2012

The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence

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ABSTRACT

In this Article, I argue that the Supreme Court is implicitly piecing together a constitutionally mandated *model of bounded adjudication* governing mass torts, using decisions that facially rest on disparate constitutional provisions. This model constitutionally restricts common law courts from adjudicating the rights, liabilities, and interests of persons who are neither present before the court nor capable of being defined with a reasonable degree of specificity. I find evidence for this model in the Court's separate decisions rejecting tort-based climate change claims, global settlements of massive asbestos litigation, and punitive damages awards justified as extra-compensatory damages. These new forms of tort litigation echoed the public law models of Abram Chayes and Owen Fiss that, a generation ago, described public interest litigation in areas such as civil rights. In rejecting public law *tort* litigation, the Court constitutionally imposes a more traditional model of adjudication—a model advocated by mid-twentieth century legal philosopher Lon Fuller but regarded as archaic by most contemporary scholars. I then evaluate the Court's model on the basis of factors including the limits of judicial competence, the need to legitimize the judicial role in a democracy, and the related impact of constitutional separation of powers. I weigh these factors against arguments that unbounded adjudication is necessary both to compensate mass torts victims who otherwise would be denied recovery and to regulate corporate misconduct in the face of regulatory dysfunction. I conclude that a presumptive model of bounded adjudication would restrain unprincipled adjudication without imposing an institutional straightjacket.

THE CONSTITUTIONAL BOUNDING OF ADJUDICATION: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence

Donald G. Gifford*

INTRODUCTION

The Justices' skepticism was evident throughout the oral arguments in *American Electric Power Co. v. Connecticut*,[1] which marked the first time the Supreme Court had considered a common law tort action against businesses contributing to global climate change. Chief Justice Roberts suggested that because "everyone is harmed by global warming," if the case were allowed to proceed, "every individual in the world" could sue.[2] Similarly, Justice Kagan asked counsel whether the six states and other plaintiffs had a cause of action "against anybody in the world."[3] Not surprisingly, the Court unanimously held in favor of the defendants and in the process noted that "considerations of scale and complexity distinguish global warming from the more *bounded* pollution giving rise to past federal nuisance suits."[4]

The Court's holding in *American Electric Power Co.* rests on the relatively obscure doctrine of displacement of federal common law.[5] More than a decade earlier, the Court struck down global class action settlements that would have determined the rights of "untold numbers of individuals"[6] who were not yet even experiencing the effects of asbestos-related diseases

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1. 131 S. Ct. 2527 (2011). Transcript of Oral Argument *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-174.pdf.
2. *Id.* at 57–58.
3. *Id.* at 51.
4. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (emphasis added).
5. *Id.* at 2537.
6. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 602 (1997).

in two opinions that rely nominally on the class action certification requirements of the Federal Rules of Civil Procedure but are suffused with due process concerns.[7] More recently, the Court reversed a $79.5 million punitive damages award against a tobacco manufacturer on due process grounds because the trial court invited the jury to punish the defendant for harming an indeterminate number of unidentified "persons who [were] not before the court . . . ."[8] Meanwhile, lower federal courts have dismissed climate change tort actions similar to *American Electric Power Co.* on justiciability grounds—namely standing and the political question doctrine[9]—because of their concerns about the unbounded, diffuse, and generalized nature of the harm.[10]

These decisions rely on a variety of constitutional and doctrinal grounds. On the surface, no obvious constitutional basis appears to undergird the results. One possible explanation is that the Supreme Court and lower federal courts are picking and choosing from a grab bag of sometimes-obscure constitutional doctrines to accomplish their pro-business purposes. In a 2010 study, Lee Epstein, William Landes, and Richard Posner found the Roberts Court to be decidedly more pro-business than its predecessors.[11] However, the fact that Justice Ginsburg, probably the most liberal member of the Court, wrote for a unanimous Court in *American Electric Power Co.* casts doubt on this assertion. In this Article, I suggest another more principled and more fundamental alternative explanation: the Supreme

7. *See infra* notes 158–68 and accompanying text.

8. Philip Morris USA v. Williams, 549 U.S. 346, 349 (2007); *see infra* notes 169–86 and accompanying text.

9. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009) (dismissing public nuisance case on standing and political question grounds); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *48 (N.D. Cal. Sept. 17, 2007) (dismissing federal common law nuisance claim on political question grounds); *see also* Comer v. Murphy Oil USA, 598 F.3d 208, 210 (5th Cir. 2010) (vacating decision of three-judge panel that reversed the lower court's dismissal for lack of standing and presentation of a nonjusticiable political question), *vacating* 585 F.3d 855, 860 n.2, 879–80 (5th Cir. 2009).

10. *ExxonMobil*, 663 F. Supp. 2d at 880–81; *Gen. Motors Corp.*, 2007 U.S. Dist. LEXIS 68547, at *47–48.

11. Lee Epstein, William M. Landes & Richard A. Posner, Is the Roberts Court Pro-Business? 1–3 (Dec. 17, 2010) (unpublished manuscript), *available at* http://epstein.law.northwestern.edu/research/RobertsBusiness.pdf. According to the authors, the Roberts Court reached a decision that they characterized as anti-business in only 39 percent of all "economic activity" cases (largely non-tort cases), compared with 58 percent of decisions from all previous Court terms from 1953 until 2005. *Id.* at 2. The Roberts Court also granted certiorari in a larger fraction of economic activity cases than previous courts. *Id.* at 3.

Court is "[s]louch[ing] toward[]"[12] a new "unified theory"[13] of constitutional boundaries in mass tort litigation. I deliberately use the word "slouching" because the Supreme Court's movement does not appear to have the development of a unified doctrine as its stated goal.

This Article is the first to argue that when the Court dismisses cutting-edge mass tort claims, wittingly or not, it constitutionalizes a particular conception of common law adjudication, which I call the *model of bounded adjudication.*[14] The Court's emerging view is that the Constitution limits common law tort adjudication to those cases between individual parties or well-defined and carefully-circumscribed groups. Under this new model, it is constitutionally inappropriate for a common law court to adjudicate the rights, liabilities, and interests of persons who either have not yet been harmed or who cannot be identified or described with a reasonable degree of specificity at the time of the adjudication. The Court draws a sharp contrast between legislation—in which popularly elected assemblies create generalized rights and responsibilities—and common law adjudication that establishes the respective rights and liabilities of only the parties present in the litigation.[15] Thus, any *judicial* attempt to address plaintiffs' allegations of generalized or diffuse harms violates the Constitution. My concern is not with routine class action practice, even though the Supreme Court and other federal courts have largely nixed the use of class actions seeking compensation for tort damages.[16] Instead, I address a critically important, but narrower subcategory of collective tort litigation—*unbounded* adjudication.

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12. William Butler Yeats, *The Second Coming*, *in* THE NEW OXFORD BOOK OF ENGLISH VERSE 1250–1950, at 820–21 (Helen Gardner ed., 1972) ("And what rough beast, its hour come round at last, Slouches towards Bethlehem to be born?").

13. STEPHEN HAWKING & LEONARD MLODINOW, A BRIEFER HISTORY OF TIME 16–17 (2005) (describing efforts to unify quantum mechanics and the general theory of relativity, just as the Supreme Court is unifying disparate doctrines related to a constitutional requirement of bounded adjudication).

14. *See infra* notes 87–89, 135–39 and accompanying text.

15. *Cf.* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 235 (2007) (comparing the distinction between adjudication and legislation with differences between administrative rulemaking and adjudication and stating that "[a]ffected persons are entitled as a matter of constitutional due process to an individualized 'opportunity to be heard' in adjudication but not in rulemaking").

16. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (rejecting attempt to certify class of future victims of asbestos-related diseases under Rule 23(b)(1)(B)); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 641 (1997) (reversing certification of class consisting of both current asbestos victims and those as yet asymptomatic); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1235 (9th Cir. 1996) (denying class certification in case against manufacturer of epilepsy drug); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (denying class certification of hemophiliacs whose blood transfusions were contaminated with HIV).

If my interpretation is correct, the Supreme Court's nascent constitutional architecture for mass torts signals an end to many new forms of cutting-edge mass tort litigation that have emerged during the past two decades. The Court's jurisprudence has already functionally eliminated global settlements of class actions,[17] upset what had been the most widely shared scholarly conception of the role of punitive damages,[18] and probably rendered global climate change tort litigation impossible.[19] In addition, the Court's emerging model of bounded adjudication contrasts sharply with the *Principles of the Law of Aggregate Litigation*,[20] recently adopted by the American Law Institute (ALI). Despite the Court's consistently strong commitment to the due process rights of notice and the opportunity for all affected individuals to participate in an adjudication, the ALI concludes that such efforts, at least in the most literal sense, are "doomed."[21]

This new genre of public law tort litigation is an offshoot of more firmly established public interest litigation seeking enforcement of constitutional and federal statutory rights and involving issues such as civil rights, the environment, and institutional reform of school systems, prisons, and state psychiatric hospitals. It is only within the past fifteen years or so that the public law model began to inspire innovative forms of mass torts, resting on the common law, that seek judicially imposed—but explicit and comprehensive—regulation of the conduct of private actors, usually corporations.[22]

The Supreme Court's dismantling of public interest tort actions parallels its reining in of more traditional public interest litigation. Judith Resnik recently described three decisions from the 2010 term[23] that restricted judicial access rights for "consumers, employees, and parents"[24] who had gained entitlements under statutes enacted as a result of the "social and

17. *See infra* notes 158–68 and accompanying text.

18. *See infra* notes 171–76 and accompanying text.

19. *See infra* notes 238–53 and accompanying text.

20. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

21. *Id.* at 1.

22. *See infra* notes 106–13 and accompanying text.

23. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751–52 (2011) (holding that state statute invalidating contract provisions precluding class arbitration was preempted by the Federal Arbitration Act); Turner v. Rogers, 131 S. Ct. 2507 (2011) (concluding that an indigent father facing incarceration in civil contempt proceeding for failure to pay child support is not necessarily entitled to appointment of counsel, but finding a due process violation under the facts of the case); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (denying class certification for 1.5 million female employees of Wal-Mart in action alleging discrimination in violation of Title VII).

24. Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 169 (2011).

political movements of twentieth-century America"[25] and under constitutional provisions newly infused with "commitments to equality and . . . dignity."[26] Two of the three decisions analyzed by Resnik constricted class action litigation,[27] holdings closely related to the more general issue of a court's authority to bind parties not participating directly in the adjudication.

Normatively, however, the propriety of the Court's restrictions on enforcement of constitutional and statutory provisions and the legitimacy of the Court's limitations on the more avant-garde public *tort* litigation do not necessarily rise and fall together. Public tort litigation poses risks to both the accuracy of adjudication and the role of the judiciary in a democratic society that more traditional forms of public interest litigation do not. Trial and appellate court judges, particularly those feeling comparatively less constrained by traditional notions of the limits of judicial law-making power—who are often derisively referred to by many in the business community as "activist judges"—possess enormous discretion under the common law to reinterpret precedents in an expansive manner enabling them to extend adjudication to directly affect nonparties.[28] In contrast, adjudication of rights granted by statutes rests on the usually *comparatively* determinate wording adopted by Congress or state legislatures. Even when statutory language is conducive to expansive interpretations, the statute itself, unlike the common law, reflects past decisions of a politically accountable Congress or state legislature. Admittedly, the words and meaning of constitutional provisions sometimes are quite vague, but within a constitutional system of governance, they presumably reflect a higher order of authority and legitimacy than does judicially-authored common law.[29]

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25. *Id.* at 168.

26. *Id.* at 169.

27. *AT&T Mobility, L.L.C.*, 131 S. Ct. at 1740; *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2541.

28. Consider the trial court judge in the State of Rhode Island's litigation against lead pigment manufacturers. State v. Lead Indus. Ass'n., 951 A.2d 428, 435 (R.I. 2008). The judge knew that thousands of mostly poor children in his state suffered from childhood lead poisoning and that the state government lacked the resources or the political will to effectively eliminate the problem. *See* DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 141–42 (2010). The State's strongest claim rested on public nuisance, perhaps the most indeterminate of all common law torts. *Id.* at 88, 144–48. The trial court's expansive interpretation of the tort, later reversed on appeal, *Lead Indus. Ass'n.*, 951 A.2d at 435, would have dramatically affected the rights of thousands of property owners who were not parties to the litigation. GIFFORD, *supra*, at 154–55.

29. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (describing the Constitution as "superior, paramount law"); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991) (reasoning that the Constitution represents "higher lawmaking" in the legal system).

Contemporaneously with the earlier waves of traditional public interest litigation, Abram Chayes and Owen Fiss described the phenomena as examples of a newly emerging "public law model" of litigation, in which reform-minded plaintiffs asserted constitutional and statutory rights in efforts designed to regulate government defendants.[30] The Supreme Court's nascent constitutional architecture of bounded adjudication rejects the application of Chayes's and Fiss's public law model to mass torts. Instead, the Court's emerging jurisprudence echoes the limits of adjudication espoused by legal philosopher Lon L. Fuller a half-century ago, a concept of adjudication that Chayes and Fiss rejected as archaic even when they wrote during the 1970s.[31]

The normative questions remain: Does the Supreme Court's response to contemporary mass tort litigation represent the Court's adoption of an outmoded model for understanding adjudication, or even worse, an unprincipled manifestation of the Court's pro-business bias? Or does the Court's model reflect an understanding of the inherent limitations of common law judicial authority in a constitutional democracy when courts encounter these new forms of avant-garde litigation?

In this Article, I assess three factors that arguably justify the Supreme Court's constitutional bounding of mass torts: (1) the limits of judicial competency and the need for accuracy in adjudication,[32] (2) the participation of individuals affected by the adjudication as a means of legitimizing the judge's powerful role in a democratic society,[33] and (3) the related impact of constitutional separation of powers.[34] I weigh these factors against two arguments suggesting that unbounded mass tort litigation is necessary notwithstanding constitutional tensions. First, without the unbounded collectivization of mass torts involving widespread latent diseases, such as tobacco-related diseases or childhood lead poisoning, victims harmed by tortfeasors' conduct often lack any remedy whatsoever.[35] Second, given the frequently dysfunctional state of our political processes and the serious threat posed by global climate change and other mass harms, public law tort litigation sometimes affords the only realistic means of preventing

30. *See infra* notes 90–105 and accompanying text.
31. *See infra* notes 67–89 and accompanying text.
32. *See infra* notes 260–78 and accompanying text.
33. *See infra* notes 279–90 and accompanying text.
34. *See infra* notes 291–307 and accompanying text.
35. *See infra* notes 308–21 and accompanying text.

potentially catastrophic consequences.[36] In other words, as the late Justice Tom Clark once wrote, "the Constitution is not a suicide pact . . . ."[37]

Part I[38] of the Article begins by describing the contours of the model of bounded adjudication that emerge from the writings of Fuller.[39] I then contrast this model with the public law models of Chayes and Fiss.[40] Finally, I describe the emergence during the past generation of the new genre of public law tort litigation that more closely resembles the public interest reform litigation described by Chayes and Fiss than it does traditional tort litigation.[41]

In Part II,[42] I assert that when the Supreme Court has encountered mass tort actions, it has constitutionally mandated a model of bounded adjudication at odds with the public law model. I trace the Supreme Court's implicit adoption of this bounded adjudication model through a constellation of cases resting on separate and distinct doctrinal grounds.

Part III[43] provides a normative assessment of the Court's constitutionally imposed model of bounded adjudication. I then briefly conclude.[44]

I. UNBOUNDED LITIGATION

Today's typical tort victim looks remarkably similar to her counterpart fifty years ago—someone injured in an auto accident or in a slip-and-fall incident at the local grocery store.[45] The victim sues one or two tortfeasors who acted wrongfully and contributed to her injury. The result of the adjudication does not *directly* impact anyone else—that is, nonparties—and the extent of the defendant's liability does not depend upon harms he might have caused nonparties. The adjudication is bounded and circumscribed.

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36. *See infra* notes 323–33 and accompanying text.

37. Tom Clark, *The First Amendment and Minority Rights*, 36 U. CHI. L. REV. 257, 260 (1969); *cf.* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

38. *See infra* notes 45–134 and accompanying text.

39. *See infra* notes 61–89 and accompanying text.

40. *See infra* notes 90–113 and accompanying text.

41. *See infra* notes 114–34 and accompanying text.

42. *See infra* notes 135–253 and accompanying text.

43. *See infra* notes 254–334 and accompanying text.

44. *See infra* notes 335–44 and accompanying text.

45. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES: EXECUTIVE SUMMARY 20–21 (1991) (stating that the "typical injury incident" is a "minor injury"); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1192 (1992) (noting that "cases of the auto negligence and slip-and-fall variety" are more frequent than "torts of mass destruction").

Of course, tort theorists subscribing to law and economics and other instrumental conceptions of tort law view all tort law as a form of public law. As early as 1959, Leon Green famously characterized tort law as "public law in disguise" because of the importance of its societal impact on others "outside and beyond the interests of the immediate parties to the litigation."[46] To the extent that tort judgments deter others from engaging in harmful conduct[47] and distribute losses resulting from accidents in a manner that alleviates societal costs,[48] individual tort judgments obviously affect nonparties, but only indirectly. In contrast to law and economic scholars, other tort scholars, notably those representing the civil recourse[49] and corrective justice[50] perspectives, reject "public law in disguise" as the most accurate characterization of tort law. They focus instead on the relationship between the victim and the wrongdoer, not implementing society-wide instrumental goals that may affect the interests of nonparties.

In any event, it is against the backdrop of traditional common law actions that Professor Lon L. Fuller of Harvard developed his well known theory of adjudication, a model described below in Section A.[51] For purposes of this Article, one aspect of Fuller's model is most pertinent: his contention that the explicit and direct effects of the court's remedy in an adjudication should be limited to the parties before the court.[52] In other

46. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1959).

47. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68 (1970) (asserting the need to discourage activities likely to be harmful and to encourage "safer ways of engaging in the same activities"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 315–48 (8th ed. 2011) (identifying punishment for tortious conduct as socially and economically efficient); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (arguing that punishment in a system of fault-based liability serves as a deterrent to potential tortfeasors).

48. CALABRESI, *supra* note 47, at 27–28.

49. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 599 (2005) (concluding that tort law "empowers a victim to seek redress from a wrongdoer because [the wrongdoer] has acted wrongfully toward him (or persons such as him)—not merely because the actor acted in a sufficiently antisocial manner for government officials to be justified in sanctioning him"); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 744, 746 (2003) (viewing torts as relational wrongs where "one has a right of action in tort only against a person who has wronged one").

50. *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1, 142–44 (1995) ("The most striking feature of private law is that it directly connects two particular parties through the phenomenon of liability."); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409 (1992) (identifying "the basic feature of private law" to be that "a particular plaintiff sues a particular defendant").

51. *See infra* notes 67–89 and accompanying text.

52. *See infra* notes 87–89 and accompanying text.

words, courts should not explicitly engage in comprehensive regulation that directly affects nonparties.

Fuller's model of traditional adjudication appeared antiquated by the mid-1970s, when civil rights and other institutional reform litigation flooded the federal courts. In this then-novel litigation environment, Abram Chayes of Harvard espoused a competing, more reform-litigation-friendly "public law model."[53] Soon thereafter, Owen Fiss of Yale advanced his own "structural reform" model, a model distinct from that of Chayes, but generally complementary to it. Because of the similarities of these models, I sometimes refer to them both as "public law models." These models contrast sharply with that of Fuller. For example, Chayes views adjudication not as "a dispute between private individuals about private rights, but a grievance about the operation of public policy."[54] Fiss refers to Fuller's model as a "dispute resolution model" of adjudication[55] while Chayes equates it with "traditional" adjudication.[56] I briefly describe Chayes's and Fiss's models in Part B below.[57]

Chayes and Fiss wrote against a background of large-scale public interest litigation. The common law tort adjudication of their day was not what they had in mind. Their public law and structural reform models focused on legal challenges to government wrongdoing; today's public law *tort* ligation challenges corporate wrongdoing.[58] Constitutional provisions undergirded the earlier genre of litigation—its younger sibling rests, sometimes uneasily, on the judge-made common law of torts. In many public law tort actions, the objectives are to tackle large social problems caused by private corporations, such as global warming or childhood lead poisoning, and to replace the regulation of corporate conduct by the politically accountable branches, perceived to be inadequate, with judicially imposed

53. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

54. *Id.* at 1302.

55. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39 (1979); Chayes, *supra* note 53, at 1282.

56. Chayes, *supra* note 53, at 1282; Fiss, *supra* note 55, at 37; Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1279 (1995). Bone argues that these characterizations are "caricature[s]," and that Fuller appreciated "the creative, moral dimension to adjudication." *Id.* at 1275, 1323.

57. *See infra* notes 90–107 and accompanying text.

58. Chayes, *supra* note 53, at 1284; *see also* Fiss, *supra* note 55, at 41 (discussing the importance of public-interest litigation in "[t]he reconstruction of a prison, . . . a school system, . . . a hospital, or any bureaucracy"). Sixteen years later, Chayes expanded his public law model to include actions designed to change corporate policies. Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 28 (1982).

comprehensive regulatory regimes.[59] In Section C,[60] I describe public law tort litigation.

A. Fuller and his Principles of Bounded Adjudication

By the 1930s, legal realists had obliterated the notion that the law was a neutral, apolitical science.[61] However, the rise of Nazism and Stalinism increased the need for legal scholars to justify the exercise of judicial power within a democracy on the basis of something other than ideology or results alone.[62] With its origins in the work of scholars during the 1930s and 1940s,[63] the "legal process school" emerged during the 1950s as a means to re-create the idea of principled adjudication by establishing process standards of "[r]easoned [e]laboration."[64] The model suggested that certain types of decisions should be made by the legislature, the political branch that expresses the will of the electorate.[65] Other decisions would be made by the judicial branch, where judges were often not elected. The courts' decision-making should be subject to procedures designed to assure self-restraint and objectivity of process.[66]

Fuller emerged as a leading theorist of the legal process movement that "dominated the academy during the 1950s and 1960s and that influenced

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59. *See infra* notes 128–34 and accompanying text.

60. *See infra* notes 115–34 and accompanying text.

61. *See, e.g.*, JEROME N. FRANK, LAW AND THE MODERN MIND 108–16 (1930) (arguing that judges work backwards from results to reasoning); Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931) ("Behind decisions stand judges . . . they have human backgrounds. Beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch.").

62. *Cf.* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 5 (1973) ("[T]he frightening rise of European totalitarianism, especially Nazism, directly challenged both the political security and theoretical validity of democracy.").

63. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

64. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 253–68 (1992) (asserting that the "single dominant theme in post-war American academic legal thought is the effort to find a 'morality of process' independent of results"); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 279 (1973) (noting that "Reasoned Elaboration" emerged in the 1930s and 1940s as a result of "academic hostility to jurisprudential Realism").

65. HART & SACKS, *supra* note 63, at 696–97.

66. *Id.* at 568–69.

several generations of judges and lawyers."[67] His article, *The Forms and Limits of Adjudication*,[68] is regarded as one of the three "central works of . . . [the] legal process tradition."[69] Excerpts from the article are included in Henry Hart and Albert Sacks's once iconic teaching materials, *The Legal Process: Basic Problems in the Making and Application of Law*.[70] By the 1970s, though, critics attacked the legal process school for its sunny, 1950s assessment of the role of law as a means to expand common welfare via value-neutral principles.[71] Indeed, William Eskridge and Philip Frickey tell of one faculty member who supposedly roamed the halls of the Harvard Law School during Sacks's tenure as dean in the 1970s, uttering: "Legal process is dead."[72] However, based on their survey of the impact of Hart and Sacks's *The Legal Process* on legal scholars and the Supreme Court, Eskridge and Frickey conclude that the materials experienced "an unusually successful afterlife."[73]

In *The Forms and Limits of Adjudication*,[74] Fuller wrote that "[a]djudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[75] Each party makes a claim of right[76] based upon a rule, principle, or standard that predated the adjudication.[77] A core characteristic of adjudication is the ability of an affected party to participate through the presentation of proof

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67. Bone, *supra* note 56, at 1276. Fuller is perhaps better known to the modern audience for his debate with H.L.A. Hart concerning the relationship between law and morality. *E.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (debating the existence of a distinction between law and morality); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

68. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

69. Eskridge & Frickey, *supra* note 63, at cii.

70. *See supra* note 63 and accompanying text. Eskridge and Frickey report that once Fuller arrived as a faculty member at Harvard in 1940, he "joined Hart in a mutual admiration society . . . and [t]he two scholars openly acknowledged their debt to one another . . . ." Eskridge & Frickey, *supra* note 63, at lxxxiii.

71. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (stating that "substantive . . . conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will 'maximize the total satisfaction of valid human wants.'" (quoting HART & SACKS, *supra* note 63, at 113)).

72. Eskridge & Frickey, *supra* note 63, at cxxv.

73. *Id.*

74. *See* Fuller, *supra* note 68.

75. *Id.* at 366; *cf.* John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 187 (1951) ("[A] judgment in a particular case is evidenced to be rational by showing that . . . [it] is capable of being explicated by a justifiable principle.").

76. Fuller, *supra* note 68, at 365.

77. Lon L. Fuller, *The Forms and Limits of Adjudication* (1957) (unpublished earlier version of manuscript, reproduced in HART & SACKS, *supra* note 63, at 399). Fuller further explains that in adjudication, "like cases" must receive "like treatment." *Id.*

and reasoned arguments.[78] Elsewhere, Fuller explained that judges work "within a particular institutional framework"[79] and "that there are certain kinds of social tasks that are not suitable raw material for the adjudicative process."[80] He warned that when these principles are ignored, society "suffers from too much government by judges."[81]

In Fuller's view, common law courts are inescapably unsuited for managing enterprises and institutions.[82] He warned that in complex activities in which "every part is in interaction with the whole; to obtain through adjudicative procedures all the information necessary for economic direction would overfill the hearing chamber with 'litigants,' each with a different, segmental story of the relevance of a contemplated decision to his fractional participation in the whole undertaking."[83] Fuller also concluded that polycentric issues, the sort of issues that lie at the heart of contemporary tort cases such as climate change litigation, are inherently beyond the limits of judicial competence.[84] As an example, Fuller suggested that it would be impossible for courts to establish wage and price controls because "the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages."[85] Fuller compared polycentric issues to "a spider web" in which "a

78. Fuller, *supra* note 68, at 365. Of course, Fuller continued, the opportunity for a political candidate to make a speech to the electorate would also satisfy this criterion. What is unique to adjudication is the fact that the participation in the decision "is institutionally defined and assured." *Id.* at 366; *see also* Lon L. Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC'Y INT'L L. PROC. 1, 2, 5 (1960) (describing a party's right of participation as the "familiar conception . . . of giving the affected party 'his day in court'").

79. Fuller, *Adjudication and the Rule of Law*, *supra* note 78, at 1; *see also* HART & SACKS, *supra* note 63, at 643 (stating that questions submitted to courts must be ones capable of being resolved through a judicial process); Fuller, *supra* note 68, at 353–409 (defining the "kinds of social tasks" that courts are competent to handle).

80. Fuller, *Adjudication and the Rule of Law*, *supra* note 78, at 1.

81. LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE: A SELECTION OF READINGS SUPPLEMENTED BY COMMENTS PREPARED BY THE EDITOR 716 (Temp. ed. 1949); *see also* HART & SACKS, *supra* note 63, at 645 (arguing that modern democratic theory relegates "disputes which are not susceptible of solution by reasoning from generally applicable criteria of decision" to the legislature).

82. LON L. FULLER, ANATOMY OF THE LAW 110 (1968).

83. *Id.* at 111.

84. Fuller, *supra* note 68, at 371. Hart and Sacks reach a similar conclusion:

> Adjudication of disputes about managerial decisions involving the selection of a course of action for the future from among many possible courses is not ordinarily satisfactory, if it is feasible at all, 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.

HART & SACKS, *supra* note 63, at 647.

85. Fuller, *supra* note 68, at 394.

pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole."[86]

For purposes of this Article, Fuller's most important insight regarding the adjudication process undergirds what I refer to as the *model of bounded adjudication.* Fuller recognized that courts are ill-equipped to engage in comprehensive regulation that affects the interests of nonparties to the litigation. This core principle of the model reflects Fuller's strong commitment to the idea that it is the participation of the parties that both informs the judge's decision and legitimizes his exercise of power within a democratic society. As early as 1947, Fuller wrote that when judges attempt to regulate beyond the specific problems experienced by the parties, they "may not understand the interests that are affected by a decision rendered outside that framework."[87] As with managerial decisions, the proofs and arguments of the parties fail to adequately inform the court when there are "considerations much more important than those contained in the fragmentary presentation open to any single party."[88] Fuller believed that when a court fails to proceed in a piecemeal fashion and instead "undertakes comprehensive regulation[,] it forfeits its distinctive force . . . ."[89]

B. The Public Law Models of Chayes and Fiss

Chayes's public law model of litigation contrasts sharply with the norm envisioned by Fuller and is distinctly unbounded in nature. Chayes viewed adjudication as "a grievance about the operation of public policy"[90] and asserted that a court's fact-finding is "legislative" in nature.[91] Like Fuller, Chayes identified the interests of nonparties who are affected by public law litigation as at the core of his disagreement with Fuller about the nature of adjudication.[92]Chayes argued that the parties to an adjudication are "not rigidly bilateral but sprawling and amorphous."[93] Further, the relief granted by the court "often [has] important consequences for many persons including absentees."[94]

Chayes acknowledged that it is an open question as to whether the judge in public law litigation is capable of designing "a party structure that is

86. *Id.* at 395.
87. FULLER, *supra* note 81, at 707.
88. Fuller, *Adjudication and the Rule of Law*, *supra* note 78, at 4.
89. FULLER, *supra* note 81, at 728.
90. Chayes, *supra* note 53, at 1302.
91. *Id.*
92. *Chayes*, *supra* note 58, at 5.
93. *Chayes*, *supra* note 53, at 1302.
94. *Id.*

adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight."[95] He also appreciated the trial court's difficulty in weighing the interests of each of those affected by the litigation.[96] Finally, he admitted that Congress "is the institution authoritatively empowered in our system to balance incommensurable political values and interests."[97] Ultimately though, Chayes believed that these issues of judicial competence and constitutional propriety were outweighed by the need for courts to step in when the politically accountable branches of government fail.[98]

Three years later, Owen Fiss offered his own analysis of the same new litigation that Chayes analyzed.[99] According to Fiss, the critical aspect of the high profile reform litigation during the 1960s and 1970s was that it constituted "structural reform"[100] of large-scale government institutions such as schools or prison systems. In his view, the function of courts is not to decide disputes, but rather to participate in the "social process by which judges give meaning to our public values."[101] Fiss directly attacked Fuller's conception of adjudication, characterizing it as being naïve, because it grew out of an "essentially harmonious" social order "rooted in a world that no longer exists."[102] He recognized the link between what he regarded as the inherently polycentric nature of the courts' role in generating public norms and the notion, mistaken in his view, that all affected parties should have an opportunity to participate.[103] Such participation rights, in Fiss's view, would make structural reform litigation unwieldy and, ultimately, infeasible.[104] When he observed that court-generated public norms usually affect many groups of individuals,[105] Fiss openly acknowledged the unbounded nature of structural reform litigation.

As previously noted,[106] when Chayes and Fiss formulated their public law models, they described litigation enforcing federal constitutional and

95. *Id.* at 1312.
96. *Id.*
97. *Id.* at 1313. Ultimately, Chayes rested his hopes for addressing this concern on the parties' ability to negotiate settlements. *Id.* at 1310.
98. *Id.* at 1312–13.
99. Fiss, *supra* note 55, at 35–36.
100. *Id.* at 2.
101. *Id.*
102. *Id.* at 18, 44.
103. *Id.*
104. *Id.* at 44.
105. *Id.* at 2.
106. *See supra* note 58 and accompanying text.

statutory rights, not common law tort litigation.[107] As early as 1984, David Rosenberg argued that the public law model accurately described the then-current handling of asbestos cases and other mass products claims and provided courts with an appropriate litigation structure to regulate private corporations as well as public agencies.[108] Linda Mullenix disagreed with Rosenberg, contending that actions between "private parties alleging private harms" could not be analogized to public law litigation designed to change government policy.[109] As described below,[110] more recent mass tort litigation cycles, such as those seeking to have judges comprehensively regulate greenhouse gas emissions[111] or solve society-wide problems such as childhood lead poisoning,[112] reform government policy and fit comfortably within the public law model.[113]

C. *The Emergence of Unbounded Tort Litigation*

The repeated and massive nature of harmful corporate acts and omissions poses challenges to a tort system still operating under a very distinctive set of fundamental common law principles designed by common law judges of an earlier era. When courts first established these principles, they addressed

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107. Chayes, *supra* note 53, at 1284, 1314–15 (describing the objective of public law litigation as "the vindication of constitutional or statutory policies"); *see also* Fiss, *supra* note 55, at 29 (identifying constitutional litigation as "the most vivid manifestation" of his model).

108. 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). Rosenberg saw the public law model as a means to overcome an individual victim's inability to prove that the products of any particular manufacturer caused her harm. *Id.* at 859; *see also* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472–74 (1994) (noting similarities between mass products torts cases and public law litigation).

109. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 424–31 (1999); *see also* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 580–82 (1994) (asserting that mass tort litigations are not "public law litigation" because they "do not involve constitutional rights, . . . do not pit . . . defenseless claimants against . . . big, impersonal government institution[s], . . . [and] there is no state action involved in any of these cases").

110. *See infra* notes 129–30 and accompanying text.

111. *E.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (dismissing federal common law nuisance claims brought by eight states against electric power corporations for defendants' contributions to global warming).

112. *E.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 435 (R.I. 2008) (reversing judgment for state, acting as *parens patriae*, in action against former lead pigment manufacturers).

113. *See* Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 219–22 (2010) (suggesting that "the latest genre of policy-making tort litigation fits comfortably within [the public law model]").

far different kinds of harms, such as the traumatic injuries that occurred instantaneously to a single victim when a railroad locomotive or an automobile smashed his body.[114] However, in our mass production society, when multinational corporations manufacture harmful products such as asbestos insulation or cigarettes, they injure hundreds of thousands of people, if not millions. Some of these people, at the time the litigation is filed, are already experiencing injuries, but many others are not.[115] Similarly, in global warming, thousands of firms contribute to the problem by emitting greenhouse gases.

Two recent developments in mass tort litigation largely explain why tort actions are less tightly bounded than they once were. First, courts have begun to view tortious harm collectively, instead of as a series of individual harms.[116] This enables claimants to satisfy causation requirements when they otherwise might not be able to. Second, public interest advocates and mass plaintiffs' attorneys increasingly believe that the political process has failed to effectively regulate corporate conduct resulting in widespread harm—such as greenhouse gas emissions—and ask courts to impose alternative regulatory schemes.[117] In these instances, the attorneys view the harm as society-wide in scope, that is, unbounded.

1. Collectivization of Mass Torts and Causation

Victims of mass corporate torts often cannot satisfy what William Prosser described as "the simplest and most obvious"[118] aspect of determining tort liability: the requirement that a specific tortfeasor caused a particular victim's harm. For example, the daughter of the woman who took DES during her pregnancy to prevent miscarriages is unable to identify the pharmaceutical manufacturer that produced the drug that causes her cancer decades later.[119] In other instances, the actions of multiple tortfeasors

114. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005) (detailing the history of the common law system in the United States, including tort litigation).

115. *See, e.g.*, STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION (2005) (reporting on both current and anticipated incidence of asbestos-related diseases), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

116. *See infra* notes 118–27 and accompanying text.

117. *See infra* notes 128–34 and accompanying text.

118. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 237 (4th ed. 1971); *see also* Payton v. Abbott Labs., 437 N.E.2d 171, 188 (Mass. 1982) (stating that "identification of the party responsible for causing injury to another is a longstanding prerequisite" for liability).

119. *E.g.*, Sindell v. Abbott Lab., 607 P.2d 924, 936–38 (Cal. 1980) (noting that if the plaintiff in a DES case were required to identify the specific manufacturer who supplied her mother with DES, she would "effectively be precluded from any recovery"); *see also, e.g.*,

combine to cause a victim's harm, such as when several tobacco companies manufactured cigarettes smoked by the recently diagnosed cancer victim during her lifetime. In the global climate change litigation, literally billions of people contribute to the emission of greenhouse gases by heating their homes, driving their automobiles, and firing up their grills. As Justices Scalia and Kagan suggested,[120] theoretically at least, they might all legitimately be joined as defendants.

As a result, courts sometimes view harms to many individuals as a collective harm in order to circumvent the traditional requirement that any particular victim prove which, among many, tortfeasors specifically caused his harm. Individual victims are represented before the court by a "collective" plaintiff,[121] such as a class action representative,[122] a state suing as *parens patriae*,[123] or a municipal or county government representing some or all of its residents.[124] In these circumstances, the defendant's liability extends beyond the harms suffered by the parties before the court and includes harms to many nonparties allegedly harmed by its conduct, including those as of yet unidentified and even unharmed. Often this is accomplished by using a substantive claim, such as public nuisance, that views the pervasive harms not as an aggregation of individual harms, but rather as collective harm to society as a whole.[125]

Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1219, 1225 (Cal. 1997) (noting that plaintiffs could not prevail if required to show that exposure to asbestos produced by any particular manufacturer "increase[ed] the decedent's risk of developing lung cancer").

120. *See supra* note 3 and accompanying text.

121. Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 892–900, 915–33 (2005).

122. *E.g.*, Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1257 (Fla. 2006); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 652–53 (E.D. Tex. 1990) (describing class certification in action against asbestos manufacturers), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998).

123. *E.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 434 (R.I. 2008) (describing action by state, acting as *parens patriae*, against former lead pigment manufacturers); *In re* Mike Moore *ex rel.* State Tobacco Litig., Cause No. 94–1429, 2006 WL 3804253 (Miss. Ch. Ct. May 30, 2006) (describing *parens patriae* action against tobacco manufacturers for tobacco-related diseases).

124. *E.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1147–48 (Ill. 2004) (dismissing the city's action seeking compensation for expenditures caused by gun-related violence); City of Milwaukee v. NL Indus. Inc., 691 N.W.2d 888, 890, 897 (Wis. Ct. App. 2004) (allowing the city's action against paint companies to proceed to trial).

125. *See* GIFFORD, *supra* note 28, at 144. *Compare Lead Indus. Ass'n.*, 951 A.2d at 455 (dismissing public nuisance claim asserting that presence of lead pigment in residences throughout state "interfered with a public right"), *with NL Indus. Inc.*, 691 N.W.2d at 897 (allowing public nuisance action against lead paint manufacturer to proceed to trial); *see also* Gifford, *supra* note 121, at 915–33 (noting that other collective causes of action include unjust enrichment, indemnity, and misrepresentation).

While it addresses the plaintiffs as a collective entity, the court frequently also views the defendants as parts of a collective whole. It is well-accepted tort doctrine that independent tortfeasors who have each contributed to an indivisible harm are held jointly and severally liable for the victim's damages.[126] But how would joint and several liability operate when the litigation aims to hold utility companies and other industrial polluters liable for global climate change to which literally billions contribute and the percentage contribution of any individual defendant is comparatively trivial?[127] Obviously, at least in some collective tort actions involving numerous victims and contributors to their harms, the adjudications are essentially unbounded.

2. The Intentional Regulation of Nonparties

The second factor characterizing much public law tort litigation is the explicit intent to impose a judicially created regulatory regime on product manufacturers or other tortfeasors. Ordinarily, the loss minimization impact of tort law occurs as a result of the accumulation of judgments in individual lawsuits; those suits send regulatory signals to potential tortfeasors.[128] The new paradigm of tort litigation is different. It seeks to impose explicit regulatory regimes when those sponsoring such litigation believe that the political branches of government have failed to act or that an existing statutory or regulatory regime is insufficient and in need of replacement. For example, consider the explanation of John P. Coale, one of the leading private attorneys who assisted state and city governments in bringing common law tort actions against tobacco and gun manufacturers: "They failed to regulate tobacco and they failed regarding guns. . . . Congress is

126. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094, 1096 (5th Cir. 1973) (finding that where asbestos manufacturers contributed to asbestos dust at plaintiff's worksites, they could be held jointly and severally liable for his disease even if it was impossible to show "which particular exposure . . . resulted in injury").

127. *E.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2532 (2011) (dismissing federal common law nuisance claims alleging that defendant utility companies contributed to global warming); Comer v. Murphy Oil USA, 585 F.3d 855, 859–60 (5th Cir. 2009) (considering claims that regional businesses contributed to the indivisible harm of global warming); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (dismissing claims against ExxonMobil for contributing to global warming); People v. Gen. Motors Corp., No. C06-05755, 2007 U.S. Dist. LEXIS 68547, at *2 (N.D. Cal. Sept. 17, 2007) (dismissing claims against automobile manufacturers for contributed to global warming).

128. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297–98 (7th Cir. 1995) (Posner, C.J.) (contrasting 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).

not doing its job. . . . [and] lawyers are taking up the slack."[129] Similarly, a New York assistant attorney general who played a critical role in the climate change litigation 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 . . . so that the unfortunate inaction of one branch does not leave our citizens without hope or recourse."[130]

The proponents of this new form of litigation also see punitive damages as essential to regulating or deterring the conduct of those that inflict mass harms. Michael Rustad characterizes punitive damages as a tool to be used "as a gap-filler to constrain corporate wrongdoing that is not punished and deterred by the criminal law."[131] For decades, courts and commentators recognized deterrence as being one of the legitimate objectives of punitive damages.[132] During the past generation, however, plaintiffs' attorneys and scholars increasingly viewed punitive damages not only as a tool to deter the specific defendant before the court from engaging in further harmful conduct but also as a means to regulate other corporate actors.[133]

Realistically, the impact of explicit regulation through the tort system is unbounded. If *American Electric Power Co.*[134] had proceeded to a remedial phase, the practical effect of any court-ordered reductions in greenhouse gas emissions would have extended far beyond the five greenhouse gas emitters present before the Court, just as punitive damages awards influence the

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129. John Coale, Litigator for the Plaintiff, Government-Sponsored Litigation—What's Next?, Remarks Before the Manhattan Institute Conference Series No. 1 (June 22, 1999), *in* REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT-SPONSORED LITIGATION 64 (Manhattan Inst. for Policy Research ed., 1999), *available at* http://www.manhattan-institute.org/pdf/mics1.pdf.

130. Peter Lehner, Connecticut v. AEP*: A Long History of Nuisance Law*, 35 COLUM. J. ENV'T. L. FIELD REP. 1, 7 (2010), *available at* http://www.columbiaenvironmentallaw.org/articles/connecticut-v-aep-a-long-history-of-nuisance-law.

131. Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 788 (2008).

132. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (stating that punitive damages are "aimed at deterrence and retribution"); Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (noting that punitive damages limit outrageous behavior by reducing the chance of profiting from such behavior); *see also, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams: *The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 474 (2008) (discussing the many purposes of punitive damages).

133. *See, e.g.*, Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 111 (2002) (identifying deterrence of "future wrongdoers" as a goal of punitive damages); Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 536–37 (2011) (describing role of punitive damages in regulating entire automobile industry).

134. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

activities of others within the same industry. In short, the public law tort litigation of the past two decades is a very different creature from the bounded tort adjudications of the preceding centuries.

II. CONSTITUTIONALIZING THE MODEL OF BOUNDED ADJUDICATION

During the past fifteen years, the Supreme Court began to constitutionally mandate a version of bounded adjudication that echoes Fuller's principles.[135] The Court has held that as a matter of constitutional law, courts may not:

> adjudicate the rights of victims who are neither parties before the court nor fall within well-defined categories of those who may be adequately represented, notably members of class actions;[136]
>
> consider harms to nonparty victims when assessing a tortfeasor's compensatory or punitive damages;[137]
>
> grant standing to plaintiffs claiming generalized and diffuse, rather than specific and circumscribed, harms;[138] or
>
> enjoin the harmful conduct of tortfeasors whose harmful activities fall within the purview of a comprehensive federal regulatory scheme, even if the scheme has not been effectively enforced.[139]

The Court's requirement of bounded adjudication emerges from this constellation of doctrinally disparate cases that rely on due process,[140] justiciability doctrines inherent in Article III,[141] and even the Supremacy Clause.[142]

During most of the twentieth century, the United States Supreme Court stayed on the sidelines as state courts oversaw the development of tort law. The Court rarely reviewed tort actions between private parties that involved neither a federal statute nor defamation or invasion of privacy claims implicating First Amendment protections. However by the 1990s, mass torts,[143] huge punitive damages awards against corporations, and other

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135. *See supra* notes 68–89 and accompanying text; *see also infra* notes 262–64 and accompanying text.

136. *See infra* notes 158–68 and accompanying text.

137. *See infra* notes 169–86 and accompanying text.

138. *See infra* notes 200–25 and accompanying text.

139. *See infra* notes 238–53 and accompanying text.

140. *See infra* notes 158–86 and accompanying text.

141. *See infra* notes 187–237 and accompanying text.

142. *See infra* notes 238–53 and accompanying text.

143. Deborah R. Hensler and Mark A. Peterson define "mass torts" by reference to three factors: "[1] the large number of claims associated with a single 'litigation'; [2] the

variants of public law tort litigation encountered a formidable obstacle in the Supreme Court. Since 2005, this trend has accelerated under Chief Justice John Roberts's leadership of the Court.[144] According to Jeffrey Rosen, the Roberts Court is particularly suspicious of "regulation by litigation."[145]

The Supreme Court now casts considerable influence over the development of American tort law even though the Court traditionally left it in the hands of state courts. Supreme Court decisions reflecting a model of bounded adjudication that rest on the Fourteenth Amendment's Due Process Clause directly restrain state courts. Even though Article III justiciability doctrines do not directly limit the types of cases that state courts may adjudicate, when state courts consider requirements such as standing and the political question doctrine, they frequently find the Supreme Court's analysis of such doctrines highly persuasive.[146] Finally, the Court's recent opinion in *American Electric Power Co. v. Connecticut*,[147] holding that the Clean Air Act displaced the federal common law of nuisance, suggests that in a future case the Court may find that comprehensive federal regulatory statutes preempt state common law actions.[148]

The Court's decisions appear to reflect the influence of the emerging model of bounded adjudication rather than an unprincipled bias in favor of corporate defendants. For example, all of the Court's comparatively liberal Justices joined Justice Ginsburg's opinion in *American Electric Power Co.* Each of the current Justices once had a front row seat to observe either Fuller's development of his model of adjudication or the ensuing debate between Fuller and his public law antagonists, Chayes and Fiss. Each attended law school—and presumably began to develop his or her own unique understanding of adjudication—during a generation-long period between 1957 and 1986.[149] Six of the Justices attended Harvard and likely

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commonality of issues and actors among claims within a litigation; and [3] the interdependence of claims values." Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

144. *See* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 956, 961–72 (2008) (concluding that "the Roberts Court is the most pro-business Court of any since the mid-1930s").

145. Jeffrey Rosen, *Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 932 (2009).

146. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 134 (3d ed. 2000).

147. 131 S. Ct. 2527 (2011).

148. *See infra* note 204 and accompanying text.

149. This era began when Justice Scalia first enrolled at the Harvard Law School in 1957 and ended with Justice Kagan's graduation from the same school in 1986. *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 9, 2012).

encountered the ideas of Fuller and later Chayes in the classroom either from these scholars themselves or from their colleagues,[150] and three attended Yale where Fiss was an influential intellectual presence among his colleagues and students.[151]

Fuller first presented his "Forms and Limits of Adjudication" manuscript to the Legal Philosophy Discussion Group at Harvard Law School in 1957, and he taught courses based on these materials to students at the law school during the 1960s.[152] When the *Harvard Law Review* eventually published Fuller's seminal article posthumously in 1978, its managing editor was none other than today's Chief Justice, John Roberts. Many of the current Justices probably were exposed to Fuller's theory of adjudication through their study of the widely circulated materials on the legal process, edited by Hart and Sacks.[153] While attending law school in the years that followed Fuller's death, today's junior Justices of the Court perhaps encountered either the Hart and Sacks legal process materials or the then-raging debate between Fuller's traditional model of bounded adjudication and the more activist, public law orientation shared by many of their teachers and Fuller's critics, including Chayes and Fiss.[154]

A. Due Process and the New Tort Regime

Beginning in the mid-1990s, even before the appointment of Chief Justice Roberts, the Supreme Court began to constitutionalize the model of bounded adjudication, at least in the context of mass torts. The Court struck down global settlements that bound future victims of asbestos-related diseases who were neither parties before the trial court, nor even yet showing symptoms of illness.[155] More recently, in *Philip Morris USA v. Williams*,[156] the Court reversed a huge punitive damages award punishing a tobacco company for its actions that caused harm to victims of tobacco-related diseases throughout the country, although only one of them was before the court as a plaintiff.[157] Because the Court's ruling in *Williams* benefited the defendant, and not the absent victims, it cannot be accurately

150. *Id.*

151. *Id.*

152. *See* Kenneth I. Winston, *Special Editor's Note* preceding Fuller, *supra* note 68, at 353 (providing account of events leading up to the publication of Fuller's manuscript).

153. Five members of the Supreme Court in 2002 had studied the legal process materials in the classroom. Eskridge & Frickey, *Introduction to The Legal Process*, *supra* note 63, at li.

154. Bone, *supra* note 56, at 1274.

155. *See infra* notes 158–65 and accompanying text.

156. 549 U.S. 346 (2007).

157. *See infra* notes 169–86.

explained as an instance in which the Court recognized a right of participation. Instead, it represents a distinct building block in a constitutionally required architecture of bounded adjudication.

1. Claimants' Due Process Rights to Meaningful Participation

The Court first hinted at due process limits on the ability of common law tort litigation to bind nonparties when it addressed two global settlements that arose in massive asbestos lawsuits. These purported settlements limited the manufacturers' liability to unbounded classes of future victims of asbestos-related diseases, including those who had been exposed to such products but had yet to manifest symptoms. In *Amchem Products, Inc. v. Windsor*,[158] the parties' proposed settlement detailed a schedule of payments to be made to victims who developed certain asbestos-related illnesses in the future, as well as an administrative mechanism for considering claims and disbursing payments.[159] The Supreme Court held that those asymptomatic individuals who had not yet filed a claim, but who had been exposed to asbestos, were too different from one another and too different from victims already diagnosed with illnesses to be certified as a single class for class action purposes.[160] On the surface, the holding in *Amchem* rests on the Court's conclusion that plaintiffs failed to satisfy the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure.[161] Nowhere in its opinion did the Supreme Court mention due process.

Two years later in *Ortiz v. Fibreboard Corporation*,[162] the Supreme Court rejected another attempt to use the class action mechanism to bind

158. 521 U.S. 591 (1997).

159. *Id.* at 597, 603–04.

160. *Id.* at 626–27.

161. *Id.* at 629. The Supreme Court found that common questions of law and fact did not predominate over questions affecting only individual members as required for certification under Federal Rule of Civil Procedure 23(b)(3). *Id.* at 622. Specifically, some of the members of the proposed class already suffered from any number of very different asbestos-related diseases, while others did not. *Id.* at 624. The Court further noted, "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." *Id.* (internal quotation marks omitted). The Court also held that certification was not proper because the named class representatives could not "fairly and adequately protect the interests of the class" as required by Rule 23. *Id.* at 625–26. According to the Court, "the critical goal [of] generous immediate payments" for the currently injured "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626.

162. 527 U.S. 815 (1999).

members of an indeterminate and unbounded, purported class of those exposed to asbestos products but not yet symptomatic.[163] In *Ortiz*, unlike *Amchem,* the Supreme Court explicitly recognized future claimants' due process interests in participation.[164] Even though both *Amchem* and *Ortiz* superficially relied upon the class certification requirements of Rule 23, leading scholars of class action practice conclude that what really drove the Court's analysis was "a fundamental tenet of constitutional due process."[165]

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163. Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999). Fibreboard and its principal insurer agreed to settle both the 45,000 pending claims against the corporation and all future claims for $1.535 billion, to be paid almost entirely by its principal insurer, with modest contributions from Fibreboard itself and one other insurer. *Id.* at 824–25. Claimants would seek compensation from a trust funded with these proceeds, and their rights to sue in court would be extremely limited. *Id.* at 827. Counsel sought class certification of the exposure-only plaintiffs under subsection (b)(1)(B) of Rule 23, which allows class actions if plaintiffs' separate actions would impair the ability of similarly situated victims to protect their own interests. FED. R. CIV. P. 23(b)(1)(B). Fibreboard argued that the settlement trust funds constituted a "limited fund," so that the full payment of the earlier claims would deplete the funds available to pay victims who filed later claims. *Ortiz*, 527 U.S. at 841. Unlike *Amchem*, the limited fund class certification established a mandatory class certification without any opportunity for class members to opt out. *Id.* at 869–70. The Supreme Court rejected the class certification. *Id.* at 843 (noting that the Advisory Committee, which wrote Rule 23, had not contemplated that a defendant's contention that it lacked resources to pay claims justified mandatory class action certification).

164. *Ortiz*, 527 U.S. at 846 (stating that at least in "mandatory class actions aggregating damages claims implicate[s] the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party'") (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

165. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353 (1999); *see also* Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1911 (2000) (describing the central focus in the two opinions "as a matter of constitutional due process"); Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 587 (2006) ("[T]he *Amchem* and *Ortiz* majorities framed their rejection of both class action settlements on procedural due process grounds . . . ."); Linda S. Mullenix, *Standing and Other Dispositive Motions After* Amchem *and* Ortiz*: The Problem of "Logically Antecedent" Inquiries*, 2004 MICH. ST. L. REV. 703, 720 (2004) (reporting that "[Professor Laurence] Tribe's brief and oral argument in *Amchem* attempted to constitutionalize the debate").

At least in some specific circumstances, the Supreme Court requires that each party bound by a judicial decision have a personal right to participate in the adjudication. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (holding that claims for individualized damages cannot be certified under Rule 23(b)(2) because absent class members lack the ability to participate or opt-out); AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that, in order to bind absent plaintiffs on a claim for money damages, "plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"). Martin Redish recently argued that such a right, broadly conceived, is inherently inconsistent with class action practice. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 1–3 (2009) (suggesting that class action lawsuits were never intended to "obtain[]

The Supreme Court decisions in *Amchem* and *Ortiz* overwhelm the ability of common law adjudication to address mass harms. A number of scholars, including David Rosenberg, argue that mandatory class actions represent the most effective means of both achieving optimal deterrence and adequately compensating victims of mass harms.[166] He contends that individual participation rights leave "everyone worse off" in the long run.[167] The mandatory class action, according to Rosenberg, is also the most effective response to regulators' failure to prevent mass harms.[168] Obviously, Rosenberg speaks from a public law perspective, a perspective implicitly rejected by the Supreme Court in *Amchem* and *Ortiz*.

2. Punitive Damages as Extra-compensatory or Societal Damages

The Supreme Court explicitly recognized constitutional limits on the ability of a court to consider the interests of nonparties in its punitive damages decision in *Philip Morris USA v. Williams*.[169] Catherine Sharkey argues that *Williams* "signifies verve for federal intrusion upon a

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relief for many plaintiffs whose claims are insufficiently large to economically justify individual litigation"). *But see* Resnik, *supra* note 24, at 135 ("[A]lthough the *Wal-Mart* opinion . . . [states] that the 'class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'' that description has long since ceased to be apt." (quoting *Wal-Mart*, 131 S. Ct. at 2550)).

Resnik argues that any individual's right to participate in seeking legal redress for mass harms is largely illusory given the maldistribution of resources between businesses and victims and the costs of litigation. *Id.* at 142, 145. While her observation may be valid in the context of smaller consumer, employment, and civil rights claims, it seems inapposite in the context of claims alleging significant personal injures where contingent fee agreements award plaintiff's counsel adequately for their efforts.

In construing *Amchem* and *Ortiz*, Issacharoff argues that the "fundamental tenet of due process" is best characterized not as a matter of the individual rights of absent class members, but rather as a "question of governance, and the requirement that there be adequacy of representation for absent class members." Issacharoff, *supra*, at 353; *see also* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970–71 (1993) (agreeing that the class member's right is "not a right of participation, but rather . . . the right to have one's interest adequately represented"). Issacharoff later served as Reporter for the ALI's *Principles of Aggregate Litigation* and his representational model permeates the *Principles*. AMERICAN LAW INSTITUTE, *supra* note 20, at § 1.05 cmt. b (providing that judges should "promote adequate representation" in aggregate litigation).

166. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 862 (2002); *see also, e.g.*, Sergio J. Campos & Howard M. Erichson, *The Future of Mass Torts*, 159 U. PA. L. REV. PENNUMBRA 231, 234 (2011).

167. Rosenberg, *supra* note 166, at 863.

168. *Id.* at 832.

169. 549 U.S. 346 (2007).

traditionally state-law area of torts."[170] In the decades preceding *Williams*, many scholars and influential judges viewed punitive damages from a law and economics perspective. Punitive damages provided "extra-compensatory" or "societal" damages—they forced tortfeasors to internalize negative externalities that occur as a result of harms to nonparties to assure that tortfeasors consider the possibility of such damages when they elect to engage in harm-producing activity.[171] For example, Sharkey notes that diffuse harms affect not only parties before the court and other identifiable parties but also numerous additional victims of exposure to pollution, toxic products or similar harms who, for one reason or another, are unlikely to file suit.[172] In her 2003 article, she explicitly acknowledges that court-ordered damages for diffuse harms resemble "an effluent tax, or taxing defendants for the general welfare."[173] During recent oral arguments in *American Electric Power Co.*,[174] Justice Breyer hinted at a contrasting perspective when he skeptically questioned plaintiff's counsel as to whether a *court* could order a tax on carbon emissions as a solution to global climate change.[175] Counsel admitted, "I don't think so."[176]

In *Williams*, the widow of a deceased cigarette smoker sued Philip Morris, the manufacturer of Williams's preferred brand of cigarettes, for negligence and deceit, alleging that the defendant knowingly and falsely led him to believe that cigarette smoking was safe.[177] During closing arguments, plaintiff's attorney asked the jury to consider how many other people the defendant had killed.[178] The trial court judge denied the defendant's request for a jury instruction that would have informed the jury that it could not

170. Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLIAMETTE L. REV. 449, 477 (2010).

171. Ciraolo v. City of New York, 216 F.3d 236, 244–46 (2d Cir. 2000) (Calabresi, J., concurring) (justifying punitive damages as social damages serving as a proxy for compensation for harms to victims who will not sue); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 354 (2003) (arguing that punitive damages serve as "'societal damages' designed to compensate others directly harmed but not before the court").

172. Sharkey, *supra* note 171, at 400, 404.

173. *Id.* at 400; *see also* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 950–51 (2008) (discussing the legislative nature of the Master Settlement Agreement that settled state tort litigation against tobacco companies).

174. Transcript of Oral Argument, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-174.pdf.

175. *Id.* at 43, 61.

176. *Id.* at 61.

177. Philip Morris USA v. Williams, 549 U.S. 346, 349–50 (2007).

178. *Id.* at 350.

punish the defendant for harm to nonparty victims,[179] and the jury awarded $79.5 million in punitive damages.[180] The U.S. Supreme Court held that "the . . . Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[181] Although Justice Stevens, as well as three other Justices, dissented from the Court's holding, even he acknowledged the existence of due process limits on the ability of a court to award *compensatory* damages to a plaintiff before the court "measured by the harm that the conduct had caused to any third parties."[182]

Justice Breyer, writing for the five-member majority, offered two justifications for the holding.[183] First, punitive damages that take into account damages done to others deprive a defendant of "an opportunity to present every available defense."[184] For example, Philip Morris might have been able to show that some nonparty victims did not rely on its misrepresentations—in other words, even in the absence of such misrepresentations, the nonparty victims would not have stopped smoking. In the prototypical, dispute-resolution case envisioned by Fuller, when an individual victim sues a specific tortfeasor, the defendant has reasonable notice of the plaintiff's allegations of facts supporting liability. However, this is not the situation when the jury considers harms inflicted on unknown numbers of anonymous, purported victims when awarding damages. In these circumstances, the extent of the defendant's liability depends upon what has happened to hundreds of thousands, even millions, of sometimes similar and, inevitably often dissimilar individual harms for which issues such as reliance, causation, and injury vary widely.[185] The *Williams* majority's second rationale for its holding was that "to permit punishment

179. *Id.* at 351.

180. *Id.* The trial court judge found the award excessive and reduced it to $32 million, but the Oregon Court of Appeals reinstated the original award. Williams v. Philip Morris, Inc., 48 P.3d 824, 843 (Or. Ct. App. 2002).

181. *Phillip Morris*, 549 U.S. at 353. However, the majority went on to say that its decision does not prevent the plaintiff from showing "harm to others in order to demonstrate reprehensibility." *Id.* at 355. Justice Stevens in his dissent found this distinction to be incoherent. *Id.* at 360 (Stevens, J., dissenting).

182. *Id.* at 358–59 (Stevens, J., dissenting).

183. *Id.* at 353–54.

184. *Id.* at 353 (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

185. *See* Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1434–35 (2004) (concluding that "ascertaining the merits of the absent person's claim" is the greatest problem with using punitive damages to redress harms for parties not before the court); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (reasoning that defendant-employer "is entitled to individualized determinations of each employee's eligibility for backpay" under Title VII).

for injuring a nonparty victim would add a standardless dimension to the punitive damages equation."[186] Both of Justice Breyer's rationales ultimately address problems inherent in unbounded adjudication.

B. *Justiciability*

The federal courts use the language of Article III's grant of judicial power to the federal courts, limiting jurisdiction to "Cases" and "Controversies,"[187] as a second constitutional basis for imposing a mandatory model of bounded adjudication. During the past decade, the Supreme Court repeatedly indicated that these words "confine 'the business of federal courts to questions . . . in a form historically viewed as capable of resolution through the judicial process.'"[188] According to Justice Kennedy, "[i]n the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees."[189] After reviewing the historical records of

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186. *Phillip Morris*, 549 U.S. at 354. The jury likely would not hear specific evidence in response to questions such as "How many such victims are there? How seriously were they injured? [and] Under what circumstances did injury occur?" *Id.* In these circumstances, the Court concluded, "[t]he jury will be left to speculate." *Id.* The "standardless dimension" described by the Court is similar to the impossible tasks facing a trial court in climate change litigation. *See infra* notes 265–73 and accompanying text.

187. U.S. CONST. art. III.

188. Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) (describing Article III as restricting federal judicial power "to the traditional role of Anglo-American courts").

189. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011). Justice Kennedy added, "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Id.* at 1142. He then quoted Chief Justice Marshall who once wrote that without such restrictions, "federal courts might take possession of 'almost every subject proper for legislative discussion and decision.'" *Id.* (quoting 4 PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984)). Similarly, Justice Scalia finds that justiciability doctrines have "deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition." Honig v. Doe, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting). Nearly a half-century earlier, Justice Frankfurter asserted:

> In endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . . Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'

Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). Several distinguished scholars have questioned whether the conception of "Cases" and "Controversies" at the time of the adoption of the Constitution was as limited as Justice Frankfurter concluded. *E.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J.

the Constitutional Convention and the ratification debates, James Leonard and Joanne C. Brant recently concluded that "the Framers most likely viewed the courts as places where individual litigants came to have actual and personal grievances resolved."[190] Even for those members of the Supreme Court who reject an originalist interpretation of this provision, the meaning of the Article III requirement of a "Case" or "Controversy" ultimately rests on the limits of judicial competence[191] and separation of powers.[192]

Standing and the political question doctrine are the specific justiciability doctrines that are most often implicated in implementation of the model of bounded adjudication.[193] The Supreme Court itself has yet to use these doctrines to limit the federal courts' handling of mass tort litigation, but its past decisions in other contexts suggest that it may not be long before the Court addresses justiciability in this context.[194] Not surprisingly, federal courts scholars find the standing and political question doctrines, particularly when interpreted aggressively to prevent jurisdiction, to be manifestations of what they usually refer to as the "dispute resolution model,"[195] defined by reference to the same characteristics inherent in Fuller's model of adjudication.[196] In contrast, the public law model of Chayes and structural reform model of Fiss find their justiciability parallels

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816, 819–27 (1969) (highlighting the difficulty in the Framers limiting judicial review to "Cases" and "Controversies" without a clear definition of either term); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–75 (1961) (discussing the historical background of the U.S. Constitution to challenge modern interpretations); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 636–41 (1992) ("[E]ven resort to history and tradition does not reveal a plain meaning of 'cases' and 'controversies.'").

190. James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 5–6 (2001).

191. *See infra* notes 260–78 and accompanying text.

192. *See infra* notes 209–12, 291–307 and accompanying text.

193. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009) (dismissing climate change litigation on political question and standing grounds); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 at *48 (N.D. Cal. 2007) (dismissing climate change litigation on political question grounds).

194. *See infra* notes 217–23, 235–37 and accompanying text.

195. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–73 (6th ed. 2009); Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 12–13 (2003); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 626–27 (1992); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368–71 (1973); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77–78 (2007).

196. FALLON ET AL., *supra* note 195, at 74 n.4.

in what Richard Fallon calls the Supreme Court's "law declaration model."[197] Fallon describes this model as assuming that the Supreme Court and other federal courts have a special role "to declare and explicate legal values—norms that transcend individual controversies."[198] He concludes that the Court's recent justiciability holdings generally reflect the dispute resolution model rather than the law declaration model.[199]

1. Standing

In a traditional tort case, the standing doctrine is superfluous. The injured victim suffers a physical injury caused by the tortfeasor's conduct that can be redressed by court-awarded compensation, thus satisfying the Supreme Court's three elements of standing outlined in *Lujan v. Defenders of Wildlife*[200]—an injury in fact, causation or traceability, and redressability. However, the requirements of liability in public law model torts sometimes diverge from the elements of standing. Consider the standing question in the Supreme Court's recent opinion in the climate change litigation, *American Electric Power Co v. Connecticut.*[201] In that case, eight states, the City of New York, and three land trusts sued five electric utility companies, seeking abatement of emissions from the defendants' fossil fuel-powered plants that allegedly contributed to global climate change.[202] Four Justices of the equally divided eight-member Court held that plaintiffs lacked standing.[203] Even if the plaintiffs proved facts establishing the required, common law elements for both liability and the injunctive relief they sought, it is unlikely that the court could realistically redress plaintiffs' injuries, a requirement for standing. Even with the granting of requested injunctive relief, greenhouse gas emissions from billions of others not before the court, as well as from natural causes, would still cause the harms asserted by plaintiffs. Because standing is a component of jurisdiction that must be addressed before a court considers issues on the merits, including federal

197. *Id.* at 73 n.2 (referring the reader to Chayes and Fiss, among others, for elaboration of the model).

198. *Id.* at 73; *see also* MARTIN H. REDDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 87–88, 103–06 (1991) (using the term "judicial-political model"); Lee, *supra* note 195, at 627–28 (describing the "'public values' model"); Siegel, *supra* note 195 (calling this model a "public law" or "special function" view).

199. FALLON ET AL., *supra* note 195, at 75.

200. 504 U.S. 555, 560–61 (1992).

201. 131 S. Ct. 2527, 2532 (2011).

202. Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527, 2533–34 (2011).

203. *Id.* at 2535. The Supreme Court unanimously held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuel fired power plants." *Id.* at 2537.

preemption of state public nuisance claims, it is likely that the Ninth Circuit Court of Appeals, and probably ultimately the Supreme Court itself, will soon face the question of whether plaintiffs have standing to pursue state public nuisance claims in climate change litigation in *Native Village of Kivalina v. ExxonMobil*.[204]

Heather Elliott identifies three functions often regarded as underlying standing, two of which are relevant here.[205] First, as the Supreme Court recently stated in *Massachusetts v. EPA*,[206] standing ensures that the "business of the federal courts" is confined "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[207] In other words, here the Court echoes Fuller's general concerns about the form and limits of the judicial function.[208] The second and even more important foundation of standing doctrine lies in the "pro-democracy,"[209] separation-of-powers concept that undergirds the Article III delegation of federal judicial power.[210] If a harm is inflicted in a general and diffuse manner on all or many individuals, the Supreme Court has held that the "matter is committed to the surveillance of Congress, and ultimately to the political process."[211] The Court usually refrains "from adjudicating 'abstract questions of wide public significance'

204. 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009) (noting an appeal to the Ninth Circuit, including the preemption issue).

205. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460–62, 468 (2008). The third function identified by Elliott, not considered here, is that standing prevents the federal courts from being conscripted by Congress in its power struggle with the President and executive agencies. *Id.* at 468.

206. 549 U.S. 497 (2007).

207. Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982) (noting that standing requires "'concrete adverseness which sharpens the presentation of issues'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))); Elliott, *supra* note 205, at 460, 469–75 (discussing the adverse nature and proper interest necessary for standing). *But see* Siegel, *supra* note 195, at 87–90 (casting doubt on so-called "litigation-enhancing" arguments for standing doctrine).

208. *See supra* notes 67–89 and accompanying text.

209. Elliott, *supra* note 205, at 468.

210. *See* Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Change*, 83 CAL. L. REV. 1309, 1319 (1995) (noting that standing "helps to preserve" separation of powers); Elliott, *supra* note 205, at 475–87 (describing the "pro-democracy function" of standing). Stearns also focuses on another distinctive aspect of the separation of powers rationale for standing. He notes that legislatures, unlike courts, are able to refuse to decide an issue until a legislative consensus is achieved. Stearns, *supra*, at 1319. The standing requirement reduces the ability of a litigant to prompt the court to change the status quo when the legislature has refused to do so, thus protecting the elected body's decision not to act.

211. United States v. Richardson, 418 U.S. 166, 179 (1974).

which amount to 'generalized grievances,' pervasively shared and most appropriately addressed by the representative branches."[212]

Perhaps counterintuitively, application of Fuller's right of participation often calls for federal courts to deny standing—that is, the right to participate—when the plaintiff's purported injury is generalized or diffuse, in other words, shared by numerous other members of society. Why? If plaintiffs are allowed to pursue their generalized grievances, other victims who suffer harms similar to those of the plaintiffs but who are not parties in the original litigation will be effectively denied their own participation rights. If the defendants prevail in the first adjudication, a nonparty victim likely is effectively foreclosed from recovery in a subsequent proceeding, either because competent plaintiffs' counsel are no longer willing to accept the case on a contingent fee basis or because the precedential value of the earlier adjudication results in dismissal of her case. Of course a victim who is not the first to sue always faces this risk. However this probability increases dramatically when the first adjudication is brought by someone with only a generalized interest, because the adverse judgment likely is more broadly applicable than it would be in litigation involving a specific claim. Further, as Fuller warned, the initial plaintiff with the generalized grievance may not pursue the claim with the same adversarial vigor or with the same effectiveness as the victim who experienced a more specific harm.[213]

Lea Brilmayer identifies a second manner in which allowing generalized grievances to be heard blocks the participation rights of other victims.[214] Special interest groups often encourage and sponsor mass tort litigation. They choose those victims whose harms are most likely to lead to an outcome advancing the interest groups' own ideological agendas to be plaintiffs. The ability of nonparty members of the general public with different ideological perspectives to be heard effectively in these judicial

212. *Valley Forge Christian Coll.*, 454 U.S. at 475 (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)); *see also, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) (stating that standing bars "adjudication of generalized grievances" that would be "more appropriately addressed in the representative branches"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) (holding that the "generalized interest of all citizens in constitutional governance . . . is an abstract injury" that is not adequate for standing).

213. *See* FULLER, *supra* note 81, at 707 and accompanying text.

214. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306 (1979) (arguing from the "representation" perspective that due process problems arise if the initial litigant, often an "ideological challenger" without a "personal stake" is allowed to represent the interests of others and comparing this problem with the due process problems that arise in class action certifications); Stearns, *supra* note 210, at 1405–06.

proceedings frequently is quite limited.[215] Brilmayer contends that allowing often ideologically driven parties to represent the rights of victims who are not before the court is a violation of the nonparty victims' rights of self-determination.[216]

Adjudication of generalized grievances resulting in broad-based remedies also increases the risk of harm to nonparties other than additional victims or tortfeasors. For example, in global climate change litigation, the generalized nature of the grievance likely results in broad-based remedial action that affects not only the employees and customers of the defendants before the court but also those in similar relationships with other emitters of greenhouse gases. Perhaps other factories should be forced to abate greenhouse gas emissions, but standing doctrines should not dramatically exacerbate the problem that many affected by court orders lack effective participation rights.

The Supreme Court's recent opinion in *American Electric Power Co.*[217] leaves the standing questions in global climate change cases in a decidedly uncertain state.[218] No grievance could be more generalized than the worldwide effects of global climate change. In climate change cases, the second *Lujan* standing element,[219] causation or traceability, is key. The harm caused to any particular victims results from the totality of all greenhouse gas emissions from all users of fossil fuels throughout the world regardless of their respective locations. The emission of any given quantum of greenhouse gases from a utility plant in California causes no greater melting of the snowpack in the California mountains than does the emission of an equivalent quantum of greenhouse gases from an automotive plant anywhere else in the world. The plaintiffs' assertion in these cases is essentially that defendant utility companies are significant contributors to

215. Stearns, *supra* note 210, at 1406.

216. Brilmayer, *supra* note 214, at 310–11.

217. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).

218. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held, in a 5-4 ruling, that Massachusetts and the other plaintiff-states had standing as *parens patriae* to sue the Environmental Protection Agency to compel it to regulate the emissions of four greenhouse gases under the provisions of the Clean Air Act. *Id.* at 519, 526. But this ruling does not necessarily mean that states or other climate change plaintiffs have standing in federal courts to sue private defendants on common law tort claims. Justice Stevens' majority opinion found that the 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." *Id.* at 520. A state's relationship within the federal political structure is not a factor when it brings a common law tort action against private defendants.

219. *See supra* note 200 and accompanying text.

the indivisible harm of global warming.[220] They argue that all named defendants should be held jointly and severally liable, and once liability is established, the courts will sort out each defendant's appropriate portion of the total damages caused by global warming or the total costs of abatement.[221] Therefore, plaintiffs claim, they have satisfied the traceability requirement. Further, they assert, the *Lujan* redressability standing element does not require plaintiffs to "promise to solve the entire problem"[222] but only that the requested remedy "could provide some measure of relief."[223]

The reality is that in such an unbounded adjudication, the trial court lacks the ability to trace the plaintiffs' harms to the greenhouse gas emissions of any or all the named defendants, to determine the appropriate share attributable to each defendant, or to provide any judicial relief that would make one whit of difference to the plaintiffs. The liabilities of the named defendants simply cannot be fairly and adequately adjudicated in the judicial arena. Fuller almost certainly would conclude that climate change litigation lies beyond the limits of adjudication, both because it would be impossible to grant participation rights to all affected parties and because of the polycentric nature of the issues in such litigation. Federal courts address these same factors under the constitutional labels of standing[224] and, as will be explained in the next section,[225] the political question doctrine. Whether one uses the labels of the Supreme Court or Fuller's model, the result is the same.

2. The Political Question Doctrine

Another aspect of justiciability under Article III,[226] the political question doctrine, also serves as a tool for the federal courts to constitutionally require a model of bounded adjudication. Similar to the standing doctrine, the political question doctrine's roots lie in the concept of separation of

220. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 345 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

221. *Id.* at 346 (stating that "common law public nuisance action imposes liability on contributors to an indivisible harm").

222. *Id.* at 349 n.24 (quoting Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957, 968 (D. Or. 2006)).

223. *Id.* at 348.

224. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (denying plaintiff standing to sue oil, energy, and utility companies for a federal common law and state claim of public nuisance based on emission of greenhouses gases that allegedly contributed to global warming).

225. *See infra* notes 226–37 and accompanying text.

226. U.S. CONST. art. III.

powers[227] and include both Article III minimal requirements and "prudential" considerations of judicial restraint, such as the idea that a court might not be the appropriate forum for deciding certain disputes.[228] In the leading case of *Baker v. Carr*,[229] the Supreme Court identified six factors that, individually or in combination with one another, may lead a court to conclude that an issue poses a political question. Here, the second and third factors are most relevant: "a lack of judicially discoverable and manageable standards for resolving" the dispute and "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[230] In the 2004 case of *Vieth v. Jubelirer*,[231] a plurality of the Court concluded that claims that political gerrymandering violated Constitutional provisions were nonjusticiable on political question grounds.[232] Justice Scalia's opinion rested squarely on the second *Baker* factor—namely, the absence of judicially discoverable and manageable standards for resolving the dispute.[233] He interpreted the grant of judicial power in Article III as limited to cases where the court may "act in the manner traditional for English and American courts."[234]

Unbounded adjudications involve disputes with thousands of potential victims and/or thousands of potential tortfeasors, some of whom are parties before the court but most of whom are not. Further, unbounded adjudications often concern problems that are unavoidably polycentric in nature.[235] In these situations, judicially discoverable and manageable standards often do not exist, either for resolving the liability question or for crafting and implementing a remedy. In the climate change litigation, each of the four federal district courts that would have been responsible for hearing and adjudicating the cases dismissed the complaints on the grounds

227. Baker v. Carr, 369 U.S. 186, 210 (1962) ("[N]onjusticiability of a political question is primarily a function of the separation of powers.").

228. *See* Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1043–45 (1984–1985) (explaining the "prudential" version of political question doctrine).

229. 369 U.S. 186 (1962).

230. *Id.* at 217. In *Baker*'s numerical order, the remaining factors are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" . . . (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

231. 541 U.S. 267 (2004).

232. Vieth v. Jubelirer, 541 U.S. 267, 305–06 (2004).

233. *Id.*

234. *Id.* at 278.

235. *See supra* notes 84–86 and accompanying text.

that they posed nonjusticiable political questions.[236] For example, the *Kivalina* trial court found that it lacked judicially discoverable and manageable standards to reach a principled decision on material liability issues, such as whether defendants' carbon emissions were unreasonable. The court explicitly identified the unbounded nature of its adjudicatory tasks when it noted that every person or business that uses fossil fuels contributes to the harms alleged by the plaintiffs.[237]

C. *Displacement and Preemption*

The Supreme Court also mandates the model of bounded adjudication by using a third set of doctrines, those of displacement and preemption. When a unanimous Court decided *American Electric Power Co.*,[238] it held that the congressionally-enacted Clean Air Act and the EPA actions implementing it displaced any federal common law of nuisance claims against the utility companies.[239] Provided that a statute is constitutional, it always trumps judge-made common law.[240] Congressional displacement of federal common law[241] parallels Congressional statutes that "preempt" state common law under the Supremacy Clause,[242] except that in preemption

236. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009) (dismissing federal and state nuisance claims on standing and political question grounds); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *38 (N.D. Cal. Sept. 17, 2007) (dismissing federal common law nuisance claim on political question grounds); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (dismissing federal and state nuisance claims on political question grounds), *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *see also* Comer v. Murphy Oil USA, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (reporting district court's ruling from the bench that the case represented a nonjusticiable political question).

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

238. 131 S. Ct. 2527, 2531 (2011).

239. *Id.* at 2537.

240. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313, 315 n.8 (1981) (stating the Court has "always recognized that the federal common law is 'subject to the paramount authority of Congress'" and "[w]hen Congress has spoken its decision controls" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))).

241. *Milwaukee*, 451 U.S. at 313–15. In holding that the common law had been displaced, the Court relied upon both the comparative institutional competency of specialized administrative agencies created by Congress when compared with that of courts, *id.* at 317, and separation of powers concerns. *Id.* at 325.

242. The Court often uses the word "displace" in the context of a state law being preempted as well as when a federal statute displaces the common law. *E.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1451 (2010) (discussing when a federal statute will "displace" a state law); Riegel v. Medtronic, Inc., 552 U.S. 312, 335 (2008) (discussing the "scope of Congress' displacement of state law"); *Milwaukee*, 451 U.S. at 315

cases, the Court recognizes a strong presumption against preemption flowing from the states' traditional police powers.[243]

At least until *American Electric Power Co.*, the Court regarded the critical question to be whether the *purpose* of a congressionally-enacted statute included the displacement of the federal common law.[244] In *American Electric Power Co.*, the Court focused on a different set of issues and, in its short opinion, repeatedly addressed the comparative institutional competences of Congress and the EPA, on one hand, and the federal courts on the other hand, to remedy problems posed by global climate change.[245] Justice Ginsburg's opinion for the Court describes the polycentric nature of the decisions necessary to regulate greenhouse gas emissions.[246] Further, she recognizes that input into the adjudicative decision must come from those who participate before the court, and not others who offer advice about the effects of the decision on nonparties.[247] The Court implicitly recognizes that tort adjudication cannot solve generalized or diffuse problems.[248]

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n.8 (explaining the use of the word "displace" in the context of a state law being preempted as well as when a federal statute displaces the common law).

243. *See* Wyeth v. Levine, 555 U.S. 555, 623–24 (2009) (discussing the presumption against preemption); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (recognizing the presumption). In *American Electric Power Co.*, the Court comes close to implicitly recognizing the opposite presumption when the federal common law is at issue. The Court stated, "'[W]hen Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears.'" Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (alteration in original) (quoting *Milwaukee*, 451 U.S. at 314). The Court continued by noting that "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Id.* (quoting *Milwaukee*, 451 U.S. at 317).

244. *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485).

245. *Am. Elec. Power Co.*, 131 S. Ct. at 2537–40. A handful of opinions in the Court's previous displacement and preemption decisions allude to similar justifications. *E.g.*, *Wyeth*, 555 U.S. at 604 (Alito, J., dissenting) (disagreeing with the holding of the Court that "a state tort jury, rather than the Food and Drug Administration (FDA), is ultimately responsible for regulating warning labels for prescription drugs"); Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000) ("The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."); *Milwaukee*, 451 U.S. at 316–17 (relying on both separations of powers and the comparative institutional competency of specialized administrative agencies compared with that of courts in holding that federal common law was displaced).

246. *Am. Elec. Power Co.*, 131 S. Ct. at 2539 ("The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum . . . informed assessment of competing interests . . . [including] environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.").

247. *Id.* at 2540.

248. *Id.* (noting that "[s]imilar suits could be mounted . . . against 'thousands . . .' of other defendants").

The factors discussed by the Supreme Court in its opinion in *American Electric Power Co.* closely resemble those that might have been considered by the Court if it had decided the case on the basis of the political question doctrine.[249] The Court notes that the plaintiffs were asking a federal district court judge to determine both the reasonableness of the quantity of the defendants' greenhouse gas emissions and the feasibility of abatement.[250] Without stating so explicitly, the Court suggests that in the context of global warming, there are no "judicially discoverable and manageable standards for resolving" the dispute[251] and that resolution of these issues requires an "initial policy determination" from the politically accountable branches of government,[252] in other words, the second and third *Baker* factors signaling a political question.[253]

By using displacement to shut down climate change litigation based on federal common law, the Supreme Court once again reined in a decidedly unbounded adjudication. Climate change litigation contrasts sharply with a model of bonded adjudication. Affected parties cannot all appear before the court to present proof and reasoned arguments. Courts cannot address the issues that must be resolved through reasoned elaboration. Both legal process theorists and a unanimous Supreme Court conclude that these issues are ones that must be handled by the EPA or Congress.

III. THE MODEL OF BOUNDED ADJUDICATION—PROTECTING DEMOCRACY OR A RELIC OF THE PAST?

The current Supreme Court appears to be committed to constitutionally requiring a Fullerian understanding of common law adjudication and, in the process, prohibiting public law tort litigation that collectivizes diffuse harms, particularly when such litigation aspires to impose a judicially-created regulatory regime. For example, early in the oral arguments in *American Electric Power Co.*, Justice Scalia expressed his concern about

249. *See supra* notes 226–37 and accompanying text.

250. *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

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

252. *Id.*

253. *See supra* note 230 and accompanying text. The Court even suggested that there are "international" implications of any court ruling restricting greenhouse gas emissions, *Am. Elec. Power Co.*, 131 S. Ct. at 2532, a factor that sometimes convinces courts that the issue before it is committed by the Constitution to the President and therefore establishes a political question. Both the Second Circuit in *Connecticut v. Am. Elec. Power Co.* and the district court in *Kivalina* agreed that the international implications of global climate change did not make it a political question. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 325 (2d Cir. 2009); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009).

using standing to dismiss the case, because he feared that the litigation could simply be re-filed in a state court, where the results might be even worse.[254] The message was clear: Justice Scalia intended to drive a stake through the heart of any adjudication as unbounded in nature as global climate change litigation. But the normative issue remains: When Fuller writes of the limits of adjudication that underlie his bounded adjudication model and when the Supreme Court constitutionally mandates such a model, are they wrong?

In this Part, I begin by assessing three separate but intertwined normative justifications for the model of bounded adjudication: (1) judicial competence and accuracy in adjudication;[255] (2) the role of participation by those directly affected by the adjudication in establishing its legitimacy in a democratic society;[256] and (3) the commitment of generalized grievances to the politically accountable branches as a result of constitutional separation of powers.[257] Finally, I assess the arguments of proponents of public law tort litigation that, notwithstanding traditional proprieties, unbounded adjudication is pragmatically necessary, in order to both (1) enable injured parties to recover when traditional notions of causation would otherwise prevent recovery[258] and (2) establish regulatory regimes to prevent serious societal harms when the politically accountable branches of government fail.[259]

A. The Limits of Judicial Competence

In this section, I investigate whether courts using generally accepted judicial methods are able to accurately determine liability and fashion effective remedies in unbounded tort adjudication. In the past, concerns about the limits of judicial competence usually arose when judicial decrees implemented constitutional protections, such as in school desegregation and prison reform cases, where the focus was largely on the nature of judicially

254. Transcript of Oral Argument at 5–6, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-174.pdf (asking defense counsel whether dismissal on standing grounds will do any good because "[t]he suit will just be brought in State court" and expressing the opinion that counsel "would frankly rather have Federal judges do it, probably").

255. *See infra* notes 260–78 and accompanying text; *see also* Resnik, *supra* note 24, at 88 (identifying "utilitarian concerns for accuracy" as justification for "inquiry into the quality of procedure").

256. *See infra* notes 279–90 and accompanying text.

257. *See infra* notes 291–307 and accompanying text.

258. *See infra* notes 308–21 and accompanying text.

259. *See infra* notes 323–34 and accompanying text.

imposed remedies, not the prerequisite recognition of rights and liabilities.[260] As I illustrate below,[261] public law tort litigation tests the limits of judicial competence in both the liability and the remedial phases.

To review briefly, a model derived from Fuller's understanding of adjudication rests on the following principles:

> An adjudication cannot directly determine the rights, liabilities, or interests of nonparties, with a few specific exceptions, such as when the nonparty's interests are adequately protected by a class action;[262]
>
> A court cannot consider polycentric issues;[263] and
>
> A party must make a claim based on a rule, principle, or standard pre-dating the litigation and direct his proofs and arguments so as to enable the court to resolve the case under this criterion for decision.[264]

Global climate change litigation represents the clearest example of why unbounded adjudication exceeds the limits of judicial competence in both its liability and remedial phases. Consider the application of Fuller's first factor. In order to decide whether any particular defendant's contributions to the collective, indivisible harm of global warming are unreasonable, an element of liability for the public nuisance claim,[265] the court would be required to compare the relative costs and benefits of each emitter's contribution with those of all the billions of nonparties who emit greenhouse gases throughout the world. No court, even with the assistance of expert special masters, is capable of performing this limitless number of analyses necessary to determine the named defendants' liabilities. Further, as previously noted,[266] the court's remedy would necessarily set specific

260. *See, e.g.*, Gerald Gunther, *Commentary—Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L. Q. 817, 818 (1979), *available at* http://digitalcommons.law.wustl.edu/lawreview/vol1979/iss3/12 ("[T]he problem of judicial competence—of institutional expertise and effectiveness—is characteristically associated with remedies, not rights.").

261. *See infra* notes 265–75 and accompanying text.

262. *See supra* notes 87–89 and accompanying text.

263. *See supra* notes 84–86 and accompanying text; *see also* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 646–49 (1982) (explaining that Fuller believed polycentric problems were not fit for adjudication and agreeing that polycentric issues pose a major problem for trial courts).

264. *See supra* notes 77–78 and accompanying text.

265. *E.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 446 (R.I. 2008) (noting that an "unreasonable interference" is a necessary element of a public nuisance claim); RESTATEMENT (SECOND) OF TORTS § 821B (1979) (defining "unreasonable interference" as essential element of public nuisance).

266. *See supra* notes 236–37 and accompanying text.

emissions standards that, viewed pragmatically, would likely affect both the rights of countless other nonparty victims of global climate change as well as the liabilities of numerous nonparty contributors to global warming.

Common law climate change litigation also violates Fuller's second admonition that courts should neither consider polycentric issues nor decide issues on the basis of "managerial" factors, in contrast to judicially appropriate standards determined through "reasoned elaboration."[267] Nothing about the judicial process grants the judge either the competence or the authority to prioritize or ration greenhouse gas emissions among a group of industries and consumers, all of whom are contributing to a worldwide problem but are also engaged in activities benefiting society. Precedent and legal reasoning fail to provide the answer. Even critics of Fuller's principles of adjudication fall back on the idea that such complex cases will not be adjudicated, but rather negotiated among the parties.[268] For example, Ralph Cavanagh and Austin Sarat admit that "[i]mposing the Procrustean frame of a 'principled' solution on such subject matter is likely to constitute an exercise in futility at best and at worst to exacerbate already complicated problems."[269]

Finally, Fuller's third requirement of adjudication—the idea that the parties must make a claim based on a rule, principle or standard—lies at the core of his understanding of adjudication.[270] The Supreme Court wisely gives this proposition constitutional significance when it identifies the lack of judicially discoverable and manageable standards as a factor in determining justiciability.[271] Richard Fallon writes that the criteria delineating the concept of judicially discoverable and manageable standards include "[a]dministrability [w]ithout [o]verreaching the [c]ourts' [e]mpirical [c]apacities,"[272] the court's competence to structure remedies, determinacy, and the ability to generate consistent and predictable results.[273] If applied to climate change litigation, both Fallon's administrability and remedial-competence factors clearly support a finding of nonjusticiability. Tort standards such as "reasonableness" may be determinate and likely to generate consistent and predictable results in the context of circumscribed torts, such as whether a driver is driving unreasonably fast under all the

267. *See supra* notes 82–86 and accompanying text.

268. *See supra* note 97.

269. Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 405 (1980).

270. *See supra* notes 76–77 and accompanying text.

271. *See supra* notes 230–33 and accompanying text.

272. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1291 (2006).

273. *Id.* at 1289–92.

circumstances. However, when numerous courts throughout the country determine whether emissions of a given quantum of greenhouse gases, considered alongside the economic consequences of judicial regulation and the contributions of other emitters to global climate change, are unreasonable, their conclusions are likely to be indeterminate, inconsistent, and unpredictable.

Global climate change lawsuits, which represent litigation of an unprecedented scope, clearly exceed the institutional capacity of a court acting in a principled manner, thus validating the Supreme Court's (and Fuller's) model of bounded adjudication, at least in this single instance. But does the same conclusion necessarily follow when we consider either the punitive damage awards against the tobacco manufacturer in *Williams*, where the jury was invited to consider harm to other smokers,[274] or the asbestos compensation plan for future claimants?[275] At this point in the discussion, I consider only the question of whether a court is capable of reaching an accurate and fair substantive conclusion through the use of appropriate judicial processes.

Standing alone, judicial competence concerns do not justify the Supreme Court's decision to reject the administrative compensation plan for future asbestos claimants in *Amchem* and in *Ortiz*. Richard Nagareda correctly analogized the asbestos compensation schemes in these cases to workers' compensation systems.[276] Actuaries working for insurance companies routinely and accurately calculate the amounts necessary to fund benefits to be paid to workers' compensation claimants as well as to many other sets of future claimants. Further, to the extent that the *Amchem* holding rests on the possible unequal treatment of current and future claimants, courts are both experienced and institutionally well-equipped to evaluate claims of unequal treatment. Hence the holdings in *Amchem* and in *Ortiz* cannot be justified on judicial competence grounds.

Nor do judicial competence concerns, considered in isolation from other factors, justify the Court's holding in *Williams*. The trial judge invited the jury to consider the harms caused to nonparty victims by the misrepresentations of the defendant-tobacco manufacturer only to guide its quantification of punitive damages. As previously noted,[277] the Supreme Court reversed the punitive damages award, in part, because it did not afford the defendant an opportunity to avail itself of all the defenses it might have if sued by any of the nonparty victims. However, neither the presence

274. *See supra* notes 177–86 and accompanying text.

275. *See supra* notes 158–65 and accompanying text.

276. NAGAREDA, *supra* note 15, at 76–77; *but see infra* note 322 and accompanying text.

277. *See supra* notes 184–85 and accompanying text.

of the nonparty victims at trial nor even the identification of specific nonparty victims is necessary for this purpose. The defendant might have proffered survey research that would have informed the jury about the percentage of nonparty victims who would not have stopped smoking even if the defendant had not misrepresented facts and the percentages of claims to which the defendant had other viable defenses.[278]

In summary, the utilitarian values of judicial competency and accuracy justify a model of bounded adjudication in the extreme situation of global climate change litigation. However, standing by themselves, they do not rationalize the Supreme Court's more widespread application of the model.

B. Participation as a Means of Legitimating Adjudication in a Democratic Society

Deontological considerations as well as utilitarian ones justify the model of bounded adjudication. Regardless of the wisdom or fairness of substantive outcomes, adjudication, as a form of state coercion within a democracy, requires participation by both the victims and the tortfeasors whose rights, liabilities, or interests are directly affected.[279] Participation rights protect self-determination and avoid paternalism.[280] As Lea Brilmayer writes, "If I have a personal interest in the dispute, a tangible stake, then I seem to have both a moral and a legal right to involve myself."[281] According to Jerry Mashaw, rendering decisions that affect an individual without his participation reflects a loss of "dignity and self-respect" for that person that,

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278. *See, e.g.*, Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 338 (E.D.N.Y. 2000) (recounting testimony of an expert that 2.4 times as many smokers would have quit in the absence of defendant's misrepresentations and finding that this use of statistical proof did not violate defendant's due process rights); *see also, e.g.*, *In re* Simon II Litig., 211 F.R.D. 86, 153–54 (E.D.N.Y. 2002) (relying on statistical proof in a nationwide class action against a tobacco company to prove numbers of smokers' illnesses resulting from defendant's misrepresentations), *rev'd*, 407 F.3d 125, 140 (2d Cir. 2005) (reversing and decertifying the class for failure to satisfy class certification requirements). *See generally* Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999) (providing examples of statistical analysis being used in the courtroom and explaining that statistical evidence can serve as the necessary proof of causation required for liability).

279. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Values*, 44 U. CHI. L. REV. 28, 49 (1976); Resnik, *supra* note 24, at 88 (arguing that "the demand for subsidizing and equalizing opportunities to participate . . . comes in service of democratic values that recognize the contribution of and need for diverse voices and participants being heard in social orders").

280. Brilmayer, *supra* note 214, at 310, 313.

281. *Id.* at 313.

in turn, leads to alienation.[282] Further, the lack of participation by victims in adjudication, such as future asbestos claimants, also implicates equality values when parties with interests in direct opposition to their own, such as asbestos manufacturers, are present before the court.[283]

The Supreme Court appears to have recognized the deontological importance of participation rights in *Amchem* when it held that in a settlement-only class action, the trial court's evaluation of the fairness of the settlement, albeit required, did not replace the need to determine whether the members of the class were adequately represented.[284] Further, the Court has already established that when a court adjudicates a common law claim for damages, the victim must be provided with individual notice, an opportunity to participate, and the right to opt out.[285]

When the ALI (in its *Principles of Aggregate Litigation*),[286] Issacharoff,[287] and Fiss[288] attempt to legitimize the proxy's representation of individual victims in collectivized litigation as "a question of governance,"[289] they ignore the importance of participation as a means of legitimizing judicial authority. The *Principles* analogize the proxy's role to those of corporate directors and officers in representing shareholders.[290] However, persons who will be directly affected by an adjudication are different from those who voluntarily (and usually with some sophistication) invest in corporations. In contrast, victims do not voluntarily seek harm, nor do defendants voluntarily pursue litigation.

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282. Mashaw, *supra* note 279, at 50.

283. *Id.* at 53. Mashaw advises caution in changing the "modes of operation," such as common law adjudication, that form the fabric of our social order. *Id.* at 55. He warns that changes justified by "instrumental rationality" often result in unforeseen consequences. *Id.*

284. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997).

285. *See supra* note 165.

286. AMERICAN LAW INSTITUTE, *supra* note 20, at § 1.05 cmt. b (providing that judges should "promote adequate representation" in aggregate litigation but may "limit the control of parties and represented persons" over the litigation).

287. Issacharoff, *supra* note 165, at 347.

288. Fiss, *supra* note 165, at 970–71.

289. Issacharoff, *supra* note 165, at 353; *see also* NAGAREDA, *supra* note 15, at 220 (concluding that class actions for mass torts "involve governance, not litigation").

290. AMERICAN LAW INSTITUTE, *supra* note 20, at § 1.05 cmt. d (stating that the literature on corporate governance has many "analogues that are or could be deployed in aggregate lawsuits with beneficial effects"); § 2.07 cmt. c (suggesting that corporate analogues are useful in analyzing victims' due process rights in both preclusion and class action contexts).

C. Separation of Powers

Fuller viewed "the lawyer as an architect of social structures."[291] Much of his work, including *The Forms and Limits of Adjudication*,[292] focuses on which issues should be decided by adjudication and which by legislation.[293] The same idea lies at the heart of the concept of separation of powers.[294] The case and controversy requirement of Article III, according to the Supreme Court, "assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"[295] In *Mistretta v. United States*,[296] the Court quoted James Madison's admonition that "'[i]n republican government the legislative authority, necessarily, predominates.'"[297]

More recently, James Henderson writes that "in a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates."[298] Each of the public law tort cases that the Supreme Court has considered would have resulted in judicial regulatory orders that more closely resemble legislative regulation than they do the outcomes of traditional adjudication.[299] For example, the proposed settlements in *Amchem* and *Ortiz* would have established an administrative compensation system to pay those who manifested asbestos-

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291. LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER 265 (Kenneth I. Winston, ed. 1981).

292. Fuller, *supra* note 68.

293. *See supra* notes 80–86 and accompanying text. *See generally* HART & SACKS, *supra* note 63, at 979–81 (discussing the role of legislation versus private adjudication in private claims).

294. U.S. CONST. art. I, § 1 (allocating all federal legislative powers to the Congress); U.S. CONST. art. II, § 1 (allocating all executive power in the President); U.S. CONST. art. III, § 1 (placing all judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain").

295. Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Allen v. Wright, 468 U.S. 737, 750 (1994)); *see also* Allen v. Wright, 468 U.S. at 750 (explaining that Article III limitations are based on "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government") (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

296. 488 U.S. 361 (1989).

297. THE FEDERALIST No. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961).

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

299. *See* NAGAREDA, *supra* note 15, at 76–77 (analogizing the unsuccessful attempts of counsel in the asbestos class action litigation to achieve global settlements with the enactment of workers' compensation systems during the initial decades of the twentieth century); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 568 (1997) (arguing that a global asbestos settlement "more closely resembles a legislative compensation plan than a judgment in a tort case").

related illnesses in the future.[300] The settlement in *Amchem* would have created a payment grid showing the requirements for receiving compensation and the amount to be awarded based on the seriousness of the claimant's illness.[301] The plan would have governed the rights of as many as hundreds of thousands of claimants who were unknown and unidentified at the time the settlement agreement became operative.

Separation of powers concerns also play a decisive role in *Williams*, if less obviously so. Tom Colby reasons that punishing a defendant for harm done to the plaintiff is a legitimate goal of private civil adjudication, but punishing defendants for larger scale or aggregate harm is a role for criminal law.[302] Most often, the legislature plays an inherent role in criminal law—the passing of criminal statutes—that it does not play in tort adjudication. The Supreme Court in *Williams* signals that if a corporation harms numerous, unidentified nonparty victims who are not before the court, it is not a matter that can be handled through private adjudication. In doing so, the Court significantly alters the allocation of powers among the coordinate branches of government by reducing judicial power to effect general deterrence and by concomitantly increasing reliance on the legislature and administrative agencies to deter activities causing widespread harm.

Climate change litigation actions also implicate separation of powers concerns. The society-wide (indeed worldwide), diffuse, and generalized harms caused by climate change are harms that our constitutional structures suggest the political branches should handle. Maxwell Stearns writes that Congress, not the courts, is the institution that should respond when all of us

300. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 620 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (noting that the proposed settlement "purports to settle all present and future claims of class members" and "establishes an administrative procedure that provides compensation for claimants meeting specified exposure and medical criteria"); Flanagan v. Ahearn (*In re* Asbestos Litig.), 134 F.3d 668, 679 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (comparing the "allocation decisions" for compensation in the proposed settlement to those proposed in *Amchem*).

301. *See Georgine*, 83 F.3d at 620 (explaining a proposed "range of damages" to be awarded to claimants based on the seriousness of their illness, using "objective criteria for medical diagnoses").

302. Colby, *supra* note 132, at 479. Several other commentators on punitive damages reach somewhat similar but distinct conclusions. *See, e.g.*, Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1096–99 (2005) (concluding that a judicial remedy seeking to punish the defendant and deter that defendant from violating plaintiff's rights in the future is civil in nature, but one that seeks to deter the defendant from violating rights of others is criminal).

have been injured.[303] Climate change litigation is simply not the kind of case or controversy envisioned by Article III of the Constitution. Unlike the typical tort plaintiff, such as the victim of an auto accident, there is no single harm at issue in climate change litigation. Nor is the harm as circumscribed, discrete, and localized as it has been in past nuisance claims that alleged air or water pollution.[304]

As previously noted,[305] 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. Such choices cannot be accomplished through the application of judicial standards. Legislatures and administrative agencies, not courts, should determine the trade-offs between ecological and economic considerations and make the thousands of decisions concerning a myriad of issues required to enact a national emissions reduction program. The legitimacy of the actions of administrative agencies within a constitutional framework rests not on reasoned elaboration, but rather on the accountability of these agencies to the political branches of the government.[306] In contrast, federal courts are not politically accountable.[307]

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303. Stearns, *supra* note 210, at 1406 (noting that "to the extent that we all *have* been injured" it is the duty of Congress, not the courts, to "act on our behalf").

304. *E.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907) (enjoining a Tennessee factory from emitting pollution into Georgia's air); Missouri v. Illinois, 200 U.S. 496, 526 (1906) (declining to enjoin Illinois from dumping sewage into the Mississippi River).

305. *See supra* note 266 and accompanying text.

306. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that administrative agencies "may . . . 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 Government to make such policy choices").

307. Even state court judges, often elected, are not politically accountable in the same manner as members of legislatures and governors. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(12) & (13) (2007) (providing that judges and judicial candidates shall not make statements that could be understood either "to affect the outcome or impair the fairness" of an adjudication or "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"); HART & SACKS, *supra* note 63, 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."). *But see* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (reporting empirical findings that federal judges appointed by a Democratic president were more likely to cast liberal votes in arbitrariness review of EPA and NLRB decisions than their Republican counterparts).

D. *The Necessity Counter-arguments*

In this section, I consider two frequently proffered, and potentially compelling, responses to the arguments in the previous sections that it is inappropriate for courts to engage in unbounded adjudication.

1. The Victim's Right to Recovery

As discussed in Part I, because of the inability of many victims of mass torts to identify the specific businesses that caused their respective harms, aggregating their injuries and viewing those injuries as a collective harm is often the only means available to prove the causal connection between the victim and the tortfeasor required to establish liability.[308] Further, in the specific context of the asbestos settlements, manufacturers were understandably unwilling to agree to a settlement that did not limit their liability to all claimants, including those not yet symptomatic at the time of the settlement.[309]

Many courts,[310] commentators,[311] and public spokespersons[312] believe that the Supreme Court just has it wrong when it implements the model of bounded adjudication and denies victims compensation. For them, common law courts should assure a remedy for every wrong, or even for every harm.[313] More than forty state constitutions guarantee the right of access to courts to obtain a remedy for a wrong.[314] These provisions give voice to popular aspirations regarding the role of tort law in compensating victims

308. *See supra* notes 118–27 and accompanying text.

309. *See supra* notes 158–65 and accompanying text.

310. *E.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 315 (2d Cir. 2009) (allowing global climate change litigation to proceed in a public nuisance claim), *rev'd sub nom.* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Collins v. Eli Lilly, 342 N.W.2d 37, 45 (Wis. 1984) (reasoning that when an adequate remedy for harm does not already exist under the common law, the courts should fashion one).

311. *See, e.g.*, T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1571 (1997) (claiming that the law "guarantees a remedy for every wrong").

312. *See* Thomas D. Lehrman, *Reconsidering Medical Malpractice Reform: The Case for Arbitration and Transparency in Non-Emergent Contexts*, 36 J. HEALTH L. 475, 479 (2003) ("The commonly held belief that there ought to be a remedy for every wrong still resonates with citizens and plaintiffs."); Editorial, *The Court and Global Warming*, N.Y. TIMES, Apr. 19, 2011, at A24 (calling for the Supreme Court to provide a remedy in *American Electric Power Co.*).

313. *See* Ashby v. White, 14 How. St. Tr. 695, 814 (Q.B.1704) (introducing the concept of "*ubi jus ibi remedium*," which means "where there is a right, there must be a remedy").

314. *See* Thomas R. Philips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003) (noting that the right to a legal remedy for a wrong appears "expressly or implicitly" with some variations, in forty state constitutions).

and correcting wrongs. The Wisconsin Supreme Court has held that its state constitution's "access to court" provision justifies the court in *changing* the substantive content of traditional rules of common law causation so that a tort plaintiff is able to recover.[315] However, most courts hold that the right to a remedy is triggered only by a *legal* harm, requiring both (1) jurisdiction, including all aspects of justiciability; and (2) proof of all elements of the tort, including causation (often particularly difficult to prove in latent diseases resulting from exposure to mass products).[316]

We expect too much from the *common law judicial* process when we ask courts to afford compensation for *all* mass harms, or even all such harms where defendants have acted tortiously. The Supreme Court itself proffered an alternative. In *Amchem*,[317] the Court took the unusual step of suggesting that Congress enact legislation: "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."[318] In designing administrative compensation systems for victims of mass torts, Congress would be constricted by neither the constitutionally imposed bounded adjudication model nor the traditional requirement that a victim prove that a particular tortfeasor caused her harm. Instead it could establish statutory requirements for compensating victims and tax manufacturers to finance the system.[319] However, Congress has repeatedly voted down legislation adopting an administrative compensation system for

315. In *Collins v. Eli Lilly*, the Wisconsin Supreme Court took the unusual step of construing its state constitutional provision in a manner that supported the loosening of the common law causation requirements in a mass product tort case. 342 N.W.2d 47, 57 (Wis. 1984). However, in *State v. Henley*, the same court described its earlier actions under Article 1, Section 9 of the state constitution in *Thomas v. Mallet*, 701 N.W.2d 523, 556 (Wis. 2005) (following *Collins*) in creating a new remedy as "unwarranted" and "arbitrary and irrational." 787 N.W.2d 350, 367 n.29 (Wis. 2010).

316. *See supra* notes 118–20 and accompanying text. Even if a state court holds that victims are entitled to a remedy for every tortiously caused harm, under the Supremacy Clause, the Supreme Court's due process holdings flowing from the model of bounded adjudication trump the state constitutional right. In federal court cases, even those applying state substantive common law, the Article III justiciability requirements also prevent the federal court from taking jurisdiction over such a case even if an applicable state constitutional provision suggests that the harmed victim should be entitled to a remedy. Holdings based solely on federal justiciability doctrines, however, obviously would not prevent the plaintiff from re-filing in state court.

317. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

318. *Id.* at 628–29.

319. *See* GIFFORD, *supra* note 28, at 221–23, 227–28 (discussing the feasibility of a congressionally-imposed administrative compensation system); Robert Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955 (1993) (identifying "statutory constraints on possible catastrophic tort liability" as a socially beneficial legislative response to mass tort compensation models).

asbestos victims.[320] Today, trusts established by bankruptcy courts compensate many victims of asbestos-related diseases.[321] In their current form, such trusts have been heavily criticized for their lack of transparency that enables specious claimants to recover at the expense of both genuinely harmed future claimants and solvent co-defendants.[322] However, properly structured and supervised by courts, such trusts would enable mass tort victims to recover compensation without common law adjudication.

2. A Response to Political Dysfunction

The second objective of the public law model of torts is to regulate when Congress and administrative agencies have been "captured" by the interests they regulate.[323] Unfortunately, the performance of the politically

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320. *See* Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 168–72 (2009) (identifying several Congressional attempts to establish administrative compensation systems for asbestosis claims).

321. *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 113–14 (2004) (describing how bankruptcy courts channel asbestos claims to settlement trusts).

322. *E.g.*, *The Furthering Asbestos Claims Transparency Act of 2012: Hearing Before the H. Judiciary Comm., Subcomm. of Courts, Commercial & Admin. Law*, 112th Cong. 3 (2012) (written statement of S. Todd Brown, *available at* http://judiciary.house.gov/hearings/Hearings%202012/Brown%2005102012.pdf) (stating that "[e]arly trusts were flooded with specious unimpaired claims . . . . We know that dubious claims continue to slip through the cracks . . . "); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 76 (2003) (arguing that bankruptcy trusts lack "distribution procedures that would enable the trusts to reject the hundreds of thousands of meritless and specious claims").

323. *See supra* notes 128–34 and accompanying text; *see also* RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 42–44 (2010) (analyzing the phenomenon of agency "capture"). Many scholars make the more limited claim that public law tort litigation advances legislative and administrative reform, even if the courts themselves sometimes lack the capacity to regulate. *E.g.*, WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 295 (2004) (arguing that "the penchant for rights-based litigation must be understood in relationship to the larger institutional and cultural features of U.S. politics"); Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1838 (2008) (concluding that public tort litigation influences regulatory policy by "framing issues in terms of institutional failure . . . generating policy-relevant information; . . . [and] placing issues on the agendas of policy-making institutions"); Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 908 (1998) (suggesting that public interest litigation can serve as "the centerpiece of an overall political strategy"); Wendy E. Wagner, *When All Else Fails: Regulating Risky Products through Tort Litigation*, 95 GEO. L.J. 693, 695 (2007) (concluding that public law torts "can be more effective than the

accountable branches in regulating tobacco products[324] and greenhouse gas emissions,[325] among other causes of mass harms, is disappointing. The Supreme Court's recent decision striking down limits on corporate campaign contributions will probably exacerbate the inability of Congress to effectively regulate corporate interests.[326]

There are several responses to what might be called the "necessity argument" in favor of unbounded mass tort litigation. First, Gerald Rosenberg concludes in his classic study, *The Hollow Hope: Can Courts Bring About Social Change?*,[327] that traditional public interest litigation emphasizing constitutional and statutory claims against government actors is actually counterproductive to reformers' attempts to bring about social change. He argues "that courts act as 'fly-paper' for social reformers who succumb to the 'lure of litigation'"[328] by deflecting reformers' energies from substantive political battles offering genuine hope for reform to largely symbolic judicial actions. It is extremely difficult to assess Rosenberg's arguments in the context of public law torts. For example, the agreement settling the litigation brought by state attorneys general against the tobacco companies was largely denounced by public health experts.[329] However, it established the nation's framework for regulating tobacco companies for more than a decade until Congress enacted stronger regulation. In the absence of the 1998 agreement, would Congress have been pressured to enact stronger legislation earlier than 2009,[330] or would other factors, such as the then Republican, pro-business Congress (and, for most of the period, the Presidency), have prevented such legislation? Obviously, similarly difficult questions arise in the context of climate control.

A second response to the argument that the political branches are dysfunctional is that Congress should have the freedom to preserve the

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regulatory system in accessing the various types of information needed to inform regulatory decisions").

324. *See* GIFFORD, *supra* note 28, at 104–12 (addressing the failure of the legislature and administrative agencies to regulate tobacco products).

325. *See* Gifford, *supra* note 113, at 218 (reporting on the frustrations associated with climate control policy in Congress and the EPA among those assisting in litigation).

326. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 882–85 (2010) (holding that under the First Amendment, corporate funding of independent political broadcasts in candidate elections cannot be limited).

327. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

328. *Id.* at 427.

329. *See* GIFFORD, *supra* note 125, at 171–85 ("Following the announcement of the settlement agreement, many public health advocates blasted it as a sweetheart deal for the tobacco companies.").

330. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.).

status quo, without interference from the courts, by not acting until a legislative consensus emerges.[331] This view assumes the legitimacy of Congress' inactivity without questioning the fairness or effectiveness of the political process. The net result, as Duncan Kennedy once reasoned, is "deference to private power, rather than to the legislature."[332]

The final response to the necessity argument is that the principles supporting the model of bounded adjudication other than judicial competence—namely, arguments based on (1) participation as justification for adjudication and (2) separation of powers—simply trump the necessity argument.[333] When tortiously caused mass harms of any sort are involved, it is tempting to bend constitutional principles that are often not self-defining and to accept, without question, the authority of any government actors, including judges, who offer the promise of compensating victims or regulating harmful conduct. Weighing such immediately recognizable benefits against long term damage to either the constitutional structure or the legitimacy of adjudication is not impossible, but it must be done with care. In the Conclusion,[334] I explore this tricky balancing process.

CONCLUSION

Each of the factors described in Part III is important, but none by itself is decisive. Certainly, considered together, they leave room for disagreement among reasonable people. Defining the limits of judicial competence and the appropriate role of adjudication in a constitutional democracy helps to structure the analysis, but it does not answer the ultimate questions. When application of these factors point in opposite directions, as they frequently do in assessing particular examples of cutting-edge mass tort litigation, both trial courts and the Supreme Court are left to a balancing test.

Chayes clearly recognized the tension between his public law model and the appropriate limits of adjudication in a constitutional structure when he admitted that he was willing to accept "a good deal of disorderly, pragmatic institutional overlap"[335] between the courts and the political branches when

331. Stearns, *supra* note 210, at 1319 (contrasting Congress's "institutional power of inertia" with the courts' "obligat[ion] to decide cases properly before [it]").

332. Kennedy, *supra* note 71, at 1761.

333. *Cf.* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 326 (2008) (stating that "prevailing deontological theories are moderate rather than absolutist . . . [and] may be overridden for the sake of furthering good outcomes or avoiding bad ones if enough good (or bad) is at stake").

334. *See infra* notes 335–44 and accompanying text.

335. Chayes, *supra* note 53, at 1313.

the only alternative was the imperfect functioning of Congress and administrative agencies. Perhaps more surprising was the fact that Henry Hart, Lon Fuller's colleague and an early admirer of his model of bounded adjudication, reportedly shared Chayes's sentiments.[336] Eskridge and Frickey recount a story about Hart that occurred during one session of his Federal Courts course in the midst of the often politically and legally fractious 1960s. Hart began teaching an opinion in which the Supreme Court used the Civil Rights Act of 1964 to abate state prosecutions of civil rights protesters.[337] He laid out the facts and relevant statutory framework, setting the stage for what promised to be a blistering legal process critique of the Court's holding and reasoning. However, Hart suddenly stopped and paused for a full thirty seconds before continuing, "Sometimes, sometimes, you just have to do the right thing."[338]

To me, this story resonates with the current global climate change situation where Congress and the EPA appear unable or unwilling to prevent widespread, serious harm. I would be willing to bend the deontological principles underlying a model of unbounded adjudication to achieve a solution to global climate change, *but one obstacle remains*. I am convinced that courts lack the institutional capacity to solve the problem and would likely either offer false hope to those concerned about climate change or worse, would make a mess of the ecological system, the economy, or both. Trial courts lack the competence to hear the facts and arguments of all affected individuals and to resolve the infinitely polycentric issues involved in determining whether any particular greenhouse gas emitter's contributions to global warming are unreasonable and whether abatement is warranted. Accordingly, though I might be willing to trade a solution to global climate change for a modest bending of the principles of separation of powers and the legitimacy of adjudication, I am unwilling to compromise these principles in exchange for a grant of authority to the courts when their efforts to abate global climate change are likely doomed to failure. If the solution to a transcendent social or ecological issue of a massive scale, such as segregation or global climate change, reasonably appears to lie within the capabilities of a common law court, like Professor Hart, I would make the Faustian bargain.

However, just because the Supreme Court's (and Fuller's) implicit model of bounded adjudication does not answer all questions, does not mean that it is without value. A more openly acknowledged and explicitly stated model

336. Eskridge & Frickey, *supra* note 63, at cxiii.

337. Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

338. Eskridge & Frickey, *supra* note 63, at cxiii (quoting David Chambers's recollection of Hart's comments).

of bounded adjudication, serving as a presumptive model or set of guidelines, would force judges, who may primarily see themselves as government actors solving social problems, to focus on the limits of their appropriate function within a democracy. The model of bounded adjudication could help them appreciate that their powers flow from principled and restrained methods of adjudication and, ultimately, the public's respect for these processes. However, in the end, if a court is otherwise capable of resolving an intractable, mass social or ecological problem, the democracy-enhancing objectives of the model of bounded adjudication should not serve as a straightjacket.

Beyond these rare examples of litigation focused on uniquely threatening and transcendent problems, such as civil rights and climate change litigation, courts should be genuinely deferential to the model of bounded adjudication. When the Court decided *Amchem*, it wisely called upon Congress to establish an administrative compensation system.[339] A stalemated Congress failed to act, but other governmental bodies—in particular, the bankruptcy courts—assumed the task.[340] Soon after the Supreme Court reversed the punitive damages award in *Williams*, which was the result of an unbounded process, Congress strengthened tobacco regulation and the Oregon state courts even found a way to preserve the jury's original damage awards.[341] The public law tort advocates did not win the dramatic, highly publicized judicial victories that would have resembled the major constitutional law cases of an earlier era, but the governance structure as a whole stumbled forward, compensating victims and regulating conduct.

At the same time, the Supreme Court's implicit constitutional adoption of the model of bounded adjudication should not be blamed for failing to save us from the inadequacies of a dysfunctional political system. Our frustrations should be focused instead on Congress and administrative agencies, such as the EPA. This is not the Supreme Court of the New Deal. The Court is declaring neither the FDA's regulation of cigarettes nor the EPA's regulation of greenhouse gas emissions to be unconstitutional.

339. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (suggesting that Congress should consider the "sensibly made" argument that "a nationwide administrative claims processing regime" be established).

340. *See supra* note 321 and accompanying text.

341. Williams v. Philip Morris USA, 176 P.3d 1255, 1263 (Or. 2008) (finding no error in the trial court's jury instruction, as challenged by the defendant, and reinstating the jury's punitive damages award), *cert. granted*, 553 U.S. 1093 (2008), *cert. dismissed as improvidently granted*, 556 U.S. 178 (2009).

Today, attorneys general of the federal[342] and state governments[343] sometimes file public law model, common law, or statutory tort actions against corporate tortfeasors after their own colleagues in stalemated legislatures and captured administrative agencies fail to enact effective regulation or to otherwise legislatively solve public health problems. These public officials and other public interest advocates should pause long enough to refresh their memories of Shakespeare's *Julius Caesar*, paraphrase its language, and apply it to their current situation: "The fault . . . is not in [the Court], [b]ut in ourselves . . . ."[344]

342. United States v. Philip Morris USA, Inc., 566 F.3d 1095 (D.C. Cir. 2009) (per curiam) (dismissing most of the federal government's claims for injunctive relief under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968) *cert. denied*, 130 S. Ct. 3502 (2010).

343. State v. Lead Indus. Ass'n, 951 A.2d 428, 435 (R.I. 2008) (reversing the judgment for the state, acting as *parens patriae*, in an action against former lead pigment manufacturers); Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. May 23, 1994) (filing a complaint on behalf of the state of Mississippi against thirteen tobacco companies), *available at* http://www.library.ucsf.edu/sites/all/files/ucsf_assets/ms_complaint.pdf.

344. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, 16 (Filiquarian Publishing 2007) ("The fault, dear Brutus, is not in our stars, [b]ut in ourselves, that we are underlings.")