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REFORMING PUBLIC INTEREST TORT LAW TO REDRESS PUBLIC HEALTH EPIDEMICS*

MICHAEL L. RUSTAD** & THOMAS H. KOENIG***

ABSTRACT

This Article is a new audit of *parens patriae* public health lawsuits in which government attorneys address grave public health problems not resolved by either private tort litigation or administrative regulations. Our argument is that public health lawsuits are justified when the states have a substantial quasi-sovereign interest in reallocating the cost of medical monitoring or other means of addressing risks created by products-related disasters. In tobacco and lead paint cases, the state, as subrogee, employed *parens patriae* litigation in an effort to recoup the cost of treating hundreds of thousands of smoking and lead poisoning victims. The recent British Petroleum (BP) oil spill *parens patriae* actions are attempts to compel the polluters to pay for the public health costs created by the release of millions

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of gallons of oil and toxic chemicals into the waters of the Gulf of Mexico. These Gulf State *parens patriae* actions raise complex issues of justiciability, standing, separation of powers, and regulation by litigation. The size of the populations affected, the magnitude of the harm inflicted, and the inability of traditional tort principles to offer the victims any relief are important factors in determining the legitimacy of these public health actions. Part I traces the trajectory of public health law tort litigation from its roots in medieval English equity doctrine to the recent actions by U.S. state governments and municipalities in the aftermath of the BP oil spill. Part II summarizes and critically examines Professor Donald Gifford's thesis that the public law model of tort law employing *parens patriae* actions are a form of "faux legislation" that usurps the legitimate functions of America's legislative branch. Gifford argues that *parens patriae* lawsuits to resolve public health problems are doomed to be ineffective and, worse yet, raise the specter of creating an unaccountable "fourth branch of government." Part III presents a brief defense of the public law model of tort law as a mechanism to allocate the costs of health and environmental catastrophes from the corporate defendant to the state. *Parens patriae* litigation is beneficial because it redresses not just one on one or particularized injuries but also vindicates societal interests.

INTRODUCTION

The sinking of British Petroleum's oil rig created the "largest marine oil spill in history with an approximate release of 4.9 million barrels of oil, methane gas and other pollutants."¹ The BP oil spill has led to what are potentially the largest public health *parens patriae* lawsuits in world history because of the short and long-term impacts of oil and dispersants in the states affected by the spill and cleanup. In the wake of the April 2010 BP oil spill in the Gulf of Mexico, attorneys general (AGs) in Alabama and Mississippi filed nuisance and Oil Pollution Act claims against several major oil industry defendants, charging them with responsibility for massive environmental, public health, and economic devastation.²

1. Complaint, Alabama ex rel. King v. Transocean, Ltd., No. 2:2010cv00691 at 2 (M.D. Ala. Aug. 12, 2010) (describing magnitude of the BP oil spill and its public health as well as environmental dimensions). The BP oil spill may have been surpassed when "[b]etween five and 10 million barrels of oil poured into the Persian Gulf in 1991 when Iraqi troops, retreating from their occupation of Kuwait, set fire to desert oil wells and opened the valves on oil rigs and pipelines. The spill . . . devastated marine wildlife and coastal habitats in Kuwait and Saudi Arabia." Mark Tutton, Lessons Learned from the Largest Oil Spill in History, CNN WORLD (June 4, 2010), http://articles.cnn.com/2010-06-04/world/kuwait.oil.spill_1_slicks-oil-spill-rigs-and-pipelines?_s=PM:WORLD.

2. Alabama's AG filed one public environmental tort complaint against BP and its corporate affiliates connected to the oil spill. Complaint, Alabama ex rel. King v. BP, P.L.C., No. 2:2010cv00690 (M. supra D. Ala. Aug. 12, 2010) [hereinafter BP Complaint]. That same day, the

Louisiana's BP oil industry complaint explicitly addressed the public health implications of the disaster, asserting *parens patriae*³ authority to protect "the health, safety and welfare of the citizens of" that state.⁴ These Gulf Coast *parens patriae* actions represent the states' societal interest that is independent from the economic losses suffered by local fishermen, shrimpers, oystermen, hotel owners and other individual plaintiffs. In its public nuisance complaint,⁵ Louisiana's Attorney General⁶ placed particular emphasis on the public health implications of the spill, stating "[t]he presence of oil, gas and other pollutants in Louisiana coastal waters continues to this day, and has caused severe damage to the environment, endangering human life and health, and is likely to continue to do so for an unspecified period of time, in violation of Louisiana law."⁷ A Louisiana law firm hired a toxicologist who challenges "government assurances that Gulf Coast seafood is safe to eat in the wake of the BP oil spill, saying it poses 'a significant danger to public health.'"⁸ A scientist from the National Resources Defense Council echoes these concerns.⁹

Alabama AG also filed a virtually identical complaint against non-BP companies such as Transocean Ltd., the provider of drilling management services and designer of the oil rig, and Halliburton Energy Services, who completed the cementing operations. Complaint, *supra* note 1.

3. Alfred L. Snapp & Son v. P.R., 458 U.S. 592, 600 (1982) ("*Parens patriae* means literally 'parent of the country.' The *parens patriae* action has its roots in the common-law concept of the 'royal prerogative.' The royal prerogative included the right or responsibility to take care of persons who 'are legally unable, on account of mental incapacity, whether it proceed from (1) nonage; (2) idiocy; or (3) lunacy: to take proper care of themselves and their property.'"). The *parens patriae* institution evolved to address other matters of "grave public concern" such as conspiracies to fix freight rates, water pollution, or the diversion of water or other natural resources. *Id.* at 605.

4. Complaint, Louisiana v. B.P. Exploration & Production, Inc., No. 2:11-cv-00516 (E.D. La., Mar. 3, 2011) (stating that Louisiana sued "on its own behalf to protect the State's economic and environmental resources and revenue, and as *parens patriae* on behalf of the citizens of Louisiana who have been, and will continue to be, impacted by the Gulf Oil Spill").

5. A public nuisance is a tort that enables the States or other governmental agencies to abate a condition dangerous to the public health or environment. "It consists of conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety, or comfort of a considerable number of persons." Copart Indus. v. Consolidated Edison Co., 362 N.E.2d 968, 971 (N.Y. 1977).

6. Louisiana has a long history of deploying *parens patriae* in public health matters. In *Louisiana v. Texas*, 176 U.S. 1 (1900), Louisiana filed a complaint against Texas, its Governor, and its Health Officer over its misuse of their powers of "quarantines over infectious or contagious diseases" after a yellow fever epidemic in 1897. Louisiana contended that Texas exercised its quarantine powers as a pretext for diverting commerce from New Orleans to Galveston. *Id.* at 20.

7. Complaint, *supra* note 4, at 32.

8. Kari Huus, *Panel Challenges Gulf Seafood Safety All-Clear*, MSNBC.COM (December 27, 2010), http://www.msnbc.msn.com/id/40494122/ns/us_news-environment/t/panel-challenges-gulf-seafood-safety-all-clear/.

9. The Switchboard Blog, *BP Oil Disaster at One Year: Assessing the Public Health Threats*, MNN.COM (April 19, 2011), <http://www.mnn.com/health/fitness-well-being/stories/bp->

The dimensions of the public health problem produced by the oil spill are presently unknown and unknowable because, as the Center for Disease Control acknowledges in a recent report:

The specific chemicals and concentrations will vary depending on the location of the oil, length of time since the oil was released into the environment, type and stage of response, materials used during spill remediation, climate conditions, use of personal protective equipment (PPE), and the workers' specific tasks.¹⁰

Much of the public health impact of the spill may not materialize for a considerable period because toxic exposures often produce latent injuries.¹¹

In March of 2011, the National Institutes of Health initiated a "national study to track possible health effects of the BP Deepwater Horizon spill on the 55,000 clean-up workers and volunteers in Louisiana, Florida, Mississippi, and Alabama."¹² The National Institute for Occupational Safety and Health continues to monitor the long-term health impact of the BP oil spill, reporting that as of December 2010:

Overall, response workers in the exposed group reported higher prevalences of all types of symptoms than workers in the unexposed group. Those reporting exposure to oil and those reporting exposure to dispersants had significantly higher prevalences of upper respiratory

oil-disaster-at-one-year-assessing-public-health-threats ("Contaminants in oil, such as polycyclic aromatic hydrocarbons (PAHs) and metals, can accumulate in the food chain contaminating seafood and leading to health risks, particularly for people who eat a lot of seafood. The large volume of oil that spewed into this productive fishery, the use of subsurface dispersant chemicals to breakdown the oil into smaller particles, and the findings of plumes of oil-spill related contaminants in the subsurface raise questions about the extent and duration of potential seafood contamination. A long-term monitoring program is needed.").

10. CTRS. FOR DISEASE CONTROL, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NIOSH INTERIM INFORMATION, DEEPWATER HORIZON RESPONSE: CHEMICAL EXPOSURE ASSESSMENT CONSIDERATIONS FOR USE IN EVALUATING DEEPWATER HORIZON RESPONSE WORKERS AND VOLUNTEERS (July 2, 2010), available at <http://www.cdc.gov/niosh/topics/oilspillresponse/assessment.html>.

11. Kari Huus, *supra* note 8 (citing what the law firm calls a state-of-the-art laboratory analysis, toxicologists, chemists and marine biologists, retained by the firm of environmental attorney Stuart Smith, who contend that the government's seafood testing program, which has focused on ensuring the seafood was free of the cancer-causing components of crude oil, has overlooked other harmful elements).

12. Press Release, United States Representative Lois Capps (D-CA), *Capps Applauds Launch of Federal Government Study to Track Health Effects of BP's Gulf Oil Spill on Clean-Up Workers* (Mar. 1, 2011) available at http://www.house.gov/list/press/ca23_capps/pr030408gaviota.html ("I commend the Obama Administration for taking this proactive step to monitor the health of the thousands of oil spill clean-up workers and Gulf Coast residents who were exposed to the BP Oil spill. As a public health nurse and witness to the 1969 oil spill in Santa Barbara, I know the damage wrought by BP will inevitably affect the public's health. But when the BP oil spill hit, scientific research on how exposure would affect worker health was lacking.").

symptoms, cough, and lower respiratory symptoms than those without these exposures. . . . Dispersants used in the response and any remaining volatiles in the oil may cause respiratory symptoms and could be responsible in part for the symptoms reported.¹³

BP oil spill clean-up workers reported physical and mental health problems, including “fatigue, upset stomach or vomiting, dizziness, heavy sweating, thirst, headaches, vision problems, jaw clenching, nonspecific aches and pains or disturbed sleep” as well as numerous psychological problems.¹⁴ Columbia University’s School of Public Health surveyed Gulf Coast residents and concluded that there was:

a significant and potentially lasting impact of the disaster on the health, mental health, and economic fortunes of Gulf residents and their children. As demonstrated by the study, done after the well was capped, there is a significant and persistent public health crisis in this region underscored by the large number of children with medical and psychological problems related to the oil disaster.¹⁵

The BP oil spill disaster provides an emblematic example of the complex nature of collective injuries that may (or may not) ripen into a full-blown public health crisis for the Gulf Coast States.

Ironically, only a few months before Louisiana and Alabama’s public health-based complaints against BP and the other oil defendants, Professor Donald Gifford of the University of Maryland Law School, the foremost expert on *parens patriae* litigation,¹⁶ published *Suing the Tobacco and*

13. CTRS. FOR DISEASE CONTROL, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NIOSH INTERIM INFORMATION, SUMMARY OF INTERIM REPORT #9, HEALTH HAZARD EVALUATION OF DEEPWATER HORIZON RESPONSE WORKERS, available at http://www.cdc.gov/niosh/topics/oilspillresponse/pdfs/summary_Int_rpt_9.pdf (last visited June 27, 2011) (summarizing December 7, 2010 update of report of health study of 826 BP oil spill response workers).

14. CTRS. FOR DISEASE CONTROL, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NIOSH INTERIM INFORMATION, MANAGING TRAUMATIC INCIDENT STRESS FOR DEEPWATER HORIZON RESPONSE AND VOLUNTEER WORKERS, available at <http://www.cdc.gov/niosh/topics/oilspillresponse/traumatic.html> (last visited June 27, 2011).

15. *Children’s Health Fund Responds to Public Health Crisis by Providing Mobile Clinic to Care for Children Impacted by the BP Oil Spill*, PR NEWSWIRE (Oct. 7, 2010), <http://www.prnewswire.com/news-releases/childrens-health-fund-responds-to-public-health-crisis-by-providing-mobile-clinic-to-care-for-children-impacted-by-the-bp-oil-spill-104480569.html>. See also *Fund Targets Spill-Related Mental Illness*, UNITED PRESS INTERNATIONAL (August 16, 2010), http://www.upi.com/Top_News/US/2010/08/16/Fund-targets-spill-related-mental-illness/UPI-17251282007088/ (“BP said it will provide \$52 million for mental health services on the U.S. Gulf Coast, where experts say the oil spill has caused widespread mental illness.”).

16. Donald Gifford, formerly the Dean of the University of Maryland School of Law, is currently the Edward M. Robertson Research Professor of Law at Maryland. He publishes widely

Lead Pigment Industries: Government Litigation as Public Health Prescription.¹⁷ This study of *parens patriae* public health litigation builds upon Gifford's path-breaking law review articles,¹⁸ which criticize state attorneys general who partnered with trial lawyers as special counsel in the government public health cases against Big Tobacco and the lead pigment paint manufacturers. Gifford describes public health *parens patriae* lawsuits as "dead in the water," at least in mass products liability cases, because of the courts' unwillingness to accept this legal remedy.¹⁹ Gifford cautions that public health lawsuits bypass legislatures entirely, creating the peril of *parens patriae* lawsuits devolving into a "de facto fourth branch of government."²⁰

In this Article, we argue that Gifford's public health torts obituary, like the incorrect reports of Mark Twain's demise, is premature.²¹ Louisiana's March 2011 complaint has resurrected the equitable doctrine of *parens patriae* to rectify the long-term health consequences created by the massive British Petroleum oil spill. The publication of Gifford's critical analysis of the fifty-year history of public health torts is extremely timely. As the Gulf Coast states consider their options in the aftermath of the BP environmental calamity, they now have a bible of the limitations of *parens patriae* actions in prior products-related public health lawsuits.

Professor Gifford's cautionary account of overreaching by governmental lawyers will be invaluable to policymakers and courts that will be considering the legal implications of the BP oil spill's *parens patriae* actions. The high water mark for product-related *parens patriae*

in the fields of tort law, products liability, and complex litigation. Foundation Press recently issued the Fifth Edition of *Cases and Materials on the Law of Torts* edited by Gifford and his colleague Oscar Gray, who is the 2010 Prosser Award recipient by the Association of American Law Schools' Section on Torts & Compensation Systems.

17. DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* (2010).

18. The themes in Gifford's book were prefigured in two prior law review articles. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 921 (2008) [hereinafter Gifford, *Impersonating the Legislature*] (criticizing states that have delegated "public policy decisions regarding which public health and safety crisis to address and who should be held financially accountable for these matters" to trial attorneys specializing in mass products litigation); see also Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 753-54 (2003) [hereinafter Gifford, *Public Nuisance*] (discussing the advent of public nuisance as a mass products tort and detailing the role of government lawyers in tobacco litigation).

19. GIFFORD, *supra* note 17, at 228 (concluding that products-related public health *parens patriae* actions are "dead in the water").

20. GIFFORD, *supra* note 17, at 134.

21. "Stories abound of obituaries accidentally published whilst the person concerned was still alive. One of the best known examples was Mark Twain, who responded 'The rumors of my death have been greatly exaggerated.'" FACT INDEX, <http://www.fact-index.com/ob/obituary.html> (last visited April 24, 2011).

was a 2000 case in which Guatemala, Nicaragua, and Ukraine asserted *parens patriae* standing to seek reimbursement for smoking-related health care costs.²² The refusal of U.S. courts to grant standing to foreign countries to pursue products-related cases suggests a judicial reluctance to expand *parens patriae* to address transborder public health disasters. The judicial hesitation about expansionary *parens patriae* is reflected in one court's comparison of public nuisance law in *parens patriae* actions to a tort monster "that would devour in one gulp the entire law of tort."²³

This article presents a new audit of the public law model for resolving health or environmental problems in the absence of effective leadership by regulators or legislatures.²⁴ Part I briefly introduces the equitable history of *parens patriae* and its modern applications to public health and environmental disasters. Part II critically examines Professor Gifford's thesis that the public law model of tort law and *parens patriae* actions are not only ineffective but also threaten America's constitutional separation of powers. Gifford's thesis is that public/private partnerships between government attorneys and trial lawyers fail "to accomplish their public health objectives," and undermine democracy.²⁵ Part III is a brief rebuttal to Gifford, defending the public law model of public health torts.²⁶ Public health *parens patriae* litigation is an important legal mechanism to address toxic torts and other products-related calamities. In the contemporary era of hazardous technologies and cross-border industrial entities, potent societal remedies are necessary to defend the public's health and well-being.

22. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000) (ruling that these countries had no ability to file a *parens patriae* action as Mexico produced no evidence that a branch of the U.S. government granted them standing).

23. *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (ruling that the plaintiffs in a lead paint case could not proceed in public nuisance since they did not meet the special injury requirement that is a predicate for this tort).

24. We use the term public law model of torts to describe these *parens patriae* actions to redress public health and environmental problems. In Don Gifford's most recent article, he extends his critique of the public law model to *parens patriae* actions filed to address problems such as climate change and mass products catastrophes. Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 204 (2011).

25. GIFFORD, *supra* note 17, at 218.

26. The public law model of torts is frequently under attack by tort reformers. See John T. Nockleby & Shannon Curreri, Comment, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1038-39 (2005) ("As the society has become increasingly complex, and the harms a single producer or segment of the economy could create ever more dramatic, the challenges for a civil justice system justified by an ideology of individualistic dispute-resolution have been profound.").

I. THE HISTORY OF PROTECTING THE PUBLIC HEALTH THROUGH *PARENS PATRIAE* ACTIONS

At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where public rights (i.e. social interests or public interests) might be jeopardized.²⁷

A. *The Roots of Parens Patriae in Equity*

Parens patriae is a Latin phrase that is roughly translated as “parent of the country,” a doctrine that originated in Thirteenth Century England. Under this medieval equitably-based remedy, the King asserted his inherent “right to guard and enforce all charities of a public nature by virtue of his general superintending power over the public interests.”²⁸ *Parens patriae* empowered the Crown to safeguard the interests of the insane, the poor, infants, the elderly and others who were unable to protect themselves.²⁹ *Parens patriae* powers were deployed to protect the rights of subjects “who lacked a legally cognizable injury.”³⁰ The powers of the Crown included the “supervision or control over local government, education, public health, pauperism, housing, and a wide variety of other social and industrial matters.”³¹

The trust doctrine of *cy pres* evolved in equity to ensure that the King would carry out the purpose of a charitable bequest in situations where there

27. ROSCOE POUND, 3 JURISPRUDENCE 264 (1959).

28. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS IN ENGLAND AMERICA 477, 521 (1886) (citing Blackstone’s Commentaries and other authorities).

29. *Parens patriae* was originated as an equitable doctrine justifying the King’s power to take over the affairs of “persons unable to manage their affairs. In England, at Common Law, the King as *parens patriae* is the guardian of all idiots and lunatics, which function he exercises through some court.” CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD (photo. Reprint 1993) (1917); see also Note, *Federal Jurisdiction: State Parens Patriae Standing in Suits Against Federal Agencies*, 61 MINN. L. REV. 691, 691 (1977); THEODORE W. DWIGHT, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY 305 (Edward F. Dwight ed. 1894).

30. See, e.g., Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L. J. 1059, 1062–63 (2008) (discussing roots of *parens patriae* in the English law of equity); see also Robert A. Winstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798 (2009) (recounting the history of the quasi-sovereign interest reflected in U.S. state actions based upon *parens patriae* actions).

31. FREDERIC AUSTIN OGG, GOVERNMENTS OF EUROPE 70–71 (1922) (describing the powers of the Crown as including *parens patriae* actions in support of public health and welfare).

was no other trustee to administer the trust. *Parens patriae* empowered England's sovereign to act as a fiduciary for intestates. *Blackstone's Commentaries* described the King's authority to "seize upon his [the intestate's] goods as the *parens patriae* and general trustee of the kingdom."³² The Lord Chancellor of the Court of Chancery was delegated the power to pursue equity as the King's representative, making the Lord Chancellor "for all public purposes . . . the keeper of the King's conscience."³³ As early as the Fourteenth Century, English law expanded *parens patriae* by employing public nuisance to abate nuisances injurious to the general public.³⁴

B. *Parens Patriae Comes to America*

The American Colonies imported the equitable powers of *parens patriae* to protect individuals who lacked the capacity to protect themselves.³⁵ In the U.S., "[t]he State alone, as *parens patriae*," was charged with caring for the insane, the infirm, vulnerable children, and other defenseless individuals.³⁶ After the American Revolution, the states extended their *parens patriae* powers to cover "disputes between the interests of separate states with regard to natural resources and territory."³⁷ The states acted on their inherent authority to protect quasi-sovereign public interests and the welfare of their citizenry.³⁸

32. Charles Gross, *The Medieval Law of Intestacy*, ASSOCIATION OF AMERICAN LAW SCHOOLS, ED. SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 723 (1909) (noting that Blackstone, in turn, relied upon the opinion of Sir Edward Coke, the eminent Seventeenth Century English jurist and Member of Parliament).

33. JOSEPH STORY, *supra* note 28, at 521 (explaining the equitable roots of *parens patriae*).

34. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966) (tracing the history of the ancient tort of public nuisance from the Thirteenth Century English reign of Edward III to the middle of the Twentieth Century).

35. PUBLIC HEALTH LAW CENTER, WILLIAM MITCHELL COLLEGE OF LAW, Children & Families, <http://publichealthlawcenter.org/topics/tobacco-control/smoking-regulation/families-children> (last visited April 9, 2011) ("The doctrine of *parens patriae* (literally, 'father of the people') refers to the power of the state to usurp the rights of a natural parent and act as the parent of any child who is in need of protection. . . . In most jurisdictions, *parens patriae* is reflected in the principle that the single most important concern of the courts is the protection of the 'best interests' of children.").

36. CLARENCE ALEXANDER, LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS 2039 (1949).

37. Gifford, *Impersonating the Legislature*, *supra* note 18, at 936.

38. Alexander Lemann, Note, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 122 (2011) (recounting history of equitable doctrine from "the 'royal prerogative' granted to the King of England to sue on behalf of 'helpless subjects'" to its expansion in Twentieth Century America to state actions brought "to vindicate the rights of their constituents").

The U.S. Supreme Court can adjudicate interstate disputes under its “original jurisdiction” authority granted by Article III of the Constitution.³⁹ *Parens patriae* was employed as a means for states to abate inter-state pollution and resolve disputes over the allocation of natural resources.⁴⁰ For example, Justice Holmes’ opinion in *Georgia v. Tennessee Copper Co.*⁴¹ upheld Georgia’s *parens patriae* standing to protect its citizens against a copper smelter that discharged “noxious gases from the defendant’s plant in Tennessee.”⁴² The *Tennessee Copper* Court expressly stated that the state had a sovereign right to enjoin environmental pollution that “threaten[s] damage on so considerable a scale . . . to health.”⁴³

In an 1883 case, *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*,⁴⁴ the Court held that the operation of a railroad yard was a nuisance due in part to “the smoke from the chimneys, with its cinders, dust, and offensive odors.”⁴⁵ The Court rejected the defendant’s argument that its compliance with smoke stack permitting regulations shielded the firm from liability.⁴⁶ The Court observed that the railroad could be required to remodel its facility or to relocate to a less disruptive setting to remediate the nuisance.⁴⁷

In *Missouri v. Illinois*,⁴⁸ the U.S. Supreme Court considered a Missouri *parens patriae* action, charging Illinois with endangering the health of Missourians by dumping Chicago sewage into the Mississippi river basin. The Court noted that the nuisance law of an earlier era needed to evolve to better accommodate cross-border environmental hazards.⁴⁹ However, the Court ultimately rejected Missouri’s claim, finding an inadequate causal connection between water pollution originating in Chicago and a resultant typhoid fever epidemic in St. Louis.⁵⁰

39. Joseph Zimmerman, INTERSTATE DISPUTES: THE SUPREME COURT’S ORIGINAL JURISDICTION (2006) (reviewing the history of interstate conflicts adjudicated by the U.S. Supreme Court including disputes over state boundaries, natural resource allocation, unclaimed property, taxation, pollution and other issues).

40. See, e.g., *New York v. New Jersey*, 256 U.S. 296 (1921) (dismissing New York’s bill for an injunction if New Jersey’s operation of a sewer proved to be injurious to the health, welfare, or commerce of the people of New York).

41. 206 U.S. 230 (1907) (holding that the state of Georgia had a sufficient quasi-sovereign interest to seek relief against the discharge of sulphurous fumes from Tennessee copper smelters).

42. *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 604 (1982) (discussing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907)).

43. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907).

44. 108 U.S. 317 (1883).

45. *Id.* at 329.

46. *Id.* at 334–35.

47. *Id.* at 334.

48. 200 U.S. 496 (1906).

49. *Id.* at 522.

50. *Id.* at 526.

Advances in the science of public health enabled *parens patriae* lawsuits to settle disputes created by cross-border environmental pollution more effectively.⁵¹ By the first decades of the Twentieth Century, as public health science evolved, municipalities had better scientific information on what public health risks warranted quarantines or other governmental action to abate dangerous conditions.⁵² By the end of the Second World War, the use of the *parens patriae* action to defend governmental interests in protecting their citizens from environmental and public health crises was well established.⁵³

In the post-World War II period, states deployed their *parens patriae* powers to resolve antitrust and unfair competition claims between states. In *Georgia v. Pennsylvania R.R. Co.*,⁵⁴ for example, the State of Georgia filed a *parens patriae* lawsuit against some twenty railroads that “conspired to fix rates so as to discriminate against Georgia” in violation of the federal antitrust laws.⁵⁵ Georgia’s case against the common carriers was that their activities created “blight.”⁵⁶ The Court characterized the *parens patriae* as a mechanism through which the state could address “matters of grave public concern [where they had] an interest apart from the particular individuals who may be affected.”⁵⁷ In a 1982 decision, the Court further stretched *parens patriae* to address an employment discrimination claim filed by Puerto Rico on behalf of its workers against apple growers whose policies favored workers from Jamaica.⁵⁸ The common element in these modern *parens patriae* actions is a quasi-sovereign interest not addressed by either legislation or traditional litigation.

C. Public Nuisance & the Abatement of Environmental Pollution

From the medieval period to Blackstone’s day, torts protected the public’s health. A neighbor who ‘infected the

51. See, e.g., *id.* at 522 (observing that the advance of science made it possible to bring lawsuit that would have failed a half century before).

52. Municipalities have a legitimate right to abate conditions dangerous to the public health under their police powers. See, e.g., *City of Jacksonville v. Sohn*, 616 So.2d 1173, 1174 (Fla. Dist. Ct. App. 1993); see also *JTR Colebrook, Inc. v. Town of Colebrook*, 829 A.2d 1089 (N.H. 2003) (“whatever power towns may have to regulate to protect the public health under [the statute] . . . is subordinate to the State law”).

53. See, e.g., *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945) (“Suits by a State, *parens patriae*, have been long recognized.”).

54. 324 U.S. 439 (1945).

55. *Id.* at 445.

56. *Id.* at 450.

57. *Id.* at 451.

58. *Alfred L. Snapp & Son, Inc. v. P.R.*, 458 U.S. 592, 600 (1982) (discussing *parens patriae* lawsuit filed in Puerto Rico against fifty-one Virginia apple growers who allegedly discriminated against Puerto Rican temporary workers by hiring Jamaican workers).

air' or polluted the environment was liable for the offense of nuisance at common law. Nuisances are difficult to conceptualize because the offensive nature of the harm is based on subjective sensory reactions to unpleasant sounds, sights and smells. Courts calculated damages for nuisance torts based on the depreciation in the value of land and the degree of personal discomfort and annoyance.⁵⁹

From the early common law onwards, *parens patriae* actions enjoined public health dangers through public nuisance tort actions. Public nuisance is an elastic tort that has the inbuilt capacity to stretch to address public health predicaments.⁶⁰ This equitably-based tort action is used to enjoin "conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all in a manner . . . that endangers or injures the property health, safety or comfort of a considerable number of persons."⁶¹ Courts of equity issued injunctive relief against conditions affecting public health such as "bad odors, smoke, dust, and vibration."⁶² Vermin-infested grounds, unhealthy multiple dwelling and other public health problems also led to actions for public nuisance.⁶³

William Prosser conceptualized public nuisances as a flexible instrumentality for social control and "a species of catch-all [for] low grade criminal offense."⁶⁴ The Reporters of the Restatement (Second) of Torts agreed in their recapitulation of the law of public nuisance:

Thus public nuisances included interference with the public health, as in the case of keeping diseased animals or the

59. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 *BROOK. L. REV.* 1, 14–15 (2002) (tracing the historical struggle over the parameters of U.S. tort law).

60. The elements of public nuisance are the virtually the same in all jurisdictions. David A. Grossman, *Warming Up to Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 *COLUM. J. ENVTL. L.* 1 (2003) ("The basic elements of a public nuisance claim are quite uniform throughout the country, since most states follow the approach embodied in the Restatement (Second) of Torts. To be liable for a public nuisance, defendants must carry on, or participate to a substantial extent in carrying on, activities that create 'an unreasonable interference with a right common to the general public . . . The first critical element of the definition of public nuisance is "a right common to the general public. Such a right is collective, not like the right each individual has not to be assaulted. Thus, if stream pollution deprives 100 landowners of the use of the water for purposes connected with their land, that alone would not constitute a public nuisance. If, however, pollution prevents the use of a public beach or kills the fish in a navigable stream and thus potentially affects all members of the community, it impinges on a public right and can be characterized as a public nuisance. The enjoyment of the natural environment would seem to constitute such a public right.").

61. *Copart Indus. v. Consolidated Edison Co.*, 362 N.E.2d 968 (N.Y. 1977).

62. Richard A. Epstein, *Takings, Exclusivity, and Speech*, 64 *U. CHI. L. REV.* 21, 42 (1997).

63. PROSSER AND KEETON ON THE LAW OF TORTS 646 (W. Page Keeton et al. eds., 5th ed. 1984).

64. William L. Prosser, *Private Action for Public Nuisance*, 52 *VA. L. REV.* 997, 999 (1966).

maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.⁶⁵

In general, public authorities, rather than individuals, file injunctive actions for public nuisances in contrast to private nuisances, which are filed by non-governmental plaintiffs.⁶⁶ Private individuals lack standing to sue for public nuisance unless they can demonstrate “special damages” from the public nuisance that are separate from the injury to the public.⁶⁷ In the words of the Reporters for the Restatement (Second) of Torts:

Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.⁶⁸

Recently, North Carolina filed a public nuisance action against the Tennessee Valley Authority for emitting excessive sulfur dioxide and nitrogen oxide, to the detriment of the citizens in that state.⁶⁹ Cross-border

65. RESTATEMENT (SECOND) OF TORTS §821B, cmt. b.

66. Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459 (N.Y. 1983).

67. Queens County Bus. Alliance v. N.Y. Racing Ass’n., 98 A.D.2d 743, 744 (N.Y. App. Div. 1983).

68. RESTATEMENT (SECOND) OF TORTS §851B, cmt. g (explaining the standing requirement that injury be collective as opposed to a particularized injury to individuals).

69. N.C., *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010).

parens patriae litigation is expected to evolve further because of “[t]he nature of global business operations and the transport of toxic substance augurs for an increasing number of public health epidemics created in the Twenty-First Century.”⁷⁰ The widespread contamination from the post-tsunami nuclear reactors in Japan and from the Chernobyl radioactivity disaster reminds us that toxic torts do not respect national borders and that illness may not manifest itself for decades to come.⁷¹

D. Public Health *Parens Patriae* Actions

The states have long employed their “police powers” to “control venereal diseases and other contagious diseases . . . considered to be an ‘unsocial status’ which is dangerous to our members of our society, and subject to supervision under the Police Power.”⁷² Governments may override religious and other objections to vaccinations in order to protect the public health, safety, morals, or general welfare of their citizens. In *Jacobson v. Massachusetts*,⁷³ for example, the Court upheld the police power of the state to require a citizen to submit to vaccination in order to shield the public from epidemics.⁷⁴

70. THOMAS C. GALLIGAN ET AL., TORT LAW CASES, PERSPECTIVES, AND PROBLEMS 630 (2007).

71. See, e.g., PHYSICIANS FOR SOCIAL RESPONSIBILITY, *Japan Nuclear Reactor Crisis* (March 14, 2011), available at <http://www.psr.org/take-action/safe-energy/japan-nuclear-reactor-crisis.html>.

72. ALEXANDER, *supra* note 36, at 2045; see also *In re Guardianship of Thompson*, 502 N.E.2d 916, 921 n.2 (1986) (“The State may invoke its police power, plenary in nature, as a means to promote the public health, safety, and general welfare. Unlike the police power, the State *parens patriae* power, literally meaning ‘parent of the country,’ is a limited power of the State to act as guardians to persons with legal disabilities, such as infants and mental incompetents who lack the capacity to protect their own best interests. The modern concept of *parens patriae* is subject to three limitations. First, exercise of *parens patriae* power is presumed to apply only to those “dependent” children who lack the mental competence of adults. Second, before the State acts in its capacity as *parens patriae*, the federal due process clause requires the State to demonstrate that, by clear and convincing evidence, exercise of its power is necessary because the child’s parent or custodian is unfit. Third and finally, State exercise of this power must attempt to further the best interests of the child.”).

73. 197 U.S. 11 (1905).

74. *Id.* at 30 (ruling that local authorities in Cambridge, Massachusetts could require compulsory vaccinations as part of their police powers in advancing the public health and welfare). In *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), the court upheld the constitutionality of an immunization statute for school children. The court reasoned that the compulsory immunization law was neutral and therefore heightened scrutiny was not required even though the statute burdened the plaintiffs’ right to free exercise. *Id.* at 953. The court observed that “[i]t is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State’s police power.” *Id.* at 954.

In 1922, Justice Louis Brandeis authored *Zucht v. King*,⁷⁵ a decision that upheld compulsory vaccination as a public health necessity.⁷⁶ The *Zucht* Court ruled that a decision of public officials to exclude a child from a San Antonio, Texas school when she refused to submit to vaccination did not violate her right to due process.⁷⁷ In *Town of Mount Pleasant v. Van Tassell*,⁷⁸ a New York trial court enjoined the operation of a piggery that drew rats, flies and threatened the public health through its unsanitary conditions. The trial court ruled that the piggery was a public nuisance despite local zoning that permitted farm animals.⁷⁹

The states are not likely to succeed in their public nuisance litigation against public health threats if they are unable to demonstrate a collective injury beyond harm to individuals. *Baltzegeer v. Carolina Midland Ry. Co.*⁸⁰ was an emblematic case in which the South Carolina Supreme Court ruled that public nuisance was not cognizable because the plaintiff could not demonstrate a special injury. In *Baltzegeer*, the plaintiff contended that the railroad line's obstruction of the flow of surface water created foul odors and spread diseases that afflicted his family.⁸¹ The South Carolina Supreme Court ruled that a condition that affected the plaintiff and his family, but not other inhabitants, was not classifiable as a public nuisance.⁸²

75. 260 U.S. 174 (1922) (affirming a trial court's judgment dismissing a student's complaint that public and private school officials denied her the right to attend school due to her refusal to be vaccinated).

76. CHESTER JAMES ANTIEAU, *OUR TWO CENTURIES OF LAW AND LIFE: 1775–1975: THE WORK OF SUPREME COURT AND THE IMPACT OF BOTH CONGRESS AND PRESIDENTS* 121 (2001) (quoting Justice Brandeis as stating that public officials “have broad discretion in drafting and enforcing public health laws”).

77. 260 U.S. 174 at 176.

78. 166 N.Y.S.2d 458 (N.Y. Sup. Ct. 1957).

79. *Id.* at 462.

80. 32 S.E. 358 (S.C. 1899).

81. *Id.* at 359 (noting that the plaintiff's complaint stated that in 1886 or 1887 “the Blackville, Alston and Newberry Railroad Company . . . constructed the line of railway . . . caus[ing] a high embankment to be created, and also dug deep ditches on the upper and lower sides of said embankment, which . . . stopped the flow and passage of the surface water down said hollow, . . . and in times of rains and floods caused the said water to accumulate in a pond on the upper side of said railway track, and also caused a considerable quantity of water to accumulate and gather in the said ditch on the lower side of said railroad track; and the said water, so collected, remains in said ditches.” *Id.* at 358. The plaintiff contended that the foul water emitted “nauseous odors and gases, which poison and pollute the air in and around the plaintiff's said dwelling house, and renders the same unhealthy and dangerous to live at, and has within the last three years caused annoyance, sickness, pains and suffering to the plaintiff, and also to the members of his family, and has within that period caused the death of one of plaintiff's children, who was made sick by the offensive and nauseous gases emitted from said stagnant waters”).

82. *Id.* at 360 (“The complaint alleges that the plaintiff's lot, upon which is his dwelling, is in the corporate limits of the town of Wagener, and within one hundred feet of defendant's line of railroad; and there is nothing in the complaint showing that the other inhabitants of the town of Wagener are not as susceptible to the injurious effects of the alleged nuisance as the plaintiff.

E. Critique of Public Health Torts as Regulation Through Litigation

In recent years, government lawyers have pleaded public nuisance as a cause of action to abate social problems at the crossroads of criminal law and the law of torts.⁸³ The protean nature of the tort of public nuisance exposes state AGs to the charge that they are impermissibly blurring the line between the legislative and judicial branches.⁸⁴ Governmental lawyers deploying *parens patriae* to solve social problems are criticized for engaging in back door regulation and not giving proper deference to the legislative process. For example, Harvard Law School Professor John C.P. Goldberg states that we “need to ask less, yet expect more, of tort.”⁸⁵ He castigates judges who follow a public interest tort paradigm for engaging in judicial overreach because they stretch tort principles in order to advance social justice or to “deny liability as a matter of law in the name of ‘public policy.’”⁸⁶ This “new negligence,” Professor Goldberg charges, provides “judges, juries, and law professors with a mandate to undertake *de novo* ‘social engineering.’”⁸⁷ Goldberg doubts that courts have the competence to devise remedies for widespread social problems, resulting in “ad hoc solutions to perceived social ills.”⁸⁸ Donald Gifford makes a parallel argument, that government lawyers are breaching the separation of powers through rapacious *parens patriae* actions in mass products cases.⁸⁹

Part II of this article critically examines Donald Gifford’s contentions that state AGs are employing public nuisance too expansively in *parens patriae* cases, and thereby are placing the democratic process in jeopardy.⁹⁰ Public nuisance was the basis for the tobacco master settlement⁹¹ as well as

Under these circumstances, and tested by the foregoing authorities, the alleged nuisance could only be regarded as public in its nature.”).

83. See Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENVTL. L. & POL’Y F. 57, 109 (2005).

84. AMERICAN TORT REFORM ASSOCIATION, *Regulation Through Litigation*, <http://www.atra.org/issues/index.php?issue=7351> (last visited Jan. 30, 2011).

85. John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L.REV. 1501, 1518 (2002).

86. *Id.*

87. *Id.* at 1511.

88. *Id.* at 1519.

89. Gifford, *Impersonating the Legislature*, *supra* note 18 (describing how the state attorney general has emerged as a “super plaintiff” in state *parens patriae* litigation” against diverse product manufacturers including pharmaceuticals, lead paint, tobacco, and automobiles).

90. Courts have long recognized the far-reaching powers of state attorneys general in protecting the public interest. See, e.g., *Bokowsky v. State*, 111 N.H. 57, 58 (1971) (“The powers of the Attorney General are broad and numerous. Some grow out of the common law, and many are specified by statute.”); see also *State Dept. of Env’tl. Prot. v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 758–59 (N.J. Super. Ct. App. Div. 1975) (stating that a State may employ *parens patriae* standing for redress to injuries to natural resources as fiduciary for the states’ citizens).

91. GIFFORD, *supra* note 17, at 120–33.

the largest verdict ever awarded in a lead paint torts case,⁹² legal actions that Gifford attacks as judicial overreach.⁹³ Gifford contends that the “public law model of tort litigation is the wrong tool” for solving social problems.⁹⁴ He argues that public health torts constitute “faux-regulations,” ill suited to address social problems.⁹⁵ The case studies in his book, although raising a variety of valid concerns, suggest the opposite conclusion.

II. PROFESSOR GIFFORD’S CRITIQUE OF THE “FOURTH BRANCH OF GOVERNMENT”

Donald Gifford’s in-depth case studies of the lead paint and tobacco litigation shed light on the policy, doctrinal, and constitutional quandaries that will arise in future high profile public health *parens patriae* lawsuits. Issues of justiciability, standing, separation of powers, and regulation by litigation were raised in both of these legal struggles. Another difficulty is that the traditional remedies for public nuisance actions by governmental entities are abatement or enjoining a hazardous condition as opposed to recouping monetary damages.⁹⁶ These same governance issues are likely to arise in the Gulf Coast states’ *parens patriae* actions against BP and other oil industry defendants.

92. *Id.* at 144 (describing 2006 Rhode Island jury verdict that held the lead paint manufacturers potentially liable for abating the consequences of lead paint rather than landlords).

93. *See generally id.* (describing and critiquing tobacco and lead paint litigation as a threat to America’s fundamental separation of powers because of judicial overreach).

94. Gifford, *supra* note 24, at 206, 222–229 (criticizing the climate change litigation employing *parens patriae* as faux legislation and arguing that Congress and federal agencies are the proper parties to regulate pollutants leading to climate change, not *parens patriae* environmental lawsuits).

95. “We used to be a nation of laws, but this new strategy presents novel means of legislating — within settlement negotiations of large civil lawsuits initiated by the executive branch. This is faux legislation, which sacrifices democracy to the discretion of . . . officials operating in secrecy.” Gifford, *Impersonating the Legislature*, *supra* note 18 at 915. *Parens patriae* actions by state AGs are, in Gifford’s view, “a bridge too far” in stretching tort law to address product-caused public health epidemics. GIFFORD, *supra* note 17, at 219.

96. For example, Ohio’s General Assembly enacted “legislation to control, such litigation, which nearly resulted in a constitutional crisis, requiring the Ohio Supreme Court to determine whether the legislation was properly enacted into law.” David J. Owsiany, *The Rise and Fall of Lead Paint Litigation in Ohio*, 1 STATE AG TRACKER 1 (2009) (discussing how Ohio’s Attorney General voluntarily ended the litigation after a separation of powers challenge); *see also* Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997); RESTATEMENT (SECOND) OF TORTS §821C, cmt a. (“The original remedies for a public nuisance were a prosecution for a criminal offense or a suit to abate or enjoin the nuisance brought by or on behalf of the state or an appropriate subdivision by the proper public authority.”).

A. Public Law Model of Tort Litigation Endangers Democracy

Professor Gifford, as well as other critics, asserts that an unholy alliance of greedy trial lawyers and publicity-seeking government lawyers undermines the public interest in *parens patriae* actions.⁹⁷ One legal commentator charges that “contingency-fee lawyers have snatched the distressed ‘sleeping giant’ that is the public natural resource damages action.”⁹⁸ Briefly, Gifford’s thesis is that the state governments and municipalities should not be in the business of filing public products liability actions, but instead should turn to the legislative process. He favors stronger statutes and concomitant regulation—not more tort law—to resolve social problems such as childhood lead poisoning, cheap handguns, and tobacco addiction.

In Gifford’s 2011 *South Carolina Law Review* article, he draws on the public law model of tort law in his critique of *parens patriae* actions filed to redress global climate change.⁹⁹ *Parens patriae* for climate change may be a bridge too far because the alleged injury is transnational and the causation is complex. To prevail in their public- nuisance claims, the states will need to prove that an individual company’s emissions caused an injury-in-fact to the public health.¹⁰⁰ The *parens patriae* climate litigation, unlike the BP oil spill *parens patriae* actions, creates the potential for unfair attribution of harm because of the uncertain causal connection between injury and indeterminate defendants:

Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the

97. An *amicus* brief on behalf of industry charges that State AGs are placed in a position of impropriety in products-related *parens patriae* actions because they have a fiduciary obligation to “choose which cases are meritorious and most likely to lead to a return on its investment of public resources (measured in the broader benefit to the public good). But here, because the State’s investment in the case “is minimal, and the potential payoff is sizeable, the government will behave opportunistically and allow contingent-fee counsel to prosecute such cases, regardless of their merit.” *PCA/FSCT File Amicus Brief in Support of Petitioner Before Pennsylvania Supreme Court*, STATES NEWS SERVICE (Sept. 1, 2009).

98. Julie E. Steiner, *The Illegality of Contingency-Fee Arrangements When Prosecuting Public Natural Resources Damage Claims and the Need for Legislative Reform*, 32 WM. & MARY ENV’T L. & POL’Y REV. 169, 169–170 (2007).

99. Gifford, *supra* note 24, at 229–232 (arguing against climate change *parens patriae* actions as violating separation of powers).

100. *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (noting that “[t]he elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or a significant threat of injury to some cognizable interest [of the states]”).

non-linear, collective impact of millions of fungible, climatically indistinguishable, and geographically dispersed emitters. Given this fact, granting a plaintiff relief from the coastline-changing or other adverse consequences of global climate change bears no genuine resemblance to identifying a responsible defendant.¹⁰¹

The nexus between the BP oil defendants and harm exacted on the Gulf Coast states' coastlines, estuaries, and economies is clear and convincing in contrast to the climate change cases.

B. Contingency Fee Lawyers & the Public Interest

Gulf Coast State AGs are considering entering into contingency fee agreements with private attorneys to make use of their expertise and to reallocate the gamble of this high-stakes litigation to trial lawyers in the BP litigation.¹⁰² "Rather than costly bureaucratic regulatory schemes, litigation by the AG's office is comparably cheaper, especially if the AG contracts with an experienced plaintiffs' attorney under a contingency fee arrangement."¹⁰³

Gifford finds such public/private partnerships to be inordinately problematic. Contingency fee trial lawyers may receive multi-billion dollar payouts, even if the *parens patriae* actions quickly settle, resulting in an extortionate payout of tens of thousands of dollars per hour.¹⁰⁴ The attorneys in the tobacco settlement were "paid from a \$1.25 billion pool over a four year period."¹⁰⁵

Tort reformers denounce the rise of Trial Lawyers Inc. who are said to exercise political power without being subject to the checks and balances

101. Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (January 2010) (Working Paper).

102. Editorial, *The Pay-to-Sue Business: Write a Check, Get No-Bid Contract to Litigate for the State*, WALL ST. J., April 16, 2009, at A14.

103. Allan Kanner, *supra* note 83, at 112-13.

104. "During the course of this litigation, defendants sought a ruling by the Superior Court that the contingent fee agreement was unenforceable and void because, in defendants' view, said agreement (1) constituted an unlawful delegation of the Attorney General's authority and (2) was violative of public policy." *State v. Lead Industries, Ass'n, Inc.* 951 A.2d 428, 467 (R.I. 2008) (discussing ethical and public policy issues in the Rhode Island state AG action against lead paint manufacturers where law firms were to receive 16.67% of the total recovery on behalf of the state); see also generally Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N.Y. TIMES, March 10, 1999, at A1.

105. Joy Johnson Wilson, SUMMARY OF THE ATTORNEYS GENERAL MASTER TOBACCO SETTLEMENT AGREEMENT 7 (March 1999).

that restrain government officials.¹⁰⁶ Financial, careerist and/or ideological inducements may converge to incentivize state AGs to violate their fiduciary duty to safeguard the public interest, resulting in a crisis of legitimacy.¹⁰⁷ Cash-strapped states may be tempted to misuse the legal system by extorting tantalizing concessions from deep-pocketed corporations even when the legal liability is attenuated.¹⁰⁸ However, states may enact statutes demarcating the role of trial attorneys in public torts litigation, even prohibiting state AGs from entering into contingency fee agreements. State attorneys general have the inherent power to veto overly “opportunistic” trial lawyers if these private attorneys fail to fulfill the public interest objectives of the *parens patriae* action.¹⁰⁹

Gifford deplors what he views as the devolution of public health torts into an anti-democratic, quasi-legislative force:

In less than a decade, litigation filed against product manufacturers by state attorneys general has changed the structure of product regulation in the United States. Tobacco manufacturers operate under a set of detailed regulations governing many aspects of their operations, including advertising directed toward young people, which are strikingly similar to proposals previously rejected by Congress. Federal regulators and state legislators, however, did not devise this regulatory regime. The new regulations resulted when state attorneys general and their partners – a handful of plaintiffs’ firms focused on mass products liability lawsuits – brought manufacturers to the bargaining table by filing lawsuits asserting novel substantive claims, such as public nuisance.¹¹⁰

Champions of the public torts model counter this criticism by arguing that private/public partnerships are a cost-effective way of remediating

106. See REGULATION THROUGH LITIGATION: TRIAL LAWYERS, INC. SUPPLANTS ELECTED OFFICIALS AND REGULATORS AS A FOURTH BRANCH OF GOVERNMENT, available at <http://www.triallawyersinc.com/html/print08.html> (last visited Jan. 28, 2011).

107. *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that a government lawyer’s goal is to represent the sovereignty “whose obligation . . . is not that it shall win a case, but that justice be done”).

108. “You don’t need a legislative majority to file a lawsuit. . . . The leading plaintiffs’ attorney who led the litigation efforts in New Orleans and in many other cities boasted that the plaintiffs’ bar was ‘a de facto fourth branch of government.’” GIFFORD, *supra* note 17 at 134; see also Gifford, *Impersonating the Legislature*, *supra* note 18, at 921.

109. Julie E. Steiner, *Should ‘Substitute’ Private Attorneys General Enforce Public Environmental Actions? Balancing the Costs and Benefits of the Contingency Fee Environmental Special Counsel Arrangement*, 51 SANTA CLARA L. REV. 853, 869 (2011).

110. Gifford, *Impersonating the Legislature*, *supra* note 18, at 914.

collective health or environmental disasters.¹¹¹ State AGs “defend the practice as the only way to finance these lawsuits without gambling with millions of dollars of taxpayer money if the lawsuit is unsuccessful.”¹¹² Public health torts function as a gap-filler “when the normal mechanisms supplied by the legislative branch and the administrative agencies . . . failed to prevent and to end these epidemics.”¹¹³

C. Gifford’s History of Public Health *Parens Patriae* Actions

Gifford’s examination of *parens patriae* actions in products litigation is difficult to summarize because the legal struggles he depicts are Byzantine litigation on steroids with as many emergent threads as a Charles Dickens novel. His expansive description of public health *parens patriae* is invigorated by anecdotes about the historical chronicle of lead paint, cigarettes and other products that once symbolized the “bright future of America in the newly emerging technological era.”¹¹⁴ The nationwide distribution of consumer goods created the potential of devastating mass harms from the widespread dissemination of dangerously defective products.

Gifford’s study of public health torts begins with a history of products liability, describing the legal accountability of manufacturers for injuries to consumers caused by defective products. In the late Nineteenth Century, courts did not encounter today’s thorny dilemmas involving probabilistic injuries, indeterminate causation, or latent occupational illnesses found in toxic torts. Torts, in this bygone era, possessed a clear causal link between injurer and the injured. At common law, causation was a simple matter of applying the “but for” test to a single plaintiff injured directly by an individual defendant.¹¹⁵ No convoluted chain of causation was required to explain an injury created when a brutal conductor threw a passenger from a moving streetcar or a railroad employee lost his leg in a decoupling accident.¹¹⁶ In contrast, the BP oil spill litigation, like lead paint and

111. Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crim torts*, 27 UCLA J. ENV’T L. & POL’Y 45, 50–51 (arguing for expansion of *parens patriae* to redress environmental injury to Gulf Coast States arising out of the BP oil spill).

112. Andrew Spiropoulos, *State AGs Hiring Private Attorneys to Assist in Government Lawsuits*, FEDERALIST SOC’Y (Jan. 10, 2008), available at http://www.fed-soc.org/publications/pubID.473/pub_detail.asp.

113. GIFFORD, *supra* note 17, at 215.

114. *Id.* at 13.

115. Under the “but for” test, a plaintiff must prove that she would not have suffered injury “but for” the negligence of the defendant.

116. GIFFORD, *supra* note 17, at 215.

tobacco, involves latent, collective injuries that may not manifest for decades.

1. The Failure of Torts to Address the Lead Paint Epidemic

By the early Twentieth Century, lead was ubiquitous in everyday consumer products and as American as apple pie and the Fourth of July. Dentists routinely used lead to fill cavities, ignorant of the hidden hazards.¹¹⁷ The 1893 World Columbian Exposition featured a stage for the exposition known as “White City,” named for its covering of 50,000 pounds of white lead paint.¹¹⁸ Katharine Lee Bates’ wrote her celebrated line “Thine alabaster cities gleam” after visiting the White City stage.¹¹⁹ Today, lead paint poisoning is recognized as “a public health crisis that has plagued and continues to plague this country, particularly its children.”¹²⁰

By the early 1900s, Australia had outlawed the use of lead in the manufacture of paint. Gifford credits the associated fields of occupational health and industrial hygiene for raising consciousness about the dangers of lead paint. These occupational health professionals prefigured Rachel Carlson’s *Silent Spring* – where birds no longer sang because of toxic exposures.¹²¹ Despite growing consciousness of the risks of lead poisoning, U.S. manufacturers were able to convince Congress to postpone the ban on lead paint until 1978.¹²² Childhood lead poisoning from paint chips remains decades away from eradication.¹²³ Twenty-four million housing units in the United States still contain perilous lead paint chips.¹²⁴

117. *Id.* at 16.

118. *Id.* at 13.

119. *Id.*

120. *Rhode Island v. Lead Indus., Ass’n*, 951 A.2d 428, 436 (R.I. 2008) (litigating *parens patriae* action by state of Rhode Island against lead paint manufacturers).

121. GIFFORD, *supra* note 17, at 19, 31.

122. *Id.* at 30.

123. Lead paint poisoning continues to be a major problem “in communities with older houses built when the risks of lead poisoning were unknown.” *Hinchey Helps Secure \$2.1 Million Grant to Help Stop Childhood Lead Poisoning in Binghamton*, STATES NEWS SERVICE, (Jan. 13, 2011). For example, in 2010, in a single N.Y. County, forty-four children were diagnosed “with elevated levels of lead in their blood.” *Id.* Economist Rick Nevin has found empirical support for the hypothesis that the decline in violent crime by youth in impoverished neighborhoods is partially caused by the decline in poisoning of children by lead exposure. Shankar Vedantam, *Research Links Lead Exposure, Criminal Behavior*, WASH. POST (July 8, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/07/AR2007070701073.html>.

124. “Around the nation, as estimated 250,000 kids have dangerous levels of lead in their blood. Poisoning can lead to irreversible neurological and organ damage. It is also tied to higher school dropout rates and violent behavior. There are still 24 million U.S. homes with exposed lead

Courts and torts struggle with the complexities of modern injury such as multiple causation, latent injury, the indeterminate plaintiff, and the indeterminate defendant.¹²⁵ Individual plaintiffs in lead pigment cases faced a “legal regime that made victory on their part impossible.”¹²⁶ A tenant apartment may have numerous coats of paint, each composed of different combinations of lead and non-lead paint.¹²⁷ Lead pigment cases often have an additional causal connection problem in that the property owners could have avoided the peril through proper maintenance.¹²⁸ In private tort litigation, these barriers to establishing cause-in-fact give the lead paint manufacturers a *de facto* immunity from responsibility.

Gifford’s historical account documents a graveyard of failed *avant-garde* theories of tort causation that has left many Twenty-First Century plaintiffs with rights but without meaningful remedies. To date, plaintiffs in mass torts litigation have enjoyed little success in convincing courts to recognize collective liability theories such as market share, enterprise liability, civil conspiracy and concert of action.¹²⁹ While a few creative courts have sidestepped the individual causation requirement in tort law by recognizing market share, most courts have rejected this approach.¹³⁰ Enterprise liability is another theory of causation that has largely died out as appellate courts have refused to expand this innovative doctrine to new factual settings beyond blasting caps.¹³¹ Plaintiffs have been thwarted in extending market share to asbestos or other products beyond DES.¹³² Courts have nearly always refused to expand market share liability because most mass products are not classifiable as fungibles.¹³³ Similarly, many

hazards.” Meredith Cohn, *It’s National Lead Poisoning Prevention Week*, BAY AND ENVIRONMENT (Oct. 21, 2009).

125. The traditional causation barriers were obstacles for the victims of tobacco-related illnesses and childhood lead poisoning. GIFFORD, *supra* note 17, at 78. Plaintiffs allege, “that cigarettes and lead paint cause cancer and childhood lead poisoning, respectively” and government lawyers sought to hold multiple and indeterminate product manufacturers jointly and severally liable. *Id.* at 87.

126. *Id.* at 33.

127. “Neither plaintiffs nor defendants possess the necessary records to determine the market shares for lead paint or lead . . . defendant’s market share because the paint containing lead pigment are present in the three houses where the child” ingested the paint chips. *Id.* at 64.

128. *Id.* at 43.

129. *Id.* at 62–68.

130. “Despite considerable scholarly support for the idea of market share liability the concept met with virtually universal rejection by the courts.” GIFFORD, *supra* note 17, at 63.

131. *Id.* at 66 (discussing Judge Weinstein’s enterprise liability theory formulated in blasting cap case).

132. *Id.* at 60.

133. *Id.* at 64.

appellate courts have been disinclined to recognize class certifications, thus leaving the victims of mass torts without legal recourse.¹³⁴

The legal system's failure to embrace modern theories of cause-in-fact for probabilistic environmental and product-related injuries led State AGs to join with trial lawyers in novel public/private partnerships. The state AGs cases against lead paint manufacturers were total fiascos, even though Providence, Rhode Island has received the unfavorable moniker, "the lead paint capital," because of its disproportionately large number of children with elevated blood-lead levels.¹³⁵ The state's Lead Hazard Mitigation Act has failed to "increase the supply in which lead hazards have been mitigated."¹³⁶

The promise that *parens patriae* could redress America's lead paint epidemic was eviscerated when the Rhode Island Supreme Court overturned a 2006 verdict, which held lead paint manufacturers responsible for remediating 240,000 houses and buildings in which children were injured or endangered by flaking paint chips.¹³⁷ The Rhode Island Supreme Court held that public nuisance¹³⁸ did not apply to lead paint manufacturers because the state AG "failed to allege infringement of a 'public right' sufficient to state a cause of action for public nuisance."¹³⁹ In addition, the court found that the state failed to demonstrate that the lead paint manufacturers were in control of the instrumentality that caused the injury,¹⁴⁰ which, in this case, were the ingested paint chips.¹⁴¹ The Rhode

134. *Id.* at 70–72.

135. *Rhode Island v. Lead Indus., Ass'n*, 951 A.2d 428, 436 (R.I. 2008) ("In order to establish clear goals for increasing the availability of housing in which lead hazards have been mitigated, to provide performance measures by which to assess progress toward achieving the purposes of this chapter, and to facilitate coordination among state agencies and political subdivisions with responsibilities for housing and housing quality for lead poisoning reduction and for the availability of insurance coverage described in this chapter, the housing resources commission established.").

136. R.I. GEN. LAWS §42-128.1-13 (2011).

137. Owsiany, *supra* note 96.

138. 951 A.2d at 468.

139. *Id.* at 447.

140. *Id.* at 453 ("The state's complaint alleges simply that '[d]efendants created an environmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the [s]tate, thereby constituting a public nuisance.' Absent from the state's complaint is any allegation that defendants have interfered with a public right as that term long has been understood in the law of public nuisance. Equally problematic is the absence of any allegation that defendants had control over the lead pigment at the time it caused harm to children.").

141. *Id.* at 433 ("Unlike the Legislature's careful adherence to these long-established notions, plaintiffs ignore the fact that the conduct that created the health crisis is the conduct of the premises owner. Plaintiffs therefore would separate conduct and location and thus eliminate entirely the concept of control of the nuisance.").

Island Supreme Court ruled that the state AG action stretched the law impermissibly and that courts:

can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law. . . . “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.”¹⁴²

The refusal of the Rhode Island Supreme Court to apply public nuisance theory to the public health epidemic of lead paint poisoning has left tens of thousands of children without any meaningful remedy for their permanent mental retardation and other developmental problems.¹⁴³

Critical race theorists view lead poisoning as racism in disguise.¹⁴⁴ The deplorable history of childhood lead paint poisoning is a reflection of the racial and class inequities in contemporary American society.¹⁴⁵

142. *Id.* at 436 (footnote omitted) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921)).

143. The failure to tackle this social problem in a serious way reflects the reluctance of legislators and courts to consider race and class differences to be of central importance. Trial courts as “the front-line representatives and human face of the law, cannot blink away the baleful effect in our criminal and civil litigations of sharp and growing socioeconomic differences.” Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Fifth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 26 (2008).

144. For a compelling study of how racial segregation correlates with unequal environmental protections, see Rachel Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules and Environmental Racism*, 53 *EMORY L.J.* 1807 (2004). Tampa Bay’s inner city suffers from an epidemic of lead paint related disease. “In fact, thousands of children in Tampa Bay (Florida) who live in old housing are exposed to the health risks associated with lead poisoning – hearing loss, delayed or stunted speech development, behavior problems, learning disabilities. Lead poisoning is particularly harmful to children because their nervous system and organs are still growing.” Wayne Washington, *Lead, An Old Enemy, Remains a Threat*, *ST. PETERSBURG TIMES* (Fla.), Jan. 17, 1999, at 1B.

145. *Maryland Childhood Lead Levels Decrease*, *U.S. STATE NEWS*, July 29, 2009 (reporting an epidemiological study of lead poisoning in Baltimore’s inner city, the home of the University of Maryland Law School, where Don Gifford teaches, that found “106,452 children under the age of 6 years were tested, an increase over the 2007 figure of 105,708. In Baltimore City, 18,622 children were tested, an increase from 17,670 in 2007. Elevated blood lead level (EBL level): 713 children (or 0.7 percent) had an elevated blood lead level, which by law is 10 micrograms per

Gender, too, plays a role in toxic torts cases because female-headed households are left with the care of a disproportionate number of brain-damaged infants. If more of the victims of lead paint poisoning were upper middle class, Congress and the states would be far more likely to consign this public health epidemic to the dustbin of history. Professor Gifford denounces the Rhode Island *parens patriae* actions, but the state AG's lawsuit was the last line of defense against an epidemic of childhood lead poisoning. In *parens patriae* public health actions, government lawyers serve on the front lines because of the benign neglect of legislators and regulators.

2. *The Legacy of the Tobacco Master Settlement*

Each year more than 400,000 Americans die of smoking-related injuries, a death toll greater than the rate of "homicides, vehicle crashes, alcohol, suicides and fire."¹⁴⁶ Gifford provides a compelling history of tobacco use beginning in 1604 when England's King James I warned that smoking tobacco was "loathsome to the eye, hatefull to the nose, harmful to the braine, dangerous to the lungs."¹⁴⁷ Tobacco was a leading industry in the American colony of Virginia. By the end of the Nineteenth Century, tobacco smoking was entrenched in American culture as millions took up the habit.¹⁴⁸ Technological advances, such as the introduction of white burley tobacco and flue curing, created blends that were milder and thus easier to inhale.¹⁴⁹ James Bonsack, the Henry Ford of tobacco, reduced the cost of smoking by creating an assembly line that "could produce over two hundred cigarettes a minute."¹⁵⁰

Public health officials warned of the skyrocketing incidence of lung cancer as early as the first half of the Twentieth Century.¹⁵¹ Between 1914

deciliter or above. This is lower than the 0.8 percent in 2007. In Baltimore City, the EBL was 2.5 percent, which is down from 3.5 percent in 2007."). In contrast to the current epidemic of American children suffering retardation from lead paint, Canada has all but eradicated the problem. "The number of Canadians with potentially dangerous levels of lead in their blood has dropped from 25 per cent in 1978 – the last time lead was measured nationally – to less than 1 per cent." David Bruser, *Canadians' Lead Levels Drop Sharply; But Statistics Canada Study Failed to Measure Metal Quantities in Most Vulnerable Group Kids Under 6*, TORONTO STAR, Nov. 25, 2008, at A25.

146. Joe Newman, *Tobacco Company Health Claims Should be Regulated*, <http://www.citizen.org/prezview/articles.cfm?ID=19112> (last visited Jan. 29, 2011).

147. GIFFORD, *supra* note 17, at 20.

148. *Id.*

149. *Id.* at 15.

150. *Id.*

151. *See id.* at 21 (discussing "a lung cancer epidemic in twentieth-century America" and a paper published in 1939 by researcher Franz Hermann Müller about the relationship between cigarette smoking and lung cancer).

and 1950, lung cancer rates increased twenty fold, as approximately half of all American adults became cigarette smokers.¹⁵² The tobacco industry mounted a massive disinformation campaign to create a swirl of uncertainty over the validity of empirical evidence of disease being produced by epidemiologists.¹⁵³ For many decades, the tobacco industry was successful “in puncturing the scientific consensus . . . that cigarette smoking caused lung cancer.”¹⁵⁴ Cigarette companies promoted filtered and sweetened brands to undermine the public’s perception that smoking was dangerous.

The World of Tomorrow exhibit at the 1939 World’s Fair in New York linked tobacco with a bright American future by featuring “Electro the Moto-Man,” a seven-foot tall robot, who smoked cigarettes while welcoming visitors.¹⁵⁵ The tobacco industry hoodwinked even medical professionals through their astute public relations campaigns. Magazine advertisements featured endorsements by physicians touting the health benefits of smoking. Doctors stood in long lines to receive complimentary cigarettes from Philip Morris at the 1947 American Medical Association Convention.¹⁵⁶ As late as 1994, R.J. Reynolds’s CEO compared the addictive attributes of cigarettes to “those of coffee, chocolate, and Twinkies.”¹⁵⁷ For much of the Twentieth Century, tobacco defendants enjoyed, in effect, a tort-free zone to market their deadly products.

Plaintiffs in tobacco products liability cases generally pleaded causes of action such as negligence or the implied warranty of merchantability without success.¹⁵⁸ The tobacco lawyers countered with “blaming the victim defenses,” such as contributory negligence and the assumption of risk,¹⁵⁹ themes that resonate with the individualism at the core of American culture.¹⁶⁰ The tobacco defense lawyers asserted that, “[t]he plaintiff’s contributory negligence or assumption of risk totally barred the plaintiff from recovery, even if the defendant’s conduct was more egregious or

152. *See id.* (noting that in the United States, the number of lung cancer cases went from 371 in 1914 to 7,121 in 1950).

153. *Id.* at 22.

154. *Id.* at 23.

155. *Id.* at 13.

156. *Id.*

157. *Id.* at 24.

158. *Id.* at 36; *see also* Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, 35 TRIAL 18 (1999) (reporting tobacco’s perfect record of winning every case including two appellate cases reversing plaintiff’s jury verdicts).

159. GIFFORD, *supra* note 17, at 36.

160. “Perhaps the most successful defense offered by the cigarette manufacturers involved variations on the assumption of risk doctrine – the argument that smokers chose to smoke despite awareness of potential adverse health effects, and therefore were legally responsible for their own illnesses.” Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 462 (2009).

substantial in causing the plaintiff's injury."¹⁶¹ Juries were predisposed to agree with the tobacco industry's arguments that smokers made a personal choice to run well-known risks of cancer and other diseases.¹⁶²

In a successful effort to sidestep these "victim-blaming" defenses, Mississippi filed a *parens patriae* public health lawsuit in 1994 to recover the medical costs of treating that state's victims of tobacco-related disease.¹⁶³ *Parens patriae* litigation avoided previously intractable issues such as foreseeability, causal indeterminacy, and negligence-based defenses. The states could not be tarred with user-oriented defenses because they had never smoked a single cigarette.¹⁶⁴ Mike Moore, Mississippi's AG, conceptualized the lawsuit to recoup the states' direct costs caused by smoking: "You caused the health crisis, you pay for it. The free ride is over. It's time these billionaire tobacco companies start paying what they rightfully owe to Mississippi taxpayers."¹⁶⁵ Attorney General Moore described the action as "the most important public health litigation ever in history."¹⁶⁶

Forty-six states eventually joined Mississippi by asserting their quasi-sovereign authority "to sue as a collective plaintiff on behalf of its citizens suffering from product-related diseases."¹⁶⁷ The state AGs jettisoned strict liability, negligence and warranty in favor of the torts of "public nuisance, unjust enrichment, and indemnity."¹⁶⁸ Under public nuisance theory, defenses such as assumption of risk and contributory negligence melted away because the state was the plaintiff rather than smokers and their estates.¹⁶⁹

161. GIFFORD, *supra* note 17, at 39.

162. *Id.* at 40.

163. *Tobacco Settlement Review: Hearing Before the Senate Judiciary Comm.*, 105th Congress, FEDERAL NEWS SERVICE (July 16, 1997) ("Attorney General Mike Moore of Mississippi filed the first lawsuit by a state government against the major cigarette manufacturers on May 23rd, 1994. In that action, General Moore sought injunctive relief to protect Mississippi's children from the marketing practices of the tobacco industry and sought restitution for hundreds of millions of dollars spent by Mississippi taxpayers occasioned by the provision of health care to indigent citizens and to those other citizens who qualify for medical assistance under various programs.")

164. David Barstow, *Can This Man Tame Tobacco?* ST. PETERSBURG TIMES (Fla.), April 7, 1997, at 1A. ("After all, no state ever chose to smoke a single cigarette. Yet the state foots the bill, through Medicaid payments, for thousands of smokers too poor to pay for their own medical care.")

165. CARRICK MOLLENKAMP ET. AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* (Bloomberg Press, 1998), available at <http://www.nytimes.com/books/first/m/mollenkamp-tobacco.html>.

166. *Id.* at 1.

167. GIFFORD, *supra* note 17, at 64 ("*Parens patriae* litigation thus accomplishes what the victim herself could not have accomplished as a litigant.")

168. *Id.* at 122.

169. *Id.* at 64.

Faced with these *parens patriae* actions, the tobacco industry acceded to a master settlement¹⁷⁰ with the five largest tobacco manufacturers (Brown & Williamson Tobacco corporation, Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Commonwealth Tobacco, and Liggett & Myers).¹⁷¹

This settlement was controversial because it was a clear example of “regulation through litigation.”¹⁷² The state AGs were primarily seeking indemnification for Medicaid expenses, but, as part of the settlement, they demanded changes in the way that the tobacco industry marketed and advertised cigarettes in order to lower the rate of smoking by minors. The state AGs formulated an “alternative regulatory system through judicial action, bankrupting the companies, or imposing sufficiently severe penalties for tobacco company practices, particularly the practices of advertising to young people” and for artificially jacking up the nicotine level in order to create millions of American cigarette addicts.¹⁷³ For instance, “tobacco manufacturers were prohibited from opposing state legislation that ban[ned] the manufacture and sale of cigarette packs containing fewer than 20 cigarettes” after November 23, 1998.¹⁷⁴ The tobacco settlement outlawed “cartoon characters in advertising,” and restricted brand-name sponsorship of events with significant youth audiences and banned outdoor advertising as well as free samples.¹⁷⁵

Gifford argues that the provisions protecting children from tobacco addiction were inevitable so there was no need for the state AGs to demand these reforms.¹⁷⁶ He approvingly quotes tobacco industry advocates who argue that regulators were already micromanaging “cigarette labeling and

170. Joy Johnson Wilson, SUMMARY OF THE ATTORNEYS GENERAL MASTER TOBACCO SETTLEMENT AGREEMENT 5 (March 1999) (“The agreement settle[d] all antitrust, consumer protection, common law, negligence, statutory, common law and equitable claims for monetary, restitutionary, equitable and injunctive relief.”) The settlement gave the states over \$206 billion beginning in June, 2000.

171. *Id.* at 4.

172. See Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215–16 (2001) (“Lawyers and activist courts discovered the power of high-stakes litigation to force an entire industry to change its commercial behavior during the well-publicized state attorneys’ general tobacco litigation in the late 1990s. Since then, other lawful industries such as automobile manufacturers, health insurance companies, firearms manufacturers, and computer companies have been targets of this policy-driven litigation.”).

173. Gifford, *Impersonating the Legislature*, *supra* note 18, at 922 (discussing the motives of the Mississippi Attorney General and the other forty-five state attorneys general who joined the Master Settlement).

174. Wilson, *supra* note 170, at 3.

175. Wilson, *supra* note 170, at 6.

176. GIFFORD, *supra* note 17, at 108, 173.

advertising issues.”¹⁷⁷ This argument is disingenuous given that the regulators had not yet addressed the marketing of smoking to children, the use of Joe Camel as the advertising mascot for Camel Cigarettes, the easy availability of vending machines to minors and other important reforms required by the tobacco settlement.¹⁷⁸

The public law model of torts developed in large part because of Congress’ refusal to regulate tobacco or lead paint, coupled with the failure of individual litigants to prevail in products liability. Only after it became apparent that Congress and state legislatures lacked the political will to regulate these products, did the victims of tobacco-related illnesses and lead chip poisoning turn to the tort system.¹⁷⁹ Regulatory torts mobilize private claimants “to identify and deal with problems that have not been adequately addressed by other institutions.”¹⁸⁰

Big Tobacco provides an emblematic example of regulatory failure at every level. The industry’s vast political influence and financial resources stymied Congress’ attempt to regulate the marketing of tobacco products.¹⁸¹ Congressional Committee chairs from tobacco states did their best to “delay many federal anti-tobacco legislative proposals.”¹⁸² It is true that “during the same year that Mississippi filed the first state litigation against the tobacco companies, the FDA initiated the process to begin the comprehensive regulation of cigarettes.”¹⁸³ However, this effort was stillborn because of the tobacco industry’s successes in federal appellate courts located in tobacco country. The lower court in Greensboro, North Carolina upheld the FDA’s regulations but the Fourth Circuit Court of Appeals, based in Richmond, Virginia, reversed this decision.¹⁸⁴ The U.S.

177. *Id.*

178. *Id.* at 105 (noting that public health and antismoking activists were critical of regulatory efforts including FTC labeling and packaging rules).

179. “Thus, the failure of conventional forms of legislative and administrative regulation of tobacco products and the recent shift in the landscape of tobacco litigation indicate that tobacco product liability litigation provides one of the most promising means of controlling the sale and use of tobacco.” Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL’Y REV. 63, 63–64 (1997) (arguing that tobacco products enjoyed a limited immunity for many decades because of administrative and legislative failure to enact effective tobacco control legislation).

180. Richard Stewart, *Crisis in Tort Law*, 54 U. CHI. L. REV. 184, 198 (1987).

181. Bruce Yandle, et. al., *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1246–47. (2008) (“During this time [the 1950s and 1960s], the tobacco industry needed no allies to achieve its objectives for several reasons. First, the industry could directly protect itself from emerging threats because its power to block change at the federal level was pervasive. Members from tobacco-producing states chaired one-third of House committees and nearly one-quarter of Senate committees in the early 1960s.”).

182. GIFFORD, *supra* note 17, at 111–112.

183. *Id.* at 118.

184. *Id.* at 110.

Supreme Court upheld the Fourth Circuit, ruling that the Federal Food and Drug Administration (FDA) had no jurisdiction to regulate tobacco.¹⁸⁵

Every time Big Tobacco got in any kind of trouble with regulatory agencies, such as the Federal Trade Commission or the Federal Communications Commission, their lobbyists went to Congress to bail them out.¹⁸⁶ “The tobacco industry’s influence over federal and state legislators makes it difficult, if not impossible, for effective tobacco control legislation to be passed at the federal or state level.”¹⁸⁷ Gifford criticizes a Public Citizen Report that concluded: “The fact that tobacco money buys pro–tobacco results is clear, consistent, and irrefutable.”¹⁸⁸ He cites an empirical study suggesting that the tobacco industry’s campaign contributions of millions of dollars to every session of Congress were “a less important factor in voting patterns than were the legislators’ generally pro–business and anti–regulatory philosophies.”¹⁸⁹

Public health regulation of tobacco was impractical because of the Supreme Court’s holding in *FDA v. Brown & Williamson*¹⁹⁰ that Congress had not granted the Federal Food and Drug Administration jurisdiction to regulate tobacco products.¹⁹¹

In *FDA v. Brown & Williamson*, the Supreme Court blocked the Food and Drug Administration (FDA) from exerting regulatory authority over the tobacco industry, and in the process restricted the amount of deference provided to public health authorities. In that case, the Court developed new rules for statutory interpretation that gave future courts greater flexibility to strike down public health regulations in non–tobacco settings. In particular, the Court collapsed the two–part Chevron test into one step by using the statute’s “context” to conclude that the statute in question did not contain any ambiguity. By addressing the

185. *Id.* at 4.

186. Yandle et al., *supra* note 181, at 1243 n.63 (“The FTC and FCC actions in the 1960s and 1970s, for example, along with the three waves of suits against the tobacco industry from the 1950s forward, caused the industry to perpetually fend off attack with the main weapons they had: Congress, big law firms, and secrecy. Each of these weapons showed holes and grew less powerful with time, as regulation–by–litigation came to the fore.”). In the 1990s, the tobacco industry was able to beat back the FDA’s efforts to regulate tobacco. *Id.* at 1254 (“After this episode [attempt to regulate tar content], cigarettes mostly avoided additional federal regulatory oversight until the 1990s, when the FDA attempted to assert regulatory authority. A significant reason was the tobacco industry’s continued sway in Congress, particularly in the Senate.”).

187. GIFFORD, *supra* note 17, at 69–70.

188. *Id.*

189. *Id.* at 111.

190. 529 U.S. 120 (2000).

191. *Id.* at 142–43.

issue this way, the Court was able to circumvent Chevron's far more deferential second step. Although the Supreme Court's decision was likely driven by the cultural and economic importance of tobacco, this legal mechanism developed in *Brown & Williamson* was later used to strike down public health regulations in other fields.¹⁹²

Tobacco is not the only industry that has enjoyed a tort-free zone. Gifford's case study of the lead paint pigmentation cases filed in Rhode Island illustrates the failure of public nuisance and *parens patriae* to remediate a serious social problem affecting hundreds of thousands of children. Prominent plaintiffs' attorneys, inspired by their successes in the tobacco settlement, approached Rhode Island government officials to seek recovery from the manufacturers of lead pigment. The Rhode Island Attorney General joined forces with plaintiffs' attorneys to adapt public nuisance theories to address the public health epidemic of childhood lead poisoning. While the AG tobacco lawsuits resulted in a master settlement, the Rhode Island paint litigation was stillborn. The lead paint industry has far less culpability than Big Tobacco as they did not conceal the hazard or engage in a systematic conspiracy to market their products to children. In fact, the lead pigment industry sponsored neutral scientific studies of lead exposure, in sharp contrast to the tobacco industry's comprehensive campaign of misinformation.

D. Reassessing Regulation Through Litigation

In our mass tort cases, delayed decision and frustration of rights is endemic. Powerful stories of human tragedy have echoed in my court through the years: women damaged by their mothers' ingestion of DES, who are now unable to have children of their own; Vietnam veterans, frightened of the effects of herbicides on their progeny; men struck down by dreaded lung cancers because, when they were still teenagers, they were exposed to asbestos while building the ships with which we won a war; persons suffering from AIDS because of tainted blood used in transfusions; and mothers driven to become drug couriers by cruel traffickers and poverty. To see those who live such stories is to understand why the law must be sensitive to human needs.¹⁹³

192. Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOKL. L. REV., 1, 15-16 (2009).

193. Weinstein, *supra* note 143, at 26.

Donald Gifford places his confidence in the legislative process and federal and state administrative agencies rather than the courtroom.¹⁹⁴ He maintains that tort law is not the proper legal institution to force industries to change their marketing practices or pursue mitigation efforts because such reforms are properly the exclusive province of legislatures and administrative agencies. In Gifford's opinion, it is irresponsible for the states to resort to *parens patriae* litigation as an alternative to regulation.¹⁹⁵ He concedes that, "[c]hildhood lead poisoning is a public health problem, even if it is not a public nuisance."¹⁹⁶ By the time that the Rhode Island AG filed a lawsuit against the pigment manufacturers, paint containing lead pigment was no longer on the market because, in 1978, Congress enacted a nationwide ban on the marketing of paint containing lead pigment.¹⁹⁷ Nevertheless, 38 million housing units containing lead-based paint are still not remediated, creating a continuing public health epidemic among children of the urban underclass.¹⁹⁸

Gifford concludes his book with a stinging critique of public health *parens patriae* in products cases, contending that the "tobacco and lead pigment litigation cycles not only largely failed to accomplish their public health objectives," but also upset the "constitutional allocation of powers."¹⁹⁹ Gifford states, "Congress, state legislatures, and federal and state administrative agencies can and must do better to prevent tobacco-related illnesses and childhood lead poisoning."²⁰⁰ In his opinion, it is possible that the political processes failed . . . because [the legislative branch] did not represent the will of the electorate."²⁰¹

We do not share Gifford's faith in the legislative and regulatory process when powerful industries such as Big Tobacco make a determined effort to capture the regulators, the courts, and the politicians. *Parens patriae* actions have a continuing vitality in redressing the harms suffered by the Gulf States in the recent BP oil spill. Phoebe Haddon criticizes Gifford for leaving the states with no alternative in dealing with collective injuries:

Gifford reminds us that James A. Henderson earlier observed that it is commonly accepted 'in a representative democracy macro-economic regulation is accomplished by

194. GIFFORD, *supra* note 17, at 228.

195. *Id.* at 112.

196. *Id.* at 227.

197. *Id.* at 112.

198. *Id.*

199. *Id.* at 218.

200. *Id.* at 228.

201. *Id.*

ected officials and their lawful delegates.’ But the fact is that neither state nor federal legislatures seem inclined to address these problems in a broad way, responsive to the needs of numerous individual tort victims or the public interest in addressing massive and expensive health effects of products. Indeed, as Gifford confirms, state legislative agendas have been dominated by business interests bent on limiting, not expanding, tort claims and relief, through caps to pain and suffering, limitations on actions and immunity. Congress has gutted the grounds for class actions and is more likely to limit or eliminate claims rather than expand liability; it seems more bent on conflating victim rights with frivolous suits.²⁰²

III. IN DEFENSE OF THE PUBLIC LAW TORT MODEL

“An adequate tort law remains crucial to providing “for” the people. Tort law is our primary fallback method of empowering ordinary people to remedy injustices to themselves through their courts.”²⁰³ Over the centuries, the law of torts evolved to solve public health hazards of each historic epoch.²⁰⁴ The public policy underlying tort law in the pre-negligence period, 1200 to 1825, was to protect community and the public order, not just address “private wrongs.”²⁰⁵ Tort law enables plaintiffs to obtain civil recourse but torts also involve the interests of the larger public, which Leon Green described as the interests of “we the people.”²⁰⁶ “What is important to note here is that torts often redress public wrongs, beyond the interests of the immediate parties.”²⁰⁷ The public health *parens patriae* action is the latest example of what Leon Green called “public law in disguise.”²⁰⁸

202. Phoebe Haddon, *Book Review*, TORTSPROF BLOG, April 12, 2010, <http://lawprofessors.typepad.com/tortspof/2010/04/guest-blogger-phoebe-haddon-update-on-the-umd-clinic-and-thoughts-on-don-giffords-new-book.html>.

203. Weinstein, *supra* note 143, at 20, 43 (2008).

204. The emblematic feature of the *parens patriae* public health actions for the deleterious effects of cigarettes and lead paint held “multiple and indeterminate product manufacturers jointly and severally liable” for public health problems. GIFFORD, *supra* note 17, at 87.

205. Rustad & Koenig, *supra* note 59, at 9–10.

206. See Leon Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928, 937 (1957) (“Whatever the doctrine, strict or less strict, it has its source in the maximum protection that can be given through the courts to ‘we the people,’ and at the same time not burden enterprise beyond its capacity to function.”).

207. Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 440 (2011).

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

The common law of torts is continually evolving, as it is “not a closed system of static rules, immutable unless changed by legislation.”²⁰⁹ As Judge Jack Weinstein reminds us, “[c]ontroversies about how the courts should exercise their powers in interpreting the Constitution are not new. Jefferson’s battle with Marshall over the limits on the Court’s power still reverberates.”²¹⁰ The courts’ role in eliminating segregation, for example, created a firestorm that lasted for decades.²¹¹ The courts took over school districts at a time when many American educational institutions had apartheid-like enrollment policies. This controversial expansion of judicial power is now overwhelmingly regarded as admirable.

The critics of public health torts ask courts to step aside in favor of legislatures and regulators and to wait for decades while hundreds of thousands of additional children ingest paint chips or become addicted to cigarettes. Justice Benjamin Cardozo was one of the first to recognize that tort law did not come from the legal heavens nor was it “deduced from an orderly conceptual system of precepts.”²¹² *Parens patriae* public nuisance litigation is a flexible remedy that can be invoked when public authorities fail to shield the citizenry from an avoidable epidemic of injury.

A. Rejoinder to Gifford’s Critique of the Public Law Model of Torts

Donald Gifford’s anthem would likely be “Public Health Torts! What Are They Good For?” Moreover, the answer he gives in his latest book is “Absolutely nothing!” “Public Health Torts, huh, yeah. What are they good for? Absolutely nothing.” If Edwin Starr were to write an anti-torts anthem, he might say:

Public Health Torts, it ain’t nothing but a heartbreaker
Public Health Torts, it’s got one friend

209. Thomas F. Lambert, Jr., *Principles, Persuasions, and Primrose Propaganda*, 19 NAT’L ASS’N CLAIMANTS’ COMPENSATION ATT’YS L. J. 25, 25 (1957).

210. Weinstein, *supra* note 143, at 20 (defending the public law model of tort law and comparing it to constitutional litigation).

211. Judge Weinstein worries that much of the court’s desegregation work will be stopped in its tracks because of a recent U.S. Supreme Court decision involving Seattle and Jefferson County. *Id.* at 243. Judge Weinstein quotes Justice Breyer to support this point. *Id.* at 242–43 (“The very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they face They have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments . . . they believe are needed to overcome the problems of cities divided by race and poverty This is a decision . . . the Court and the Nation will come to regret.”). Weinstein writes that the Court “refused to recognize that these local school boards were using racial classifications to help, rather than, as in pre-Brown to denigrate Blacks.” *Id.* at 243. Gifford’s reform proposal is for courts to reject the use of *parens patriae* lawsuits to redress an epidemic of lead paint poisoning, tobacco addiction, and other social problems affecting children’s health and welfare.

212. Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 OR. L. REV. 1033, 1043 (2000).

That's the undertaker.²¹³

Our former teacher,²¹⁴ the late Abram Chayes, first conceptualized the “public law model,” observing that the “dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”²¹⁵ *Parens patriae* tort actions addressed environmental and public health problems where neither Congress nor the state legislatures had provided sufficient leadership.²¹⁶

The partnership between state AGs and trial lawyers in suing the tobacco companies, lead pigment industry, and now the BP oil defendants is the latest stage of tort law as public health prescription.²¹⁷ These *parens patriae* tort actions, filed by government lawyers, address environmental or public health problems where Congress or the state legislatures failed.²¹⁸ Public health *parens patriae* lawsuits are the last defense against corporate wrongdoers who fail in their duty to safeguard the public interest.

The environmental *parens patriae* actions by Louisiana and other Gulf governments will serve quasi-criminal law objectives of punishment and deterrence if the oil industry defendants are found to have recklessly carried out deep-water oil drilling operations or if there is proof of the companies' conscious indifference to the safety of their workers. *Ex post* public health

213. Edwin Starr, *Lyrics to War*, http://www.oldielyrics.com/lyrics/edwin_starr/war.html (last visited Feb. 19, 2010).

214. Michael Rustad studied international legal process with Professor Chayes in the Harvard University Law School's LL.M program. Tom Koenig studied with Professor Chayes at Harvard Law School during his Liberal Arts Fellowship in Law and Sociology a decade later.

215. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284–85 (1976) (“[T]he dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”). Chayes noted that Nineteenth Century adjudication “assumed that the major social and economic arrangements would result from the activities of autonomous individuals.” *Id.* at 1285.

216. See, e.g., Gifford, *supra* note 24 at 202 (discussing the timing of climate change litigation). Gifford notes that “[t]he use of common law tort actions to implement regulatory regimes when the political branches had stalemated reached unprecedented heights when states, municipalities, and class action representatives filed tort actions seeking to impose more stringent emission standards on those who emit greenhouse gases contributing to global climate change.” *Id.* at 216–17.

217. Gifford critiques this new evolutionary stage of *parens patriae* for product-related epidemics. He characterizes State AG products actions as “driven by mass plaintiffs' attorneys who often profit handsomely, to the tune of thousands of dollars per hour.” *Professor Urges Legislative Solutions, Not Court Battles, to Public Health Dangers*, HT MEDIA LIMITED (April 17, 2010).

218. The tobacco litigation was filed in the wake of Congress' refusal to regulate big tobacco. “A decade later, frustrated by a stalemated Congress's inability to address global climate change, environmentalists, state attorneys general and mass plaintiffs' attorneys are again turning to the courts, this time to regulate greenhouse gas emissions.” Gifford, *supra* note 24, at 202.

and environmental *parens patriae* actions bridge the gap left by inadequate *ex ante* regulation at the state and federal level.²¹⁹ Public products liability and environmental litigation need to address catastrophic oil releases as well as other public health and environmental disasters that are not adequately dealt with by legislatures, regulators or prosecutors.

B. Safeguarding the Public Interest from Overreaching AGs

1. Standing to File Parens Patriae Public Health Cases

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*,²²⁰ the U.S. Supreme Court reviewed a line of cases employing public nuisance in *parens patriae* actions.²²¹ The Court characterized *parens patriae* as an instrumentality enabling states to file lawsuits on behalf of their citizenry to advance a “quasi-sovereign interest,” which is a “judicial construct that does not lend itself to a simple or exact definition.”²²² Whenever a state asserts standing to sue in a *parens patriae* case, it must: (1) “allege injury to a sufficiently substantial segment of its population;” (2) “articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party;” and (3) “express a quasi-sovereign interest.”²²³ These elements are also the predicates for a contemporary public health *parens patriae* action. Public health tort lawsuits should be initiated only when there is a grave risk to health and safety not addressed by legislators, regulators, or the private tort system. *Parens patriae* lawsuits supplement but should not supplant either regulation or private tort litigation.

219. “The *parens patriae* is a flexible collective claims mechanism that enables states to bring suits to “safeguard[] nearly all the interests that a state might reasonably seek to protect.” Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1882 (2000).

220. *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 600 (1982) (defining the states’ quasi-sovereign interest as protecting their citizens from discrimination).

221. The *Snapp* Court reviewed a line of U.S. Supreme Court cases decided during the first two decades of the Twentieth Century where states deployed public nuisance tort actions against other states for discharging sewage and other toxins that polluted interstate waters and endangered the health of their citizenry. *Id.* at 603 (citing *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *New York v. New Jersey*, 256 U.S. 296 (1921); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Missouri v. Illinois*, 180 U.S. 208 (1901)); *see also*, *Maine v. Tamano*, 357 F. Supp. 1097, 1099 (D. Me. 1973) (“Suits by a State, *parens patriae*, have long been recognized.”)

222. *Snapp*, 458 U.S. 592 at 600; *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (noting that a state may “sue as *parens patriae* to prevent or repair harm to its quasi-sovereign interests”).

223. *Snapp*, 458 U.S. 592 at 607.

2. *Parens Patriae* & *Judicial Overreach*

Gifford argues that *parens patriae* actions are anti-democratic and violate principles of separation of powers.²²⁴ The danger in letting trial lawyers and government attorneys pursue “regulation by litigation” is that there is no formal mechanism for democratic participation. For example, in the tobacco litigation, state AGs and trial lawyers developed a regulatory framework without approval of Congress or expert agencies.²²⁵

Gifford indicts *parens patriae* public health torts as an example of extreme judicial overreach, but the states have always wielded their “‘police power’ to protect the health of their citizens, as well as the *parens patriae* power to protect disadvantaged citizens.”²²⁶ Lead paint and tobacco *parens patriae* actions were in accord with the historical use of this doctrine to promote the “best interests of minors, and an interest in promoting the public health of minors.”²²⁷ *Parens patriae* authority permits a state, in delimited circumstances, to exert its governmental “interest in [protecting] the health and well-being—both physical and economic—of its residents in general.”²²⁸ “The state retains extensive regulatory power even over families—that is, *parens patriae* power—so that ‘a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.’”²²⁹ The lead paint cases were about protecting vulnerable children living in urban housing projects and the tobacco cases were about preventing children from becoming addicted. Public nuisance draws from the spring of equity and fills the void left by inadequate tort or regulatory remedies.

3. *Separation of Powers* & *Federalism Concerns*

Gifford asserts that the Master Tobacco Settlement’s detailed and extensive regulation of tobacco products conflicts with Congress’

224. Professor Gifford tacitly assumes that because the legislature has acted in a given area, that public tort actions are precluded by the “separation of powers.” GIFFORD, *supra* note 17, at 205. He acknowledges that state statutes authorize attorneys general to file *parens patriae* actions. Nevertheless, he contends that “[s]eparation of powers principles calls for the diffusion of power among the legislative, executive, and judicial branches of government.” *Id.* He applies federal separation of powers principles by analogy to the states. *Id.* at 206. However, states are not “miniature versions of the national government.” G. Allan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 330 (2003).

225. Gifford, *Impersonating the Legislature*, *supra* note 18, at 914.

226. Joan H. Krause, *Healthcare Fraud and Quality of Care: A Patient-Centered Approach*, 37 J. HEALTH L. 161 (2004).

227. *Aid for Women v. Foulston*, 441 F.3d 1101, 1127 (10th Cir. 2006) (Herrera, J., dissenting).

228. *Snapp*, 458 U.S. 592 at 607.

229. C.P. Dominic Ayotte, *Troxel v. Granville: Parental Power to Determine Associational Interests of Children*, 52 BAYLOR L. REV. 997, 1005 (2000).

representative powers.²³⁰ He views the state AGs' actions in the tobacco settlement as the legitimate domain of the legislative branch rather than the judicial branch. This is an odd argument because *state* attorneys general are not even part of the executive branch of the federal government.²³¹ State attorneys general are part of the executive branch of state governments. The separation of powers is about conflicts between coordinate branches of the federal government, not about state AGs displacing Congress' authority to regulate the labeling and marking of tobacco products.²³²

The BP *parens patriae* actions do not raise substantial issues of federalism. It has been long established that states may employ their *parens patriae* powers to protect their citizens' health. The predicate for a public health *parens patriae* action is that the state AG identify a substantial segment of its population affected by a hazard such as chemical dispersants.²³³ In the BP oil spill, there is obviously sufficient quasi-sovereign interest to justify state actions.²³⁴ Numerous U.S. Supreme Court decisions have upheld the right of states to employ *parens patriae* to enjoin public nuisances that constitute public health threats.²³⁵

4. Constitutional Concerns with the Gulf States' Public Health Lawsuits

The Gulf Coast AGs are not encroaching upon powers of Congress, the U.S. Supreme Court, or the Executive Branch in pursuing public nuisance claims against the BP oil industry defendants. Unlike the Master Tobacco Settlement, in the BP *parens patriae* actions, courts have not been asked to "micromanage" regulations governing chemical dispersants or other aspects of the cleanup that Congress regulates. The federal courts simply have no principled reason to refuse to adjudicate these claims.

Separation of powers issues arise when a coordinate branch of the federal government exceeds its specific powers enumerated in the

230. GIFFORD, *supra* note 17, at 205.

231. *Id.* (arguing that the conflict is not between the judicial branch and the legislative branch but between the state AG's role as a member of the executive branch infringing on the prerogatives of the representative branch).

232. *Id.*

233. Alfred L. Snapp & Son, Inc. v. P.R., 458 U.S. 592, 607 (1982).

234. *See, e.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972) (stating that a state may "sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests").

235. *See, e.g.,* New York v. New Jersey, 256 U.S. 296 (1921) (upholding *parens patriae* action against other state to abate the discharge of sewage); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (upholding Georgia's *parens patriae* lawsuit to enjoin copper smelter causing air pollution endangering its citizens' health and welfare); Missouri v. Illinois, 180 U.S. 208 (1901) (upholding state's *parens patriae* action to abate air pollution).

Constitution.²³⁶ This is clearly not the case here. Louisiana and other Gulf Coast states that may join the public health litigation are pursuing state tort causes of actions under well-established equitable powers of *parens patriae*.

5. Gulf Coast States' Standing in Public Health Litigation

In the BP *parens patriae* actions, federal courts have standing and there is no compelling reason why they should refrain from adjudicating these claims, since they are dealing with a local public health problem. States, rather than Congress, historically have exercised the primary responsibility for protecting the health and welfare of their citizens.²³⁷ Similarly, there is no issue of political question or of Article III standing since the Gulf Coast States are employing state tort law to protect their citizenry. Unlike the climate change *parens patriae*, courts are not being called upon to decide abstract questions involving the indeterminate causation of environmental degradation.²³⁸ Here, the causal connection between the BP oil spill and the public health menace is clear and convincing. There is no doubt that the defendants have caused an environment disaster affecting substantial numbers of citizens in the Gulf Coast States.

C. The Future of Public Health Parens Patriae Partnerships

Forecasting the future of the public health *parens patriae* is hazardous. It is too soon to determine whether the millions of gallons of oil and toxic chemicals will cause significant long-term health problems. The Gulf States will have standing to file *parens patriae* lawsuits if a public health crisis materializes because states have a quasi-sovereign interest in protecting the health and welfare of all their citizens.²³⁹ The essence of these public health tort lawsuits is offering interstitial protection to society where private tort litigation and regulators fail. *Parens patriae* is an

236. Krause, *supra* note 224, at 163. "The federal government's authority to regulate public health is derived, on the other hand, from specific powers enumerated in the Constitution, such as the powers to tax, spend, and regulate interstate commerce." *Id.* at 183 n.147.

237. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that courts should exercise self-restraint in not adjudicating claims more appropriately addressed "in the representative branches").

238. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (stating that the standing doctrine does not permit court to decide "abstract questions of wide public significance" where other governmental institutions are "more competent to address the questions").

239. 72 AM. JUR. 2D STATES, ETC. § 90 (2011) ("The '*parens patriae*' doctrine is a recognition of the principle that a state, when a party to a suit involving a matter of sovereign interest or quasi-sovereign interest, must be deemed to represent all its citizens, and therefore has standing.").

essential equitably based means to overcome the extreme difficulties of single plaintiffs taking on billion dollar industries such as tobacco and paint manufacturers.

Donald Gifford is correct in warning that *parens patriae* lawsuits are subject to abuse, especially in so-called private/public partnerships in which state AGs cede too much control of the litigation to trial lawyers.²⁴⁰ The borderline between private and public justice blurs if state AGs breach their fiduciary duty to the public for the prospect of a career-enhancing settlement. However, the judiciary has ample tools to deal with this danger. Judges have the inherent power to reject *parens patriae* settlements that shortchange the public interest. Just as courts may refuse to approve class action settlements, they have the authority to reject *parens patriae* settlements that give trial attorneys grossly disproportionate fees. Courts must supervise *parens patriae* to ensure that a careful balance is struck between employing the talents, skills, experience of private trial lawyers and ensuring that societal interests are advanced.

States are uniquely situated to determine whether public/private partnerships fit their budgetary and other needs.²⁴¹ Louisiana's AG contended, for example, that his state's sovereignty would be "compromised if there are not separate tracks, because the states would inevitably be required to defer to private parties' attorneys as liaison or lead counsel."²⁴² Recently, Alabama's Attorney General, Luther Strange, assumed "personal control of the state's" BP claims.²⁴³ In contrast, his

240. See generally, GIFFORD, *supra* note 17, at 211 (describing hiring of plaintiffs' firms by states and cities in tobacco and lead paint public health litigation and resultant ethical issues). Contingency fee agreements between government lawyers and trial attorneys have the potential to create troubling ethical and practical dilemmas. Government lawyers owe a higher fiduciary duty to the public than do trial attorneys. The danger is that when trial lawyers pursue zealous advocacy, the public interest may be sacrificed. The Rhode Island Supreme Court, which ultimately did not disapprove of contingency fee agreements, noted in the leading lead paint *parens patriae* case that there was a potential conflict between the ethical standards of trial lawyers and government lawyers. *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 473 (R.I. 2008) ("Although all attorneys have numerous important duties and responsibilities by virtue of their role as members of the bar, attorneys general have additional special duties, which, because of the nature of that ancient and powerful governmental office, differ from those of the usual advocate. Unlike other attorneys who are engaged in the practice of law, the Attorney General "has a common law duty to represent the public interest.").

241. For example, when George W. Bush was Governor of Texas, he signed a bill that limited the authority of Texas' attorney general to retain private lawyers to aid in class action lawsuits.

242. Rebecca Mowbray, *State Fights Proposal to Lump its BP Oil Spill Litigation Together With Other Suits*, THE TIMES-PICAYUNE, Oct. 6, 2010 (quoting Louisiana Attorney General), available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/10/state_fights_proposal_to_lump.html.

243. Luther Strange, *Alabama in Forefront of BP Claims Litigation*, GADSDEN TIMES (Alabama), April 24, 2011.

predecessor, Troy King, cooperated with trial lawyers²⁴⁴ in developing Alabama's *parens patriae* complaint against BP and other oil industry defendants.²⁴⁵

Mississippi's AG, who was then considering filing BP-related lawsuits, disagreed with King, favoring a Chinese Wall between private and public actions against the BP oil spill defendants.²⁴⁶ In contrast, the City of Pensacola, Florida is assembling a "dream team"²⁴⁷ of private lawyers to assist it in pursuing their BP oil spill-related claims for "reduction in revenue because of the oil spill."²⁴⁸ In the forty-three states that elect their attorney general,²⁴⁹ the voters may remove AGs who fail to fulfill their fiduciary duty to protect the public interest. Legislatures in the Gulf States could adopt sliding scales limiting the contingency fees collected by trial attorneys or require that the legal fees be proportionate to reasonable hours expended. Finally, legislatures could enact statutes prohibiting contingency fee agreements entirely.

CONCLUSION: THE U.S. STILL NEEDS *PARENS PATRIAE* PUBLIC HEALTH LAWSUITS

State AGs have the right, as well as the duty, to exercise their *parens patriae* and police powers to protect children from the perils of lead paint,

244. Troy King, who lost his bid for reelection as Alabama's AG, cooperated with trial lawyers and considered entering into a contingency fee agreement to pursue that state's BP-related oil spill claims. State AG King clashed with Alabama governor Bob Riley who opposed King's plans to cooperate with prominent trial lawyers. He contended that the Alabama "attorney general offered private law firms a contingency fee of 14 percent of the state's total claim to join the case." ASSOCIATED PRESS, *Ala. Governor Limits Attorneys Fees in Oil Spill Lawsuit* (Aug. 17, 2010), <http://www.law.com/jsp/article.jsp?id=1202469951114>.

245. The state attorney general filed one public environmental tort complaint against British Petroleum (BP) and its corporate affiliates connected to the oil spill. See Complaint, *supra* note 1. The same day, the Alabama Attorney General filed a virtually identical complaint against non-BP companies such as Transocean Ltd., the provider of drilling management services, designer of the oil rig, and Halliburton Energy Services, who completed the cementing operations. See BP Complaint, *supra* note 2.

246. *Mississippi Attorney General in No Hurry to Sue BP Over Gulf of Mexico Oil Spill*, ASSOCIATED PRESS (Aug. 17, 2010), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/mississippi_attorney_general_h.html.

247. Kris Wernowski, *City of Pensacola Assembles 'Dream Team' Attorneys for BP Lawsuit*, PNJ.COM BLOG (April 16, 2011)

<http://www.pnj.com/article/20110417/NEWS01/104160339/0/HELPPDESK06/City-Pensacola-assembles-dream-team-attorneys-BP-lawsuit?odyssey=mod%7Clateststories>.

248. *Id.*

249. "In five states (Alaska, Hawaii, New Hampshire, New Jersey and Wyoming), they are appointed by the governor. In Maine, the legislature chooses the attorney general by secret ballot and, in Tennessee, the state Supreme Court."

http://ballotpedia.org/wiki/index.php?title=Attorney_General (last visited June 25, 2011).

tobacco and toxic spills.²⁵⁰ In the lead paint and tobacco litigation, *parens patriae* functioned to express grievances for mass product injuries where regulation was either lax or nonexistent. Prior to the Master Tobacco Settlement, the catastrophic costs of tobacco-related illnesses fell solely on the smokers, their families, health care providers and the taxpayer. The story of lead paint illustrates the promise of *parens patriae* but this equitable remedy was ultimately dashed by the Rhode Island Supreme Court. The continuing vitality of *parens patriae* lawsuits is evidenced in the Gulf Coast AGs' actions to redress significant public health problems created by the oil spill.

The Gulf Coast States' actions against BP and other oil industry defendants raise many challenging issues for tort law, constitutional law, and public policy. Donald Gifford's new book does a fine job of laying out the limitations and the potential for abuse of this remedy, but his lack of realistic solutions will leave many victims of public health epidemics without a meaningful remedy. The public law model of tort law emphasizes the judicial system's role in addressing larger societal interests "outside and beyond the interests of the immediate parties to the litigation."²⁵¹ A flexible public tort regime is necessary to reallocate the public health costs from the citizenry to the wrongdoer. Since the Thirteenth Century, the government has had not only a right, but also a duty to protect the vulnerable.²⁵² In the Twenty-First Century, this equitable remedy has evolved to enable government lawyers to address public health catastrophes as a gap-filling mechanism.

We are living in a historical epoch where injury is collective and may not manifest for many decades. The long-term public health effects of the BP oil spill, for example, are currently unknown and unknowable. Donald Gifford's narrow view of *parens patriae* reflects a Nineteenth Century view of accidents that limits tort law to cases that have a clear causal connection to the resultant injuries. In the modern globalized era, injuries will increasingly take the form of public health catastrophes where the injuries may be latent and probabilistic. The public health *parens patriae* is the latest stage in the evolution of tort law in responding to emergent social problems in cases of ineffective legislative and regulatory responses.

250. We disagree with Gifford that judicial restraint doctrines such as standing and the political question doctrine should stymie the Gulf Coast states actions against BP and the other oil industry defendants to address the long-term health effects of the oil spill.

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

252. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 521 (Melville M. Bigelow ed., 13th ed. 1886).

