phrase to describe the federal government's efforts to sue manufacturers of cigarettes and handguns when a deadlocked Congress refused to regulate tobacco "death sticks" and weapons that teenage boys used "to shoot up high schools."[2] Reich warned that these well-meaning legal actions, initiated by an administration that he once served, threatened to "sacrifice[] democracy."[3] A decade later, frustrated by a stalemated Congress's inability to address global climate change,[4] environmentalists, state attorneys general, and mass plaintiffs' attorneys are again turning to the courts, this time to regulate greenhouse gas emissions.[5] The federal courts reached conflicting results in the early climate change lawsuits,[6] and the United States Supreme Court recently granted

---

1. Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

2. *Id.*

3. *Id.*

4. *See* Carl Hulse & David M. Herszenhorn, *Democrats Call Off Effort for Climate Bill in Senate*, N.Y. TIMES, July 23, 2010, at A15 (discussing the Senate's failure to advance a climate change bill).

5. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855, 859–60 (5th Cir. 2009) (reversing the district court's dismissal of a class action that Gulf Coast property owners brought seeking damages from energy, chemical, and fuel companies whose emissions allegedly exacerbated the ferocity of Hurricane Katrina); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314–15 (2d Cir. 2009) (reversing the dismissal of an action seeking abatement of the defendant power companies' contributions to global warming); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (dismissing action seeking damages from twenty-four oil, energy, and utility companies for their excessive emission of carbon dioxide and other greenhouse gases); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (dismissing action seeking damages from automakers contributing to global warming).

6. *Compare Am. Elec. Power Co.*, 582 F.3d at 315 ("We hold that the district court erred in dismissing the complaints [of states, a municipality, and land trusts] on political question grounds; that all of [the p]laintiffs have standing; that the federal common law of nuisance governs their claims; [and] that [the p]laintiffs have stated claims under the federal common law of

certiorari to review the Second Circuit's decision in one of these cases.[7] The central questions before the Court will be ones of standing and whether the federal common law of nuisance provides an implied cause of action under the Clean Air Act even though the Act assigns responsibility for regulating such emissions to the Environmental Protection Agency (EPA).[8] But the overarching issue is a different one: Within our constitutional framework, and consistent with the separation of powers and the limits of the judicial function, can courts use the vague standards of tort law to impose detailed regulations on a group of businesses allegedly contributing to a problem that is literally worldwide in scope?

In *Connecticut v. American Electric Power Co.*,[9] the Second Circuit allowed a public nuisance action to proceed against the six largest electric utility companies serving the heavily populated northeastern quadrant of the United States.[10] If this litigation continues, a federal district court judge will someday become an extraordinarily powerful judicial regulator, setting emission standards for these utilities. While the defendants allegedly contribute to climate change that is global in scope,[11] the plaintiffs themselves allege that the defendants contribute only 2.5% of all *man-made* greenhouse gas emissions.[12] Unless the judge turns out the lights, it seems likely that any court-ordered remedy would reduce man-made emissions by only a modest fraction of this amount. Undoubtedly, similar lawsuits are on the way. In fact, this theory of liability applies not only to businesses but to anyone whose activities emit greenhouse gases, including those of us who drive automobiles or heat our homes with fossil fuels.

This is not the first season of faux legislation. Beginning with the states' litigation against tobacco manufacturers in the mid-1990s,[13] state attorneys

---

nuisance. . . ."), *with* Comer v. Murphy Oil USA, 598 F.3d 208, 210 (5th Cir. 2010) (vacating decision of three-judge panel that reversed the district court's dismissal for lack of standing and presentation of a non-justiciable political question), *Kivalina*, 663 F. Supp. 2d at 868 (dismissing public nuisance claims on standing and political question grounds), *and Gen. Motors Corp.*, 2007 WL 2726871, at *16 (dismissing federal common law nuisance claims on political question grounds).

7. *Am. Elec. Power*, 582 F.3d 309, *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174). When the six electric power company defendants petitioned the Court seeking reversal of the Second Circuit's decision to allow *Connecticut v. American Electric Power Co.* to proceed, 79 U.S.L.W. 3092 (U.S. Aug 2, 2010) (No. 10-174), the Obama Administration surprised many observers by joining the petitioners in urging the Supreme Court to accept certiorari and reverse the decision of the Second Circuit. *See* Brief for Tennessee Valley Authority as Amicus Curiae Supporting Petitioners, 582 F.3d 309 (No. 10-174), 2010 WL 3337661.

8. 79 U.S.L.W 3342 (2010).

9. 582 F.3d 309, *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174).

10. *Id.* at 314–15.

11. *Id.* at 314 (quoting Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005)).

12. *Id.* at 347 (reiterating the plaintiff's assertion that the defendant companies "allegedly account for 2.5% of man-made carbon dioxide emissions" (internal quotation marks omitted)).

13. *See infra* Part III.A.

general and their partners, a small group of plaintiffs' attorneys specializing in mass products torts, consciously viewed these lawsuits as filling the void left by the political branches' abdication of regulatory responsibility.[14] John Coale, one of the private attorneys that assisted in government lawsuits against tobacco and gun manufacturers,[15] explained that "[the government] failed to regulate tobacco and they failed regarding guns. . . . Congress is not doing its job. . . . [L]awyers are taking up the slack."[16] Together with the State of Rhode Island's lawsuit against the manufacturers of lead pigment[17]—exposure to which may cause childhood lead poisoning[18]—and similar legal actions against handgun manufacturers,[19] the tobacco litigation represented the first wave of what I call "public interest tort litigation," tort-centered examples of Robert A. Kagan's "adversarial legalism," the uniquely American phenomenon of attempting to establish government policy through litigation.[20] The perceived failures of legislatures and regulatory agencies to address global climate change and public health problems resulting from cigarette smoking and lead paint exposure created what Kagan refers to as a "mismatch between a changing legal culture and an inherited set of political attitudes and structures."[21]

This Article argues that the public law model of tort litigation is the wrong tool for the job of addressing climate change and that wise judges should use the traditional doctrines of judicial restraint to reject the invitation to engage in faux legislation. Part II begins by describing the "public law model" that Abram Chayes first identified in the mid-1970s[22] when federal courts heard numerous school desegregation cases, as well as litigation to reform prisons and mental hospitals. Next, this Article discusses David Rosenberg's suggestion to extend the public law model to the world of torts, but only as a means of affording compensation to those suffering from latent diseases caused by exposure to toxic substances such as asbestos. Finally, Part II considers Linda Mullenix's critique of the efforts of Rosenberg and others to fit mass tort litigation into Chayes's public law model. I conclude that Mullenix is correct when she argues that the

---

14. *See* John Coale, Castano Tobacco Litig. Grp., Government-Sponsored Regulation—What's Next?, Remarks at the Manhattan Institute Conference Series No. 1 (June 22, 1999), *in* Regulation By Litigation: The New Wave of Government-Sponsored Litigation 53–54 (Ctr. for Legal Policy at the Manhattan Inst. ed., 1999), *available at* http://www.manhattan-institute.org/pdf/mics1.pdf.

15. *See id.* at 51.

16. *Id.* at 64.

17. State v. Lead Indus. Ass'n, 951 A.2d 428, 434 (R.I. 2008).

18. *Id.* at 437.

19. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1147–48 (Ill. 2004) (holding that the city and county failed to state a cause of action for public nuisance against firearms manufacturers, distributors, and dealers).

20. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 9–14 (2001).

21. *Id.* at 40.

22. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

asbestos litigation and other examples of "traditional" mass products torts during the 1980s and early 1990s do not meet the criteria of Chayes's model.

Part III traces the development of public interest tort ligation, beginning with its origins in the states' tobacco litigation, continuing through the cycles of litigation against the manufacturers of handguns and lead pigment, and concluding with the current round of climate change litigation. With each successive round, public interest tort litigation became increasingly directed toward establishing an alternative regulatory regime when Congress or state legislatures failed to regulate effectively. The tobacco litigation ended with a settlement that provided the blueprint for tobacco regulation for a full decade.[23] States and municipalities asked for similar judicially-imposed regulatory regimes in the handgun, lead paint, and climate change litigation.

Neither legislation nor administrative regulations provided a basis for determining when businesses would be held liable in these actions or set standards for their obligations under the remedial decrees. To handle these tasks, a new variant of tort law evolved, which more closely resembles Chayes's public law model than it does traditional tort law, even the asbestos litigation and other mass torts of the 1980s. Public interest tort litigation addresses large-scale social problems, not individual injuries or aggregations of individual injuries.[24] The plaintiff is either a state or municipal government or some other collective entity.[25] The substantive claim, usually public nuisance, conceives of the harm suffered as a collective harm, not an individual injury.

Unlike earlier public interest litigation where courts derived their authority from constitutional provisions or federal statutes, in public interest tort actions, trial court judges base their exercise of power on judge-made common law,

---

23. *See Master Settlement Agreement*, NAT'L ASS'N OF ATTORNEYS GEN., http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/ [hereinafter MSA].

24. *See* Chayes, *supra* note 22, at 1302 ("The subject matter of [a public interest tort] lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.").

25. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009) ("The plaintiffs, residents and owners of lands and property along the Mississippi Gulf coast, filed this putative class action in the district court against the named defendants, corporations that have principal offices in other states but are doing business in Mississippi. . . . The plaintiffs' putative class action asserts claims for compensatory and punitive damages based on Mississippi common-law actions of public and private nuisance . . . ."); NAACP v. AcuSport, Inc., 271 F. Supp. 2d. 435, 446 (E.D.N.Y. 2003) ("[T]he National Association for the Advancement of Colored People ("NAACP")[] is suing for injunctive relief on its own behalf and that of its individual and potential members in the state for New York. The theory is one of public nuisance under New York state law."); District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 637 (D.C. 2005) (en banc) ("The District of Columbia and nine individual plaintiffs appeal from the dismissal of their suit against manufacturers or distributors of firearms alleging common-law negligence and public nuisance . . . ."); State v. Lead Indus. Ass'n, 951 A.2d 428, 434 (R.I. 2008) ("In this landmark lawsuit, filed in 1999, the then Attorney General, on behalf of the State of Rhode Island (the state), filed suit against various former lead pigment manufacturers and the Lead Industries Association (LIA) . . . . This monumental lawsuit marked the first time in the United States that a trial resulted in a verdict that imposed liability on lead pigment manufacturers for creating a public nuisance.").

sometimes generated by the particular judges themselves. The public nuisance tort, because it often is vaguely defined, offers a high degree of discretion to the judge committed to solving social problems. Finally, at least in the climate change and lead pigment litigation, the most recent iterations of public interest tort law, the objectives of the state attorneys general and other attorneys representing the plaintiffs have been to impose regulatory regimes where the legislature has stalemated, or even to supplant legislation that the attorneys general do not believe goes far enough. This Article proceeds to argue that this new genre of tort litigation fits snugly within Chayes's public law model.

My reading of the evidence as a non-scientist is that global warming is occurring, human contributions of greenhouse gases are playing a substantial role in this process, and the consequences of global climate change are likely to be significant, if not cataclysmic, in the century to come.[26] Like others who are concerned about global climate change, I too am frustrated that Congress, the EPA, and the international community are not working more effectively to ameliorate its effects. But for me, nagging questions remain about climate change litigation and other public interest tort actions. Is it really possible for courts, using principled, judicial standards, to decide whether alleged corporate tortfeasors should pay to correct society-wide or even worldwide problems? Are such adjudications consistent with the proper role of common law courts within our constitutional framework? Part IV suggests overarching principles that should guide courts in answering these questions.

Part V examines the predecessor of climate change litigation, claims brought by states and municipalities against manufacturers of products, such as handguns and lead pigment. In this earlier cycle of public interest tort litigation, state attorneys general first pioneered the use of the public nuisance tort in their attempts to regulate industries so as to prevent or remediate society-wide public health and safety problems. Courts almost inevitably dismissed these actions because of plaintiffs' inability to satisfy the substantive requirements of the principal collective tort, public nuisance; the conflict between the common law actions and legislative enactments already in place; or the fact that any harm sustained by the states or municipalities was too "remote" from the manufacturers' conduct or too "derivative" to justify liability. Lurking behind the dismissals on any of these grounds, I find judicial discomfort with the idea that plaintiffs had asked the courts to take on fundamentally administrative or legislative tasks.

---

26. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30–33, 37, 46–48 (Rajendra K. Pachauri et al. eds., 2008), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (addressing causes, effects, and future consequences of climate change). A significant percentage of Americans reject these conclusions. *See 61% Say Finding New Energy Sources More Important Than Conservation*, RASMUSSEN REPORTS (Aug. 28, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/energy_update.

The current climate change litigation is an even more ambitious manifestation of the public law model of torts. Part VI suggests that the application of two specific doctrines of judicial restraint, standing and the political question doctrine, could enable courts to decline jurisdiction of these matters, which Congress and the administrative agencies it creates should handle. These judicial restraint doctrines developed in a far different context than common law tort actions between private parties, but their underlying purposes justify their application to this entirely new phenomenon of public interest tort actions. Plaintiffs' goals in public interest tort suits may be admirable, or even noble, but the only tool in their kit, adversarial litigation, is uniquely ill-suited to the task. Thus, there is wisdom in the traditional limits courts have placed on themselves. These limits, the judicial restraint doctrines, can give the judges a principled basis to decline the invitation to engage in faux legislation.

II. THE PUBLIC LAW MODEL AND TORT LAW

A. Constitutional and Statutory Law and the Public Law Model

The mid-1970s saw the zenith of the adjudication practices that some conservatives and business spokespersons referred to as "judicial activism."[27] Federal judges ran entire school systems,[28] prison systems,[29] and state mental hospitals.[30] In the midst of this flurry of reform-minded judicial activity, Abram Chayes wrote his now classic article, *The Role of the Judge in Public Law Litigation*.[31] Chayes described a new form of litigation that was centered in the federal courts and that was far different from the traditional lawsuit intended to "settl[e] disputes between private parties about private rights."[32] Chayes called

27. *See generally* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002) (defining six categories of judicial activism); Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004) (discussing the various historical and modern meanings of judicial activism).

28. *See* Philip B. Kurland, *"*Brown v. Board of Education *Was the Beginning:" The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309, 322 (1979) (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1954)).

29. *See generally* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 27–143, 362–80 (1998) (analyzing the judiciary's role in prison reform); Daryl R. Fair, *Prison Reform by the Courts*, *in* GOVERNING THROUGH COURTS 149, 149–58 (Richard A.L. Gambitta et al. eds., 1981) (concluding that courts have the capacity to implement prison reform).

30. *See, e.g.*, Davis v. Watkins, 384 F. Supp. 1196, 1203–12 (N.D. Ohio 1974) (implementing minimum constitutional standards at maximum security facility for the criminally insane); Wyatt v. Stickney, 344 F. Supp. 373, 379–86 (M.D. Ala. 1972) (implementing similar treatment standards in reforming state mental institutions).

31. Chayes, *supra* note 22.

32. *Id.* at 1282–84.

this new form of adjudication "public law litigation"[33] and characterized it as "a grievance about the operation of public policy."[34] He delineated several other characteristics of public law litigation, including:

> The fact inquiry is not historical and adjudicative but predictive and legislative.
>
> . . . Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
>
> . . . .
>
> . . . The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.[35]

Three years later, Owen M. Fiss offered a distinct, but largely complementary, analysis of the same litigation that Chayes analyzed.[36] To Fiss, the critical aspect of the high-profile reform litigation of the 1960s and 1970s was that it constituted "structural reform."[37] He argued that sometimes "our constitutional values cannot be fully secured without effectuating basic changes in the structures of [large-scale] organizations" that affect "the quality of our social life."[38] Fiss contended that what had changed was not the function of adjudication, but rather the forms that adjudication now took because of the necessity to address problems in "a society dominated by the operation of large-scale organizations."[39] In short, both Chayes and Fiss saw profound changes in litigation in the federal courts during the civil rights area; however, Fiss viewed the changes through a different lens than Chayes did.

In his advocacy for this new form of public law litigation, Chayes explicitly noted that its object was the "vindication of constitutional or statutory policies."[40] He made no mention of public law litigation derived from a different source of law, judge-made or common law. In "reconcil[ing] adjudication in the new model with the majoritarian premises of American political life," Chayes argued that in cases seeking relief under federal statutes, "the problem . . . is not

---

33. *Id.*
34. *Id.* at 1302.
35. *Id.*
36. Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).
37. *See id.* at 2–5.
38. *Id.* at 2.
39. *Id.* at 36.
40. Chayes, *supra* note 22, at 1284.

difficult."[41] Chayes reasoned, "The courts can be said to be engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives."[42] Constitutional claims, continued Chayes, typically arise in a context when the government acts affirmatively, such as in its operation of schools, prisons, and mental institutions.[43] The public law model ensures that the government conducts these activities in a constitutional manner.[44] Interestingly, Fiss appeared to be more open to extending this new genre of more activist litigation to claims arising under the common law. According to Fiss, "[c]onstitutional adjudication is the most vivid manifestation" of the courts' role in "giv[ing] meaning to our public values." But, he argues, this role "also seems [evident in] most civil and criminal cases, certainly now and perhaps for most of our history as well."[45]

B. The Public Law Model and First-Generation Mass Products Torts

In 1984, David Rosenberg called for the extension of the public law model to the handling of mass tort claims,[46] where the plaintiff's rights were almost always derived from judge-made common law—not statutory or constitutional sources.[47] Rosenberg focused on mass tort claims,[48] which included both those seeking damages for diseases resulting from exposure to mass products, such as asbestos,[49] Agent Orange,[50] and DES,[51] and those claiming damages as a result of environmental exposure to harmful substances, such as the release of harmful radiation at the Three Mile Island nuclear power plant.[52] Rosenberg's greatest concern regarding the traditional handling of tort claims was the requirement that

---

41. *Id.* at 1314.
42. *See id.*
43. *See id.* at 1314–15.
44. *Id.*
45. Fiss, *supra* note 36, at 29.
46. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 905–24 (1984).
47. *See id.* at 854.
48. *Id.* at 853.
49. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973) (affirming judgment in favor of estate of decedent whose death was caused by asbestos exposure); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 652–53 (E.D. Tex. 1990) (setting a trial plan for personal injury and wrongful death class action against asbestos manufacturers).
50. *See, e.g.*, Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 618 F. Supp. 623, 624 (E.D.N.Y. 1985) (approving settlement agreement for Agent Orange class action suit); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1228, 1264 (E.D.N.Y. 1985) (dismissing product liability claims of Vietnam veterans and family members).
51. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 930–31, 936–38 (Cal. 1980) (allowing the plaintiff to proceed against DES manufacturers on a market share liability basis); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1071–72 (N.Y. 1989) (same).
52. *See In re* Three Mile Island Litig., 557 F. Supp. 96, 96–97 (M.D. Pa. 1982) (establishing twenty-five million dollar fund for compensating victims exposed to radiation and for related public health purposes).

any particular plaintiff be able to prove that a specific defendant caused her harm.[53] As Rosenberg noted, this traditional requirement of tort liability cannot be satisfied when the victim develops a disease caused by exposure to a fungible product produced by several manufacturers, decades after the exposure.[54] Rosenberg also argued that because of the inability of most victims to prove the individualized causation requirement, defendants would not be assessed the appropriate amount of damages to deter them from harmful conduct in the future.[55] His solution was to employ a "public law model" to avoid the traditional, particularized causation requirement and to overcome "systemic causal indeterminacy."[56] Rosenberg envisioned that his public law model of torts would serve a parallel function to Chayes's model—regulating institutions, albeit private institutions instead of public institutions.[57] Rosenberg noted that such a model also would substantially reduce the litigation costs involved in any repetitive series of individual adjudications.[58]

Rosenberg's public model of tort law began with the use of class actions in mass torts and the elimination of the requirement that any particular victim prove that any specific manufacturer's product caused her harm.[59] Damages would be awarded to the class of victims as a whole,[60] and then distributed according to a damages schedule similar to those traditionally used in the workers' compensation system.[61] Future victims would be able to receive compensation from an insurance fund created during the litigation.[62] Throughout the litigation, the judge would "assume[] an aggressive managerial role."[63]

Rosenberg's ideas set the tone for the handling of mass products tort claims during the late 1980s and early 1990s. The explosion of asbestos claims necessitated that judges administer them in an aggregate, "public law" model.[64] A decade later, Judge Jack B. Weinstein, probably the most experienced and knowledgeable judge on the topic of mass products torts, wrote, "Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions

---

53. *See* Rosenberg, *supra* note 46, at 856–57.

54. *See id.* at 856.

55. *See id.* at 884.

56. *Id.* at 859.

57. *See id.* at 907; Chayes, *supra* note 22, at 1302.

58. *See* Rosenberg, *supra* note 46, at 905.

59. *See id.* at 908–16.

60. *Id.* at 917.

61. *See generally* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[5]–[6] (rev. ed. 2010) (explaining damage scheduling for the workers' compensation system).

62. *See* Rosenberg, *supra* note 46, at 921.

63. *Id.* at 906.

64. *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 650–52 (E.D. Tex. 1990) ("The great challenge presented to the [c]ourt by this litigation is to provide a fair and cost effective means of trying large numbers of asbestos cases."). *But see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) ("[Asbestos litigation] defies customary judicial administration and calls for national legislation.").

to protect constitutional rights. In dealing with such mass tort cases as Agent Orange, asbestos, and DES, I have sensed an atmosphere similar to that of public interest cases I have supervised," including cases involving school desegregation, prison reform, and reform of government institutions serving the needs of the developmentally disabled.[65] At the same time, courts other than that of Judge Weinstein have rejected many of Rosenberg's specific proposals, sometimes on constitutional grounds. [66]

Linda Mullenix has criticized Rosenberg, Weinstein, and others who have attempted to fit the mass products tort litigation of the 1980s and early 1990s into the mold of Chayes's public law model.[67] Looking only at the mass tort ligation that predated the states' tobacco litigation,[68] in most respects Mullenix appears to have the better side of the argument. She acknowledges that many aspects of mass tort cases do resemble the public law model described by Chayes—"sprawling and amorphous litigation, subject to change over the course of the litigation, and suffused with negotiating and mediating processes at every point."[69] At the same time, she notes a number of important differences between the mass tort litigation typical in the 1980s and 1990s and the type of public law litigation described by Chayes.[70] Mullenix first distinguishes the "traditional" mass products torts of that earlier era from the public law model by noting that "mass tort cases typically involve private parties alleging private harms,"[71] not, as Chayes described, the substance of public law adjudication, "a grievance about the operation of public policy."[72] Mullenix notes that "very little mass tort litigation is directly invested with a public purpose."[73] Several other factors that Mullenix describes suggest that earlier rounds of mass tort litigation do not fit

---

65. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472–74 (1994).

66. *See, e.g.*, *Ortiz*, 527 U.S. at 821–30 (striking, on due process grounds, a settlement agreement between plaintiffs and defendants that enabled asbestos claimants, both with pending claims and with future claims, to recover from a trust funded largely with insurance proceeds, but which severely limited the claimants' right to sue in court); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (affirming denial of class action certification under Federal Rule of Civil Procedure 23 for a "settlement only" class consisting of all individuals exposed to defendants' asbestos products regardless of whether they currently displayed symptoms of any asbestos-related disease); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 317–20 (5th Cir. 1998) (overturning, on due process grounds, the attempts of Judge Robert M. Parker to combine the class action vehicle with statistical sampling to eliminate any requirement of individual causation).

67. *See* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 580–82 (1994) [hereinafter Mullenix, *Paradigm Misplaced*]; Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 421–31 (1999) [hereinafter Mullenix, *Mass Tort Litigation*].

68. *See* Mullenix, *Mass Tort Litigation*, *supra* note 67, at 425.

69. *Id.* at 424 (internal quotation marks omitted).

70. *Id.* at 424–31.

71. *Id.* at 426.

72. Chayes, *supra* note 22, at 1302.

73. Mullenix, *Mass Tort Litigation, supra* note 67, at 426.

within the public law model.[74] For example, she writes that "mass tort litigation typically does not involve ongoing supervision by the courts or the presiding judge once a mass tort has been settled or otherwise resolved."[75] She also reasons that while "mass tort litigation (with a few exceptions) typically is litigation seeking compensatory and exemplary damages, . . . [t]he classic public law litigation, in contrast, was quintessentially equitable in nature, seeking primarily injunctive or declaratory relief or other non-compensatory remediation such as a consent decree."[76]

III. THE EMERGENCE OF MACRO-REGULATORY TORT LITIGATION

When state governments filed tort actions against the tobacco manufacturers in the mid-1990s, a new variant of mass torts emerged that was far different from its immediate predecessors. The earlier mass products tort actions often were collective in nature[77] but remained focused almost entirely on compensation for the victims of product-caused diseases. Beginning in 1995, governments and class action representatives sued the manufacturers of cigarettes,[78] handguns,[79] and lead pigment,[80] and eventually corporations emitting greenhouse gases.[81] During these successive but overlapping litigation cycles, the goal of imposing judicial regulation on the targeted industries grew in importance relative to compensatory goals. These new cycles of litigation increasingly resembled the traditional models of public interest litigation that relied on constitutional and federal statutory provisions to reform organizational behavior.

A. State Government Tobacco Litigation

In the mid-1990s, more than forty states filed tort actions against tobacco manufacturers.[82] Certainly one objective of the litigation was for the states to be reimbursed for the Medicaid funds that they already had spent addressing tobacco-related diseases,[83] but many of the litigants had an additional goal. Graham E. Kelder, Jr. and Richard A. Daynard argued that "the failure of

74. *Id.* at 427–31.
75. *Id.* at 429.
76. *Id.*
77. *See* Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 892–900 (2005).
78. *See infra* Part III.A.
79. *See infra* Part III.B.
80. *See infra* Part III.C.
81. *See infra* Part III.D.
82. Copies of the complaints filed by the states are available at the Galen Digital Library, University of California, San Francisco. *See State Lawsuit Summary Chart*, UCSF LIBRARY, http://www.library.ucsf.edu/tobacco/litigation/states (last visited Jan. 11, 2011).
83. Robert L. Rabin, *The Tobacco Litigation: A Tentative History Assessment*, 51 DEPAUL L. REV. 331, 331 (2001).

conventional forms of legislative and administrative regulation of tobacco products and the recent shift in the landscape of tobacco litigation indicate[d] that tobacco product liability litigation provide[d] one of the most promising means of controlling the sale and use of tobacco."[84] Daynard, a professor of law and an early proponent of state litigation against tobacco manufacturers, influenced Mississippi attorney general Michael Moore's decision to file the first state lawsuit against the tobacco companies.[85]

The tobacco companies and the states settled in 1998[86] and, in the process, imposed a blueprint for tobacco regulation that would govern the industry for more than a decade.[87] Perhaps the most publicized aspect of the settlement was the tobacco companies' agreement to pay the states more than $206 billion over a period of twenty years.[88] However, the Master Settlement Agreement (MSA) also provided significant regulation of the tobacco companies' advertising and other promotional activities.[89] The MSA prohibited using cartoon characters, such as Joe Camel, in advertising.[90] The signatory companies agreed to forego brand name advertising at events targeted to youth, including most concerts and specified athletic events.[91] The MSA banned outdoor and transit advertising,[92] apparel advertising tobacco products,[93] and distribution of free samples in locations accessible to youth.[94] In short, the MSA established the type of regulatory regime that one would have expected Congress or federal administrative agencies, such as the Federal Trade Commission or the Federal Communications Commission, to enact.

B. Municipal Litigation Against Handgun Manufacturers

Many of the same mass plaintiffs' attorneys who sued the tobacco companies next focused their attention on the epidemic of inner-city violence,

---

84. Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y. REV. 63, 63–64 (1997).

85. *See* Frank J. Vandall, *The Legal Theory and the Visionaries That Led to the Proposed $368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 478–80 (1998).

86. *See* MSA, *supra* note 23.

87. *See id.* at 18–36. Effectively, the MSA provided a comprehensive national blueprint that provided the bulk of industry regulation until 2009 when Congress enacted the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

88. MSA, *supra* note 23, at 54–83; *see also* Alison Frankel, *After the Smoke Cleared: The Inside Story of the Big Tobacco $206 Billion Settlement*, AM. LAW., Jan.–Feb. 1999, at 48 (reflecting on the states' settlement with the tobacco companies); Milo Geyelin, *Forty-Six States Agree to Accept $206 Billion Tobacco Settlement*, WALL ST. J., Nov. 23, 1998, at B13 (summarizing the MSA).

89. MSA, *supra* note 23, at 18–26.

90. *See id.* at 19.

91. *Id.* at 18–19.

92. *Id.* at 22–24.

93. *Id.* at 25.

94. *Id.* at 26.

which they alleged resulted from the ready availability of handguns.[95] More than a dozen municipalities joined with these attorneys to sue the manufacturers and distributors of handguns.[96] The National Rifle Association (NRA), a powerful lobbying organization, had blocked effective regulatory legislation for years.[97] But as one plaintiffs' attorney commented, "You don't need a legislative majority to file a lawsuit."[98] Another, Wendell Gauthier, described the plaintiffs' bar as "a de facto fourth branch of government."[99]

The regulatory focus of the gun litigation was both more transparent and more far-reaching than that of the tobacco litigation. The lawsuits filed by municipalities and other collective entities, such as nonprofit organizations, asked for significant injunctive relief as well as damages.[100] The plaintiffs requested "injunctive relief requiring the [f]irearms [s]uppliers to take assorted measures that would effectively inhibit the flow of firearms into illegal markets."[101] Only a single gun manufacturer, Smith & Wesson, settled.[102] It agreed to restrict the manner in which it distributed guns, to provide each new handgun with a trigger lock, and to develop "smart-gun technology."[103] Congress eventually ended tort-based regulatory litigation against gun manufacturers by passing the Protection of Lawful Commerce in Arms Act.[104]

---

95. *See* Douglas McCollam, *Long Shot*, AM. LAW., June 1999, at 86, 86.

96. *See, e.g.*, District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 638–39 (D.C. 2005) (en banc) (bringing public nuisance, negligent firearm distribution, and statutory health care reimbursement claims); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1105–06 (Ill. 2004) (seeking to recover law enforcement and medical expenses associated with illegal gun violence).

97. *See* Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 152, 155–60 (Timothy D. Lytton ed., 2005).

98. Walter K. Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000, at A26 (internal quotation marks omitted).

99. McCollam, *supra* note 95, at 86.

100. *See, e.g.*, *District of Columbia*, at 638–39 (seeking reimbursement for health care expenses and other costs "paid by the District to or on behalf of victims of gun violence"); NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 446 (E.D.N.Y. 2003) (seeking injunctive relief under public nuisance theory); NAACP v. A.A. Arms, Inc., No. 99 CV 3999(JBW), No. 99 CV 7037(JBW), 2003 WL 21242939, at *1 (E.D.N.Y. Apr. 1, 2003) (same); *City of Chicago*, at 1105–06 (seeking a permanent injunction to abate the public nuisance resulting from gun usage and damages for emergency medical expenses, prosecution of gun control ordinances, law enforcement efforts, and victim health care expenses).

101. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 391 (2d Cir. 2008); *see also AcuSport*, 271 F. Supp. 2d at 524–26 (detailing the requested injunctive relief).

102. *See* James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1.

103. *See id.* (internal quotation marks omitted).

104. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109–92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903 (2006)).

C. *Rhode Island Lead Pigment Litigation*

During the same period, the State of Rhode Island[105] and dozens of municipalities and other localities[106] sued lead pigment manufacturers, seeking abatement of the alleged public nuisance stemming from the presence of lead in older paint covering the walls of houses and preschools throughout the state. These efforts were an even more direct attempt to use courts to solve a massive public health problem and to circumvent the inability or unwillingness of state legislatures and public health officials to do so. The incidents of lead poisoning in Rhode Island were twice the national rate.[107] A leading state housing official admitted that the state had "one of the weakest laws in the country" to protect children from lead poisoning.[108] The state's environmental risk assessor concluded, "We were sinking like the Titanic."[109]

The state's complaint against the lead pigment manufacturers asked for a "judgment ordering the [d]efendants to detect and abate [l]ead in all residences, schools, hospitals, and public and private buildings within the [s]tate accessible to children."[110] In February 2006, after nearly seven years of proceedings in the trial court and after eight days of deliberation, the jury returned a verdict in favor of the state, holding three of the four defendant pigment manufacturers liable for the costs of abating the public nuisance caused by lead in buildings throughout the state.[111] Following the jury verdict, the trial court judge asked the state attorney general to provide a plan for remediating the conditions causing childhood lead poisoning throughout the state.[112] He indicated that his ultimate remedial decree would likely track the attorney general's proposal.[113] The 128-

105. *See* State v. Lead Indus. Ass'n, 951 A.2d 428, 434 (R.I. 2008).

106. *See, e.g.*, City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 114 (3d Cir. 1993) (seeking recovery for expenses incurred from lead-based paint removal); Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 25 (Cal. 2010) ("A group of public entities composed of various California counties and cities . . . are prosecuting a public-nuisance action against numerous businesses that manufactured lead paint . . . ."); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 112–13 (Mo. 2007) (en banc) (per curiam) (seeking to recover costs from city's lead paint abatement program).

107. David A. Herzog, *In War on Lead Poisoning, R.I. Is Inadequately Armed*, PROVIDENCE J., Feb. 21, 1999, at 1.

108. Peter B. Lord, *Another Generation Caught in a Sad Cycle—Public Health Crisis—Poisoned*, PROVIDENCE J., May 13, 2001, at E1.

109. Herzog, *supra* note 107, at A17 (internal quotation marks omitted).

110. Complaint, State *ex rel.* Whitehouse v. Lead Indus. Ass'n, No. 99-5226 (R.I. Super. Ct. Oct. 12, 1999), *available at* http://www.riag.ri.gov/documents/reports/lead/lead_complaint.pdf.

111. *See* Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A1.

112. State *ex rel.* Lynch v. Lead Indus. Ass'n, No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at *307 (R.I. Super. Ct. Feb. 26, 2007).

113. *Id.*

page plan that the attorney general submitted [114] was never implemented because the Rhode Island Supreme Court soon reversed the judgment against the defendants.[115]

The attorney general's proposal called for remediation of lead in approximately 240,000 Rhode Island residences and 758 schools and child care centers,[116] at an estimated total cost to the defendants of more than $2.4 billion.[117] The plan anticipated that ten thousand trained and skilled workers would spend four years working under the court's supervision to abate the nuisance.[118] The plan was extremely detailed. For example, it required that when workers replaced windows to avoid the lead dust created when old windows were raised or lowered, "Energy Star label" windows should be installed,[119] presumably responding to the legitimate public objective of saving energy, but unrelated to lead hazard abatement.

If the Rhode Island Supreme Court had not reversed the jury verdict, and the trial court judge had followed his plan of closely hewing to the attorney general's proposal, the judge would have supervised the largest public works project in Rhode Island history and the largest lead remediation program in history. It is likely, of course, that the court would have needed to address, on an ongoing basis, defendant manufacturers' objections regarding the costs of the remediation effort and even concerns of homeowners and renters unhappy about being forced from their homes during lead remediation. No court, even in cases of constitutionally mandated school desegregation or prison reform, has tackled a project of this scope and complexity. The only authority justifying this massive judicial enterprise was a questionable judicial interpretation of the boundaries of the most indeterminate of all torts, public nuisance.[120]

D. Climate Change Litigation

The use of common law tort actions to implement regulatory regimes when the political branches had stalemated reached unprecedented heights when states,[121] municipalities,[122] and class action representatives[123] filed tort actions

---

114. *See* R.I. DEP'T ATT'Y GEN., RHODE ISLAND LEAD NUISANCE ABATEMENT PLAN (Sept. 14, 2007) [hereinafter ABATEMENT PLAN], *available at* http://www.riag.ri.gov/documents/RILead NuisanceAbatementPlan9-14-07.pdf.

115. State v. Lead Indus. Ass'n, 951 A.2d 428, 435 (R.I. 2008).

116. ABATEMENT PLAN, *supra* note 114, at 8.

117. *Id.* at 122.

118. *Id.* at 107.

119. *Id.* at 15.

120. *See* Donald G. Gifford, *Public Nuisance as a Mass Product Tort*, 71 U. CIN. L. REV. 741, 774–90 (discussing public nuisance as an "ill-defined tort").

121. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 316 (2d Cir. 2009) (reporting lawsuit filings by eight states for the abatement of the defendants' contributions to global warming); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (discussing California's claim for damages against car manufacturers for contributing to global warming). In *California v. General Motors Corp.*, California voluntarily

seeking to impose more stringent emission standards on those who emit greenhouse gases contributing to global climate change. At the time of the filing of these lawsuits, the EPA argued that it lacked statutory authority to regulate greenhouse gases,[124] a position later repudiated by the Supreme Court in *Massachusetts v. EPA*.[125]

In *Connecticut v. American Electric Power Co.*,[126] eight states, the City of New York, and three land trusts sued six electric utility companies, seeking abatement of emissions from the defendants' fossil fuel-powered plants that allegedly contributed to global warming.[127] At least one of the state attorneys general who filed the complaint acknowledged that the legal action sought to create a regulatory regime when the EPA had failed to do so.[128] The complaint asked the court to issue an injunction requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."[129] Peter Lehner, a New York assistant attorney general who played a critical role in the litigation,[130] later wrote of his frustration when the EPA failed to regulate greenhouse gas emissions: "We are fortunate that we live in a country with three branches of government—and two levels of sovereignty—so that the unfortunate inaction of one branch does not leave our citizens without hope or recourse."[131]

The federal district court dismissed the complaint in *American Electric Power Co.*, holding that it presented a nonjusticiable political question.[132] However, the Second Circuit reversed, holding that the complaint did not pose a

---

dismissed its appeal of the district court's decision because the EPA had acknowledged that greenhouse gases endangered public health and safety and President Obama had instructed the Department of Transportation to increase vehicle fuel efficiency standards. Unopposed Motion to Dismiss Appeal at 3–4, *Gen. Motors Corp.*, 2007 WL 2726871 (No. 07-16908). The fact that General Motors Corporation and Chrysler had both filed for Chapter 11 bankruptcy also influenced California's decision to voluntarily dismiss the appeal. *Id.* at 4.

122. *See, e.g.*, *Am. Elec. Power Co.*, 582 F.3d at 316 (noting New York City as plaintiff); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (noting an Eskimo village as plaintiff).

123. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009) (discussing allegations of class that defendants' conduct contributed to severity of Hurricane Katrina).

124. *See* Massachusetts v. EPA, 549 U.S. 497, 511–12 (2007) (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925–31 (Sept. 8, 2003)).

125. *Id.* at 528.

126. 582 F.3d 309 (2d Cir. 2009), *petition for cert. filed*, 79 U.S.L.W. 3085, 3114 (U.S. Aug. 2, 2010) (No. 10-174).

127. *Id.* at 314.

128. *See* Peter Lehner, Connecticut v. AEP: *A Long History of Nuisance Law*, 35 COLUM. J. ENVTL. L. 1, 1–2 (2010).

129. Complaint at 49, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1:04-cv-05669-LAP), 2004 WL 5614397.

130. *See* Lehner, *supra* note 128, at 1.

131. *Id.* at 7.

132. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

political question.[133] The court also held that the plaintiffs had standing to raise their claims[134] and that they had properly stated a claim under the law of public nuisance.[135] Judge Peter Hall, who wrote the Second Circuit opinion,[136] later acknowledged that the panel was motivated by the failure of both the EPA to regulate greenhouse gas emissions and Congress to pass comprehensive climate change legislation.[137] Judge Hall suggested that climate change litigation "provide[s] a backstop and 'some small impetus' to stonewalling lawmakers."[138]

Similar to the regulatory purpose behind *American Electric Power Co.*, California's climate change litigation against the domestic auto manufacturers sought stronger environmental regulation.[139] Daniel A. Farber noted that the litigation was a "part of an effort to push the federal government into acting" in the face of a federal vacuum.[140] The two other major pieces of climate change litigation, seeking damages instead of injunctive relief,[141] on their face are less openly aimed at reforming the regulation of greenhouse gases. However, informed observers and the parties themselves acknowledge that the underlying objective is to regulate greenhouse gas emissions despite the nature of the specific relief requested.[142] James E. Tierney, director of the National State Attorneys General program at Columbia Law School, acknowledged that this genre of litigation is "'a hammer' that could drive industries to the negotiating table."[143] Carol Browner, former Director of the White House Office of Energy and Climate Change Policy,[144] commented that "the courts are starting to take control of this issue" even though "setting environmental standards is best done through legislation."[145]

---

133. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 332 (2d. Cir. 2009).

134. *Id.* at 349.

135. *Id.* at 371.

136. *Id.* at 314.

137. Doug Kendall & Hannah McCrea, *Attractive Nuisance: Can Federal Courts Help Tackle Global Warming?*, SLATE (Apr. 20, 2010, 9:42 AM), http://www.slate.com/id/2251123/.

138. *Id.*

139. California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *1–2 (N.D. Cal. Sept. 17, 2007).

140. Cymie R. Payne, *Climate Change: Law and Policy—State Initiatives*, ACADEMIC EARTH (Jan. 27, 2009), http://academicearth.org/lectures/state-initiatives (presenting law school lecture by Farber).

141. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 859–60 (5th Cir. 2009); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868–69 (N.D. Cal. 2009).

142. Complaint at 1–2, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1:04-cv-05669-LAP), 2004 WL 5614397; John Schwartz, *Courts Emerging as Battlefield for Fights over Climate Change*, N.Y. TIMES, Jan. 27, 2010, at A1.

143. Schwartz, *supra* note 142, at A4.

144. *Obama Advisor Carol Browner Leaving*, WASH. POST, Jan. 25, 2011, http://www.washingtontimes.com/news/2011/jan/25/obama-adviser-carol-browner-leaving/.

145. Schwartz, *supra* note 142, at A4 (internal quotation marks omitted).

E. The Public Law Model and the New Genre of Public Policy-Making Tort Litigation

Both liberal and conservative judges and tort scholars acknowledge that one of the legitimate objectives of tort law is to regulate the conduct of potential tortfeasors in order to minimize the costs of accidental harm.[146] But typically, the deterrent or loss-minimization impact of tort law occurs as a result of the drip-by-drip accumulation of judgments in individual lawsuits sending a regulatory signal to potential tortfeasors.[147] The newer phenomenon, public interest tort litigation, seeks to impose an explicitly regulatory regime to prevent a more widespread, less circumscribed or localized, harm.

I define public interest tort litigation as any tort litigation possessing all of the following characteristics:

1. Public interest tort litigation seeks to tackle large social problems instead of seeking to resolve disputes between individual parties (or involving carefully defined and circumscribed groups of plaintiffs or defendants, or both). In this manner, it is similar to any other public interest litigation, but unlike most tort litigation.

2. Public interest tort litigation is a *collective* action, most often filed on behalf of a collective plaintiff seeking to address harms sustained in the first instance by thousands or millions of individuals. Collective actions may be filed by states as *parens patriae*, municipal governments, or class action representatives. The substantive claim—most often public nuisance—conceives of the harm as a *collective* harm.

3. Unlike earlier genres of public interest litigation, this new form of litigation purports to derive its authority not from the Constitution or federal statutes, but from judge-made or common law, most often from the most vaguely defined tort, public nuisance.

4. The objective of public interest tort litigation is either to circumvent the regulatory structures already established by the political branches or to impose new regulation where legislative efforts have stalled or otherwise failed.

---

146. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68 (1970) (discussing various methods of reducing accident costs); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167–69 (7th ed. 2007) (using the "Hand Formula" to weigh costs of accidents and behavior modification).

147. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297–98 (7th Cir. 1995). In *In re Rhone-Poulenc*, Judge Posner contrasts the "sheer *magnitude*" of liability facing defendants confronted by class action litigation with that to which they are exposed by a series of individual actions. *Id.*

The first three of these four defining characteristics were present in the tobacco litigation and in each of the litigation cycles that followed. The fourth characteristic, perhaps the key defining feature of this new genre of litigation, was present in the tobacco litigation only in a nascent form, but was readily apparent in the handgun, lead pigment, and climate change litigation. On one hand, a new regulatory regime for regulating tobacco products did emerge from the settlement of the litigation, and more stringent regulation of the industry was a goal shared by many who sponsored the litigation.[148] On the other hand, the states' primary goal in filing the litigation was probably to be reimbursed for the costs they incurred as a result of tobacco-related illnesses. Also, the new regulatory regime only emerged during the settlement negotiations and was not relief requested in the litigation itself.

As described earlier, Linda Mullenix wrote during the time when the states' tobacco litigation was pending and when mass products torts did not fit within the boundaries of Chayes's public law model.[149] Her reasoning was convincing as it applied to mass tort actions that had been litigated at the time she wrote. Asbestos actions and the other traditional mass products tort actions prevalent at that time did not meet the definitional criteria of the public law model. But Mullenix's reasoning did not—and could not have at the time she wrote—distinguish between traditional mass tort litigation and the new genre of public policy-making tort litigation that I have described. For our purposes, perhaps the most important factor that Mullenix identified for differentiating litigation under Chayes's public law model from earlier mass tort litigation was that mass tort litigation neither possesses "a public purpose" nor seeks reform of public institutions.[150] Even when she wrote in 1999, however, Mullenix was careful to exclude the then-recent tobacco litigation from this analysis. As previously discussed, the tobacco, handgun, lead pigment, and climate change litigation sought to effect government policy.[151] As such, these forms of litigation fall within the new public policy-making tort litigation.

Several other factors that Mullenix describes, while helping to exclude earlier mass tort litigation from the public law model, suggest that the latest genre of policy-making tort litigation fits comfortably within it. Mullenix noted that mass tort litigation usually "does not involve ongoing supervision by the courts."[152] Obviously, Associate Justice Michael A. Silverstein of the Rhode Island Superior Court would have continually been involved in supervising the remediation of lead paint hazards in Rhode Island if the state supreme court had not reversed his order to the defendants to abate the public nuisance.[153]

---

148. *See supra* Part III.A.

149. *See supra* notes 67–76 and accompanying text.

150. *See* Mullenix, *Mass Tort Litigation*, *supra* note 67, at 426.

151. *See supra* Part III.A–D.

152. Mullenix, *Mass Tort Litigation*, *supra* note 67, at 429.

153. *See* State *ex rel.* Lynch v. Lead Indus. Ass'n, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS 32 (R.I. Super. Ct. Feb. 26, 2007) (holding that a special master should be appointed to

Similarly, if, on remand, the district court finds a public nuisance in *American Electric Power Co.* and orders injunctive relief against the operators of the electric utility power-generating plants,[154] the nature and duration of the trial court judge's responsibility will far more closely resemble those of a trial judge in a school desegregation or prison reform case rather than those of a judge in asbestos litigation.[155]

Mullenix also contrasted mass products torts, where the primary objective consists of damages, with the public law model, where the plaintiffs usually request an injunction, some other form of equitable relief, or a consent decree.[156] Again, the tobacco, handgun, lead pigment, and climate change litigation all clearly belong on the "public law" side of the ledger under this criterion.

Finally, Mullenix noted that "mass tort cases typically involve private parties alleging private harms."[157] Of course, in public policy-making tort litigation, the tobacco plaintiffs were state governments, the handgun plaintiffs were most often municipal governments, and the lead pigment plaintiffs were either state or local governments. In climate change litigation, some of the plaintiffs are governments or quasi-governmental units and some are class representatives. Most public interest tort claims rely on public nuisance, which essentially alleges a *public* harm, not a private one.[158]

One of Chayes's own criteria defining the public law model was that "[t]he remedy is not imposed but negotiated."[159] The parties in the states' tobacco litigation obviously negotiated the remedy.[160] It is likely that any remedy in the other litigation cycles against the manufacturers of handguns and lead would have been entirely negotiated between the parties or at least that any court-imposed decree would have reflected specific terms that the parties agreed to. Chayes also described the remedy in public law litigation as "forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees."[161] The Rhode Island attorney general's proposed plan for the abatement of lead-based paint hazards in more than 240,000 private residences specified in some detail how the state

---

advise the court in considering a remedial order), *rev'd sub nom.* State v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008).

154. *See* text accompanying notes 151–92.

155. *Compare* FEELEY & RUBIN, *supra* note 29, at 27–143, 362–80 (analyzing the judicial role in prison reform), Fair, *supra* note 29, at 149–58 (concluding that courts have the capacity to implement prison reform), *and* Kurland, *supra* note 28, at 322 (discussing the role of federal district court judges in desegregating schools), *with* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 650–51 (E.D. Tex. 1990) (discussing the logistics of adjudicating thousands of potential asbestos claims).

156. Mullenix, *Mass Tort Litigation*, *supra* note 67, at 427–28.

157. Mullenix, *Mass Tort Litigation*, *supra* note 67, at 426.

158. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979); Gifford, *supra* note 120, at 814–19.

159. Chayes, *supra* note 22, at 1302.

160. *See* MSA, *supra* note 23.

161. Chayes, *supra* note 22, at 1302.

would conduct this massive project.[162] It was forward-looking and concretely affected the property owners' rights and obligations.[163] Moreover, it affected those residing in the affected residences whom the abatement would remove from their homes for periods of a few hours to ten days or more, depending on the risk level.[164] Any remedy in the climate change litigation would be forward-looking, determining by what percentage each defendant would be forced to reduce greenhouse gas emissions. Additionally, if the factual allegations of the plaintiffs in *American Electric Power Co.*[165] and the other climate change complaints[166] are correct, the court's remedy would have important consequences for all 6.9 billion of us! To determine whether a public nuisance exists in these cases and what the remedy should be, the courts' "fact inquir[ies] [will be] not historical and adjudicative but predictive and legislative"—another indication, according to Chayes, of public law adjudication.[167] In short, the new policy-driven public interest tort actions are decidedly different from the mass tort actions of the 1980s. As such, they fit within Chayes's public law model.

IV. PUBLIC INTEREST TORT LITIGATION AND THE JUDICIAL FUNCTION

I now turn to the question posed in the introduction: Within our constitutional framework, and consistent with separation of powers and the

---

162. *See* ABATEMENT PLAN, *supra* note 114.

163. *Id.*

164. *Id.* at 100.

165. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 316–19 (2d Cir. 2009) ("Plaintiffs claim that global warming, to which [the d]efendants contribute as the 'five largest emitters of carbon dioxide in the United States and . . . among the largest in the world,' by emitting 650 million tons per year of carbon dioxide, is causing and will continue to cause serious harms affecting human health and natural resources." (alteration in original) (citation omitted) (quoting Connecticut v. Am. Elec. Power Co., 406 F.Supp.2d 265, 268 (S.D.N.Y. 2005))).

166. *See, e.g.*, Complaint for Damages at 44–46, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 865 (N.D. Cal. 2009) (No. 4-08-CV-01138-SBA) ("Defendants contribute to global warming through their emissions of large quantities of greenhouse gases. Defendants in this action include many of the largest emitters of greenhouse gases in the United States. All Defendants directly emit large quantities of greenhouse gases and have done so for many years. Defendants are responsible for a substantial portion of the greenhouse gases in the atmosphere that have caused global warming and Kivalina's special injuries."); Complaint for Damages & Declaratory Judgment at 9–12, California v. Gen. Motors Corp., No. 06CV05755 MJJ, 2006 WL 2726547, at *2 (N.D. Cal. Sept. 17, 2007) ("Defendants, by their annual emissions in the United States of approximately 289 million metric tons of carbon dioxide and other greenhouse gases, are substantial contributors—among the world's largest contributors—to global warming, and to the adverse impacts on California. Defendants' motor vehicle emissions in the United States account for approximately nine percent of the world's carbon dioxide emissions and over thirty percent of emissions from sources within the State of California."); Class Action Complaint for Damages & Declaratory Relief at 11–12, Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) ("The Oil Company Defendant Class has engaged in activities that have produced the greatest single source of by-products leading to the development and increase of global warming.").

167. Chayes, *supra* note 22, at 1302.

limits of the judicial function, may courts use the vague standards of tort law to impose detailed regulations on a group of businesses allegedly contributing to a problem that is literally worldwide in scope?

In his insightful essay *The Limits of Law*,[168] Peter H. Schuck describes three separate critiques of the "growing ambitions for law,"[169] two of which are relevant to answering this question. He identifies the "functionalist critique"—a question of judicial competence,[170] and the "illegitimacy critique," of which separation of powers concerns is an important feature.[171] In this Part, I focus primarily on climate change litigation, the pinnacle of public interest tort litigation, because it most starkly exposes these issues.

A. The Limits of the Judicial Function

Environmental scholar Richard J. Lazarus describes global climate change as a "super wicked problem."[172] There is no direct and immediate feedback link between reductions in greenhouse gas emissions at a specific location, or even within a region, and changes in the climate of that geographical area.[173] The scope of the problem is worldwide.[174] The decision to regulate and reduce emissions often will not have an impact for decades or even generations.[175] Climate change is caused not only by greenhouse gas emissions, but also by the clearing of vast acreages of vegetation, such as dense tropical rainforests, that otherwise would remove huge volumes of carbon dioxide, the most common greenhouse gas, from the atmosphere.[176]

The negative impact of greenhouse gases is diffused and generalized.[177] In these cases, there is no single harm,[178] unlike that suffered by the typical tort plaintiff, say the victim of an auto accident. Nor is the harm as circumscribed, discrete, and localized as it has been in past nuisance claims that alleged air or water pollution.[179] Further, when a court orders a domestic business to reduce or eliminate emissions, the business either incurs new costs or decides to reduce or

---

168. PETER H. SHUCK, *The Limits of Law*, *in* THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 419 (2000).

169. *Id.* at 424–34.

170. *Id.* at 427–32.

171. *Id.* at 432–34.

172. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009) (internal quotation marks omitted).

173. *See id.* at 1163–64.

174. *Id.* at 1163, 1168–73.

175. *See id.* at 1167.

176. *Id.* at 1161–63.

177. *See id.* at 1163–64.

178. *See id.*

179. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 236, 239 (1907) (enjoining a Tennessee factory from emitting pollution into Georgia's air); Missouri v. Illinois (*Missouri II*), 200 U.S. 496, 526 (1906) (declining to enjoin Illinois from dumping sewage into the Mississippi River).

eliminate its greenhouse gas-emitting activity.[180] Achieving the optimal mixture of regulation across all greenhouse gas emitters and industries requires weighing the relative societal costs and benefits of reducing emissions from each.[181] Ultimately, this comparative weighing process needs to be international in scope, because the reduction of a given quanta of greenhouse gas emissions from China or India has exactly the same impact on global climate change as a similar reduction in any given industry in the United States.[182]

These are not the kinds of decisions that a common law court, without guidance from previously enacted statutory or regulatory standards, is capable of making. No appropriate judicial standard exists enabling a court to decide whether the contributions of any particular defendant emitter constitute the "unreasonable interference" required by most definitions of public nuisance.[183] The judicial process is far different from that of the EPA or any other administrative agency. As Justice Stevens concluded in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[184] "Judges are not experts in the field . . . ."[185] In contrast, wrote Justice Stevens, administrative agencies address "technical and complex" matters "in a detailed and reasoned fashion" and their decisions "reconcil[e] conflicting policies."[186]

The current and anticipated problems that global climate change causes are not "the kinds of disputes which lend themselves to reasoned decision," as Henry M. Hart, Jr. and Albert M. Sacks referred to cases appropriate for adjudication.[187] Because any group of defendants sued in any particular climate change case contributes only a very small share of the greenhouse gases that mix in the atmosphere and cause any plaintiff's harm, plaintiffs asking for relief from specific harms, such as the melting of the California mountain snowpack,[188] are asking for a remedy not "within the power of the tribunal to grant."[189] More importantly, solving global climate change falls within the category of what Hart and Sacks referred to as a "managerial decision[]."[190] Such decisions are not

---

180. *See The Costs of Reducing Greenhouse-Gas Emissions*, ECON. & BUDGET ISSUE BRIEF (Cong. Budget Office, Wash., D.C.), Nov. 23, 2009, at 2, *available at* http://www.cbo.gov/ftpdocs/104xx/doc10458/11-23-GreenhouseGasEmissions_Brief.pdf.

181. *See id.*

182. *See* Lazarus, *supra* note 172, at 1163–64 (describing how the concentration of greenhouse gases is uniform around the world).

183. *See* State v. Lead Indus. Ass'n, 951 A.2d 428, 446–47 (R.I. 2008); RESTATEMENT (SECOND) of TORTS § 821B(1) (1979).

184. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

185. *Id.*

186. *Id.*

187. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 646 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

188. *See* Complaint at 1–2, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1=04-CV-05669-LAP).

189. HART & SACKS, *supra* note 187, at 646.

190. *See id.* at 647.

usually suitable for adjudication, they explained, "because of the numerous variables to be taken into account and the impossibility of developing generally applicable premises of reasoning with reference to which the variables can be judged."[191]

James M. Landis, a leading administrative law scholar during the New Deal and the decades that followed, concluded that the modern administrative regulatory state "sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems."[192] In contrast to courts, the legitimacy of administrative agencies' actions within a constitutional framework rests not on their reasoned elaboration, but rather on their accountability to the political branches of the government.[193] Justice Stevens wrote that administrative agencies "properly rely upon the incumbent administration's views of wise policy to inform its judgments" and that "it is entirely appropriate for this political branch of the [g]overnment to make such policy choices."[194] Cass R. Sunstein, currently serving as Adminstrator of the White House Office of Information and Regulatory Affairs,[195] described how the politically accountable branches of government, including both the President and Congress, increasingly exercise tighter control over administrative agencies.[196] In contrast, federal courts are not politically accountable.[197] State judges often are elected,[198] but it clearly would be improper for a candidate running for judicial office to make a campaign promise to reduce global warming.[199]

1. Judicially Discoverable and Manageable Standards

The first requirement of judicial competence to adjudicate an issue before the court is the ability to discern "judicially discoverable and manageable standards for resolving it."[200] The issue is not whether the court can employ a special master to weigh the costs and benefits of the defendants' activities as an administrative agency would. Rather the question is whether "judicial"

---

191. *Id.*

192. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 30 (1938).

193. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

194. *Id.* at 865.

195. *About OIRA*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Nov. 11, 2010).

196. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 452–63, 478–83 (1987).

197. *See* U.S. CONST. art. III, § 1 (stating that federal judges have automatic lifetime tenure and non-diminishing compensation).

198. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 21 n.3 (7th ed. 1998).

199. *See* HART & SACKS, *supra* note 187, at 643 ("[T]he popular election of judges does not in actual practice mean political accountability for particular decisions, nor is it ordinarily so understood.").

200. Baker v. Carr, 369 U.S. 186, 217 (1962).

standards exist to guide the determination of whether a defendant's specific contributions to worldwide carbon emissions were "unreasonable."

In *American Electric Power Co.*,[201] the Second Circuit reasoned that standards did exist to determine whether the utility companies' carbon emissions constituted a nuisance, because "federal courts have successfully adjudicated complex common law public nuisance cases for over a century."[202] The court referenced the definition of public nuisance contained in the *Restatement (Second) of Torts*—"an unreasonable interference with a right common to the general public."[203] It also noted that the federal courts had competently handled trans-state boundary air and water pollution cases since at least the early decades of the twentieth century.[204]

But in *Native Village of Kivalina v. ExxonMobil Corp.*,[205] a California federal district court convincingly reasoned that the issue of whether judicially discoverable and manageable standards exist is not an issue of whether the problems are complex, but rather whether there are "legal tools" available "to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'"[206] The court rejected the argument accepted by the court in *American Electric Power Co.* that the standard of "unreasonableness" found in the definition of public nuisance in the *Restatement (Second) of Torts*, and previous interpretations of the meaning of public nuisance from the United States Supreme Court,[207] provide judicially discoverable and manageable

---

201. 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174).

202. *Id.* at 326–30.

203. *Id.* at 328 (quoting RESTATEMENT (SECOND) OF TORTS § 821B (1979)) (internal quotation marks omitted). The Restatement lists three "circumstances" that help a court determine whether the interference is "unreasonable." RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979). These circumstances include whether the interference with a public right is (1) significant, (2) proscribed by statute or regulation, and (3) continuing in nature. *Id.*

204. *Am. Elec. Power Co.*, 582 F.3d at 326–27 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 236, 239 (1907) (granting Georgia's request to enjoin a Tennessee factory from emitting large amounts of pollution into Georgia's air); Missouri v. Illinois (*Missouri II*), 200 U.S. 496, 517, 526 (1906) (dismissing Missouri's request to enjoin Illinois from dumping sewage into the Mississippi River because of inadequate evidence that bacteria from the sewage caused typhoid)).

205. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

206. *Id.* at 874 (quoting Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005)).

207. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 106–08 (1972) (holding that water pollution may create a public nuisance); New Jersey v. City of New York, 283 U.S. 473, 482–83 (1931) (holding that dumping garbage in the ocean may create a public nuisance upon citizens and property owners); *Tenn. Copper Co.*, 206 U.S. at 238–39 (holding that defendant's emission of sulfur dioxide into the air traveling over plaintiff's land sufficiently threatened harm to permit an injunction preventing the nuisance); *Missouri II*, 200 U.S at 518 ("The nuisance . . . was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch.").

standards.[208] Instead, it found that the nuisance claims in past precedents were "far different" from those alleged in the global climate change litigation.[209]

2. *The Polycentric Nature of Climate Change Litigation*

Overlapping with the absence of judicially discoverable and manageable standards is the fact that the judicial process is ill-suited to adjudicate polycentric claims with as many interrelated factors as those posed by the climate change litigation. In his classic article, *The Forms and Limits of Adjudication*,[210] published after his death,[211] Lon L. Fuller concludes that polycentric issues are inherently unsuitable for adjudication.[212] As an example, Fuller suggests that it would be impossible for courts "to have all wages and prices set by . . . adjudication" because "the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages."[213] Fuller compared polycentric issues to "a spider web" in which "[a] pull on one strand will distribute tensions [along] a complicated pattern throughout the web as a whole."[214] Yet even the complexity of wage and price controls pales in comparison with the polycentric nature of climate change reform, with its multiple interactions within the ecological web, interlaced with worldwide economic repercussions. James Henderson, applying Fuller's insights to design defect product liability cases—an example posing far less challenging issues than those inherent in global climate change—argued that it is "managers," not courts, who should decide such matters.[215] The manager, Henderson contended, "is not bound to apply any law in reaching a decision and, in fact, is free to make judgments through the exercise of his unfettered discretion."[216]

It is difficult to imagine a more polycentric set of issues than that presented in the climate change litigation. Consider the intertwining issues that Richard Lazarus identified and that were discussed earlier.[217] Similarly, in rejecting the parallel between prior public nuisance cases and the climate change litigation before it, the *Kivalina* court stated, "While a water pollution claim typically involves a discrete, geographically definable waterway, [the p]laintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its*

---

208. *Kivalina*, 663 F. Supp. 2d at 874–76.
209. *Id.* at 875.
210. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).
211. *Id.*
212. *See id.* at 393–404.
213. *Id.* at 394.
214. *Id.* at 395.
215. James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1538–39 (1973).
216. *Id.* at 1538.
217. *See supra* notes 172–76 and accompanying text.

atmosphere."[218] Stronger carbon emissions standards imposed on United States industrial producers of widgets would probably lead those producers either to cease production or to raise the costs of domestic widgets. Either event might lead a competing South Korean widget producer to increase production. Assuming, hypothetically, that South Korean producers emit a greater quantum of greenhouse gases per widget than do American manufacturers, the net contribution to global climate change would be greater, not less, than if the court had declined to act. The separate issues of (1) how the level of greenhouse gases in the atmosphere is determined and (2) the impact of mandated reductions on the world's economy are each individually enormously polycentric. When intertwined, the issues are even more web-like and polycentric. As Henderson notes, "The more polycentric the problem, the less equipped . . . the courts [are] to deal with it."[219]

3. *Judicial Competence and Public Interest Torts*

It is unlikely that a court has ever encountered a problem as polycentric as global climate change and with a judicial standard as amorphous as the "unreasonable interference" standard at the heart of liability under public nuisance law.[220] Schuck concluded that the judicial competence of common law tort judges could be "assumed" when "accidents were relatively straightforward and no obvious alternative existed."[221] But he warned that "when judges came to pursue broad policy goals through instrumental doctrines that treat litigants as proxies for putative social interests, . . . they opened a Pandora's box."[222]

Courts' inability to adjudicate whether specific defendants should be held liable for the consequences of global climate change[223] highlights the lack of judicial competence. But other public tort litigation poses similar problems. For example, the State of Rhode Island claimed that the pigment manufacturers had contributed to the creation of a public nuisance consisting of lead contained in the paint applied to the walls of residences throughout the state.[224] Studies

---

218. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009). Furthermore, the court reasoned that tracing the causation between the defendant's acts and the plaintiff's harm was far more difficult and convoluted in climate change litigation than in water pollution cases that rest on federal statutory claims. *Id.* at 880.

219. Henderson, *supra* note 215, at 1539.

220. Some definitions of public nuisance are even more vague. For example, the Florida Supreme Court has proclaimed that "a public nuisance may be classified as something that causes 'any *annoyance* to the community or harm to public health.'" Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1036 (Fla. 2001) (quoting Kirk v. U.S. Sugar Corp., 726 So. 2d 822, 826 (Fla. Dist. Ct. App. 1999)).

221. SHUCK, *supra* note 168, at 431.

222. *Id.*

223. While plaintiffs have alleged that courts should hold specific defendants liable for the consequences of global climate change, to date, there have been no cases holding a specific defendant liable for its effects on global warming. *See supra* Part III.D.

224. State v. Lead Indus. Ass'n, 951 A.2d 428, 434, 437 (R.I. 2008).

showed that property owners' neglect in maintaining surfaces covered with paint containing lead dramatically increased the likelihood of childhood lead poisoning.[225] The pigment manufacturers filed a third-party complaint alleging that property owners, instead of the manufacturers, should be forced to abate the public nuisance and that, if the manufacturers were to be held liable, they should be reimbursed, in whole or in part, by the property owners.[226] On one hand, the addition of 300,000 third-party defendants to an already complex legal action was clearly impossible.[227] On the other hand, the court's ruling left unresolved the legitimate question of whether property owners, at least those who failed to maintain their properties and who thus contributed to childhood lead poisoning, should bear some or all of the legal responsibility for the risks posed by lead-based paint hazards.[228] In short, if it is difficult or impossible for a trial court to consider the contributions of a significant number of property owners to childhood lead poisoning, the courts lack the judicial competence to resolve the issue of preventing childhood lead poisoning in the state. Yet this challenge pales in comparison with those facing courts in climate change litigation. Neither set of public health problems should be resolved in the courtroom.

B. Separation of Powers

Another one of Schuck's criterion of judicial competence is "legitimacy,"[229] which begins with the constitutional allocation of powers among the three coordinate branches of government and includes other factors affecting public respect for the law.[230] As James A. Henderson, Jr. recently concluded, "[I]t is commonly understood that, in a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates."[231] The same certainly appears true of regulation designed to prevent statewide public health problems and global environmental problems.

The concept of separation of powers within the federal system is derived from the allocation of powers to the legislative, executive, and judicial branches of government by the United States Constitution.[232] The Supreme Court has

---

225. *See* Christy Darlene Plumer, Setting Priorities for Prevention of Childhood Lead Poisoning in the City of Providence (May 2000) (unpublished M.A. thesis, Brown University) (on file with the Center for Environmental Studies, Brown University), *available at* http://envstudies.brown.edu/theses/2000FinalPlumer.pdf.

226. Third Party Complaint at 3, *Lead Indus. Ass'n*, 951 A.2d 425 (No. 99-5226).

227. *Id.*

228. *Id.*

229. SCHUCK, *supra* note 168, at 432–34.

230. *Id.*

231. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005).

232. *See* U.S. CONST. art. I, § 1 (allocating all federal legislative powers to Congress); *id.* art. II, § 1 (allocating all executive power to the President); *id.* art. III, § 1 ("The judicial [p]ower . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

consistently recognized "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate [b]ranches is essential to the preservation of liberty."[233] As part of the separation of power concept, the authority of federal courts, derived from Article III of the Constitution, is limited to "cases" and "controversies."[234] This limitation on judicial authority overlaps with the judicial competency concerns previously considered.[235] In *Mistretta v. United States*,[236] the Supreme Court stated that the business of federal courts is limited to questions presented in a form "traditionally thought to be capable of resolution through the judicial process."[237] This constraint on courts is to ensure that they are neither "assigned nor allowed 'tasks that are more properly accomplished by [other] branches.'"[238]

The requirements of justiciability follow from separation of powers concerns "about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[239] The application of two specific aspects of justiciability, standing and the political question doctrine, to public interest tort litigation, particularly climate change litigation, will be considered in Part VI.

Most state constitutions explicitly provide that separation of powers principles apply to their state governments.[240] Even in the absence of explicit provisions, many scholars find separation of powers principles implicit within the structure of state government.[241] Additionally, Laurence Tribe argues that

---

233. Mistretta v. United States, 488 U.S. 361, 380 (1989); *see also* Clinton v. City of New York, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring) ("When the legislative and executive powers are united in the same person or body, . . . there can be no liberty . . . ." (quoting THE FEDERALIST NO. 47, at 338 (James Madison) (Benjamin Fletcher Wright ed., 1961)) (internal quotation marks omitted)); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.").

234. U.S. CONST. art. III, § 2.

235. *See supra* Part IV.A.

236. 488 U.S. 361 (1989).

237. *Id.* at 385 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)) (internal quotation marks omitted).

238. *Id.* at 383 (quoting Morrison v. Olson, 487 U.S. 654, 680–81 (1988)).

239. Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring)).

240. *See, e.g.*, FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches . . . ."); ILL. CONST. art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."); N.J. CONST. art. III, § 1 ("The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No . . . one branch shall exercise any of the powers properly belonging to either of the others . . .").

241. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 161 (2005) ("Every state constitution . . . creates a horizontal separation of powers by dividing the power of state government among a legislative, executive, and judicial branch."); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist*

the language of the United States Constitution implies that separation of powers principles pertain to the states.[242]

Even though the separation of powers principle typically applies to both the federal and state governments, there are significant differences between how state constitutions and the United States Constitution allocate powers among the coordinate branches of government. Most important, unlike the limited congressional powers enumerated in the United States Constitution, the powers of state legislatures are plenary in the absence of constitutional provisions that either limit legislative powers or grant powers to the executive or judicial branch.[243]

Climate change and the other public health problems prompting public interest tort actions are the society-wide harms our constitutional structures suggest the political branches should handle. Public interest tort law requires a policy decision more of the type appropriate for political institutions deriving their legitimacy from political accountability—not a court's reasoned elaboration from precedents most often bearing little or no resemblance to the large-scale problems at hand.[244] Legislatures and administrative agencies, not courts, should determine the trade-offs between ecological and economic considerations. These institutions should make the thousands of decisions concerning a myriad of issues required to enact a national emissions reduction program. Climate change policy should not evolve from an amalgamation of uncoordinated, individual court decisions in venues scattered throughout the country.

Public interest tort litigation against manufacturers of disease-causing products poses similar separation of powers concerns. Fundamentally, the Rhode Island lead pigment litigation posed the issues of whether all lead contained in paint on the walls of residences in Rhode Island constituted a public nuisance or only those premises containing lead-based paint hazards;[245] and whether the responsibility for abating the nuisances should rest with property owners or with producers of lead pigment.[246] The Rhode Island legislature had

---

Separation of Powers Ideals in the States, 52 VAND. L. REV. 1167, 1190–91 (1999) (concluding that the separation of powers is implied in states lacking such a constitutional provision).

242. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 133–34 (3d ed. 2000); *see also* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 53–56, 59 (1998). *But see* Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) ("[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." (citing Dreyer v. Illinois, 187 U.S. 71 (1902))); *Dreyer*, 187 U.S. at 84 ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, . . . is for the determination of the State.").

243. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 16 (1998); Harold H. Bruff, *Separation of Powers under the Texas Constitution*, 68 TEX. L. REV. 1337, 1348 (1990) ("[T]he legislature's power is plenary . . . subject only to limits found in the state or federal constitution.").

244. *See* HART & SACKS, *supra* note 187, at 145–50.

245. Peter B. Lord, *Jury in Lead-Paint Lawsuit Asks Judge for Clarifications*, PROVIDENCE J., Oct. 26, 2002, at A6.

246. DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES 148–55 (2010).

previously answered both questions, at least in part. Statutes declared that a public nuisance consisted of any residential rental unit where an owner failed to meet lead hazard reduction orders[247] and placed the responsibility for remediation squarely on the shoulders of the property owner.[248] In these circumstances, the trial court's conclusions that the "presence of lead pigment in paints and coatings in or on buildings" itself "constitute[d] a public nuisance" and that the pigment manufacturers should abate the public nuisance[249] displayed a lack of deference to and respect for the coordinate branches of government.

Separation of powers concerns are less obvious and more questionable in lawsuits brought by states and cities against manufacturers of tobacco products and handguns seeking damages. The requested relief in these lawsuits usually consists of reimbursement for funds expended to address product-caused public health crises.[250] Adjudicating a request for damages is a traditional judicial function and, on its face, does not appear to intrude upon the powers allocated to the legislative and executive branches. Yet, as previously considered, the patent intent of the attorneys filing legal actions was to replace the existing regulatory regimes.[251] The tobacco and handgun litigation, as well as climate change and lead pigment litigation, implicated both judicial competence and separation of powers concerns. The litigants asked courts to assume the society-wide regulatory powers traditionally assumed by the political branches. Further, the litigation inherently required balancing policy factors for which no judicially discoverable and manageable standards exist—both in deciding whether a public nuisance existed and in designing a remedy. Even though the complaints in the states' tobacco litigation sought damages as a remedy, the detailed provisions of the Master Settlement Agreement (MSA) that ended the litigation were no accident. The MSA consisted of regulatory standards of the kind that our customary practices of governance suggest should result from a political process, not the reasoned elaboration of the judicial process.

V. DOCTRINAL EXIT RAMPS FOR PUBLIC PRODUCTS LITIGATION

During the past fifteen years, plaintiffs frequently have filed tort actions aimed primarily at creating judicial regulatory regimes. Rarely have they been successful, however.[252] The states' tobacco litigation, resolved through

247. R.I. GEN. LAWS § 23-24.6-23(d) (2008).

248. *Id.* at § 42-128.1-7 to -8 (2006).

249. State v. Lead Indus. Ass'n, 951 A.2d 428, 442 (R.I. 2008).

250. *See supra* notes 88, 103–04 and accompanying text.

251. *See supra* Part III.A–D.

252. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d Cir. 2008) (dismissing plaintiff's public nuisance claim against gun manufacturers and suppliers); City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 129 (3d Cir. 1993) (dismissing plaintiffs' abatement claim against lead pigment manufacturers); NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 526 (E.D.N.Y. 2003) (dismissing plaintiff's public nuisance claim against handgun manufacturers, distributors, and importers for failure to prove the elements of the cause of action).

settlement, is arguably an exception. But even here, some public health experts viewed the Master Settlement Agreement as a failure,[253] and the tobacco companies' willingness to settle was motivated more by a desire to avoid regulation through the political branches than from fear of liability.[254] In the other cycles of tort actions intended to overturn the enactments or forbearance of the political branches of government, courts have almost always rejected the invitation to regulate industries or solve large-scale social problems.

Part V explores the reasons behind the dismissal of actions brought by state and local governments and other collective entities against the manufacturers of products such as tobacco, handguns, and lead paint. Courts either decided that the substantive tort, usually public nuisance, was not broad enough to encompass the collective action envisioned by the attorney general and the mass tort attorneys[255] or that the harm to the state, city, or other collective entity was "derivative and remote."[256] Part VI evaluates whether two of the judicial restraint doctrines developed in contexts outside the common law of torts, namely standing and the political question doctrine, should preclude the courts' substantive consideration of climate change litigation and possibly even other forms of public interest tort litigation. Regardless of the doctrines in play, lurking in the background of these cases is a nascent, common theme: It is not the function of the judiciary, using tort law, to perform essentially macro-regulatory functions.

A. Dismissal on Substantive Grounds: Public Nuisance

When courts have ruled in cases involving legal actions brought by state and municipal governments against product manufacturers, such as the manufacturers of handguns[257] and lead pigment,[258] they almost always have

253. *See, e.g.*, DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 360–61 (2001) (discussing the views of Kessler, the former commissioner of the Food and Drug Administration and a proponent of strong anti-tobacco regulation, on the MSA); Renee Twombly, *Tobacco Settlement Seen as Opportunity Lost to Curb Cigarette Use*, 96 J. NAT'L CANCER INST. 730 (2004), *available at* http://jnci.oxfordjournals.org/content/96/10/730.full.pdf ("Many physicians and public health officials who have long been involved in trying to curb the nation's craving for tobacco see the MSA as just one more example of how the tobacco industry has outsmarted its opponents at every turn.").

254. *See* Rabin, *supra* note 83, at 339–41 (discussing pre-MSA proposed legislation that would have placed larger financial obligations and regulatory restrictions on the tobacco industry than the MSA ultimately did).

255. *See infra* Part V.A.

256. *See infra* Part V.B.

257. *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 422 (3d Cir. 2002) (dismissing claim because "plaintiffs fail[ed] to state a cognizable public nuisance claim against the gun manufacturers"); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540–41 (3d Cir. 2001) (per curiam) ("To extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court."); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1115–16 (Ill. 2004) ("[T]here is no authority for the unprecedented expansion of the concept of

rejected the expansion of the traditional boundaries of public nuisance liability to include product-caused harms.[259] The federal common law of nuisance and state public nuisance law also provide the principal substantive claims in the climate change litigation.[260]

---

public rights . . . . [P]laintiffs' claim does not meet all the required elements of a public nuisance action . . . .").

258. *See, e.g.*, City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 133 (Ill. App. Ct. 2005) (dismissing claim because plaintiff failed to adequately allege that the defendants' products proximately caused a public nuisance); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 116 (Mo. 2007) (en banc) (dismissing city's public nuisance claim because it could not prove causation due to lack of product identification evidence); *In re* Lead Paint Litig., 924 A.2d 484, 502 (N.J. 2007) (dismissing public nuisance claim because the lead-based paint products had "become dangerous through deterioration and poor maintenance by the purchasers"); State v. Lead Indus. Ass'n, 951 A.2d 428, 452–55 (R.I. 2008) (dismissing claim because the complaint failed to allege a public right and failed to show that defendant had control over the product at time of the harm).

259. *But see* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141–44 (Ohio 2002) (refusing to dismiss a public nuisance claim against firearm manufacturers); City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 892, 897 (Wis. Ct. App. 2004) (allowing claim of public nuisance to proceed against lead paint manufacturers).

Courts have also dismissed causes of action against product manufacturers based on other claims (e.g., unjust enrichment) that attempt to aggregate individual harms and pursue collective grounds for recovery, *e.g.*, Perry v. Am. Tobacco Co., 324 F.3d 845, 851 (6th Cir. 2003) (dismissing unjust enrichment claim on remoteness grounds); Or. Laborers–Emp'rs Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957, 968 (9th Cir. 1999) ("[Plaintiffs] cannot maintain an action for unjust enrichment against the defendants just because the defendants were incidentally benefitted."), and indemnity, *e.g.*, Serv. Emp. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 83 F. Supp. 2d 70, 93 (D.D.C. 1999) (rejecting plaintiffs' tort theory of indemnity); Allegheny Gen. Hosp. v. Philip Morris, Inc., 116 F. Supp. 2d 610, 621–22 (W.D. Pa. 1999) (dismissing hospital's indemnity action because the hospital wasn't "liable for any torts committed [by defendants] upon [its] . . . patients with tobacco-related diseases"). For more discussion on unjust enrichment and indemnity claims, see Gifford, *supra* note 77, at 929–32.

260. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009) (noting that plaintiffs, in seeking to force defendants to reduce carbon dioxide emissions, brought their claims "under the federal common law of nuisance or, in the alternative, state nuisance law"); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009) (noting that plaintiffs brought claims under both federal common law and state public nuisance law).

Whether or not a federal common law of nuisance exists and applies to the climate change litigation is a hotly disputed issue between the parties. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim upon Which Relief Can Be Granted at 8–13, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1:04-CV-05669-LAP), 2004 WL 5614405. This issue is not considered in this Article because it is not directly relevant to the characteristics defining public interest tort law or the legitimacy of this litigation phenomenon.

I also did not consider whether the Clean Air Act displaces the federal common law of nuisance, *see Am. Elec. Power Co.*, 582 F.3d at 371–88, or preempts state law public nuisance claims. This topic, while obviously relevant to separation of powers concerns, has not played a critical role in the current round of climate change litigation. Currently, the EPA is proceeding with plans to regulate greenhouse gas emissions from automobiles, U.S. ENVTL. PROT. AGENCY, OFFICE OF TRANSP. AND AIR QUALITY, EPA-420-F-10-014, EPA AND NHTSA FINALIZE HISTORIC NATIONAL PROGRAM TO REDUCE GREENHOUSE GASES AND IMPROVE FUEL ECONOMY FOR CARS AND TRUCKS (2010), and will soon regulate emissions from industrial sources, David A.

As described later in this section, when courts dismissed public interest tort actions, they sometimes did so noting that a contrary holding would create a conflict with regulatory frameworks previously established by the legislature. Whether or not courts openly acknowledged it, their more restrictive interpretations of public nuisance liability likely emerged from an understanding that a contrary holding would leave the trial court in the inappropriate situation of supervising statewide public health remediation measures.

In deciding whether to extend public nuisance liability to the manufacturers of products that caused public health problems, courts had a choice. On one hand, many courts in the past defined public nuisance in a very vague, expansive manner. For example, the Supreme Court of Florida proclaimed that "a public nuisance may be classified as something that causes 'any *annoyance* to the community or harm to public health.'"[261] Particularly in an era in which plaintiffs' attorneys and judicial clerks both use online database searches as their primary form of legal research, it would be understandable (but wrong) for a court to apply such a broad definition to the facts of childhood lead poisoning or handgun violence and syllogistically conclude that a plaintiff had established a public nuisance. Simplistically, any mass product that causes repeated and numerous harms probably fits within this textual description of a public nuisance. On the other hand, the long history of public nuisance law shows that courts traditionally impose liability only under far more restrictive circumstances.[262]

In its leading decision in *State v. Lead Industries Ass'n*,[263] the Rhode Island Supreme Court held that the lead pigment producers' manufacture and distribution of lead pigment did not constitute a public nuisance.[264] In other

---

Fahrenthold & Juliet Eilperin, *EPA to Pick up Climate Change Where Congress Left Off*, WASH. POST, Aug. 4, 2010, at A3. It is likely that federal preemption will play a relevant role, perhaps a decisive role—and one obviously intertwined with separation of powers—in future climate change litigation.

261. Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1036 (Fla. 2001) (quoting Kirk v. U.S. Sugar Corp., 726 So. 2d 822, 826 (Fla. Dist. Ct. App. 1999)). In 1982, the Supreme Court of Illinois acknowledged the indeterminate boundaries of public nuisance liability when it stated that "[t]he concept of common law public nuisance does elude precise definition." City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 164 (Ill. 1982).

262. *See* Gifford, *supra* note 120, at 800–33.

263. 951 A.2d 428 (R.I. 2008).

264. *Id.* at 455. The court began with the generally accepted notion that for a defendant to be held liable for a public nuisance, the defendant's activities must have violated "a right common to the general public." *Id.* at 446. Production and sale of lead pigment used in lead-based paint does not constitute a violation of a public right. *Id.* at 455. The court also noted that a "public nuisance typically arises on a defendant's land," a factor not present in the case. *Id.* at 452 (citing *In re Lead Paint Litig.*, 924 A.2d at 496); *see also* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1117 (Ill. 2004) (noting that Illinois courts have applied the public nuisance doctrine many times where the defendant's conduct in creating the nuisance involved the use of land). Third, the court concluded that to be held liable for public nuisance, "a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*." *Lead Indus. Ass'n*, 951 A.2d at 449; *see also In re Lead Paint Litig.*, 924 A.2d at 499 ("[A] public nuisance, by

cases, courts similarly have almost universally rejected government actions claiming public nuisance liability and seeking to substitute judicial action for what state attorneys general and mass plaintiffs' attorneys claim are inadequate responses to public health problems from the political branches of government.[265] Though generally unarticulated, it seems likely that the issue of judicial competence played a major role in these decisions. The Rhode Island Supreme Court presumably was not oblivious to the fact that if it had affirmed the trial court judgment finding a public nuisance and ordering the defendants to abate it,[266] the trial court would then have been required to supervise the remediation of lead paint hazards in more than 240,000 residences.[267] Nor were the courts that dismissed public nuisance cases against handgun manufacturers blind to the reality that a contrary ruling would have necessitated that trial court judges regulate the sale and distribution of handguns.[268] Given the choice between hewing close to the line of long-standing requirements for public nuisance liability and expanding those requirements to meet new social realities, courts chose the more conservative approach.

In another, more explicit manner, the recent dismissal of public nuisance claims against lead pigment manufacturers reflects separation of powers concerns—namely, courts' recognition that contrary holdings would result in direct conflicts with prior legislative regulations.[269] In the Rhode Island opinion, the court stressed that the legislature had enacted a program for preventing childhood lead poisoning that would be inconsistent with holding the lead pigment manufacturers liable.[270] The court noted that "the General Assembly has recognized that landlords . . . are responsible for maintaining their premises

---

definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right."). Finally, the court held that the defendants' manufacture and distribution of the product was not a proximate cause of the alleged public health harm. *Lead Indus. Ass'n*, 951 A.2d at 455; *see also* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 133 (Ill. App. Ct. 2005) (noting that proximate causation is a requirement in a public nuisance action); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 116 (Mo. 2007) (en banc) (holding that the plaintiff failed to meet its causation burden in its public nuisance claim).

265. *See* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d Cir. 2008); City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 129 (3d Cir. 1993).

266. *See Lead Indus. Ass'n*, 951 A.2d at 434.

267. *See id.* at 438 n.5. Defendant Sherwin-Williams argued that what the State had proposed was "a statewide abatement program" that would "transform special masters into a mini-agency making and implementing statewide public health policy." Brief of the Sherwin-Williams Company on Separation of Powers, Constitutional Error, and Trial Error at 21, *Lead Indus. Ass'n,* 951 A.2d 428 (No. 07-121-A), 2008 WL 5748817.

268. *See* cases cited *supra* note 257. As Justice Benjamin N. Cardozo wrote, "Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102 (1921).

269. *See* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 139 (Ill. App. Ct. 2005) (citing 410 ILL. COMP. STAT. ANN. 45/1 to /17 (West 2005)); *In re Lead Paint Litig.*, 924 A.2d at 505; *Lead Indus. Ass'n*, 951 A.2d at 457–58.

270. *Lead Indus. Ass'n*, 951 A.2d at 457–58.

and ensuring that the premises are lead-safe."[271] Similarly, in its decision dismissing public nuisance claims against lead pigment and paint manufacturers, the Supreme Court of New Jersey found that the legislature had concluded that the property owner whose poor maintenance practices "created the nuisance" should be responsible for lead hazard abatement.[272] If either the Rhode Island Supreme Court or New Jersey Supreme Court had ruled that pigment manufacturers were responsible for creating the nuisance and for cleaning it up, the ruling would have established a conflict with the legislature's prior enactments.[273] This reasoning, relying on separation of powers concerns, led each state supreme court to construe public nuisance liability narrowly to avoid such a conflict.[274]

---

271. *Id.* at 457.

272. *In re Lead Paint Litig.*, 924 A.2d at 501.

273. *See id.* at 494; *Lead Indus. Ass'n*, 951A.2d at 457–58.

274. *In re Lead Paint Litig.*, 924 A.2d at 494–99; *Lead Indus. Ass'n*, 951 A.2d at 446–52. Most of the requirements for public nuisance liability are satisfied in the climate change litigation. *See* Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 352–53 (2d Cir. 2009). But public nuisance claims against defendants in climate change litigation still face two, perhaps insurmountable, obstacles. The minimal, even trivial, contributions of any particular defendant to the alleged public nuisance may be inadequate to establish the required element of causation. *Cf.* Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1163 (4th Cir. 1986) (finding the presence of defendant's asbestos-containing product at plaintiff's workplace insufficient to raise an inference that the exposure was a substantial factor in plaintiff's development of asbestosis); Peerman v. AC & S, Inc., 866 F. Supp. 388, 389 (S.D. Ind. 1993) (finding that testimony indicating plaintiff had once walked through an area where asbestos was being used for a total of one week at his workplace did not satisfy causation requirement); RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965) (requiring defendant's conduct to be a "substantial factor" in order to constitute causation in negligence law and providing that the extent to which other factors contribute to the harm is a relevant factor).

The second obstacle to recovery is the requirement that the defendant's interference with the plaintiff's public rights be "unreasonable." *See Lead Indus. Ass'n*, 951 A.2d at 446; RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). I think an open question exists regarding whether a jury would find that supplying electricity to the northeastern quadrant of the United States, at a reasonable cost, is unreasonable, even if it does cause a 2.5% increase in human contributions to global warming. *See supra* notes 9–12 and accompanying text.

Until recently, liberal pleading requirements meant that it was unlikely that defendants could have these public nuisance claims dismissed early in the proceedings, and that these issues of causation and "unreasonable interference" probably would not be resolved until the trial, or at least until the summary judgment phase of litigation. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. . . . [A]ll the Rules require is 'a short and plain statement of the claim'" (quoting FED. R. CIV. P. 8(a)(2))); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (citing FED. R. CIV. P. 8; Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 723–24 (7th Cir. 1986)) (noting that complaints are "supposed to be succinct" and are not required to recite elaborate facts). However, the Supreme Court recently has held that federal courts can dismiss a complaint when its allegations are implausible or merely conclusory. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (citing Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964–66 (2007)).

B. "Remote and Derivative" Harms

When a government or other collective entity, acting as a "super-plaintiff," seeks to recover for an amalgamation of harms originally sustained by many individuals and sues a product manufacturer or other business, courts often dismiss the action because the plaintiff's claims are "remote and derivative."[275] Courts have frequently used this reasoning when a state[276] or municipal government,[277] a hospital,[278] a medical insurance company,[279] or a union health and welfare benefits plan[280] sues tortfeasors who have injured victims for whom the collective entity later provided medical expense reimbursement. On its face, the language of these opinions appears to respond to claims for damages, but in reality, plaintiffs filed many of these legal actions to implement a new regulatory protocol.[281]

Sometimes the "remote and derivative" basis for dismissal is seated within the requirements for standing. For example, in *Ganim v. Smith & Wesson*

---

275. *See, e.g.*, City & Cnty. of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1141–43 (N.D. Cal. 1997) (stating that payment of medical bills resulting from tobacco companies' actions was too remote to justify recovery under the common law of negligence); District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 661 (D.C. 2005) (en banc) (dismissing public nuisance claim due to a tenuous causal chain); *cf.* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 133 (Ill. App. Ct. 2005) (rejecting the city's claim against a manufacturer of lead pigment because of a lack of proximate causation); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 201 (N.Y. App. Div. 2003) (finding a lack of duty and proximate causation because of a tenuous causal chain).

276. *See, e.g.*, State *ex rel.* Miller v. Philip Morris, Inc. 577 N.W.2d 401, 406 (Iowa 1998) (dismissing claim "because the injures [were] derivative and too remote" (internal quotation marks omitted)); *Lead Indus. Ass'n*, 951 A.2d at 455 ("[T]here was no set of facts alleged in the state's complaint that, even if proven, could have demonstrated that defendants' conduct . . . interfered with a public right or that defendants had control over the product . . . .").

277. *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 426 (3d Cir. 2002) (dismissing claim on grounds that the connection between the City's injuries and the handgun manufacturers' conduct was "attenuated and weak"); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2001) ("This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim."); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 129–30 (Conn. 2001) ("[T]he [city and Mayor] lack standing because the harms they claim are too remote from the defendants' misconduct, and are too derivative of the injuries of others . . . .").

278. *See, e.g.*, Allegheny Gen. Hosp. v. Philip Morris, Inc., 116 F. Supp. 2d 610, 617 (W.D. Pa. 1999) (dismissing a hospital's claim for "being too remotely connected in the causal chain from any wrongdoing on defendants' part" (quoting Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 928 (3d Cir. 1999)) (internal quotation marks omitted)).

279. *See, e.g.*, State *ex rel.* Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 495 (Minn. 1996) (finding that plaintiff's injury was too remote for recovery).

280. *See, e.g.*, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 244 (2d Cir. 1999) ("[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by plan participants and therefore too remote . . . for them to have standing to sue defendants.").

281. *See supra* Part III.

Corp.,[282] the municipality of Bridgeport sued manufacturers of handguns, claiming harm to the city resulting from handgun violence, including expenditures for additional police, emergency, and social service functions, and loss of investment, economic development, and tax revenues attributable to loss of productivity.[283] The court held that the city lacked standing because the injuries were too remote and derivative to enable it to recover.[284] It traced the distribution of the manufacturers' products through the distribution chain, including gun wholesalers or distributors, retailers, legitimate or illegal consumers, and ultimately into the hands of unauthorized users who acquired the guns in the "illegal market" and then inflicted harm on victims.[285]

On other occasions, the "remote and derivative" nature of the harms suffered by the government or another collective plaintiff led the court to conclude that the plaintiff had not established the requisite element of proximate causation. In *City of Chicago v. Beretta U.S.A. Corp.*,[286] the Illinois Supreme Court held that because the alleged public nuisance in Chicago was "several times removed from the initial sale of individual weapons" by the defendant gun manufacturers, the manufacturers neither owed a duty nor proximately caused the city's asserted harms.[287] Finally, in other instances, courts appear to dismiss actions on a "remote and derivative" basis without explicitly tying the analysis to either standing or proximate causation.[288]

In effect, these opinions hold that municipal governments and other collective entities cannot ask the judicial system to regulate products that cause widespread, collective harms or harms that occur to others. Courts use different doctrinal labels, but the real message is that these are not the kind of person-to-person disputes that courts should be adjudicating. Instead, these are societal problems that the legislative branch and administrative agencies should address.

---

282. 780 A.2d 98 (Conn. 2001).

283. *Id.* at 108–09.

284. *Id.* at 133–34.

285. *Id.* at 123–24 (internal quotation marks omitted).

286. 821 N.E.2d 1099 (Ill. 2004).

287. *Id.* at 1137–38, 1148.

288. *See, e.g.*, State *ex rel.* Miller v. Philip Morris Inc., 577 N.W.2d 401, 406–07 (Iowa 1998) (dismissing claim based on the "remoteness doctrine" and describing it as "a legal doctrine incorporating public policy considerations" (quoting Kraft Chem. Co. v. Ill. Bell Tel. Co., 608 N.E.2d 243, 245 (Ill. App. Ct. 1992))); State *ex rel.* Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 495 (Minn. 1996) (applying the remoteness doctrine to dismiss a suit against tobacco companies).

VI. APPLYING JUDICIAL RESTRAINT DOCTRINES TO CLIMATE CHANGE LITIGATION

Beginning with the climate change litigation, tort actions designed to impose comprehensive regulation found a new home—federal courts.[289] Two different requirements of federal justiciability—standing and the political question doctrine—now arguably provided courts, at least in some circumstances, with grounds to dismiss public interest tort actions intended to implement macro regulation. This Part contends that the judicial restraint principles of standing and the political question doctrine, most often regarded as out of place in tort actions between private parties, have an important role to play in public interest tort actions. Laurence Tribe, perhaps the nation's preeminent constitutional law scholar, and two coauthors recently addressed the Second Circuit's decision in *Connecticut v. American Electric Power Co.*[290] They noted that the Supreme Court has made it obvious "[t]hat courts must look beyond the label attached to the plaintiff's cause of action . . . ."[291] Tribe and his colleagues suggested that the Court should use the standing doctrine "to prevent some of the most audacious judicial sallies into the political thicket, as it might in the climate change case, where plaintiffs assert only undifferentiated and generalized causal chains from their chosen defendants to their alleged injuries."[292] Finally, they also urged the Court to intervene and restore the political question doctrine's "bulwark against judicial meddling in disputes . . . so plainly immune to coherent judicial management as to be implicitly entrusted to political processes."[293]

A. Standing

1. Purposes Served by the Standing Doctrine

When plaintiffs—regardless of whether they are state governments,[294] municipal governments,[295] members of a certified class,[296] land trusts,[297] or self-

289. *See* Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 1–3 (Wash. Legal Found. Critical Legal Issues Working Paper Series No. 169, 2010), *available at* http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_wp.pdf.

290. *Id.* at 12–14.

291. *Id.* at 14.

292. *Id.* at 24.

293. *Id.*

294. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 316 (2d Cir. 2009) (listing eight states as plaintiffs: California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin).

295. *See id.* (listing New York City as a plaintiff).

296. *See* Comer v. Murphy Oil, USA, 585 F.3d 855, 859 (5th Cir. 2009) (identifying class members as residents and owners of Mississippi Gulf Coast properties).

297. *Am. Elec. Power Co.*, 582 F.3d at 318 (identifying three land trusts as plaintiffs filing a separate complaint).

governing Native American tribes[298]—sued private defendants contributing to global climate change, they each faced challenges regarding their standing to file such claims.[299] A leading treatise defines standing as a requirement of justiciability that enables courts "to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination."[300]

One set of justifications for the standing doctrine focuses on the judicial process itself. First, adjudications begun by litigants without concrete and immediate harms traceable to the activities of the government or other defendants may yield poor results.[301] As Justice Kennedy explained in his concurring opinion in *Lujan v. Defenders of Wildlife*,[302] the requirement of a "concrete and personal" injury "preserves the vitality of the adversarial process by assuring . . . that the parties . . . have an actual, as opposed to professed, stake in the outcome . . . ."[303] This assures, continued Justice Kennedy, "that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"[304] Second, requiring courts to entertain the merits of cases that do not require resolution could flood the courts and strain judicial resources.[305] Third, according to Maxwell Stearns, the standing doctrine reduces the ability of special interest groups to "game the

---

298. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

299. *Comer*, 585 F.3d at 860–69; *Am. Electric Power Co.*, 582 F.3d at 332–49; *Kivalina*, 663 F. Supp. 2d at 877–82.

300. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2008) (citing Ala. Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1308 (11th Cir. 2002)).

301. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 542 (1986) ("[S]tanding requirements . . . ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts."); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 309 (1979) ("[A] traditional plaintiff [is] better able vividly to illustrate the adverse effects of the complained-of activity[.]").

302. 504 U.S. 555 (1992).

303. *Id.* at 581 (Kennedy, J., concurring).

304. *Id.* (Kennedy, J., concurring) (omissions in original) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

305. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk . . . impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens."); Ill. Dep't of Transp. v. Hinson, 122 F.3d 370, 373 (7th Cir. 1997) ("The main contemporary reason for having rules of standing . . . is to prevent kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation from the people directly affected . . . ." (citing *Valley Forge Christian Coll.*, 454 U.S. at 473; People Organized for Welfare & Emp't Rights v. Thompson, 727 F.2d 167, 172 (7th Cir. 1984))); *Thompson*, 727 F.2d at 173 ("If passionate commitment plus money for litigating were all that was necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed.").

system" through control of the order in which the Supreme Court considers cases.[306] This sequencing of cases can influence "the substantive evolution of legal doctrine"[307] because of the precedential effects of the first cases in the queue.[308] If interest groups were able to select cases with facts most likely to yield decisions consistent with their ideological causes and without any requirement that the plaintiff experienced a discrete and concrete injury, it would be easier for them to "manipulate" the development of the law.[309]

The second set of justifications for standing consists of objectives arising from the separation of powers.[310] Stearns writes that "the modern standing doctrine preserves an important distinction between the appropriate nature of judicial and legislative lawmaking."[311] As previously mentioned, courts deciding tort disputes create law when a steady stream of tort awards regulates the conduct of potential tortfeasors.[312] But when courts depart from their typical role of making law only "on an ad hoc and as needed basis,"[313] standing doctrines may be implicated.[314] Congress, not the courts, writes Stearns, is the institution we expect to respond when all of us have been injured.[315]

Proponents of climate change litigation sometimes argue that courts must decide these cases because of the political deadlock in Congress.[316] But Stearns argues that standing also furthers separation of powers in this situation.[317] He reasons, "In contrast with appellate courts, . . . legislatures are free not to decide issues presented to them for consideration . . . ."[318] Thus, according to Stearns, "standing protects Congress'[s] power to leave issues of law undecided unless and until an appropriate legislative consensus has formed."[319]

---

306. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1315 (1995).

307. *Id.* at 1318.

308. *Id.* at 1318 n.24.

309. *See id.* at 1319. As Stearns explains, "[S]tanding serves the critical function of encouraging the order in which cases are presented to be based upon fortuity rather than litigant path manipulation." *Id.* at 1359. Thus, "standing makes the inevitable path dependency that results from stare decisis substantially more tolerable." *Id.*

310. *Id.* at 1319–20; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1459 (1988).

311. Stearns, *supra* note 306, at 1319.

312. *See supra* note 147 and accompanying text.

313. Stearns, *supra* note 306, at 1388.

314. *See id.* at 1392.

315. *Id.* at 1406.

316. *See supra* notes 131, 136–45 and accompanying text.

317. *See* Stearns, *supra* note 306, at 1319.

318. *Id.*

319. *Id.*

2. *Standing in Climate Change Litigation*

When the Second Circuit in *Connecticut v. American Electric Power Co.* and the district court in *Native Village of Kivalina v. ExxonMobil Corp.* addressed the standing issue, both applied the three-part standing test that the Supreme Court articulated in *Lujan v. Defenders of Wildlife*.[320] This test requires the plaintiff to establish (1) an "injury in fact," (2) caused or traceable to the defendant's activities, which (3) the court is capable of redressing.[321] Thomas W. Merrill, in his analysis of standing requirements in climate change litigation, finds that the Supreme Court has also required plaintiffs to allege harms that are not simply "generalized grievances shared by all citizens."[322]

In *American Electric Power Co.*, the court noted that "the injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'"[323] It was the second prong of the standing requirements, causation or traceability, where the dueling courts disagreed. On one hand, the Second Circuit held in *American Electric Power Co.* that the plaintiffs' allegations were sufficient to allege that their harms were "'fairly traceable' to [the d]efendants' conduct."[324] The court reasoned that causation for standing purposes is less demanding than the causation that substantive tort law requires.[325] It also pointed out that even when the issue is one of satisfying causation as a substantive element of the public nuisance claim, the *Restatement (Second) of Torts* provides that "[t]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution."[326]

On the other hand, the *Kivalina* court's refusal to grant standing to a "self-governing, federally-recognized Tribe of Inupiat Eskimos"[327] also focused on the causation or traceability requirement.[328] Because of the multitude of other sources contributing to global warming, that court held that the defendants'

---

320. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 339 (2d Cir. 2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)); Native Vill. Of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009) (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535 (2008)).

321. *Lujan*, 504 U.S. at 560–61.

322. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL L. 293, 295 (2005); *see also* United States v. Richardson, 418 U.S. 166, 173–74 (1874).

323. *Am. Elec. Power Co.*, 582 F.3d at 341 (quoting LaFleur v. Whitman, 300 F.3d 256, 270 (2d Cir. 2002)). The Fifth Circuit's three-judge panel in *Comer* reached the same result. Comer v. Murphy Oil USA, 585 F.3d 855, 863–64 (5th Cir. 2009). The *Kivalina* court appeared to implicitly recognize that injury-in-fact existed. *See Kivalina*, 663 F. Supp. 2d at 877–80. For a further discussion of the injury-in-fact prong of the *Lujan* test in climate change litigation, see Merrill, *supra* note 322, at 295–97.

324. *Am. Elec. Power Co.*, 582 F.3d at 347.

325. *Id.* at 346 (citing Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992)) ("[T]he 'fairly traceable' standard is not equivalent to a requirement of tort causation.").

326. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 840E (1979)).

327. *Kivalina*, 663 F. Supp. 2d at 868.

328. *Id.* at 877 (citing Bennett v. Spear, 520 U.S. 154, 167 (1997)).

activities were not the "seed" of the plaintiffs' injuries traceable to any of the defendants.[329] The court also reasoned that the plaintiffs could not satisfy the causation or traceability requirement because they were not within "the discharge zone of a polluter and . . . [were] so far downstream that their injuries [could not] fairly be traced to [the] defendant[s]."[330] The opposite conclusion, noted that court, "suggest[ed] that every inhabitant on this Earth [was] within the zone of discharge . . . ."[331] In short, the court seemed to accept the idea, previously presented, that their appropriate role was to adjudicate circumscribed, bounded disputes, not society-wide or even worldwide problems.[332]

Regarding the third prong, redressability, the Second Circuit noted that the Supreme Court had recently stated in *Massachusetts v. EPA*[333] that it is sufficient to allege "that the requested remedy would 'slow or reduce'" global warming.[334] In the *Kivalina* cases, where the requested remedy was damages,[335] there was obviously no problem with the court's ability to redress the plaintiff's harm through damage awards if the court traced the plaintiff's harm to the defendant's conduct.

Merrill's last requirement for standing is that a plaintiff's harms cannot constitute "a generalized grievance."[336] But in climate change litigation, the plaintiffs' asserted harms are diffuse and generalized to an unsurpassable extent—global climate change affects everyone on the Earth.[337] Merrill ultimately reaches the conclusion that this requirement could possibly result in

---

329. *Id.* at 880.

330. *Id.* at 881 (quoting Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 973 (7th Cir. 2005)) (internal quotation marks omitted) (citing Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996)).

331. *Id.*

332. *See Kivalina*, 663 F. Supp. 2d at 881. Merrill's analysis suggests that both courts were wrong on this issue. Merrill, *supra* note 322, at 297–98. Before these decisions, he had prophesied that in an action for damages, such as *Kivalina*, "where liability for an indivisible harm might be apportioned among multiple actors based on some formula (like market share), it [was] doubtful that a court would dismiss the action for want of standing simply because of the defendant's small market share." *Id.* But, he continued, "[p]erhaps in a suit seeking an injunction [such as *American Electric Power Co.*,] relief would be denied . . . on grounds of equity." *Id.* at 298.

333. 549 U.S. 497 (2007).

334. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 348 (2d Cir. 2009) (emphasis omitted) (quoting Massachusetts v. EPA, 549 U.S. at 525).

335. Comer v. Murphy Oil USA, 585 F.3d 855, 859–60 (5th Cir. 2009); *Kivalina*, 663 F. Supp. 2d at 868.

336. Merrill, *supra* note 322, at 298; *see also* Allen v. Wright, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . . ."); United States v. Richardson, 418 U.S. 166, 176–77 (1974) ("This is surely . . . a generalized grievance . . . since the impact on [the plaintiff] is plainly undifferentiated and 'common to all members of the public.'" (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)) (citing Laird v. Tatum, 408 U.S. 1, 13 (1972))).

337. *See* Merrill, *supra* note 322, at 298.

the dismissal of climate change claims brought by both private plaintiffs[338] and states acting as *parens patriae*.[339]

The states' standing to sue as *parens patriae* in global climate change cases has gone unchallenged by defendants and other scholars but arguably undeservedly so. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*,[340] perhaps the United States Supreme Court's most important *parens patriae* opinion, the Court held that the Commonwealth of Puerto Rico had standing in federal courts[341] to represent its "[q]uasi-sovereign interests . . . in the well-being of its populace."[342] This language provides an expansive understanding of *parens patriae* standing.[343] However, a careful analysis of Supreme Court opinions decided before *Snapp* suggests a narrower interpretation of this form of standing. Early *parens patriae* cases consisted almost entirely of disputes between adjoining or nearby states with regard to natural resources and territory.[344] For example, in *Georgia v. Tennessee Copper Co.*,[345] Georgia sought an injunction against a Tennessee manufacturing company for the discharge of noxious gases over its territory.[346] Other Supreme Court decisions have recognized a state's ability to sue *parens patriae* to protect its residents against economic discrimination when such discrimination stems from the victims' identities as citizens of the state.[347] These precedents set the stage for the decision in *Snapp* in which the Supreme Court held that Puerto Rico had a quasi-sovereign interest in protecting its residents from employment discrimination[348] because it "ha[d] an interest in securing observance of the terms under which it participate[d] in the federal system."[349]

In every one of these precedents, the harms suffered by the original (individual) victims—the "populace" whose "well-being" was being protected—were causally connected to their residency within a particular state. In each of

338. *Id.* at 298–99.

339. *Id.* at 304–05.

340. 458 U.S. 592 (1982).

341. *Id.* at 609.

342. *Id.* at 602.

343. The fact that the Court felt compelled to immediately limit the impact of its holding suggests that it recognized the expansive nature of its language: "Formulated so broadly, the [well-being of the populace] concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.*

344. *See, e.g.*, Kansas v. Colorado, 206 U.S. 46, 117 (1907) (determining whether the depletion of water from the Arkansas River by the State of Colorado for irrigation purposes injured the State of Kansas); Missouri v. Illinois (*Missouri I*), 180 U.S. 208, 242–43 (1901) (addressing Missouri's nuisance action against Illinois for the Mississippi River bringing sewage from Chicago into Missouri).

345. 206 U.S. 230 (1907).

346. *Id.* at 236.

347. *E.g.*, Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923) (allowing a state to sue for an injunction to stop the cutting of fuel supplies to the state).

348. *Snapp*, 458 U.S. at 608.

349. *Id.* at 607–08.

the economic discrimination cases, the economically harmed individuals were harmed because they were citizens of a particular state and not another jurisdiction.[350] Similarly, in the pollution cases, the harms to private property owners occurred because their properties, polluted by the defendant's activities, were physically located at a particular location within the plaintiff state's territorial boundaries instead of anywhere else on the face of the Earth.[351] In other words, in each instance, the victims' harms were directly related and causally connected to their identity as residents of the state that sought to vindicate their interests through *parens patriae* litigation.

In contrast, the state of residence and the harm sustained are independent variables in climate change *parens patriae* actions.[352] Global climate change is a worldwide problem, and an individual's residence in Connecticut neither increases nor decreases the threat of global climate change to that person. Unless courts decide that states are entitled to assume the role of "super-plaintiff" and assert the rights of victims of harms that are limited by neither jurisdiction nor geography, granting states standing to assert their claims seems out of place.

In *Massachusetts v. EPA* the Supreme Court held that Massachusetts and the other plaintiff states had standing as *parens patriae* to sue the EPA[353] to compel it to regulate the emissions of four greenhouse gases under the provisions of the Clean Air Act.[354] This holding does not necessarily mean, however, that states or other plaintiffs have standing in federal court to sue private defendants on common law tort claims. Justice Stevens, writing for the majority, found that the Clean Air Act itself granted litigants a procedural right to challenge the EPA's rejection of its rulemaking authority and that a state "is entitled to special solicitude in our standing analysis."[355] The Court reasoned, "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, [and] it cannot negotiate an emissions treaty with China or India . . . ."[356] These powers, continued the Court, "are now lodged in the Federal Government, and

350. For example, in *Snapp*, the Court focused on the fact that the injured were almost exclusively Puerto Rican. *See id.* at 594. "[W]e have no doubt that a State could seek, in federal courts, to protect its residents from such discrimination to the extent that it violates federal law." *Id.* at 609. In *Standard Oil*, Hawaii alleged in its *parens patriae* claim that the defendants monopolized only Hawaii's petroleum market in violation of antitrust laws. *Standard Oil*, 405 U.S. at 254–55.

351. For example, in *Tenn. Copper Co.*, Georgia's bill in equity only cited damages that occurred within the state as result of the [d]efendant's noxious gas. *Tenn. Copper Co.*, 206 U.S. at 236.

352. *See* Massachusetts v. EPA, 549 U.S. 497, 522 (2007) (noting that the "climate-change risks are 'widely shared'").

353. *Id.* at 526.

354. *Id.* at 505. For the provision of the Clean Air Act at issue in *Massachusetts v. EPA*, see 42 U.S.C. § 7521(a)(3)(A)(i) (2006).

355. *EPA*, 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1) (2006)).

356. *Id.* at 519.

[in exchange,] Congress has ordered EPA to protect Massachusetts . . . ."[357] Of course, no state's relationship within the federal political structure is at stake when it brings a common law tort action against private defendants. And it is the EPA, not the states, that the Court admonished to fulfill its statutory obligation to address the issue of greenhouse gases.[358] Accordingly, no "special solicitude in standing analysis" is owed to the states in common law tort actions against private defendants.

It is not surprising that the early decisions on standing in climate change litigation reach conflicting conclusions. On one hand, the standing issue seems strangely out of place in a tort action where each plaintiff alleges that each defendant has contributed to his becoming a victim of an indivisible harm. Traditionally, the standing issue has been raised when a litigant challenges the action—or more often, the inaction—of the political branches of government on the basis of a statutory or constitutional claim.[359] It has been argued that in tort litigation, the issue of standing collapses into the substantive cause of action.[360] Obviously, plaintiffs must allege and prove injury in fact and causation as part of their substantive causes of action.[361] Moreover, courts usually hold that the proper ground for dismissal of a tort claim is on substantive grounds, not the standing issue.[362] But they sometimes dismiss tort actions on standing grounds, usually when class action representatives seek to represent the interests of others whose situations vary, at least to some extent, from their own.[363]

On the other hand, the judicial competency and separation of powers rationales for standing strongly support the conclusion that courts should deny standing in climate change litigation. Harms that are this pervasive are matters

---

357. *Id.*

358. *See id.* at 521 ("EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))).

359. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 250–51 (1988).

360. *See* Stearns, *supra* note 306, at 1321.

361. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

362. *See, e.g.*, Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1242 (10th Cir. 2006) (holding that plaintiffs' failure to prove their alleged injuries under tort claims warranted summary judgment for the defendant and not dismissal for lack of standing); *cf.* Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322, 325 n.1 (4th Cir. 2005) (citing Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 239 (4th Cir. 1988)) (finding that the district court erred in dismissing claims for lack of standing and should have evaluated whether an injury in fact was present as an element of a substantive federal claim).

363. *See e.g.*, Alston v. Advanced Brands & Importing Co., 494 F.3d 562, 564 (6th Cir. 2007) (dismissing claims brought by parents against brewers and importers of alcoholic beverages claiming that the defendants' advertising caused underage children to purchase alcoholic beverages when none of the class representatives claimed that their own children purchased any alcohol); Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 316–17 (5th Cir. 2002) (dismissing class action filed on behalf of all patients who had ingested a drug subsequently found to have caused liver damage in a handful of patients when the class excluded patients who had suffered either physical or emotional harm).

that our constitutional framework makes the responsibility of Congress or the EPA to address if either deems regulation advisable.

B. The Political Question Doctrine

1. Purposes Served by the Political Question Doctrine

The political question doctrine prevents federal courts from deciding a claim when "the question is entrusted to one of the political branches or involves no judicially enforceable rights."[364] As in the case of standing, the roots of the political question doctrine lie in separation of powers principles.[365] Courts may decline jurisdiction both because of the Constitution, which limits federal judicial power to "cases" and "controversies,"[366] and because of "prudential" considerations that suggest judicial restraint.[367] Such prudential considerations include judicial deference to the decisions of colleagues operating within the executive and legislative branches,[368] and a sense that a court may not be the appropriate forum for deciding such matters.[369] In short, these are the exact factors previously analyzed in Part IV.

In the leading case of *Baker v. Carr*,[370] the Supreme Court identified six factors that individually or in combination may lead a court to conclude that an issue poses a political question.[371] Here, the first three factors are relevant: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . ."[372] During

---

364. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004). Also, in *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), the Ninth Circuit dismissed on political question grounds a tort action filed by family members of those killed or injured when Israeli security personnel used bulldozers manufactured by the defendant to demolish homes in Palestinian territory, *id.* at 977, because "[a]llowing this action to proceed would necessarily require the judicial branch . . . to question the political branches' decision to grant extensive military aid to Israel." *Id.* at 982.

365. *See e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009) ("[C]ourts have no charter to review and revise legislative and executive action."); Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

366. U.S. CONST. art. III, § 2, cl. 1.

367. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002).

368. See *id.* at 246. For Professor Barkow's full discussion on prudential considerations in the political question doctrine, see *id.* at 253–72.

369. *See* Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1043–44 (1984–1985).

370. 369 U.S. 186 (1962).

371. *Id.* at 217.

372. *Id.* The remaining three factors are as follows: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made;

recent decades, at least until 2004, the political question doctrine was relegated to a minor role.[373] In the forty years following *Baker v. Carr*, the Supreme Court declined jurisdiction only twice because a case posed a political question.[374] Each of these cases posed a relatively clear "textually demonstrable constitutional commitment of the issue to a coordinate political department."[375] The prudential prong of the political question doctrine appeared to be on its last legs. But in *Vieth v. Jubelirer*,[376] a plurality of the Court held that claims that political gerrymandering violated constitutional provisions were nonjusticiable on political question grounds.[377] Justice Scalia, speaking for the plurality, noted the existence of specific constitutional provisions that committed the authority to intervene in the drawing of congressional district boundaries to Congress.[378] Yet, his opinion rested squarely on the second *Baker* factor,[379] "a lack of judicially discoverable and manageable standards for resolving" the dispute.[380] Justice Scalia explained, "[The judicial power] is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*."[381] He then criticized the standard for resolving political gerrymandering cases that Justice Powell had proposed in an earlier decision:[382] "It is essentially a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far—or, in Justice Powell's

---

or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

373. *See generally* Barkow, *supra* note 367, at 300–03 ("In the past few decades, however, the Supreme Court has become increasingly blind to its limitations as an institution—and, concomitantly, to the strengths of the political branches . . . ."); Redish, *supra* note 369, at 1033–39 (discussing whether the political question doctrine still exists today).

374. In *Nixon v. United States*, 506 U.S. 224 (1993), the Court held that Article I, Section 3 of the United States Constitution confers on the Senate the "sole power" to conduct impeachment proceedings and, as such, Nixon's claims presented a nonjusticable political question. *Id.* at 226. In *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Court held that the Constitution authorizes the President to oversee the National Guard. *Id.* at 6–7 (citing U.S. CONST. art. I, § 8, cl. 16; 32 U.S.C. § 110 (2006)). Thus, students' claims arising from the shooting deaths of four Kent State University students during the Vietnam era, *id.* at 3–4, presented a nonjusticiable political question. *Id.* at 10–11.

375. *Baker*, 369 U.S. at 217. For example, the Court in *Gilligan* stated: "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process." *Gilligan*, 413 U.S. at 10. In *Nixon*, the Court rejected Nixon's argument that because of the framers' use of "try" in the Impeachment Trial Clause, the judiciary was not precluded from reviewing Senate impeachment proceedings. *Nixon*, 506 U.S. at 229–30.

376. 541 U.S. 267 (2004).

377. *Id.* at 305–06.

378. *See id.* at 285.

379. *Baker*, 369 U.S. at 217.

380. *See Vieth*, 541 U.S. at 305–06.

381. *Id.* at 278.

382. *See id.* at 278–79 (quoting Davis v. Bandemer, 478 U.S. 109, 123 (1986)).

terminology, whether it is not 'fair.'" [383] Justice Scalia concluded, "'Fairness' does not seem to us a judicially manageable standard."[384] Justice Kennedy, whose fifth vote was necessary to dismiss the plaintiffs' complaint, also stressed the importance of both "the lack of comprehensive and neutral principles for drawing electoral boundaries" and "the absence of rules to limit and confine judicial intervention."[385]

Particularly after the adoption of the Class Action Fairness Act of 2005,[386] it is likely that most corporate defendants in public interest tort actions will be able to remove their cases to federal courts, where federal doctrines governing jurisdiction, including the political question doctrine, apply. When this does not occur, the ability of state courts to decline jurisdiction on the basis of a "political question doctrine" (or a similar state analogue) is less likely than it would be in the federal courts.[387] Many state constitutions contain no "case or controversy" provision.[388] The lines between the legislative and judicial functions are often more blurred in state courts. Arguably, the fact that many state court judges are democratically elected adds to their legitimacy in handling policy-laden issues.[389] State court judges often zealously guard their role as policymaker within the common law.[390] At the same time, state courts frequently decline jurisdiction because of separation of powers arguments without necessarily using the label "political question."[391]

2. *Climate Change Litigation and the Political Question Doctrine*

Each of the four federal district courts that considered complaints alleging that various defendants contributed to global climate change and should be liable on a public nuisance claim dismissed the complaint on the grounds that it posed a nonjusticiable political question.[392] One of those four decisions, *Connecticut v.*

---

383. *Id.* at 291.

384. *Id.*

385. *Id.* at 306–07 (Kennedy, J., concurring). But Justice Kennedy refused to rule that all political gerrymandering cases posed political questions and were nonjusticiable: "If workable standards do emerge . . . courts should be prepared to order relief." *Id.* at 317.

386. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

387. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863 (2001).

388. *Id.* at 1879–80.

389. *See* Hershkoff, *supra* note 387, at 1887 (quoting Donald W. Brodie & Hans A. Linde, *State Court Review of Adminstrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 542). *But see supra* notes 183–86, 221–22 and accompanying text.

390. *See, e.g.*, State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1071–72 (Ohio 1999) (quoting State *ex rel.* Bishop v. Bd. of Educ., 40 N.E.2d 913, 919 (Ohio 1942); State *ex rel.* Bowman v. Bd. of Comm'rs, 177 N.E. 271, 278 (Ohio 1931)) (reporting on the details of tort reform as a "struggle . . . [that] created turbulence among our coordinate branches of government").

391. *See* Herschkoff, *supra* note 387, at 1863 n.159 (listing a number of state courts that have declined jurisdiction on political question grounds).

392. Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009); California v. Gen. Motors Corp.,

American Electric Power Co., was subsequently reversed by the Second Circuit Court of Appeals.[393]

There are two principal objections to the idea that the political question doctrine is relevant to the new context of public interest tort actions. First, there is no textual commitment assigning responsibility for addressing global climate change to the legislative or executive branches.[394] Indeed, as climate change litigation proponents will argue, there seems to be a textual commitment of common law tort actions (including those with public nuisance claims) to the judicial branch through the "cases" and "controversies" provisions of Article III.[395] But, as highlighted above, the new genre of public interest tort actions, driven by ideology and alleging harms that are undifferentiated in kind from those suffered by other members of society, constitutes neither a common law tort action nor a "case" or "controversy" as those terms were understood at the time of the adoption of the Constitution or, for that matter, until the mid-1990s.[396] Moreover, recall that the plurality of the Supreme Court itself appears to have rested its decision in *Vieth* on the second and third *Baker* factors, not on any Constitutional commitment of the dispute to a coordinate branch of government.

The second objection to the use of the political question doctrine in this context is that the doctrine usually applies when plaintiffs claim a constitutional basis for overturning past decisions of the political branches.[397] In contrast, in climate change and other public interest tort actions, the political question doctrine arguably applies in a private law tort action resting on the common law. But in recent years, several federal courts of appeals have applied the political question doctrine to deny jurisdiction in a number of tort actions or actions that were functionally tort claims.[398]

No. C06-05755 MJJ, 2007 WL 2726871, at *48 (N.D. Cal. Sept. 17, 2007); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

393. 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174).

394. *Id.* at 325 ("We find no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions . . . .").

395. Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1094 (2009) ("Courts customarily hear nuisance cases, so obviously there is no textual constitutional commitment of such issues to another branch of government, nor is there a lack of sufficient judicial standards in a nuisance case to satisfy Article III of the Constitution.").

396. *See supra* notes 146–48, 177–99 and accompanying text.

397. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that a challenge to the Constitution's Impeachment Clause was a nonjusticiable political question); New York v. United States, 505 U.S. 144, 184 (1992) ("In most of the cases in which the Court has been asked to apply the [the Constitution's Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine.").

398. *See, e.g.*, El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 846, 851 (D.C. Cir. 2010) (en banc) (affirming dismissal of plaintiffs' defamation claim as a nonjusticiable political question because adjudicating the claim would involve determining the factual validity of the President's stated reasons for a military strike); Carmichael v. Kellogg, Brown & Root Serv., Inc.,

The two federal district courts that dismissed climate change litigation on political question grounds[399] and the federal court of appeals that reached the contrary conclusion[400] all applied the same *Baker* factors.[401] Regarding the first factor—asking whether there was a textual commitment to another branch of government—both the Second Circuit, which decided *American Electric Power Co.*, and the *Kivalina* court agreed that their respective cases did not intrude upon the political branches' constitutionally delegated authority over foreign policy.[402] The court in *Kivalina* acknowledged that global climate change had an "indisputably international dimension"[403] but found this was not enough to place the issue "beyond the reach of the judiciary."[404] The Second Circuit's conclusion that a decision from a single federal district court establishing emissions standards for a handful of domestic defendants "does not establish a *national* or *international* emissions policy"[405] may or may not be convincing given the precedential value of such a decision, the publicity likely to be generated by the litigation, and the probability that it will influence others to file similar litigation. A decision in climate change litigation affects the ability of the President and his subordinates to negotiate international treaties on limiting the emissions of greenhouse gases. Nations with competing interests will not make bargaining concessions of their own in exchange for reductions in greenhouse gas emissions already ordered by an American court. But many domestic court decisions may affect international treaty negotiations, and the mere presence of such an effect does not necessarily render the domestic dispute nonjusticiable. For example, the implications of products liability litigation may have an effect on international trade protocols, but typical products liability actions obviously are justiciable. Accordingly, the *American Electric Power Co.* and *Kivalina* courts' conclusions appear sound—the delegation of foreign policy

572 F.3d 1271, 1278–79, 1295–96 (11th Cir. 2009) (holding that the negligence claim of an Army Sergeant's wife against three companies that contracted with the Army presented a nonjusticiable political question); Hwang Geum Joo v. Japan, 413 F.3d 45, 46, 52 (D.C. Cir. 2005) (holding that claims against Japan under the Alien Tort Statute by South Korean, Chinese, Taiwanese, and Filipino women presented a nonjusticiable political question).

399. *See* Native Vill. Of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007). Although the district court in the *Comer* litigation did not issue a written opinion, its decision was based on the second and third *Baker* factors. *See* Comer v. Murphy Oil USA, 585 F.3d at 860 n.2 (5th Cir. 2009).

400. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 2, 2010) (No. 10-174).

401. *See Am. Electric Power Co.*, 582 F.3d at 324–32; *Kivalina*, 663 F. Supp. 2d at 872–77; *Gen. Motors Corp.*, 2007 WL 2726871, at *13–16.

402. *Am. Elec. Power Co.*, 582 F.3d at 323 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)); *Kivalina*, 663 F. Supp. 2d at 873.

403. *Kivalina*, 663 F. Supp. 2d at 873.

404. *Id.*

405. *Am. Elec. Power Co.*, 582 F.3d at 325.

matters to the executive and legislative branches does not make climate change litigation nonjusticiable.[406]

It is predominantly the second and third *Baker* factors, the ones given renewed prominence by Justice Scalia's plurality opinion in *Vieth*, that determine whether courts should dismiss the climate change cases on political question grounds. Are there "judicially discoverable and manageable standards" for determining if a defendant's activities warrant a finding of liability on public nuisance grounds; for determining whether the plaintiffs are entitled to abatement of the public nuisance or only damages as the remedy; or for judicially establishing the emissions standards used to regulate the defendant's greenhouse gas emissions? Are these matters ones that are impossible to decide "without an initial policy determination of a kind for nonjudicial discretion"?

In *American Electric Power Co.*, the Second Circuit concluded that judicially discoverable and manageable standards to resolve the case were available both in the *Restatement*'s treatment of the public nuisance tort[407] and in the public nuisance cases that federal courts had previously decided.[408] The court also held that climate change litigation was not the type of dispute that required "an initial policy determination of a kind clearly for nonjudicial discretion" before it could act.[409] The court reasoned that "if regulatory gaps exist[ed]" it was appropriate for the "common law [to fill] those interstices."[410] This statement is obviously an accurate statement of the relationship between the common law and statutory enactments,[411] but it does not address the question of whether the climate change litigation poses issues of the type that require the delicate balancing of policy factors rather than the application of rules and standards capable of being judicially discerned. If so, the political branches are both the appropriate organs to perform this weighing within our constitutional structure and the most capable entities of undertaking this process.

---

406. Without deciding its case on this basis, the federal district court in *California v. General Motors Corp.* warned, "Plaintiff's nuisance claims sufficiently implicate the political branches' powers over . . . foreign policy, thereby raising compelling concerns that warn against the exercise of subject matter jurisdiction on this record." *Gen. Motors Corp.*, 2007 WL 2726871, at *14. The court had a similar concern about the litigation's impact on interstate commerce, which it argued was "constitutionally committed to Congress." *Id.* The Second Circuit refused to consider the interstate commerce issue in *American Electric Power Co.*, finding that the matters had been insufficiently briefed by the defendants. *Am. Elec. Power Co.*, 582 F.3d at 324.

407. *Am. Elec. Power Co.*, 582 F.3d at 328 (defining a public nuisance as "an unreasonable interference with a right common to the general public" (quoting RESTATEMENT (SECOND) OF TORTS § 821B (1979)) (internal quotation marks omitted)); *see also supra* note 203 and accompanying text.

408. *Am. Elec. Power Co.*, 582 F.3d at 326; *see also supra* notes 207–08 and accompanying text (discussing further the use of prior public nuisance decisions in *American Electric Power Co.*).

409. *Am. Elec. Power Co.*, 582 F.3d at 331 (quoting McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir. 2007)) (internal quotation marks omitted).

410. *Id.* at 330.

411. *See* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 570, 580 (2007).

The Second Circuit also noted that both Congress and the Executive Branch had at least indicated concern about global climate change, even if they had not yet regulated greenhouse gas emissions.[412] The court reasoned, therefore, that judicial regulation of these emissions would not conflict with congressional policy.[413] But recognizing that a problem exists is not the same thing as balancing the complex ecological, economic, and foreign policy factors necessary to achieve resolution. For a court to resolve these nationwide—indeed, worldwide—issues necessitates initial policy determinations by Congress or the EPA. Ultimately, the Second Circuit in *American Electric Power Co.* erroneously concluded that the action before it seeking to enjoin six utility companies from contributing to global climate change was just "an ordinary tort suit."[414]

It is probably no coincidence that each federal trial court that has ruled on these issues has reached a contrary conclusion from that of the court in *American Electric Power Co.*[415] The lower courts have held that judicial standards to resolve climate change litigation do not exist and that the regulation of greenhouse gas emissions must await decisions from the political branches of government.[416] These trial courts, after all, are the courts that would be faced with establishing the regulatory regime for each specific group of defendants to govern greenhouse gas emissions if the climate change cases move forward. As previously mentioned, the *Kivalina* court found that it lacked judicially discoverable and manageable standards to reach a principled decision as to whether defendants' carbon emissions were "unreasonable." As the court noted, "[A]ny person, entity or industry which uses or consumes such [fossil] fuels

412. *See Am. Elec. Power Co.*, 582 F.3d at 331–32.

413. *Id.* at 332.

414. *Id.* at 331 (quoting *McMahon*, 502 F.3d at 1365) (internal quotation marks omitted).

415. *Compare id.* at 326–30 (finding that there are judicially discoverable standards for resolving global climate change cases), *with* Comer v. Murphy Oil USA, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (noting the district court's finding that there are no judicially discoverable standards to resolve the climate change claims at issue); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) (noting the lack of "judicially discoverable and manageable standards"); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (same); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (finding that without an initial policy determination from Congress or the President, the court could not balance the interests required to address a climate change case).

416. *E.g.*, *Comer*, 585 F.3d at 860 n.2 (noting the trial court's finding that the issue of global warming has "no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct"); *Kivalina*, 663 F. Supp. 2d at 876 ("Plaintiffs nor [*American Electric Power Co.*] offer any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue."); *Gen. Motors Corp.*, 2007 WL 2726871, at *16 ("[T]here is a lack of judicially discoverable or manageable standards by which to properly adjudicate [the p]laintiff's federal common law global warming nuisance claim."); *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272 (finding that without an initial policy determination from Congress or the President, the court could not balance the interests required to address a climate change case).

bears at least some responsibility for [the p]laintiffs' harm."[417] A socially optimal resolution to global climate change litigation issues would require the institution setting emission limits to possess regulatory authority over all parties that contribute to global climate change. How else could the decisionmaker perform the necessary utilitarian weighing of the relative costs and benefits of each emitter's contribution to the collective, indivisible harm? Such a cost-benefit analysis is necessary in the first instance to determine whether a public nuisance exists.[418] Further, in litigation seeking injunctive relief, like *American Electric Power Co.*, weighing costs and benefits plays a critical role in determining whether the plaintiffs are entitled to injunctive relief.[419]

Such a massive global and undifferentiated problem is one that must be addressed by the political branches of government—Congress and the EPA—and ultimately by international bodies. Courts are inherently institutionally incapable of establishing rational, principled criteria for determining which emissions are "unreasonable" in the context of specific litigation affecting only a handful of named defendants. There can be no judicially discoverable and manageable standards for ending or even ameliorating global climate change. Resolving issues such as which defendant contributed what "amount" of global climate change, whether that contribution exceeded reasonable levels, and what should be done about it, is more polycentric, to an exponential degree, than any set of issues a common law court has ever resolved. Climate change is the society-wide type of harm that our constitutional structures anticipated the political branches would handle. It requires a policy decision of the type appropriate for political institutions deriving their legitimacy from something other than a court's reasoned elaboration from precedents that bear little or no resemblance to the problems at hand. In short, if the second and third *Baker* factors count for anything, they strongly suggest that climate change litigation is nonjusticiable under the political question doctrine.[420]

---

417. *Kivalina*, 663 F. Supp. 2d at 877 n.4.

418. *See id.* at 876.

419. A court will engage in "balancing of equities" when determining the appropriateness of an injunction. RESTATEMENT (SECOND) OF TORTS § 941 & cmt. a (1979) (noting that "balancing of equities" also includes consideration of the character of each party's conduct and the interests of third parties and the general public); *see also* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872 (N.Y. 1970) ("The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction."). For a list of factors courts use to determine the appropriateness of an injunction, see RESTATEMENT (SECOND) OF TORTS § 936 (1979).

420. The remaining three *Baker* factors, relating to deference to the political branches and respect for their actions, appear to have little or no impact in the climate change litigation. For example, the Second Circuit found that judicial action addressing global climate change would not implicate the last three *Baker* factors because the political branches have not reached a "unified policy on greenhouse gas emissions." *Am. Elec. Power Co.*, 582 F.3d at 331–32. Two of the federal district courts that ruled that the climate change litigation is nonjusticiable because of political questions did not find it necessary to address these last three factors. *See Kivalina*, 663 F. Supp. 2d at 877 n.5 (N.D. Cal. 2009) ("Given the Court's conclusions regarding the second and

Courts should forego jurisdiction over climate change litigation on the basis of the political question doctrine because of judicial competency concerns and the appropriate role of courts within our constitutional framework. Admittedly, employing the political question doctrine to deny jurisdiction in climate change litigation would extend the doctrine beyond its traditional boundaries.[421] But, as I have explained above, public interest tort actions are very different creatures from traditional tort actions.[422] Only this extension of the political question doctrine will faithfully serve the values of separation of powers and judicial competency that undergird all justiciability limitations, including the political question doctrine.

3. *Beyond Global Warming: The Political Question Doctrine and Public Nuisance Products Litigation*

Climate change litigation defendants have raised the political question doctrine routinely in each and every climate change litigation action.[423] In the earlier instances of public interest tort litigation—the legal actions against the manufacturers of handguns and lead pigment—courts almost always dismissed the public nuisance claims on substantive grounds.[424] Either the facts of these early cases did not fit within the boundaries of public nuisance liability,[425] or the harms sustained were derivative or remote from the defendants' actions.[426] But would the political question doctrine have provided an alternate ground for dismissal?

At least in some instances, the answer arguably appears to be yes. For example, prior to the Rhode Island lead pigment litigation,[427] political bodies in other jurisdictions, including a federal task force,[428] the Maryland legislature,[429] and the federal Department of Housing and Urban Development (HUD) governing low-income housing,[430] all concluded that only interim controls,[431]

---

third *Baker* factors, the Court does not reach the parties['] arguments regarding the remaining *Baker* factors which, in any event, largely mirror the argument analyzed above."); *Gen. Motors Corp.*, 2007 WL 2726871, at *6–16 (determining that the claim was a political question after analyzing only the first three *Baker* factors).

421. *See supra* notes 394–99 and accompanying text.

422. *See supra* Parts III.E, IV.A.

423. *See supra* Part VI.B.2.

424. *See supra* Part V.A.

425. *See supra* notes 257–68 and accompanying text.

426. *See supra* notes 275–87and accompanying text.

427. *See supra* Part III.C.

428. *See* PRESIDENT'S TASK FORCE ON ENVTL. HEALTH RISKS AND SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS 5 (2000), *available at* http://www.cdc.gov/nceh/lead/about/fedstrategy 2000.pdf.

429. *See* MD. CODE ANN., ENVIR. §§ 6-801 to 6-852 (LexisNexis 2007).

430. *See* HUD General Lead-based Paint Requirement and Definitions for All Programs, 24 C.F.R. §§ 35.100–35.175 (2010).

more modest and more cost-effective hazard-reduction measures than lead abatement, were warranted. But the Rhode Island trial court took the opposite approach.[432] These other legislative and administrative agencies weighed the costs and benefits of literally hundreds of different combinations of lead-hazard reduction measures and came to the conclusion that only measures far more modest than those that the trial court would have implemented were warranted.[433] Obviously, the process through which these standards were determined was not one driven by "judicially discoverable and manageable standards." Further, the choice of the proper approach to correcting the conditions that led to childhood lead poisoning was "an initial policy determination of a kind clearly for non-judicial discretion" of the type usually required from the politically accountable branches of government. In short, it appears that if the litigants in the Rhode Island lead pigment litigation had filed in, or removed the case to, federal court, that court could have dismissed the case for lack of jurisdiction on political question grounds.[434]

VII. CONCLUSION

Just an ordinary tort. Or so claim state attorneys general and mass plaintiffs' attorneys who file public nuisance actions seeking to establish macro-regulatory regimes when Congress and administrative agencies have failed to act. They see the flexibility inherent in judge-made common law as a way to remedy what they view as regulatory dysfunction. These advocates overlook the inherent limitations of the judicial function, the need for political accountability for those who establish macro-regulatory policy, and the allocation of powers within our constitutional framework.

Public interest tort litigation is a new phenomenon, different in kind from traditional tort law that regulates incrementally as a by product of damages awarded to particular victims harmed by specific defendants.[435] As Justice Holmes once wrote, common law "judges do and must legislate, but they can do

---

431. Interim controls are "measures designed to reduce temporarily human exposure . . . to lead-based paint hazards." § 35.110. Examples of interim controls include painting over paint that is chipping and reducing dust created by surface friction. § 35.1330.

432. In his instructions to the jury, the trial court judge asked the jury "to determine 'whether the cumulative presence of lead pigment in paints and coatings in or on buildings . . . constitutes a public nuisance.'" State v. Lead Indus. Ass'n, 951 A.2d 428, 442 (R.I. 2008).

433. R.I. DEP'T ATT'Y GEN., RHODE ISLAND LEAD NUISANCE ABATEMENT PLAN 8 (Sept. 14, 2007), *reprinted in Rhode Island Defendants to Respond to $2.4B Abatement Plan by Nov. 15*, MEALEY'S LITIG. REP.: LEAD 5 attachment 1 (Oct. 10, 2007); GIFFORD, *supra* note 246, at 143.

434. The Rhode Island Supreme Court also has recognized the political question doctrine. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 57–58 (R.I. 1995) (quoting Powell v. McCormack, 395 U.S. 486, 516–17 (1999)) (dismissing challenge to statutory scheme for public education funding on political question and separation of powers grounds).

435. *See supra* Part III.E.

so only interstitially; they are confined from molar to molecular motions."[436] Even more troubling is the fact that public interest tort litigation lacks the foundations underlying "traditional" public interest tort litigation—constitutional provisions and federal statutes. Federal statutes reflect past decisions of the politically accountable Congress. Constitutional provisions reflect a higher order of authority and legitimacy than does the common law.[437] Further, attorneys filing public interest actions grounded in constitutional and statutory provisions do not earn billions of dollars in contingent fees, as does the small cadre of sophisticated mass tort attorneys that usually partners with state attorneys general and municipal attorneys in their public interest tort actions.[438] These mass plaintiffs' lawyers continually lobby their government partners and encourage them to litigate a solution to yet another public or environmental crisis. It would be surprising if a profit motive did not affect which public health, public safety, and environmental problems attorneys tackle, whether they pursue legislative or litigation approaches, and which specific defendants they sue.

Courts should be wary of common law tort actions displaying all of the following characteristics:

1. The plaintiff files the legal action on behalf of a collective entity, such as a state as *parens patraie*, a municipality, or a class of plaintiffs;

2. The substantive claim represents a collective harm, such as public nuisance;

3. The scope of the problem identified in the litigation is society-wide, or even worldwide, in scope, instead of being discrete, circumscribed, or localized; and

4. The relief requested is injunctive relief. Or, if plaintiffs only seek damages, there is evidence that the goal of plaintiffs or their attorneys is to pressure defendants to settle and, in doing so, agree to a judicially-enforced regulatory regime.

---

436. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In chemistry, the weight of a mole depends on the identity of the element or compound. U.S. DEP'T OF COMMERCE, NAT'L INST. OF STANDARDS & TECH., NIST SPECIAL PUBLICATION 330, THE INTERNATIONAL SYSTEM OF UNITS (2008). A mole of carbon, for example, weighs twelve grams. *Id.* Thus, Justice Holmes's phrase describes motions that are small, albeit some smaller than others.

437. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (showing that the Constitution trumps the common law by striking down a punitive damages award in a common law tort case on due process grounds); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (describing the Constitution as "superior, paramount law").

438. *See* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U.L.Q. 653, 720–21 (2003).

Courts usually dismissed earlier public interest tort cases, those involving claims against the manufacturers of products that caused public safety and public health problems. They did so either because governments and other plaintiffs failed to satisfy the substantive requirements for liability[439] or because the alleged harms were too remote from the manufacturers' conduct.[440] These same doctrinal pigeonholes do not clearly require dismissal of global climate change actions.[441] However, climate change actions pose even greater challenges both to the capabilities of the judicial process and to the constitutional allocation of powers than did their product-based predecessors. These two fundamental concepts define how law is made in the United States and lie at the heart of judicial restraint doctrines, specifically standing and the political question doctrine.

Judicial restraint doctrines arose in contexts other than common law tort actions between private parties. But the avant-garde nature of public interest tort litigation warrants the principled extension of standing and political question doctrines beyond their prior applications. At times, tort plaintiffs, at least those asking for relief for society-wide harms, do lack standing. At times, even a tort action between two private parties poses a political question. These are not ordinary tort actions.

439. *See supra* notes 257–68 and accompanying text.
440. *See supra* notes 275–87 and accompanying text.
441. *But see supra* note 274 and accompanying text.

*