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Prods and Pleas: Limited Government in an Era of Unlimited Harm

ABSTRACT. Not just a system of checks and balances ideally tuned to constrain collective political action, the constitutional division of authority also may be seen as a system of “prods and pleas” in which distinct governmental branches and actors can push each other to entertain collective political action when necessary. Though prods and pleas are an inversion of the assumed direction of checks and balances, they are not a radical reconfiguration of the basic structure and principles of American government. Rather, they are limited government’s fail-safe: a latent capacity inherent to a system of divided authority that does and should activate when the external pressures of a changing world threaten the sustainability of disaggregated governance. By understanding and embracing their role in the shadow logic of prods and pleas, judges and other public officials can protect limited government by, when necessary, counteracting its potential to overprefer passivity.

Through the case study of climate change nuisance litigation, we examine how three potential obstacles to merits adjudication—the political question doctrine, standing, and implied preemption—should be evaluated in recognition of the significance of prods and pleas. We conclude that federal and state tort law provide an important defense mechanism that can help limited government sustain itself in the face of climate change and other dramatic twenty-first century threats, where the nature of the threat is, in large part, a function of limited government itself. As a residual locus for the airing of grievances when no other government actor is responsive to societal need, the common law of tort is a—and perhaps the—paradigmatic vehicle for the expression of prods and pleas. Although climate change plaintiffs still face long odds on the actual merits of their claims, judges would sell short their institutional role if they dismissed such claims as categorically beyond the proper domain of the courts and the common law. They would duck and weave when they should prod and plead.

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ARTICLE CONTENTS

INTRODUCTION	352
I. TO PROD AND PLEAD, OR PUNT?	359
II. TORT LAW AND CHANGING CLIMATES	367
III. BEFORE THE LAW SITS A GATEKEEPER	378
A. The Political Question Doctrine	380
B. Standing	387
1. Injury-in-Fact	389
2. Traceability and Redressability	391
3. Prudential Standing	395
4. Parens Patriae Standing	396
C. Implied Preemption and Displacement	401
IV. THE ACTIVE VIRTUES OF COMMON LAW ADJUDICATION	409
A. Separation of Powers	410
B. Rule of Law	417
CONCLUSION	423

INTRODUCTION

Society today faces realistic threats of unlimited harm. This is true in at least two important senses. First, the sources of some injuries are now so numerous and dispersed, or so unpredictable and evasive, as to be unregulable in any traditional fashion. Climate change is the obvious example. As we are repeatedly reminded, domestic efforts to mitigate greenhouse gas emissions will matter naught without a mechanism for limiting the remainder of the globe's nearly seven billion anthropogenic emitters. Global economic risk is similarly diffuse and wide-reaching. Interlinkages of finance and trade create opportunities for growth and efficiency but also render any individual jurisdiction vulnerable to systemic risks arising from far outside its regulatory purview. The frequency and density of international travel and migration create a similar dilemma with respect to infectious diseases and the risk of global pandemics. Threats of terrorism are not pervasive in this sense, but they may still be practically unlimited. Clandestine weapons markets and global communications channels enable the recruiting of anyone anywhere into the cause of destruction. The pipeline of recruitment may be monitored, perhaps even constricted, but it may not be shut off.

Second, the potential impact of harms is frequently both catastrophic and resistant to confident characterization.¹ For instance, climate scientists have identified a variety of scenarios under which global warming and ocean acidification spin wildly out of control, with harmful effects of unprecedented magnitude.² Yet, the mechanisms underlying these scenarios are not sufficiently well understood to assign the kind of probabilities that policymaking in the rationalist tradition demands.³ As a result, the tails of our probability distributions are fat and fuzzy; somewhat paradoxically, more knowledge often only makes them more so. The challenge is similar for other catastrophic threats. Before the events of September 11, 2001, the financial collapse of 2008, and the Deepwater Horizon oil spill disaster of 2010, knowledgeable observers warned that such threats were not only imaginable but likely. Yet, their warnings were not easily assimilated into our safety

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1. See Martin L. Weitzman, *On Modeling and Interpreting the Economics of Catastrophic Climate Change*, 91 REV. ECON. & STAT. 1 (2009) (offering a formal proof of the "dismal theorem," which holds that in certain cases of high uncertainty and extreme threat, the expected value of harm can be infinite).
 2. On such tipping point scenarios, see the extremely useful overview: Timothy M. Lenton et al., *Tipping Elements in the Earth's Climate System*, 105 PROC. NAT'L ACAD. SCI. 1786 (2008).
 3. See DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 71-98 (2010).

protocols and risk models. How do we guard against an agent determined to be indeterminable? How do we price a risk to the very mechanism that gives rise to price? How do we prepare for the worst when our history with an activity is limited and deceptively reassuring?

Threats of unlimited harm resist figuration within conventional regulatory frameworks—not least because their drivers and impacts span the globe, fall under multiple agency mandates, and confound conventional risk assessment techniques. Accordingly, many theorists of the administrative state argue that contemporary regulatory tasks require new modes of management, ones built on an understanding of regulation as a continual process of experimentation, monitoring, and adjustment against the prospect of unpleasant surprise. This “new governance” framework treats regulatory targets as embedded within intricate systems that defy precise prediction and control.⁴ Rapidly evolving, globally interconnected, and wickedly complex, such systems do not yield to straightforward command-and-control regulation or other familiar lawmaking forms.⁵ Instead, “governance” only emerges from the decentralized, overlapping, and continually evolving interventions of public and private actors—each operating at different levels and from different spheres of authority, utilizing a range of policy tools both hard and soft, and representing diverse interests and stakeholder groups. Rather than aggregated into hierarchical state authority, power within these systems is widely distributed and decidedly fractional. Indeed, even the state itself increasingly appears as a complex tissue of actors and networks, rather than a unified or even neatly stratified sovereign.

Limited government faces grave challenges in this brave new world. Our “preference for passivity,” built out of “the idea that we are more endangered by government action than inaction,”⁶ has become a dangerously double-edged sword in some significant areas of law and policy, where threats to social welfare arise in substantial part from the nature of limited government itself. For these areas of concern, effective public action may be thwarted by

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4. The “new governance” literature is vast. For overviews, see Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008); and Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).
 5. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998) (“[O]ur national affairs are too complex, diverse, and volatile to be governed by lapidary expressions of the public will—laws of Congress, administrative rules, judicial judgments—that indicate precisely how to dispose of most of the cases to which they will eventually be applied.”).
 6. Lisa Heinzerling & Frank Ackerman, *Law and Economics for a Warming World*, 1 HARV. L. & POL’Y REV. 331, 335 (2007).

Madison's all-too-familiar nightmare, in which "heterogeneity of interests . . . prevent[s] the majority coalition from doing anything at all—even just and useful things—while simultaneously facilitating the ability of self-interested minorities to loot the federal fisc."⁷ Moreover, as the new governance school emphasizes, effective public action also may be thwarted simply by the nature of the risks themselves and the challenges they pose to systems of disaggregated authority and conventional regulation. Accordingly, many twenty-first-century threats to social welfare appear to demand greater governmental responsiveness and openness to institutional and structural experimentation.

One way in which government actors in the United States can promote greater openness and responsiveness is by performing their official roles with a self-conscious appreciation for the ways in which they can signal to other institutional actors that a given problem demands attention and action. Call this function "prods and pleas" and a corollary to the more traditionally emphasized function of checks and balances. Even when a social need exceeds the scope or capacity of a government actor's role, she may still acknowledge the seriousness of that need and the desirability of action by more appropriate actors. Just as the existence of divided and overlapping government authorities creates opportunities for those institutions to check and balance one another's overreaches, it also opens space for them to prod and plead with one another when the danger instead is one of government *underreach*. For instance, agencies might proceed with regulatory rulemakings that are admittedly less desirable than new legislation in order to prompt Congress to overcome its considerable, self-imposed inertia.⁸ Recognizing that Congress faces difficulty applying its own rules of procedure in consistent and neutral ways, judges might interpret statutes using a fictional presumption that they comply with,

7. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 10 (2007); see also Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990).

8. The Environmental Protection Agency's implementation of the Clean Air Act (CAA) with respect to greenhouse gas emissions has been widely understood in these terms. See John M. Broder, *E.P.A. Limit on Gases To Pose Risk to Obama and Congress*, N.Y. TIMES, Dec. 30, 2010, <http://www.nytimes.com/2010/12/31/science/earth/31epa.html> (noting that President Obama "offered Congress wide latitude to pass climate change legislation, but held in reserve the threat of E.P.A. regulation if it failed to act"). Interestingly, Senator Lisa Murkowski, who led a legislative attempt to block EPA's implementation efforts, also understood her actions from a systemic, interbranch perspective: "You attack it at all fronts. . . . You go the judicial route. You go the legislative route. I think this is important to make sure we are looking at all avenues." Darren Samuelsohn, *President Obama's Climate 'Plan B' in Hot Water*, POLITICO, Aug. 2, 2010, <http://www.politico.com/news/stories/0810/40534.html>.

for example, congressional earmark disclosure rules, thus making nondisclosed rents harder for Congress to dispense.⁹

More controversially, governors might engage in a form of “state civil disobedience,” pursuing climate change policy coordination with foreign governments despite doubts over the constitutionality of such actions.¹⁰ Similarly, mayors might decide to confer marriage licenses on same-sex couples, local school boards might prohibit the teaching of evolution, and states might adopt divergent policies toward illegal immigrants, knowing well that their attempts at “dissenting by deciding” may be swiftly overruled by superior authorities, but hoping in the process to prompt sustained democratic engagement with their perceived area of need.¹¹ All of these actions can be understood as efforts to trigger dormant institutional hydraulics that help limited government acknowledge and address areas of social harm and discontent.¹²

In this Article, we use recent climate change nuisance suits to consider the potential for common law tort adjudication to serve a prodding and pleading function. Understandably resistant to the claim that global climate change is an ordinary pollution nuisance of the kind adjudicated for centuries, judges have sought escape from such claims through political question, standing, and implied preemption doctrines. We argue, however, that judges should overcome the temptation to exploit these malleable escape hatches and should instead proceed to the merits of the underlying claims. At the merits stage, a variety of doctrinal hurdles for plaintiffs will remain and will most likely justify

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9. See Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2009).
 10. See Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1672 (2008). For insightful characterization of these and similar actions by subnational actors as part of “translocal organizations of government actors” that resist easy mapping onto a federalism grid with strict horizontal and vertical axes, see Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).
 11. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1764 (2005) (marriage); *id.* at 1756 (evolution); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 68 (2010) (immigration).
 12. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 18 (1982) (advocating discharge of judicial duties with a view toward “induc[ing] the legislature to reconsider statutes that are out of date, out of phase, or ill adapted to the legal topography”). Daniel Markovits offers a defense of “democratic disobedience” by citizens that similarly seeks to “correct deficits in democratic authority . . . by overcoming political inertia and triggering a democratic reengagement with issues that the status quo has kept off the political agenda.” Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1933 (2005).

dismissal of the suits.¹³ Nevertheless, it is, and ought to be, an important part of the judiciary's role to grapple with the merits of such cases—even if only to the extent of finding no liability as a matter of law. Just as open trials afford democratic participation by allowing individuals to interpret—not merely observe—the judicial process,¹⁴ merits adjudication of tort suits promotes consideration of the underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decisions.¹⁵ Such adjudication ensures the continued availability and operation of tort law as a critical forum for the articulation of public understandings of morality. Rather than counseling against common law adjudication, therefore, the complexity and enormity of the climate change problem counsel in its favor, in order that baseline norms of responsibility—whatever their content—may be more clearly specified as public and private actors embark on what undoubtedly will be a centuries-long struggle to deal with greenhouse gas emissions and their impacts.

Entertaining the substance of boundary-pushing causes of action also gives tort an opportunity to fulfill a crucial institutional role too often neglected both by dominant theories of tort law's purposes and by institutional competence analyses that compare tort law with regulation "proper."¹⁶ In entertaining and adjudicating tort disputes, courts can, do, and should interact with the other branches of government. This is true even—and sometimes precisely—when they must reject allegations of harm because they do not fit the scheme of proof and liability established by tort.¹⁷ In so doing, courts reveal gaps between the

13. For analysis of these significant obstacles, see Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011).

14. See Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1 (2011).

15. See Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993).

16. For insightful comparative institutional analyses of that nature, see, for example, Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002); Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 WASHBURN L.J. 515 (2002); Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371 (2005); and Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002).

17. In a recent work, Douglas NeJaime discusses underappreciated positive aspects of litigation defeat for social movements, including the possibility of using defeat "to appeal to other state actors, including elected officials and judges, through reworked litigation and nonlitigation tactics." Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941 (2011); see also Ben Depoorter, *Passive Courts, Active Litigants*, 110 MICH. L. REV. (forthcoming 2011). Our analysis examines a similar dynamic occurring among government actors themselves.

common law's basic ideal of protection from harm imposed by others' agency and the failure of other branches to step in when the complexity of such harm renders it unsuitable for judicial resolution. Partly a classical liberal guarantee of official avenues for individuals to seek civil redress, tort also represents a quasi-constitutional mechanism whereby limited government is forced to perceive the social consequences of its own limitations.¹⁸ In that sense, prods and pleas are as conservative as they may appear radical, for they serve not to undermine the basic structure and principles of limited government, but rather to protect them against daunting threats to their perpetuation. Put more grandly, liberal anxiety today should focus not just on whether our system of checks and balances can safely constrain collective political action, but also on whether the system can ensure that collective action *does* happen when it is necessary. Prods and pleas are a modest but essential step toward that end.

This Article proceeds as follows. In Part I, we more thoroughly explain the meaning of what we are calling "prods and pleas." Part II focuses on the prodding and pleading role played by courts as they confront claims that strain the capacity of conventional private law adjudication, such as the recent suite of climate change nuisance suits that have been brought before the federal courts. We situate the judicial role in such cases within twentieth-century developments in tort law and explain its relationship to the broader, distinctively American history of legal adjudication that edges toward paradigmatically legislative and regulatory activity. In Part III, we use the framework of prods and pleas to help analyze three significant hurdles that climate change tort plaintiffs must overcome in order to reach the stage at which courts can grapple directly with substantive theories of liability. Although these hurdles were raised in the recent Supreme Court case of *American Electric Power Co. v. Connecticut*, the Court in that case only mustered a majority ruling on the narrow issue of whether federal common law has been displaced by the Clean Air Act (CAA), leaving the doctrines of political question, standing, and implied preemption available to be raised by defendants in future state common law litigation.¹⁹ We conclude that these

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18. Cf. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1102 (2006) ("What adjudication offers to democratic governance are occasions to observe the exercise of state authority and to participate, episodically, in norm generation—occurring through a haphazard process in which vivid sets of alleged harms make their way into public purview.").
 19. 131 S. Ct. 2527 (2011). Only eight justices participated following Justice Sotomayor's recusal in *American Electric Power Co.*, leaving the Court, by a 4-4 vote, to "affirm . . . the Second Circuit's exercise of jurisdiction" in the suit. *Id.* at 2535. Although one might expect that Justice Sotomayor would also favor finding jurisdiction in future cases, the margin remains narrow, and defendants naturally will continue to raise political question, standing, and

doctrines do not and should not pose dispositive barriers to tort-based climate change litigation.²⁰ Just as Alexander Bickel famously described the “passive virtues” of various jurisdictional techniques for avoiding or delaying judicial confrontation of controversial public issues raised by constitutional litigation,²¹ numerous “active virtues” attend the forthright confrontation of merits issues raised by common law litigation.²² Thus, the “private-law model of public law” litigation²³—which uses analogues to common law recovery requirements in order to ensure that parties challenging legislative or administrative action hold a sufficient interest to satisfy the case or controversy demands of Article III—should not be uncritically carried over into common law litigation itself.

In Part IV, we return to our broader theoretical claims by undertaking a normative and more expansive defense of the courts’ role in such politically charged and judicially unwieldy suits as climate change tort actions. We argue that neither separation-of-powers nor rule-of-law values justify judicial withdrawal from the merits of boundary-straining tort claims. Such arguments misapprehend important structural features of our decentralized, non-hierarchical government. So long as the broad framework of American governance remains in place, courts should remain widely open—whether as a first or last resort—to hear common law tort complaints and should be forced to struggle with seemingly unmanageable harms. Even when the ultimate result of such struggles is dismissal on the merits, much may be gained in the process as harms surface for official cognizance in light of important norms of

other justiciability barriers to tort law adjudication. Thus, in addition to their intellectual significance, the doctrinal matters discussed in Part III retain potentially weighty practical importance.

20. Nor, for that matter, should the Supreme Court’s recent decisions articulating a heightened pleading standard in federal courts be exploited to ward off climate change litigation. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As Arthur Miller has argued, such developments threaten to upset the longstanding “access-minded and merit-oriented ethos at the heart of the original Federal Rules.” Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 6 (2010). Although *Iqbal* and *Twombly* concern access-to-court issues that are relevant to our thesis, we have chosen in this Article to focus on doctrines such as standing and political question that more directly implicate separation-of-powers concerns and that involve the judiciary in a more self-conscious project of role definition.
21. Alexander M. Bickel, *The Supreme Court: 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).
22. Cf. Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001) (identifying and normatively defending departures from federal justiciability requirements among state courts).
23. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 (1988).

tort law—norms that judges *must* grapple with when articulating principled substantive grounds to deny recovery. Substantive dismissals can implicitly acknowledge societal need and serve notice on those actors in government more capable of tackling a problem but less predisposed to try. However those other branches respond, the hope is that our institutional dynamics will be catalyzed and preserved.

I. TO PROD AND PLEAD, OR PUNT?

Famously worried about concentration and abuse of political power, the Founders sought to minimize the risk of government overreaching by distributing public authority horizontally and vertically—with separate branches and levels of government often required to promulgate, implement, and enforce policy. Even as the world has changed dramatically, the fears of the Founders continue to guide our thinking. As Richard Pildes notes, “Constitutional theory and design have been dominated by the specter of legislative and executive institutions voraciously seeking to expand their powers. But in modern political practice, the flight from political responsibility—the problem of political abdication—is at least as serious a threat.”²⁴ In a world in which government has enabled private entities to amass power as breathtaking as it is elusive, and in which minor harms of diffuse, unregulated origin have accumulated into threats of catastrophic magnitudes, the basic liberal goal of preventing the aggregation and abuse of power should be applied more broadly than to the formal apexes of government authority. The critical goals of balancing and limiting power now sometimes require *more*, not less, government activity and responsiveness. Rightfully wary of majoritarian oppression in the Founding era, we nevertheless may have splintered and hobbled our government *too* well.

The American system of limited government resonates well with John Stuart Mill’s harm principle, which holds that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁵ In addition to restrictions on state action created by constitutional rights, a powerful institutional method for ensuring that government activity remains appropriately contained to this narrow harm-prevention role is to splinter and fracture government authority

24. See Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 148 (2007), <http://yalelawjournal.org/2007/12/10/pildes.html>.

25. See JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

so that its exercise is cumbersome. U.S. courts and lawmakers have also bolstered safeguards against government action by interpreting Mill's harm principle to require not only harm, but harm of a certain magnitude or nature, in order to justify government intervention. In cases where harm is deemed insufficient to merit public attention on these criteria—such that victims receive no remedy—legal and political actors routinely seek to justify the result by appealing to general-welfare benefits that victims accrue simply from living under a system of limited government with its preference for private activity.²⁶ As Oliver Wendell Holmes, Jr., famously put it, “[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.”²⁷

This preference for society's “doers”—and the accompanying acceptance of uncompensated harm in exchange for limited public interference in civil society—now faces an unprecedented reckoning, most notably in the form of climate change. Put brashly, the minor side effects of private activity are accumulating into a collective action problem with potentially biblical repercussions.²⁸ Yet, despite their cumulative impact, greenhouse gas emissions from any particular activity such as driving or farming still appear to be minor, common, and beneficial—precisely the characteristics that render such activities immune from liability or regulation under prevailing interpretations of the harm principle. The macroscale demands of climate change governance are thus obscured by microscale focus on disaggregated activities and harms, rather than on the systems in which they are embedded. In order to realize entirely new systems of energy, housing, transportation, manufacturing, waste disposal, forestry, agriculture, and water treatment—the current forms of which depend upon unsustainable levels of greenhouse gas emissions—industrialized societies will need to adopt policies that might seem welfare-*decreasing* when evaluated piecemeal according to data and expectations

26. See, e.g., RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1979) (reporting the “obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together”).

27. OLIVER W. HOLMES, JR., THE COMMON LAW 95 (Dover Publ'ns 1991) (1881).

28. A recent report in the *Proceedings of the National Academy of Sciences* projects that business-as-usual anthropogenic greenhouse gas emissions could leave as much as half of the currently inhabited land on the planet physically incapable of supporting human existence within three centuries. See Steven C. Sherwood & Matthew Huber, *An Adaptability Limit to Climate Change Due to Heat Stress*, 107 PROC. NAT'L ACAD. SCI. 9552 (2010).

derived from present orderings.²⁹ Worse, in the United States this transformation will need to occur within a governmental system that was well-designed to frustrate transformational change.

One institutional response to this dilemma is for government actors to acquaint themselves more intimately and self-consciously with the flip-side of checks and balances: prods and pleas. In the familiar rendering of checks and balances, one government branch may “check” another by slowing momentum toward a political goal so that power is not exercised in a hasty or unreasoned manner, or, alternatively, it may “balance” the other branch by stopping action altogether until the goal is abandoned or a more widely agreeable approach is achieved.³⁰ Similarly, through the lens of prods and pleas, one branch may “prod” another by taking action that makes further avoidance of the issue unpleasant or infeasible³¹ or, alternatively, it may “plead” with the other branch simply by calling attention to a problem of social need and asking for its resolution.³² Loosely speaking, the former behavior might be thought of as action-forcing and the latter action-inviting.

To better elucidate the concept, the following table offers examples of horizontal prods and pleas, in which one branch of government attempts to spur a co-equal branch to attention and action.

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29. See Douglas A. Kysar, *Politics by Other Meanings: A Comment on “Retaking Rationality Two Years Later,”* 48 HOUS. L. REV. 43, 62 (2011) (“Rather than positing some degree of fundamental dependence between socioeconomic and natural systems, [climate change] assessment models typically assume that the economy will continue to function more or less as is, even as damages from climate change grow ever larger. In the extreme, this means that global GDP can continue to pour forth within the models even after all presently inhabited land on earth has been rendered unsuitable for human existence.”); Heinzerling & Ackerman, *supra* note 6, at 348 (“A world in which business as usual threatens to cause disaster in a century or less—i.e., the warming world which we do inhabit—is not usefully modeled by theories in which stable, optimal equilibrium is the normal state of affairs.”).
 30. See Ferdinand A. Hermens, *The Choice of the Framers*, 11 PRESIDENTIAL STUD. Q. 9, 17 (1981) (emphasizing “the vital difference between checks and balances”).
 31. For instance, the Supreme Court’s requirement that EPA provide scientific reasons for its failure to implement the CAA with respect to greenhouse gas emissions made delay essentially untenable for an agency that derives its legitimacy largely from being perceived as science-driven. See *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007).
 32. The Supreme Court’s numerous attempts to draw Congress’s attention to the problem of asbestos litigation is one primary example. See, e.g., *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 166 (2003) (stating that “[t]he ‘elephantine mass of asbestos cases’ lodged in state and federal courts . . . ‘defies customary judicial administration and calls for national legislation’” (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999))).

Table 1.
PRODS AND PLEAS: A FIELD GUIDE

	LEGISLATIVE BRANCH = TARGET	EXECUTIVE BRANCH = TARGET	JUDICIAL BRANCH = TARGET
LEGISLATIVE BRANCH = SOURCE	The House repeals a statute knowing the Senate will not do likewise ³³	Congress passes a statute knowing the President will veto and Congress will not override ³⁴	Congress inserts language in a statute instructing courts to consider legislative history when interpreting it, knowing courts may decline to do so ³⁵
EXECUTIVE BRANCH = SOURCE	The President issues an Executive Order aimed at catalyzing a congressional response ³⁶	Office of Management and Budget (OMB) sends a “prompt letter” to a regulatory agency ³⁷	The President criticizes a Supreme Court decision in the State of the Union address ³⁸
JUDICIAL BRANCH = SOURCE	A court issues a merits opinion inviting/urging Congress to address an area of social need that implicates norms of tort law, but that stretches its doctrinal and/or institutional capacity ³⁹	A court requires an agency to rectify a continuing legal violation (of its statutory or constitutional authority) which persists due to inaction or inertia ⁴⁰	A lower court rules on a case knowing it will be reversed by a higher court ⁴¹

33. For instance, the Republican House’s recent attempt to repeal the Patient Protection and Affordable Care Act in the face of certain Senate rejection might be seen as a “prod.” Cf. Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011); David M. Herszenhorn & Robert Pear, *House Votes for Repeal of Health Law in Symbolic Act*, N.Y. TIMES, Jan. 19, 2011, <http://www.nytimes.com/2011/01/20/health/policy/20cong.html> (noting that Republican leaders “conced[ed] th[e] reality” that the Democratic Senate would certainly reject their repeal attempt).

34. This behavior may signal to voters that the President is unwilling to take affirmative steps to address a particular issue of concern to many people, thereby pressuring the President to respond. See Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100 (2001).

35. In 2001, in response to years of unanimous state court adherence to a strict method of statutory interpretation set forth in a famous 1993 case, the Oregon legislature passed a law intended to make legislative history a more prominent part of the state courts' interpretive methodology. See OR. REV. STAT. § 174.020(3) (2009); *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143 (Or. 1993); see also Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1775-85 (2010).
36. For instance, in July 2008, President Bush lifted an executive order banning offshore oil drilling, even though "the move, by itself, w[ould] do nothing unless Congress act[ed] as well." *Bush To Lift Ban on Offshore Drilling*, N.Y. TIMES, July 14, 2008, <http://www.nytimes.com/2008/07/14/business/worldbusiness/14iht-14oil.14482997.html>; see also *id.* (quoting Dana Perino, the White House Press Secretary, as stating: "[W]e are going to move forward, and hopefully that will spur action by the Congress").
37. As the Office of Information and Regulatory Affairs (OIRA) within OMB notes,
- The purpose of the prompt letter is to suggest an issue that OMB believes is worthy of agency priority. Rather than being sent in response to the agency's submission of a draft rule for OIRA review, a "prompt" letter is sent on OMB's initiative and contains a suggestion for how the agency could improve its regulations.
- OIRA Prompt Letters*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (last visited Sept. 18, 2011). See generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 460-63 (2008) (describing OIRA's use of prompt letters in the George W. Bush Administration).
38. President Barack H. Obama, State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems." (referencing *Citizens United v. FEC*, 130 S. Ct. 376 (2010))). As this example makes clear, a prod or plea can implicate multiple branches simultaneously.
39. See *infra* Parts II & III.
40. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding a lower court order that in the next two years California must reduce its imprisoned population to 137.5 percent of prison design capacity, to rectify California's violation of the Eighth Amendment's prohibition against cruel and unusual punishment). See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998) (describing how in the second half of the twentieth century, courts spurred prison reforms in many American jurisdictions by finding prison conditions to be in violation of the law—particularly the Eighth Amendment). This example demonstrates that some signals may be construed as calls for action or cessation of it—and thus as prods and pleas or as ordinary checks and balances—depending upon how one frames the relevant background conditions.

Vertical prods and pleas include those mentioned in the Introduction, such as the ability of subnational government actors to spur attention to a problem by “dissenting by deciding” or engaging in “state civil disobedience.”⁴² Yet, vertical prods and pleas are not a one-way street. The federal government also often uses powerful incentive schemes to pressure states to take certain political actions, and this sometimes sparks states to return the pressure in the hope of prompting federal action on a related issue attracting state concern.⁴³

It is by the Founders’ design, if not intention, that government actors have the ability and authority to prod and plead. Both are inherent to the basic framework of divided and overlapping authority. The same webbing of power that institutes checks and balances also makes possible prods and pleas. Likewise, in the way that checks and balances correct against the tyrannical overreaching of any particular branch of government, prods and pleas counteract the oppressive underreaching of government institutions. In that sense, they are the second blade of a pair of scissors.

Of course, whether another branch has underreached is a contestable issue, as are the questions of whether and how another branch will perceive or respond to a call for action. Much like those of checks and balances, the brute consequences of prods and pleas have not been, and will not be, uniformly desirable or specifically predictable. Instead, they will be predictably messy and multivalent. As with checks and balances, certain prods and pleas will appear deeply rooted in the historically recognized allocations of overlapping authority in the constitutional order, while others will strike some as more closely

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41. Some observers see the Ninth Circuit as regularly prodding the Supreme Court in this manner. See, e.g., John Schwartz, *‘Liberal’ Reputation Precedes Ninth Circuit Court*, N.Y. TIMES, Apr. 24, 2010, <http://www.nytimes.com/2010/04/25/us/25sf ninth.html> (“Those who criticize the court say the best evidence for their argument is the Supreme Court, which overturns the decisions of the Ninth more often than those of any other circuit.”). Similarly, a justice may issue an oral dissent in order to draw wider attention to the perceived failings of a majority opinion. See Lani Guinier, *The Supreme Court: 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).
 42. See *supra* text accompanying notes 10–12; see also Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008) (providing examples of cases in which state courts flout binding Supreme Court precedent).
 43. Illicit drug policy is one context in which the legislative and executive branches of the federal government have used an array of powerful levers to spur state prohibition enforcement efforts in line with the basic federal agenda. Some states have pushed back through defiant policies—such as medical marijuana distribution systems—that may be understood in part as efforts to spur the federal government out of inertia and into addressing the harms caused by its own prohibition enforcement efforts. See generally Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806–52 (2004) (describing mechanisms of federal influence over the states and states’ reassertions of their authority in the area of drug policy).

resembling realist power grabs that their perpetrators strategically defend as instantiations of the ideal interbranch dialogue for which our system is designed.⁴⁴ This amenability to strategic use, however, does not undermine arguments in favor of prods and pleas any more than it does arguments in favor of checks and balances. Rather, it reflects a tacit admission by political actors that our system of government is one in which argumentation of this kind is familiar and resonant—whether it is over checks and balances or prods and pleas.

Another way to frame the theoretical significance of prods and pleas is by reference to what Michael Dorf and Charles Sabel have called “democratic experimentalism.”⁴⁵ Justice Brandeis famously saw “one of the happy incidents of the federal system” in the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁶ Today, multiplicative experimentation in governance is not merely an option for a few courageous states, but rather an unavoidable reality for public actors at all levels: twenty-first century threats to social welfare transcend any single geographical area, regulatory device, epistemological scheme, or even normative framework. Thus, Dorf and Sabel’s system of policy experimentation, public deliberation, and intergovernmental coordination increasingly seems unavoidable, not simply desirable. The era of “new governance” is upon us, though our laws and institutions have scarcely begun to reflect it.

Prods and pleas may be seen as offering a bridge between the worlds of old and new governance. Whereas new governance scholars tend to emphasize novel forms of decentralized authority to enable democratic experimentation,⁴⁷

44. On the checks and balances side, consider the filibuster. Many have portrayed its increasing use in the Senate as a fundamental instantiation of checks and balances. Others have argued that the Senate’s electoral composition already does plenty to make it a cooling body, and modern use of the filibuster is not a deeply rooted structure of American government but a contemporary perversion of the Senate’s constitutional authority to determine its internal rules—an authority it now exploits to impose precisely the factionalism as against the public good that the Founders abhorred. *See generally* Michael Tomasky, *The Specter Haunting the Senate*, N.Y. REV. BOOKS, Sept. 30, 2010, at 22 (reviewing SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* (1997)); and GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND THE SENATE* (2010)).

45. Dorf & Sabel, *supra* note 5.

46. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

47. *See* Dorf & Sabel, *supra* note 5, at 445 (predicting that “democracy [will] increasingly come[] to mean decentralized, direct deliberation”); *see also* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. (forthcoming 2011) (manuscript at 31), available at <http://ssrn.com/abstract=1600898> (“Experimentalism

prods and pleas focus on the use of overlapping margins of existing authority structures to promote active and multiplicative engagement with policy problems. When formal legal limitations or forces of political inertia prevent the kind of democratic experimentalism that new governance thinkers advocate, prods and pleas offer a mechanism for public acknowledgment of such barriers. This may come in the form of a “prod” of dissent or disobedience that forces confrontation of an issue by other actors, or, more subtly, in the form of a “plea” for other branches or levels of government to deploy power when the speaker cannot. Inherent in the same system of divided and overlapping authority, prods and pleas offer hedges against the sometimes incapacitating force of checks and balances, seeking most basically to “quicken” democratic conversation and action.⁴⁸

Just as the notion of checks and balances permeates our political culture, exerting influence far beyond its formal manifestation in institutions and doctrines, a belief in the need for prods and pleas holds important reorienting potential. For instance, rather than presuming that ordinary principles and procedures for lawmaking must yield to exception during crisis,⁴⁹ government actors might seek to anticipate and engage the possibility of crisis proactively. Institutional actors might better appreciate the value of interbranch dialogue and planning for sporadic and unpredictable risks of catastrophe,⁵⁰ and the power vacuum created by legislative incapacity during crisis—often eagerly

combines decentralization of operative control with central coordination of the evaluation of results.”).

48. On the need for “quicken” of politics, see ROBERTO MANGABEIRA UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* 59-60 (2007).
49. For the canonical articulation of this view, see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chi. Press 2005) (rev. ed. 1934).
50. The temptation to avoid confronting such stark challenges is strong. As Justice Scalia impatiently asked counsel for petitioners in *Massachusetts v. EPA*, the Court’s first direct engagement with the problem of climate change, “[W]hen is the predicted cataclysm?” Transcript of Oral Argument at 5, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1120.pdf; see also Heinzerling & Ackerman, *supra* note 6, at 335 (discussing *Massachusetts v. EPA*). Consider also Justice Scalia’s forceful—and perhaps a bit wishful—rejection of the risks of genetic contamination and dispersion of genetically modified alfalfa: “This isn’t contamination of the New York City water supply. . . . This is not the end of the world. It really isn’t.” Transcript of Oral Argument at 42-43, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475), 2010 WL 1686195. Like most of us, the Justice seems uncomfortable with a world of stochastic processes and possibly extreme outcomes; hence his desire for precise predictions and definitive risk assessments. Unfortunately, governance cannot await their arrival.

filled by executive branch assertion of emergency authority⁵¹—might be guarded against by advance deliberation. Similarly, institutional actors attuned to the importance of their capacity to prod and plead might begin to see how, in struggling with the boundaries of their own authority, they may spotlight the need for (and help facilitate) laws and regulations that transcend the constrained logics of ordinary policy analysis and incremental public action. Overcoming such minimalist strategies is vital for a conundrum like climate change, as the full scale of the challenge cannot be grasped through an analytical lens that assumes the continuation of the status quo.⁵² Governmental actors attuned to the need for prods and pleas might help to counteract these tendencies, seeking to draw attention to areas in which the status quo assumed by policy analysis *is itself the problem*, rather than the given around which we can only incrementally adjust.⁵³ Those actors whose mandate does not include primary responsibility for wholesale change may be the best positioned to signal its need.

II. TORT LAW AND CHANGING CLIMATES

At present, at least two significant common law tort suits based on harms stemming from human contributions to global climate change are wending their way through the courts. In *American Electric Power Co. v. Connecticut*,⁵⁴ a coalition of states, land trusts, and the City of New York is suing five of the nation’s largest power utilities, demanding structured injunctive relief that caps the utilities’ carbon dioxide emissions and gradually reduces them over time. A Second Circuit panel decision ruled favorably for plaintiffs on standing, political question, and preemption issues,⁵⁵ paving the way for the suit to proceed to its tort law merits. However, the Supreme Court recently reversed the Second Circuit in part, holding that plaintiffs’ federal common law claims

51. On these dynamics, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

52. See *supra* note 29 and accompanying text.

53. As one commentator argues, the political landscape leads to an “undersupply [of] disaster preparation policies” and an “oversupply of ex post relief.” See Ben Depoorter, *Horizontal Political Externalities: The Supply and Demand of Disaster Management*, 56 *DUKE L.J.* 101, 104 (2006).

54. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev’d and remanded*, 131 S. Ct. 2527 (2011).

55. 582 F.3d 309.

were displaced.⁵⁶ The Court remanded to the Second Circuit where, assuming that plaintiffs do not abandon their claims, the court will be asked to consider the preemptive effect of the CAA upon plaintiffs' remaining state law claims.⁵⁷

In *Native Village of Kivalina v. ExxonMobil Corp.*, residents of Kivalina, Alaska seek equitable compensation from prominent oil and power companies for millions of dollars of relocation costs they face due to the increasing uninhabitability of their village in the face of sea ice melting, storm surges, and other impacts of climate change.⁵⁸ Following dismissal at the district court level, *Kivalina* is now on appeal before the Ninth Circuit where, following the Court's decision in *American Electric Power Co.*, the panel likely will also focus on whether the CAA preempts state law climate change tort claims.

In an additional suit, *Comer v. Murphy Oil USA, Inc.*, private plaintiffs who suffered property damage during Hurricane Katrina sued on claims that fossil fuel companies and other industrial actors exacerbated the force of Katrina through their contributions to global warming.⁵⁹ In an unusual and evasive procedure, an en banc review panel set aside a decision favorable to plaintiffs, effectively terminating the proceedings without engaging even the merits of procedural obstacles to adjudication, let alone the substance of the tort claims.⁶⁰ Finally, in *California v. General Motors Corp.*, the State of California

56. 131 S. Ct. 2527.

57. *Id.*

58. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal.), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

59. See *Comer v. Murphy Oil USA, Inc.*, No. 1:05 CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated and reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (declining to reinstate the panel opinion).

60. The procedural history of *Comer* bears noting, as it reflects perhaps the opposite extreme of the attitude of judicial candor and engagement for which we advocate. Initially, an appellate panel partially vacated and reversed the district court's grant of summary judgment for reasons quite similar to the Second Circuit's decision in *American Electric Power Co.*. After having agreed to rehear the appeal en banc, the Fifth Circuit then lost its quorum after numerous judges recused themselves—primarily, it is reported, because of financial connections to the oil industry. See Nan Aron, *The Corporate Courts: Fifth Circuit Judges Are Marinating in Oil*, HUFFINGTON POST (July 7, 2010, 5:37 PM), http://www.huffingtonpost.com/nan-aron/the-corporate-courts-fift_b_638591.html. Rather than reinstate the appellate panel opinion, five remaining judges on the Fifth Circuit decided to reinstate the original district court ruling that had dismissed the case, reasoning that the en banc panel no longer had jurisdiction to take any other action. *Comer*, 607 F.3d 1049. Finally, the Supreme Court denied without comment plaintiffs' request for a writ of mandamus setting aside the en banc panel's ruling, effectively terminating the proceedings. See *In re Ned Comer*, 131 S. Ct. 902 (2011). The only saving grace in this saga may come in the form of a recently proposed change to the Fifth Circuit Rules that will prevent repeat episodes in the future. See United

targeted major automakers, seeking damages for their contributions to the public nuisance of global warming.⁶¹ The State later voluntarily abandoned the suit after it successfully obtained stricter fuel efficiency standards and a new motor vehicle greenhouse gas emissions requirement through federal regulatory channels.⁶²

At the outset, it must be acknowledged that the fit between climate change and tort law seems poor. Climate change is the ultimate tragedy of the commons. Not only fossil fuel companies and industrial manufacturers, but all human beings and enterprises contribute—however marginally—to the phenomenon of anthropogenic climate change. Isolating where responsibility for greenhouse gas emissions attaches in our energy and land use cycles is therefore an intellectual, moral, and empirical challenge of the first order. In essence, climate change takes Ronald Coase’s famous reformulation of tort law—which disrupted classical tort thinking by substituting neutral concepts of reciprocal harm and resource conflict for the moralized terms of victim and polluter⁶³—and extrapolates it to the entire globe. Moreover, many of the most devastating impacts of climate change will not happen for decades or centuries hence, even though actions taken today critically affect whether they will occur. If the paradigmatic tort is one in which *A* hits *B*—a clear, direct, and unlawful action by one actor against another that gives rise to an isolated, retrospective harm—then climate change lies conspicuously far outside the paradigm.

Climate change harms also seem ill fit for the tort system in light of its supposed goals of *ex ante* efficient deterrence and *ex post* corrective justice. From the prospective regulatory standpoint, it seems obvious that carbon taxes, emissions allowances, or traditional pollution control measures are more capable of providing clear rules to facilitate coordinated planning and of casting a wide enough net to actually limit and reverse the growth of greenhouse gas emissions. From the retrospective corrective justice standpoint, a second-order duty to repair one’s victim might arise if one has contributed to her harm through the mechanism of climate change, and, in so doing, breached an underlying duty of care owed to her. However, the domain of behavior to which such an underlying duty might apply could be severely cabined by demands for clear and proximate causation, foreseeability of harm, and feasible

States Court of Appeals for the Fifth Circuit, Notice of Proposed Amendment to 5th Cir. R. 41.3, available at <http://www.ca5.uscourts.gov/news/news/413pubcmt2011.pdf>.

61. *California v. Gen. Motors Corp.*, No. Co6-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (granting motion to dismiss).
62. See Unopposed Motion to Dismiss Appeal, *California v. Gen. Motors Corp.*, No. 07-16908 (9th Cir. June 19, 2009).
63. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

allocation of damages—all far from worked out as matters of morality, let alone law.⁶⁴

On the other hand, many of the reasons for skepticism that climate change tort defendants could be held liable—especially the difficulty of pinning causation on a single defendant or group of defendants—have been similarly applicable to other environmental and toxic tort suits. Albeit with hesitation and confusion, courts *have* devised a number of doctrinal devices to accommodate the difficulties of proof associated with those cases. For instance, courts developed market share liability in the diethylstilbestrol (DES) context as a way of apportioning responsibility for harm in the absence of other means to disaggregate causal influence.⁶⁵ Courts made loss of chance recovery available in the medical malpractice context for those whose dim chances of survival might otherwise have rendered them ineligible for protection from negligent behavior under a “more-likely-than-not” causation test.⁶⁶ Subtle toxic causation presumptions incorporated into the asbestos context have helped litigants where orthodox doctrines would have prevented recovery due to scientific uncertainty regarding the biological mechanism underlying asbestos-related diseases.⁶⁷ Though its track record in these cases has been less than ideal (with many, including courts themselves, preferring legislative or regulatory solutions), the tort system is no stranger to complex, sprawling litigation. Indeed, finding in such cases a broad set of precedents upon which to legitimate climate change torts, some commentators have appeared relatively bullish about the prospects of establishing a viable claim.⁶⁸

Whether optimistic or pessimistic about the likelihood that greenhouse gas emissions can successfully be challenged, writers in the climate change tort literature have almost invariably focused on what, if anything, tort law can do

64. Indeed, at virtually every stage of the traditional doctrinal analysis, climate change plaintiffs will need to invoke novel, rare, or otherwise exceptional tort doctrines in order to pursue their claims. *See generally* Kysar, *supra* note 13.

65. *See* *Sindell v. Abbott Labs.*, 607 P.2d 924, 936–38 (Cal. 1980).

66. *See, e.g.*, *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 828 n.23 (Mass. 2008) (joining “[t]he highest courts of at least twenty States and the District of Columbia [which] have adopted the loss of chance doctrine”).

67. *See* Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, 74 BROOK. L. REV. 1011 (2009).

68. *See, e.g.*, David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 61 (2003) (“[S]ome tort-based climate change suits have strong legal merits and may be capable of succeeding.”); Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENVTL. L. REP. 10,230 (2009); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005).

to help save the global environment from potential catastrophe.⁶⁹ Less considered has been how climate change will or should impact the struggle over tort law itself—its appropriate institutional role and the values and meanings it ought to affirm. If most commentators have as yet shied away from such expansive analysis, it may be partly because of an unwritten assumption that although climate change litigation may serve near-term instrumental goals, courts and tort law have no long-term, principled role to play in the struggle to de-carbonize the economy. Thus, writers have tended to focus only on the auxiliary role climate change tort suits might play in regulation more broadly—including framing the climate change issue in terms of compelling victim narratives, stimulating and dignifying climate science against skeptics and propagandists, pushing past special interests and congressional inertia, potentially spurring new laws or regulations, and helping advocacy movements to organize and define themselves.⁷⁰

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69. For an early and thoughtful article linking tort law and climate change, see Eduardo M. Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RESOURCES J. 563 (1998). For additional, more recent contributions, see Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701 (2008); David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741 (2007); and Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005).
70. Perhaps the most thorough discussion of this auxiliary role appears in David B. Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 357 (William C.G. Burns & Hari M. Osofsky eds., 2009). See also William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1617 (2007) (portraying climate change litigation as part of a complex solution to a complex set of problems posed by the accumulation of greenhouse gases—including “multiplicity of sources, varied risks and harms in different locations, changing science and engineering, and an array of scale challenges”); Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1565 (2007) (arguing that climate change nuisance litigation might afford relief “in a manner that could possibly jumpstart an emissions trading regime [and thereby] make the best use of this intermediate time period during which Congress is considering the enactment of a [greenhouse gas] emissions cap-and-trade program but has yet to amass the consensus needed for such a program to become law”); Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 100 (2007) (“While legislatures are locked in political paralysis, the courts must respond to the cases before them.”); Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L. 79, 103-04 (2008) (“Tort-based climate change litigation may be valuable in increasing public discussions around climate change, enhancing the democratic process by providing venues for new voices . . . [and] shaping the nature of the debate.”). These discussions occur against the backdrop of a more general

Theory and experience *do* suggest that the margin of legal ambiguity entailed by tort adjudication can serve as a strong impetus for concrete, reformist agitation in the other branches of government. To give one prominent example, uncertainty over liability and the potential for varying environmental, health, and safety standards through tort law give potential defendants a strong incentive to join their plaintiff complainants in attempting to mobilize Congress to respond to the social harms at issue in litigation.⁷¹ Likewise, even when the political branches are pursuing a national policy, they may leave in place the threat of common law tort suits precisely in order to bolster the chance of that policy succeeding.⁷² Nevertheless, more analytical work is needed to defend the role of courts in this practice—this apparent means to an expedient political end for plaintiffs, their supporters, and the climate change policy world. As Timothy Lytton brings out in his study of gun industry and clergy sexual abuse suits, the brute consequential effect of litigation on the regulatory system is a contingent empirical question.⁷³ Even if litigation seems poised to stimulate more substantial and effective regulation, it

literature on the role of courts in fostering social change. Compare GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008), and Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (arguing that little evidence supports the view that courts effectively bring about social change), with JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978), MICHAEL W. MCCANN, *RIGHTS AT WORK* (1994), and Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76 (Bryant G. Garth & Austin Sarat eds., 1998) (offering arguments that courts and litigation aid social change by, inter alia, helping movements to mobilize, gain bargaining power, articulate counter-norms and narratives, and influence public opinion).

71. See E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 331-33 (1985) (summarizing the passage of the Air Quality Act of 1967).
72. For instance, when the Clinton Administration established a voluntary Holocaust reparations compensation scheme with European insurance companies, it specifically declined to preempt common law tort suits, promising only to encourage courts to dismiss them as a discretionary matter. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 406 (2003); Kysar & Meyler, *supra* note 10, at 1640. Thus, there is considerable irony in the Second Circuit's decision to dismiss on political question grounds a putative class action suit arising out of Holocaust-related property deprivation. See *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57 (2d Cir. 2005). The very executive agreement to which the panel deferred might not have been created had it not been for the pressure of looming tort litigation. Cf. *id.* at 75-83 (Straub, J., dissenting) (arguing that the majority's decision inadvisably ceded judicial authority by using the political question doctrine when discretionary doctrines such as comity could have achieved the same result).
73. Timothy D. Lytton, *Using Tort Litigation To Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008).

may instead create a backlash from reinvigorated special interests. The Protection of Lawful Commerce in Arms Act, which confers a wide grant of immunity from civil liability on manufacturers and retailers of firearms and ammunition, is one prominent example.⁷⁴

Commentators are correct that common law claims have long existed in a complementary relationship with statutory and administrative efforts to protect human health and the environment.⁷⁵ Yet, a principled justification of the courts' role in this dynamic must rest on a sturdier foundation than the mere possibility that it will promote what some observers take to be desirable substantive outcomes. The institutional role we are calling "prods and pleas" provides such a justification. Although prods and pleas are generalizable across the different branches of government, they are no more created equal than are checks and balances. Instead, they vary greatly in magnitude, message, and—perhaps most importantly—pedigree within the system and history of American governance. In our view, the common law of tort provides a distinctive and especially powerful instantiation of prods and pleas.

Neither the efficiency of deterrence and risk spreading, nor the equity of corrective or distributive justice, tort-based prods and pleas are also distinct from simple politicking in a different forum. They constitute a function for courts applying the common law of tort that is closer to, but still distinct from, John Goldberg's and Benjamin Zipursky's notion of tort law as a means of civil "recourse" or "redress."⁷⁶ Goldberg, for instance, argues that victims may have

74. See Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-03 (2006)) (immunizing gun manufacturers and sellers and their trade associations from liability for most civil actions based on the "criminal or unlawful misuse" of firearms); see also Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1504 (2009) (observing a growing conferral by Congress of tort immunity without accompanying compensatory schemes); Lytton, *supra* note 73, at 1843-49.

75. See, e.g., GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* 41 (2d ed. 2001) ("Nuisance can fill the inevitable interstices of an ever expanding regulatory system. Long-lived and adaptable, public nuisance is the common-law equivalent of a species blessed with opposable thumbs." (quoting James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T 29 (1990))); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 804 (2003) ("State legislatures [in the nineteenth and early twentieth centuries], particularly during times of economic and industrial transformation, could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public. . . . In a legal regime in which regulation was the exception and not the rule, public nuisance was a principal 'stopgap' measure.").

76. Goldberg and Zipursky have elaborated upon this idea both individually and together. See, e.g., John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); John C.P. Goldberg & Benjamin C.

a constitutional due process right to a certain baseline access, through tort, to civil redress—not an optimal system of deterrence or corrective justice, but simply the ability for victims to channel through law some attempted response to, or retaliation against, their wrongdoer.⁷⁷ Such a right of access to a civil justice system is most clearly implied by state constitutional provisions guaranteeing “open courts” and “remedies” for injury.⁷⁸ But Goldberg argues through extensive historical analysis that the federal Constitution also contemplates the availability of a system of civil justice as an integral component of the package of rights and institutions that comprise limited government.⁷⁹ As he and Zipursky note elsewhere, “It is no accident that seminal figures in our constitutional tradition, including Coke, Locke, and Blackstone, deemed individuals to enjoy a *right of recourse* against those who wronged them and deemed governments to be obligated to provide an avenue by which to exercise this right.”⁸⁰

Tort-based prods and pleas reside comfortably within this political and constitutional scheme. Whether expressly, as when judges call for attention to

Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter Zipursky, *Rights, Wrongs*].

77. See John C.P. Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L.J. POCKET PART 26, 28 (2005), <http://yalelawjournal.org/images/pdfs/24.pdf> (discussing the traditional and arguably constitutionally necessitated role of the courts as custodians of a body of private law that “identifies duties not to injure that citizens owe to one another, and, at least in principle . . . arms each beneficiary of such a duty with the power to demand redress from one who has breached it”).
78. See John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237 (1991); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992).
79. Goldberg, *supra* note 76, at 559-83.
80. Goldberg & Zipursky, *supra* note 76, at 982. We must acknowledge that this picture is somewhat out of sync with the contemporary prevalence of settlement, the decline of adjudication, and the rising self-conception of the federal judiciary in bureaucratic, politicized terms as opposed to rights-oriented terms. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). In our view, these developments only underscore the importance of recalling and revitalizing the traditional role of open courts within our structure of limited government, at least so long as more wholesale change to that structure is not in the cards.

a problem even as they struggle with it through tort,⁸¹ or implicitly, as when the mere failure to provide a remedy for suffering underscores its significance,⁸² the tort system is a vital source of information gathering and intragovernmental feedback. By struggling to apply common law principles to the harms of an ever more complex and interconnected world—and often precisely in failing to do so satisfactorily—courts deliver dignified, public pronouncements that legislative and administrative inertia have left our basic ideals unprotected. Moreover, by doing so, courts also implicitly or explicitly enter into the conversation about what actions are called for and why. Courts do so by holding up particular problems to the light of deeply rooted but multivalent and institutionally constrained values embodied in the common law of tort.

By contrast, when courts contract the common law's scope through justiciability doctrines or other non-merits maneuvers for fear of engaging with a politically wrought issue, any suggestion they might make about whether or how the legislature should act comes wrapped in a self-effacing (if not self-vitiating) disclaimer: a legal holding that the norms of the common law do not apply here, and hence the court lacks the institutional authority to suggest that other branches take any particular action, or even act at all. As with any common law tort suit, we firmly favor forthright adjudication on the merits of climate change nuisance suits. We do so not only, or even primarily, because of any particular consequentialist speculations about how it is likely to be received by other branches. The inescapable nuances and complexities involved in assessing and choosing different prods and pleas should not chill government actors, including judges, from considering and in some cases exercising their capacity to trigger or encourage action in other branches. Precisely because of intentionally and necessarily imperfect divisions of authority in our hands-tied, reactive governmental structure, actors are and will be pushed into areas of overlapping authority and asked to resolve tasks at the boundaries of their

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81. Consider the case of *Barasich v. Columbia Gulf Transmission Co.*, in which a putative class of Louisiana landowners sued several oil and gas companies for exploration, pipeline, and shipping activities that left residents more vulnerable to property damage from wind and storm surge during Hurricanes Katrina and Rita. 467 F. Supp. 2d 676 (E.D. La. 2006). The court dismissed plaintiffs' trespass and nuisance claims, but also recognized the significance of coastal erosion and invited plaintiffs to re-plead with a narrower, more carefully constituted class. *Id.* at 695.
82. A prominent historical example is the tort system's inability to grapple with the industrial accident crisis of the late nineteenth and early twentieth centuries. See generally JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004) (discussing the rise of America's workers' compensation systems).

institutional scope and competence. In responding to such challenges, judges and other government actors often will conclude that they cannot fully or appropriately address the specific area of social need given their institutional role, but they may still deliver that conclusion in a manner designed to instigate an official response elsewhere in the system.

From this perspective, tort-based prods and pleas, and the recent spate of climate change tort litigation specifically, fit within a broader historical pattern and related debate over the evolution and purpose of the judiciary. Whether styled as “adversarial legalism,”⁸³ “polycentric” litigation,⁸⁴ or “public law litigation,”⁸⁵ efforts to enact sweeping social change through judicial action attracted enormous academic and popular scrutiny during the latter half of the twentieth century. Although the bulk of this continuing debate focuses on the role of constitutional law, the tort system has not been immune from interrogation or critique; indeed, most observers today would agree that common law judges have, in response, pulled back from progressive liability-expanding efforts that, for a time, seemed on an inexorable twentieth-century march toward “total justice.”⁸⁶

Whether or not judges accept invitations to recognize new rights or to expand common law protections to cover new harms, the important point is that they should expect the invitations to keep coming—at least so long as the basic framework of American government is preserved. As Robert Kagan observes, the structural limitations on political action inherent in that framework do much to explain why reform efforts with legislative scope and character have been channeled through adversarial legalism in the courts.⁸⁷

83. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

84. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (introducing and explaining the concept of a “polycentric” task).

85. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (articulating and defending an emerging conception of adjudication as “public law litigation”); see also Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (documenting a long and seemingly successful history of institutional litigation that Fuller might have described as “polycentric” and therefore not amenable to adjudication); Hershkoff, *supra* note 22, at 1910 & n.404 (gathering support for the proposition that the Anglo-American tradition of government has never been characterized by “a clear institutional distinction between adjudication and legislation”).

86. See generally LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 5 (1985) (arguing that changes in American society and legal culture gradually gave rise to “a general expectation of justice, and a general expectation of recompense for injuries and loss” that together constituted a demand for “total justice”).

87. See KAGAN, *supra* note 83, at 40 (“Americans have attempted to articulate and implement the socially transformative policies of an activist, regulatory welfare state through the political

That Congress increasingly seems to operate as a “broken branch”⁸⁸ only exacerbates these preexisting structural incentives for individuals to turn to the courts when new social harms arise. Moreover, in the context of many contemporary civil harms, a plaintiff’s regulatory or public-law impulse need not be especially self-conscious or strong for litigation to implicate wide-ranging societal interests. Increasing interconnectedness and the advent of powerful mechanisms for causing and spreading harm help to generate tort claims that seem at once both discrete (“private”) and dispersed (“public”).⁸⁹ In this sense, climate change tort suits should feel comfortably familiar to judges despite their enormous factual and normative complexity.

Nor should judges be disturbed that the harms from climate change seem at once to constitute a garden-variety pollution nuisance and a conceptual threat of the highest order. Just as constitutional law has been described as a body of law filled with norms that may be “underenforced” due to institutional considerations,⁹⁰ tort law often falls short of implementing *its* ideals of interpersonal norm enforcement and protection from harm. In part this is due to the same practical and institutional constraints that impede full enforcement of constitutional norms.⁹¹ But it also follows from the fact that tort law’s foundational principles cannot be fully reconciled with one another. Protection from harm and liberty of movement form an antinomy at the heart of tort

and legal institutions of a decentralized, nonhierarchical governmental system.”). Mirjan Damaška made essentially the same observation much earlier: “The rise into prominence of American public interest litigation is not only a product of moderate activist impulses; it is also intimately linked to a governmental structure in which authority is widely distributed.” MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 238 (1986).

88. *E.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 10 (2006) (noting that the filibuster, previously invoked only cautiously and against legislation of unusual importance, became, by the 1980s, a regular threat to the passage of bills). For a thorough review of this and other institutional barriers to efficacy facing Congress, see RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC* (2010).
89. In Lawrence Friedman’s view, it is not so much self-conscious reorientations of political philosophy as our new “dependence, in an extraordinary way, on total strangers,” and feelings of control and security brought about by related advances in science and technology, that have made us come to expect “total justice.” Lawrence M. Friedman, *Total Justice: Law, Culture, and Society*, 40 *BULL. AM. ACAD. ARTS & SCI.* 24, 29, 31 (1986).
90. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978).
91. See *id.* at 1213-20 (distinguishing between “reasons for limiting a judicial construct of a constitutional concept which are based upon questions of propriety or capacity and those which are based upon an understanding of the concept itself” and providing examples of the former).

law—one that inevitably implies a gap between tort law’s principles and its implementation.⁹² Though this shortfall is clearest in the case of non-negligent harms to innocent victims—when the plaintiff’s interest in being free of harm clashes directly with the defendant’s interest in freely pursuing activity—every dispute between private litigants in tort can be understood to implicate competing promises of our social contract that can never be enforced “to their full conceptual limits.”⁹³ Despite its discomfiting quality, this gap is in fact a productive one, for it is precisely the space in which litigants and judges pursue the reconciliation of competing principles and the adaptation of traditional tort doctrines to changing circumstances. It is also largely in that gap that judges can meaningfully prod and plead.

III. BEFORE THE LAW SITS A GATEKEEPER

Notwithstanding a dramatic factual backdrop, recent climate change nuisance suits remain unequivocally tort actions. To obtain redress from the courts, plaintiffs must demonstrate that defendants have wrongfully harmed them according to longstanding common law principles. Adjudication of plaintiffs’ claims on the merits would serve fundamental purposes of the tort system. Specifically, it would (1) clarify through reasoned analysis whether the duty to avoid creating or contributing to a nuisance extends to emissions of greenhouse gases—thus serving notice on potential tortfeasors about the scope of their obligations to others;⁹⁴ (2) confirm the responsibility of the courts to provide a remedy in the event that a tortious wrong has occurred between the specific parties at bar;⁹⁵ (3) acknowledge that the ideals of liberty and security sometimes conflict and therefore demand forthright, respectful arbitration in order to reinforce ideals of equality and responsibility;⁹⁶ (4) enable those who are suffering harm and those who have contributed to that harm to face one another through tort law’s mediating and dignifying discourse of mutual

92. *But see* Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1832-33 (2004) (arguing that liberty and security might be reconciled in tort law by protecting individuals from interferences that deprive them of primary goods, assuming that the category of primary goods could be unproblematically defined and agreed upon).

93. Sager, *supra* note 90, at 1221.

94. *See* Gregory C. Keating, *Is Tort a Remedial Institution?* (Univ. of S. Cal. Ctr. in Law, Econ., and Org., Working Paper No. 10-11, 2010), <http://ssrn.com/abstract=1633687>.

95. *See* JULES COLEMAN, *RISKS AND WRONGS* (2002); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449 (1992).

96. *See* ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999).

accountability;⁹⁷ and (5) provide courts with an opportunity to prod and plead with the political branches to address drivers and impacts of climate change that implicate certain norms of tort law but that seem to exceed the capacity of common law adjudication.

This Part focuses not on the merits of climate change nuisance suits, but on the preliminary barriers that courts have erected to reaching the merits. These barriers are important because they represent exercises in self-definition by which the judiciary limits its own governmental role. Close examination of these doctrines may shed light on whether judges adequately perceive the significance of tort-based prods and pleas within the constitutional order. As the Supreme Court has noted:

All of the doctrines that cluster about Article III— not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.⁹⁸

To assess properly the relationship between these doctrines and common law adjudication, one must recognize that “our kind of government” contains a particular and essential role for the common law, one that should not lightly be tossed aside. Allowing tort claims to proceed to the merits—where they face a variety of substantive obstacles, many of which anticipate and, indeed, provide the model for justiciability limitations on public law litigation—ensures that courts fulfill their obligation to hold open the common law as a site for the airing of grievances unless and until they are addressed through other lawful means.

To be sure, there is a sense in which courts might be thought to prod and plead with the other branches even through their justiciability pronouncements (e.g., “this is a question for the legislature”). Yet, these pronouncements are of

97. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009).

98. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring) (internal quotation marks omitted)). As we explore in Part IV, the notion that courts are somehow emphatically “unrepresentative” is misleading—both because the Founders perceived all branches as in some sense unrepresentative of “We the People” during ordinary lawmaking, and, relatedly, because American courts are by history and institutional design notable for their relatively nonhierarchical, nonbureaucratic, and democratically responsive nature.

a perfunctory and limited scope compared with the discursive and catalytic impact that may flow from direct engagement with the merits of a tort suit. Even when agents harm one another in ways that defy tort law's institutional capacity or doctrinal constraints, courts can deliver prods and pleas with the firmest institutional authority, and the greatest normative force, when they articulate for other governmental actors the ways in which the fundamental social and moral norms of tort law shed light on values at stake. In order for such dignified and pedigreed prompts to emerge, courts will have to avoid the temptation to run for political cover, even when faced with monstrously large and complex instances of harm-doing such as contributions to climate change. As always, but now to a magnified degree, courts will have to fulfill their responsibility to uphold and apply the principles of the common law of tort even though, or perhaps precisely because, tort claims may have implications for the very nature of our social order.

A. *The Political Question Doctrine*

As the vacated Fifth Circuit panel opinion noted in *Comer*: “Common-law tort claims are rarely thought to present nonjusticiable political questions.”⁹⁹ Yet, all four of the major climate change tort suits were preliminarily dismissed at the district court level at least partially on this ground.¹⁰⁰ The decisions focused on the second and third factors from *Baker v. Carr*, the Supreme Court's most elaborate articulation of the political question doctrine: “a lack of judicially discoverable and manageable standards for resolving [the issue]” and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”¹⁰¹

99. *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 873 (5th Cir. 2009), *rev'g* No. 1:05 CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *vacated and reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (declining to reinstate the panel opinion).

100. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871-77, 883 (N.D. Cal.), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009); *California v. Gen. Motors Corp.*, No. Co6-05755 MJJ, 2007 WL 2726871, at *5-16 (N.D. Cal. Sept. 17, 2007); *Comer*, 2007 WL 6942285; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd and remanded*, 131 S. Ct. 2527 (2011).

101. 369 U.S. 186, 217 (1962). In *Baker*, the Court laid out a broad set of six factors, any one of which, if “inextricable from the case at bar,” renders the case nonjusticiable:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding

Dozens of statutes passed by Congress since 1970 touch upon climate change, with often dramatically varying policy valences. The most important of those is the CAA, which has been interpreted to apply to greenhouse gases but which faces an uncertain future in light of congressional opposition, administrative delay, and litigation challenges. Thus, plaintiffs and defendants may argue to no end over whether the legislative or executive branches have made an “initial policy determination” regarding greenhouse gases and, if so, what its content might be. Such a freewheeling debate wrongly presupposes that there is just one policy determination to be made regarding greenhouse gases, which alone must dictate whether and how courts can adjudicate public nuisance cases based on their emissions. As the Second Circuit rightly emphasized, “[T]he fact that . . . [federal] air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a ‘comprehensive’ global solution to global warming.”¹⁰² That another branch is investigating or studying a new response to an emerging problem does not mean that preexisting common law tort principles—norms always intended to apply to evolving circumstances—somehow constitute judicial invasions into political questions.¹⁰³

The unhelpfulness of the “initial policy determination” prong bolsters Justice Powell’s suggestion that the second and third factors actually amount to a single general question: “Would resolution of the question demand that a court move beyond areas of judicial expertise?”¹⁰⁴ Even when understood this

without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. A plurality of the Court has suggested that the *Baker* factors “are probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). For a valuable overview of the history and status of the political question doctrine, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

102. *Am. Elec. Power Co.*, 582 F.3d at 331.

103. *Cf. Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 688 (E.D. La. 2006) (rejecting the argument that a tort suit alleging that defendants’ destruction of coastal wetlands contributed to Hurricane Katrina storm damage presented a nonjusticiable political question, noting that “the mere fact that the government has studied the issue of coastal wetlands loss in Louisiana creates no conflict with judicial involvement in this lawsuit”).

104. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment).

way, the question is confounded by climate change nuisance suits, which seem at once both politically intractable and judicially familiar. As the vacated Fifth Circuit panel decision noted in *Comer*, “[T]he common law of tort provides clear and well-settled rules on which [a] district court can easily rely.”¹⁰⁵ To be sure, many observers have criticized the growing effort by state attorneys general, municipalities, and other government actors to use public nuisance doctrine to address serious social harms—such as climate change, lead paint contamination, illegal handgun use, and the health effects of cigarettes.¹⁰⁶ Yet, even its harshest critics would be hard pressed to argue convincingly that the longstanding doctrine of public nuisance is so unmanageable that it cannot furnish the basis for what our legal system accepts as reasoned adjudication. Actions to abate public nuisances are of “ancient origin,”¹⁰⁷ deeply embedded in the history of Anglo-American jurisprudence and reflected vividly in U.S. state and federal court practice. Moreover, relevant sections from the Restatements of Torts suggest that the type of analysis at issue is familiarly judicial in nature: not prospective theorizing about the construction of, say, an ideal greenhouse gas emissions regulatory scheme, but rather the specification and enforcement of rights grounded in fairness and *already* held by particular parties before the court.¹⁰⁸

105. *Comer*, 585 F.3d at 873 (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007)); see also *Am. Elec. Power Co.*, 582 F.3d at 325 (“[N]uisance principles contribute heavily to the doctrinal template that underbraces [environmental] statutes . . . and the tasks involved in adjudicating environmental cases are well within the federal courts’ accustomed domain.” (alterations in original) (quoting *Me. People’s Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006))); *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008) (“[W]hen faced with an ‘ordinary tort suit,’ the textual commitment factor actually weighs in favor of resolution by the judiciary.”); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (noting that “[d]amages actions are particularly judicially manageable”); *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983) (“[T]he political question theory and the separation of powers doctrines do not ordinarily prevent individual tort recoveries.”).

106. See, e.g., Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L. & POL’Y REV. 1 (2010); Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 947-52; Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543 (2006).

107. *City of Chicago v. Festival Theater Corp.*, 438 N.E.2d 159, 162 (Ill. 1982).

108. In a damages action, for instance, liability may be premised on the judicially manageable basis that “the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.” RESTATEMENT (SECOND) OF TORTS § 826(b) (1979). The general rules for public nuisance likewise focus on factors such as “[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public

The claim that judicially manageable standards are lacking in a climate change suit is plausible only if conceived in “as applied” terms—as a claim that public nuisance doctrine cannot provide a sufficient framework for reasoned adjudication *in the particular context of climate change*. The problem with such an argument is that courts need not appeal to the political question doctrine to dispense with cases for that reason. Instead, they may, and routinely do, grant summary judgment for defendants on the merits—rejecting plaintiffs’ suits as a matter of law. For instance, the special injury rule, which requires plaintiffs to demonstrate harm different in kind from that suffered by the general public,¹⁰⁹ is one straightforward substantive way to weed out claims for reasons quite similar to those underlying the political question doctrine. Other examples abound and could be invoked even in suits brought by governmental plaintiffs not subject to the special injury rule. For instance, with respect to both damages actions and suits for injunctive relief, climate change plaintiffs face a significant challenge demonstrating that relief is appropriate given the extraordinary number of other contributors to the problem beyond named defendants.¹¹⁰

These examples demonstrate that concern over any potentially undesirable effects of complex or unconventional tort suits can be adequately addressed through judicial management of the substantive standards of tort law

comfort or the public convenience,” or “whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.” *Id.* § 821B(2)(a), (c).

109. See *id.* § 821C; cf. J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 165-66 (1988) (“Courts need not treat every issue that falls outside their sphere as a political question; they have other devices for marking the boundaries of their primary sphere of responsibility.”).
110. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 36 (Proposed Final Draft No. 1, 2005) (“When an actor’s negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm,” there is no liability); RESTATEMENT (SECOND) OF TORTS § 834 cmt. d (1979) (noting with respect to public and private nuisance that “[w]hen a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it”). Although these doctrines might not bear directly on a suit for injunctive relief, similar considerations can enter into the calculus of whether and how to issue an injunction. See *Illinois ex rel. Scott v. City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *22 (N.D. Ill. Nov. 1, 1973) (observing in dicta that “[t]here may be a discharge so small that, as a practical matter, it can be regarded as de minimis, even though as a logical matter it is still part of the whole”); *Harley v. Merrill Brick Co.*, 48 N.W. 1000, 1002 (Iowa 1891) (noting in dicta that “there might be a contribution to [a pollution nuisance] so slight and inconsequential that the law would not take notice of it”); RESTATEMENT (SECOND) OF TORTS § 941 cmts. a-f (outlining various equitable factors that go into assessing the “relative hardships” to plaintiff and defendant that would flow from injunctive relief).

themselves, rather than through doctrines devised for an entirely different context. Failure to acknowledge the common law's potential in this respect can lead to the unnecessary curtailment of judicial authority. For instance, in a strident opinion rejecting federal and state common law claims brought by North Carolina against the Tennessee Valley Authority and other entities for transboundary air pollution, the Fourth Circuit went out of its way to dismiss nuisance law as lacking "any manageable criteria."¹¹¹ Yet, ironically, the panel offered as an alternative ground for dismissal a rule from Alabama and Tennessee tort jurisprudence holding that heavily regulated and permitted activities cannot as a matter of law constitute public nuisances.¹¹² Thus, within the very body of law disparaged as unprincipled by the Fourth Circuit panel rested a principled doctrine responding precisely to the panel's concerns. The panel's alternate holding—dismissing the suit on political question grounds—constituted a jurisdictional self-limitation that unnecessarily impedes the ability of tort to continue to evolve with changed circumstances and to remain open for the airing of future grievances.¹¹³

For a contrasting example, consider litigation brought by the City of Cleveland against investment banks for their role in packaging subprime real estate loans into mortgage-backed securities, which ultimately left the city with increased expenses, decreased revenue, and potential blight from abandoned homes. In this suit, the district court carefully distinguished between different stages of legal analysis, first holding that the city's complaint was preempted by state law, then proceeding to show that it also failed on the merits under public nuisance doctrine.¹¹⁴ Much like the Fourth Circuit's alternate holding in

111. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 302 (4th Cir. 2010).

112. *Id.* at 309-10; *see also* New Eng. Legal Found. v. Costle, 666 F.2d 30, 33 (2d Cir. 1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."); RESTATEMENT (SECOND) OF TORTS § 821B cmt. f. ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.").

113. Judicial self-limitation of this sort is not limited to environmental torts. Faced with a suit for reparations by descendants of African-American slaves, a federal district court similarly invoked the political question doctrine because it felt "ill-equipped to determine many issues posed in a dispute covering a period of almost 400 years." *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1061 (N.D. Ill. 2004). But the court could as easily have addressed the issues of remoteness and attenuation through doctrines such as duty and proximate causation, thereby managing its institutional capacity without unnecessarily and undesirably abdicating its responsibility to uphold and apply tort law's normative principles.

114. City of Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F. Supp. 2d 513, 520 (N.D. Ohio 2009) ("Even if not preempted by state law, however, the City's claim fails as a matter of

the suit brought by North Carolina, the district court held that under Ohio state law conduct that is governed and sanctioned by a detailed regulatory regime cannot constitute a public nuisance.¹¹⁵ In the process of its analysis, the court reviewed thoroughly the extensive regulatory regime governing the challenged activities of the banks, concluding that the resulting picture, particularly at the federal level, “is not just one of significant regulation, but of express governmental encouragement of the type of lending that forms the basis for the City’s claim.”¹¹⁶ In sharp contrast to the *Cooper* court’s approach,¹¹⁷ this analysis enabled the court to signal *where* in the complex tissue of governmental oversight a catastrophic policy failure appears to have occurred. Rather than simply gesture vaguely that the problem is one for the political branches, the court instead examined precisely which statutes implemented by which agencies had gone awry.

The view that adjudicating climate change and other complex torts would push courts beyond appropriate bounds owes partly to contemporary understandings of tort law as an instrumental incentive mechanism for promoting efficient risk-reducing behavior, in contrast to more classical understandings of tort as a system for elaborating and enforcing principles of right and responsibility between parties.¹¹⁸ If the goal and function of climate change nuisance suits are understood to be the fashioning of a comprehensive greenhouse gas emissions regulatory scheme, then courts are likely to perceive a variety of political landmines and institutional shortcomings when faced with a climate change suit. At times, plaintiffs invite this view by asking for relief that seems particularly regulatory in nature, as when the *American Electric Power Co.* plaintiffs’ request for a structured injunction gradually reducing defendants’ emissions prompted the district court to remark that “[t]he scope and magnitude of the relief Plaintiffs seek reveal[] the *transcendently legislative* nature of this litigation.”¹¹⁹ But courts in other expansive environmental tort contexts have properly resisted such a characterization. In the fuel additive products liability context, for instance, the district judge rejected arguments that tort claims against methyl tertiary butyl ether (MTBE) manufacturers presented a nonjusticiable political question, although a finding of liability

law on several other grounds. The Court turns to the substance of the public nuisance claim to address these additional bases for dismissal.”).

115. *Id.* at 530.

116. *Id.*

117. 615 F.3d 291.

118. See Goldberg & Zipursky, *supra* note 76, at 921-25.

119. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (emphasis added), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev’d and remanded*, 131 S. Ct. 2527 (2011).

would have implications for the composition of the nation's fuel supply: "While regulation of the national fuel supply is surely not an issue for the judicial branch, these suits seek abatement and damages in addition to a ban on further contamination. Weighing the issues in a products liability claim is a *quintessential judicial* function."¹²⁰

Whether a tort suit appears to be "transcendently legislative" or "quintessential[ly] judicial" will depend substantially on how the presiding judge conceives of tort law and its role. The concerns expressed by the district courts are not confined to the climate change context. Indeed, the more one focuses on the instrumental conception of tort law, the more it becomes clear that *all* of tort law treads on the territory of the legislative and administrative branches—and the less particularly worrisome this function may appear to be in any single case, such as a nuisance suit stemming from contributions to climate change. One thinks, in this respect, of Eric Posner's reaction to Kip Viscusi's claim that the Master Settlement Agreement in the tobacco context represented a troubling new form of "regulation by litigation."¹²¹ Posner noted: "This claim . . . will strike lawyers as odd. Tort law is a form of regulation, and always has been. . . . There is nothing new about regulation by litigation, and one suspects that Viscusi does not understand this basic point."¹²² The same might be said of those who treat climate change torts as *sui generis*, nonjusticiable claims simply because of their potential to tacitly regulate. Adopting this perspective confuses political question analysis by obscuring tort's longstanding role as a law of civil redress—an institution that always has regulatory effects but is never reducible to them.

Except where courts invoke the political question doctrine to throw out a tort suit they would otherwise find triable, the political question doctrine is, in a crude sense, a functional substitute for a more straightforward substantive judgment that plaintiffs' claims fail.¹²³ With no lack of sharp machetes to help

120. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 304 (S.D.N.Y. 2006) (emphasis added and omitted).

121. See Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155-57 (2003) (reviewing W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* (2002)).

122. *Id.* at 1155.

123. Any extreme scenarios in which courts have applied the political question doctrine to a common law suit are the exceptions that prove the rule. In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), plaintiffs pressed a negligent entrustment theory against the manufacturer of demolition equipment that had been used by Israel Defense Forces to destroy homes in Palestinian Territories. Because the equipment in question had actually been purchased by the U.S. government on Israel's behalf as part of U.S. foreign policy, the court concluded that the suit presented a nonjusticiable political question. *Id.* at 983. Even in

courts navigate the supposedly “impenetrable jungle”¹²⁴ of nuisance doctrine, it is hard not to suspect that those who invoke the political question doctrine against common law tort claims do so out of concern less about legally erroneous application of tort doctrine than about legally *rightful* application. How else to explain, for instance, the *Kivalina* court’s statement that “the gravity and extent of the harm alleged” in the case “underscores the conclusion that the allocation of responsibility for global warming is best left to the executive or legislative branch”?¹²⁵ The severity of a harm usually counsels *in favor* of its appropriateness for judicial attention in tort; exceptions to that rule, such as occasional policy-based refusals to base liability on foreseeability alone in cases of massive loss,¹²⁶ only underscore the fact that courts have ample avenues for dismissing intractable or politically radioactive suits without resorting to the political question doctrine. There may be reasons to support changes to public nuisance doctrine, but invoking the political question doctrine as a backdoor mechanism for keeping tort law away from challenging cases hardly reflects prudent or transparent judicial restraint. Indeed, it reflects just the opposite: a subversion of the principle of reasoned adjudication at the behest of an expedient political end.

B. Standing

Modern standing jurisprudence developed in response to the wave of public interest lawsuits triggered by widespread congressional authorization of “citizen suits” in the late 1960s and 1970s.¹²⁷ In that context, the Court began to articulate standards to limit the capacity of citizens to subject executive

that case, however, the court could as easily have held that sponsorship of the sale by the political branches rendered the activity not unreasonable and therefore nontortious as a matter of law.

124. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) (referring to the law of nuisance as an “impenetrable jungle”).
125. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 n.4 (N.D. Cal.), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).
126. In *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985), the New York Court of Appeals shielded Consolidated Edison from liability to a plaintiff who was injured from a stairway fall during the 1977 electricity blackout in New York City. Despite the acknowledged gross negligence of Consolidated Edison and despite the ready foreseeability of plaintiff and his injury in relation to such conduct, the court nevertheless stressed its “responsibility to define an orbit of duty that places controllable limits on liability.” *Id.* at 38.
127. See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 193-95 (1992).

agencies to review.¹²⁸ The aim was to minimize what some members of the Court perceived to be an “amorphous general supervision of the operations of government.”¹²⁹ Jurisdictional limits were important in this public law setting as a mechanism to prevent the courts from reaching any and all actions of the federal government, and from exercising plenary power over policymaking and implementation.¹³⁰ The central concern of modern constitutional standing doctrine is thus to prevent adjudicatory review from overreaching into areas constitutionally committed to other branches of government.

Climate change tort defendants have asked courts to apply modern standing doctrine, with its emphasis on injury, causation, and redressability,¹³¹ in a context radically different from the one in which it originated.¹³² They have

128. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

129. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

130. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (noting that standing doctrine is necessary to avoid allowing “Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3)).

131. Contemporary Supreme Court standing jurisprudence revolves around *Lujan v. Defenders of Wildlife*, in which Justice Scalia, writing for the Court, articulated a tripartite set of requirements for establishing the “irreducible constitutional minimum of standing”:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-61 (citations and internal quotation marks omitted) (alterations in original). Alongside the basic *Lujan* test for Article III standing, the Court has also erected a yet hazier doctrine of so-called “prudential standing,” which it has “not exhaustively defined” but which “encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

132. The vacated Fifth Circuit panel opinion in *Comer* gathers extensive support for the idea that private common law claims have long been presumed to confer standing on their holders. *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 863 n.3 (5th Cir. 2009) (citing authorities), *vacated and reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); see also, e.g., ERWIN CHERMERINSKY, FEDERAL JURISDICTION 69 (5th ed. 2007) (“Injury to rights recognized at common law—property, contracts, and torts—[is] sufficient for standing purposes.”); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL

failed to show that restrictive standing rules do or should apply to private common law tort suits, which do not involve the federal government as a challenged party. Questions of harm, causation, and remedy go precisely to the *merits* of a common law tort case, the burdens that plaintiffs must meet through conventional means of litigation ultimately to prevail. Yet, defendants have asked that judges use little more than a hunch about climate change’s complexity as a policy problem to dismiss climate change claims, without hearing any of the evidence that would allow them to properly adduce the extent of that complexity and the way in which it interacts with principles of common law recovery. Not only do their arguments threaten to raise plaintiffs’ burden higher than the legal standards that govern their underlying claims,¹³³ they also needlessly curtail courts’ ability to prod and plead in precisely the sort of cases where it may be most valuable.

1. *Injury-in-Fact*

The injury-in-fact requirement should not be an insurmountable difficulty for potential climate change plaintiffs because many face, and are already suffering, serious harm and expense due to the impact of human alterations of the oceans and the atmosphere. Nevertheless, application of the first *Lujan* standing prong—injury-in-fact—may turn on several subtle but important distinctions. For instance, the sheer prevalence of climate change harms might cause courts to view them as generalized grievances of the sort that the Supreme Court has insisted are not appropriate for adjudication.¹³⁴ Instead, courts must recognize that harms may be common or widely shared yet still “concrete” and “particularized” for purposes of standing, as the Supreme Court has acknowledged.¹³⁵ Judicial attitudes toward climate change plaintiffs’

COURTS 69 (6th ed. 2002) (“The law of standing is almost exclusively concerned with public-law questions involving determinations of constitutionality . . .”).

133. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (rejecting such an attempt “to raise the standing hurdle higher than the necessary showing for success on the merits”).
134. See *Fed. Elections Comm’n v. Akins*, 524 U.S. 11, 23 (1998) (“[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.”); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978) (“[W]e have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure.”).
135. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (“That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”); *Akins*, 524 U.S. at 24 (stating in dicta that “a widespread mass tort” would not

standing will also depend significantly upon whether judges view “imminence” primarily in terms of certainty or temporality.¹³⁶ Although the two often vary in tandem, climate change poses harms that scientists are quite certain will occur, albeit decades or centuries hence, and the more courts emphasize bare temporality over certainty, the easier will be defendants’ task of forestalling suits into the future.

Finally, when plaintiffs allege an increased risk of future harm, as they often will in the climate change context, they must contend with a nascent and confusing body of case law addressing probabilistic injuries. Current Supreme Court precedent requires that an individual litigant’s fear of injury be “reasonable,” but the manner in which plaintiffs must demonstrate such “reasonableness” remains unclear.¹³⁷ With the notable exception of the D.C. Circuit,¹³⁸ the courts of appeals “generally recognize[] that threatened harm in

“automatically disqualify an interest for Article III purposes”); *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment) (“While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.”).

136. See, e.g., 520 S. Mich. Ave. Assocs. v. Devine, 433 F.3d 961, 962 (7th Cir. 2006) (stating that “[s]tanding depends on the probability of harm, not its temporal proximity”).

137. Compare *Laidlaw*, 528 U.S. at 184 (deeming “reasonable” plaintiffs’ decision to refrain from recreational use of a waterway following “a company’s continuous and pervasive illegal discharges of pollutants” despite lack of evidence showing actual harm or health risk), with *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (finding no injury-in-fact from plaintiff’s “subjective apprehensions” of future harm from a police chokehold policy though he had already been subjected to a harmful chokehold once). In the more recent case of *Summers v. Earth Island Institute*, Justice Scalia rather decisively rejected the idea of probabilistic injury in the organizational standing context. 129 S. Ct. 1142, 1151 (2009). Earlier decisions in the D.C. Circuit Court of Appeals had accepted standing if a plaintiff organization could show a statistical likelihood that some of its members would suffer a concrete harm, even though the precise identity of the victims could not be established ex ante. See *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin. (Public Citizen I)*, 489 F.3d 1279 (D.C. Cir. 2007), modified on reh’g, 513 F.3d 234 (D.C. Cir. 2008); *Natural Res. Def. Council v. EPA*, 440 F.3d 476 (D.C. Cir.), withdrawn, 464 F.3d 1 (D.C. Cir. 2006). For discussion of these cases, see Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 *ECOLOGY L.Q.* 665 (2009). Whether the skepticism toward probabilistic injury displayed by the *Summers* majority will be carried over beyond the organizational standing context is uncertain.

138. In *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 665-72 (D.C. Cir. 1996), the court formulated a strict test that requires, inter alia, a “substantial probability” of harm for standing purposes. See also *Public Citizen I*, 489 F.3d at 1296 (requiring a “very strict understanding of what increases in risk and overall risk levels . . . count as ‘substantial’”). More recently, the D.C. Circuit has signaled a strong desire to jettison increased-risk standing altogether. See Cassandra Sturkie & Suzanne Logan, *Further Developments in the D.C. Circuit’s Article III Standing Analysis: Are Environmental Cases Safe from the Court’s Deepening Skepticism of Increased-Risk-of-Harm Claims?*, 38 *ENVTL. L. REP.* 10,460 (2008). As

the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes.”¹³⁹ Critically, most of the relevant court opinions reason in part that the nature of the alleged probabilistic injury fits the prospective, risk-reducing goals of the statute or regulatory regime that plaintiffs sought to enforce.¹⁴⁰

In the common law tort context, courts should similarly recognize that nuisance, negligence, and related causes of action are concerned chiefly with risk-creating activities. Plaintiffs must demonstrate harm in order to prevail in their suits, but courts should assess the degree to which risk itself is a harm *as a matter of the substantive law of tort*. One encouraging sign for plaintiffs in this regard is that in *Metro-North Commuter Railroad Co. v. Buckley*,¹⁴¹ the Supreme Court considered whether the Federal Employers’ Liability Act affords relief for enhanced risk and medical monitoring causes of action without questioning whether litigants had standing to raise those questions. This straightforward approach was appropriate, for as Lee Albert noted years ago: “[O]ne cannot transform substantive rules of law, elements of a cause of action, into procedural or preliminary principles of access to a court. The natural common law method simply reveals that rules of standing are an integral part of a claim for relief.”¹⁴²

2. Traceability and Redressability

The second and third *Lujan* hurdles are more substantial for climate change tort plaintiffs for a shared reason: the diffuse and cumulative nature of greenhouse gas emissions. Defendants may point to Supreme Court language

Judge Sentelle put it, “If we do not soon abandon th[e] idea of probabilistic harm, we will find ourselves looking more and more like legislatures rather than courts.” *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin. (Public Citizen II)*, 513 F.3d 234, 242 (D.C. Cir. 2008) (Sentelle, J., concurring in the judgment). The Eighth Circuit also has dismissed a probabilistic standing claim; if followed, the dismissal would render many climate change risks inadequate to support standing. *See, e.g., Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (holding that “the occurrence of a 100-year flood is by definition speculative and unpredictable” and therefore insufficient to confer standing on plaintiffs who wished to challenge the location of sewage retention lagoons on a flood plain).

139. *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003) (gathering sources).

140. *Id.* at 635; *see also* Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 *YALE L.J.* 1129, 1168 (1983) (noting case law suggesting that “increased risk will satisfy the requirement of injury in fact, at least where the statutory scheme that gives rise to the complaint is itself essentially concerned with restructuring risks”).

141. 521 U.S. 424 (1997).

142. Lee A. Albert, *Standing To Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425, 441-42 (1974).

demanding that injuries be fairly traceable to specific defendants, exclusive of the “independent action of some third party not before the court.”¹⁴³ Because of the globally dispersed, long-lived, and cumulative nature of greenhouse gas emissions, it is essentially impossible to attribute any particular climate-related harm to any particular source of emissions. Redressability is also a challenge for plaintiffs, given that the relief they seek could at most directly reduce or compensate for a tiny percentage of global greenhouse gas emissions. Defendants are thus likely to offer the “consequentialist alibi”¹⁴⁴ that plaintiffs’ requested relief would not redress their injuries because billions of other emitters not before the court are poised to continue emitting.

The Supreme Court heard similar arguments levied against plaintiffs in *Massachusetts v. EPA* and a majority of the Court rejected them, holding that they “rest[] on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.”¹⁴⁵ Thus, the fact that the motor vehicle emissions at issue in that case constituted only a small percentage of overall domestic emissions—and an even smaller and ever-shrinking percentage of global emissions—was not dispositive, because “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . [but] instead whittle away at them over time”¹⁴⁶ The question for climate change tort plaintiffs is whether this incrementalist, pragmatic view of climate governance will carry over into the common law context.

In *American Electric Power Co.*, the Second Circuit stressed that “traceability must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible

143. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). When causation and redressability hinge on the choices and behaviors of “independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” then the claimant must “adduce facts showing that those [third-party] choices have been or will be made in such manner as to produce causation and permit redressability of injury.” *Id.* at 562 (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

144. Kysar, *supra* note 13, at 50. In *Connecticut v. American Electric Power Co.*, for example, the plaintiffs emphasize that defendants are “the five largest emitters of carbon dioxide in the United States,” 582 F.3d 309, 345 (2d Cir. 2009) (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005)), *rev’d and remanded*, 131 S. Ct. 2527 (2011), but according to defendants’ reframing, they “allegedly account for [only] 2.5% of man-made carbon dioxide emissions.” *Id.* at 347 (citation omitted in original).

145. 549 U.S. 497, 524 (2007).

146. *Id.*

harm.”¹⁴⁷ Without fully analyzing the issue, the court referenced “federal common law of nuisance case[s] involving air pollution, where the ambient air contains pollution from multiple sources and where liability is joint and several,”¹⁴⁸ and concluded that the rule of shared liability in tort alleviates any traceability concerns for standing purposes. The court maneuvered around the difficult issue of how, as a matter of substantive tort law, the multiple defendant problem should be addressed in the climate change context. Yet, if joint and several liability or a burden-shifting doctrine exists as a potential means of helping plaintiffs overcome the multiple defendant problem, then by analogous judicial maneuver, courts should accept, say, a substantial likelihood of causal contribution as satisfying the test of traceability for the purposes of standing analysis.¹⁴⁹ Finessing the underlying multiple defendant problem in this manner has the great value of holding open space for the court to prod and plead by means of a more expansive assessment of the merits of plaintiffs’ claims in light of the common law’s norms. The court may well later determine that joint and several liability or a burden-shifting doctrine is *not* appropriate for such an extraordinary multiple causation context, but it will have done so through direct and candid consideration of how to situate greenhouse gas emissions within a common law framework of responsibility and protection from unreasonable, externally imposed harm.

Similar considerations apply to the third prong of *Lujan*: redressability. In *Simon v. Eastern Kentucky Welfare Rights Organization*—the precedent upon which Justice Scalia’s announcement of the third *Lujan* prong was based¹⁵⁰—indigent plaintiffs had challenged a ruling giving a tax benefit to certain hospitals that allegedly denied services to the plaintiffs.¹⁵¹ The theory of

147. *Am. Elec. Power Co.*, 582 F.3d at 346.

148. *Id.* at 349; *see also id.* at 346 (“Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.” (quoting RESTATEMENT (SECOND) OF TORTS § 875 (1979))).

149. The Second and Fifth Circuits have applied a substantial likelihood of causal contribution test to assess traceability for purposes of climate change tort litigants’ standing, and both courts found the criterion satisfied. *See Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 866 (5th Cir. 2009), *vacated and reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Am. Elec. Power Co.*, 582 F.3d at 346-47 (citing *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)). *But see* *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879-80 (N.D. Cal.) (rejecting the substantial likelihood of contribution approach and finding the traceability prong unmet), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

150. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

151. *Simon*, 426 U.S. at 42.

redressability, which the court found too attenuated, was that a change in the tax treatment would induce hospitals not to deny such services; hence, whether any court remedy could provide redress would be contingent upon the behavior of third parties not before the court.¹⁵² In *Massachusetts v. EPA*, the majority dismissed any concerns along these lines in the climate change mitigation context by emphasizing that “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”¹⁵³ The Court was not distracted by the billions of emitters neither before the court nor under EPA’s regulatory authority. It focused instead on EPA’s authority to enforce the particular statutory obligations that plaintiffs alleged it was unlawfully avoiding, which made plaintiffs’ complaint redressable.

The redressability of tort complaints rooted in contributions to climate change should be assessed with similar focus. If redressability requires successful elimination of the entire climate change problem, then no plausible suit could ever clear the standing hurdle. However, in the tort law context, courts have rightly rejected such an all-or-nothing approach, instead interpreting redressability as a narrow question regarding the court’s capacity to award the specific relief sought. The concern over third parties not before the court is particular to the administrative law context, where courts are keen to avoid the prospect of citizens using the power of judicial review to address policy issues in the abstract or to pursue some generalized interest in the proper administration of the law. This concern has less bearing in the common law context as it is the judicial branch itself that shapes and administers the relevant body of law. The somewhat analogous common law issue of whether plaintiff has “substantive standing” — i.e., whether plaintiff herself is the person who was aggrieved by tortious conduct and whether the conduct was a wrong in relation to her¹⁵⁴ — is addressed through the application of tort doctrine itself, not through the proxy means of standing analysis.

In each of the climate change tort cases brought thus far, plaintiffs have sought redress directly from named defendants; there is no third party that the

152. *Id.* at 42-43.

153. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007); *cf.* *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009) (holding that the causal link between climate change and the government’s offshore oil and gas lease program was “too tenuous” to establish standing in light of the “various different groups of actors not present in this case” whose decision and behaviors will affect whether harm results from the program).

154. See Zipursky, *Rights, Wrongs*, *supra* note 76, at 4 (introducing and defining the notion of “substantive standing” in the field of tort law).

court's decision must influence in order for plaintiffs to receive compensation or to benefit—however incrementally—from the abatement of certain contributions to plaintiffs' harms. Thus, redressability should not be in doubt. The “injury” to be redressed is not the phenomenon of global climate change itself, but rather the far more narrow and tractable “wrong” that plaintiffs allege is being committed against them by defendants. For purposes of standing analysis, courts should recognize that redressability requires nothing more than an inquiry into whether those courts hold the power to award the specific relief sought.

3. Prudential Standing

Recognizing how anomalous it would be to dismiss a climate change nuisance suit on Article III standing grounds, especially given the holding in *Massachusetts v. EPA*, the Acting Solicitor General in *American Electric Power Co.* urged the Supreme Court to dismiss instead on prudential standing grounds, in particular on the principle that courts should refrain from adjudicating “generalized grievances more appropriately addressed in the representative branches.”¹⁵⁵ Prudential standing doctrine, however, is an inappropriate vehicle for vindicating such concerns in the common law context. It cannot be the case that “other governmental institutions may be more competent to address the questions” raised in a common law tort suit,¹⁵⁶ given that the very question raised in such a suit is whether an aggrieved party has a viable claim *at common law*. In the absence of a dramatic constitutional reorganization, no other governmental institution is empowered to answer this question, as courts are the custodians of the body of tort law that is held out to parties as a venue for pursuing civil recourse. Likewise, one cannot know whether “judicial intervention may be unnecessary to protect individual rights”¹⁵⁷ until one has addressed the underlying tort law question of whether the plaintiff in fact holds a common law right of protection against the challenged conduct. Invoking prudential standing in this context is nothing less than a category mistake.

155. Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners at 14, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))).

156. *Id.* at 9 (citing *Newdow*, 542 U.S. at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))).

157. *Id.* (citing *Newdow*, 542 U.S. at 12 (quoting *Warth*, 422 U.S. at 500)).

4. *Parens Patriae* Standing

One might object that the foregoing analysis applies only to tort suits of a purely private nature involving nongovernmental parties and state law claims. Yet, the understanding of tort we offer applies even when the plaintiffs are state governments invoking federal common law. Just as citizens are afforded civil recourse in recognition that “[t]he rule of law forbids private retribution when . . . invasions of rights occur,”¹⁵⁸ states too are afforded access to the federal courts in recognition that they are otherwise “[b]ound hand and foot by the prohibitions of the Constitution” in their attempts to address adversaries.¹⁵⁹ Allowing the airing of grievances before an impartial judiciary in this manner “accord[s] States the dignity that is consistent with their status as sovereign entities.”¹⁶⁰ Thus, tort law furthers the projects of liberal individualism and federalism alike by respecting litigants—whether private or public—as agents who can assert rights, make arguments, and demand redress, rather than submit passively to protective regulations imposed from above.

In *Massachusetts v. EPA*, the Supreme Court affirmed that where a state has a “stake in protecting its quasi-sovereign interests, [it] is entitled to special solicitude in [the Court’s] standing analysis.”¹⁶¹ As various commentators have

158. See Zipursky, *Rights, Wrongs*, *supra* note 76, at 85.

159. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838)). As Justice Holmes put it,

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court.

Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)); see also *Missouri*, 180 U.S. at 241 (“Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy . . .”).

160. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923 (2003) (quoting *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)); see also *Alden v. Maine*, 527 U.S. 706, 714 (1999) (“The federal system established by our Constitution . . . reserves to [the States] a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”).

161. 549 U.S. 497, 520 (2007); see also *id.* at 518 (“We stress here . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual. Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”). Quasi-sovereign interests are “not sovereign interests [such as power over entities within one’s jurisdiction or recognition by other

noted, the majority opinion in that case offered less than clear analysis of this special solicitude, “fail[ing] to define to what extent and under what circumstances federal courts should apply more relaxed standing requirements for states.”¹⁶² However, the majority did clearly affirm and solidify longstanding Court precedent suggesting that where states sue partly in their capacity as *parens patriae* (“literally ‘parent of the country’”¹⁶³), asserting their “quasi-sovereign” interests in the “well-being of [their] populace[s],”¹⁶⁴ they need not allege the sort of proprietary interests that would otherwise be necessary to meet the requirements of Article III standing.

In *Massachusetts v. EPA*, the majority emphasized the special position of states for standing purposes, but it used the expression “*parens patriae*” only twice.¹⁶⁵ When it wrote that Massachusetts’s proprietary interest “only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete,”¹⁶⁶ the Court implied that it was granting standing on *parens patriae* grounds and treating the State’s property interest as auxiliary to the quasi-sovereign interests supporting standing. On the other hand, when it stated that “[g]iven [its] procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis,”¹⁶⁷ and then proceeded to analyze separately injury, causation, and remedy (implicitly following the tripartite scheme of *Lujan*),¹⁶⁸

sovereigns], proprietary interests, or private interests pursued by the State as a nominal party . . . [but rather] a set of interests that the State has in the well-being of its populace.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

162. Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1786 (2008); see also *Massachusetts v. EPA*, 549 U.S. at 540 (Roberts, C.J., dissenting) (“It is not at all clear how the Court’s ‘special solicitude’ for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.”).
163. *Snapp*, 458 U.S. at 600. In *Snapp*, the Supreme Court noted that it first recognized “[t]hat a *parens patriae* action could rest upon the articulation of a ‘quasi-sovereign’ interest” in *Louisiana v. Texas*, 176 U.S. 1 (1900). *Snapp*, 458 U.S. at 602. Later that decade, in *Missouri*, 180 U.S. 208, and *Georgia*, 206 U.S. 230, the Court found that Missouri and Georgia had quasi-sovereign interests upon which to sue for the abatement of public nuisances. See generally *Snapp*, 458 U.S. at 603-05. For a thorough history of state standing, including discussion of the *parens patriae* doctrine, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).
164. *Snapp*, 458 U.S. at 602.
165. See *Massachusetts v. EPA*, 549 U.S. at 519, 520 n.17.
166. *Id.* at 519.
167. *Id.* at 520.
168. *Id.* at 521-26.

the Court suggested the reverse: that it was finding ordinary proprietary standing, albeit partly because states' quasi-sovereign interests justify "special solicitude" in the proprietary interest analysis.¹⁶⁹

If the Court was opting for the former approach—finding *parens patriae* standing and acknowledging that Massachusetts's property interests served to bolster and solidify that holding—then it was not, as the dissenters claimed, "devis[ing] a new doctrine of state standing."¹⁷⁰ Rather, it was following a line of precedent pre- and post-dating the modern standing jurisprudence of *Lujan*. For instance, in 1945 the Court wrote in the case of *Georgia v. Pennsylvania Railroad Co.*: "It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens though here, as in *Georgia v. Tennessee Copper Co.*, we treat the injury to the State as proprietor merely as a 'makeweight.'"¹⁷¹ Nearly four decades later, after precedents supporting *Lujan*'s formal requirements were already in place, *Snapp* reaffirmed the vitality of this "makeweight" argument by citing approvingly to that very quotation.¹⁷² Whether this language means a proprietary interest can help bolster a quasi-sovereign one so as to satisfy ordinary *Lujan*-like standing or to meet a different standing test altogether, the ordinary meaning of "makeweight" establishes one critical point: proprietary interests can top off quasi-sovereign interests or push them over the standing barrier, even if those proprietary interests are insufficient on their own to support standing.

Once one recognizes this important precedent for rejecting a formalistic bifurcation of quasi-sovereign and proprietary standing into separate, non-intersecting inquiries, one can identify strong reasons for (and few, if any, against) allowing quasi-sovereign interests to serve as "makeweight" for proprietary interests—not just the other way around. The argument for rejecting a dichotomous treatment of states' quasi-sovereign and proprietary interests is simple: such interests may be categorically different, but they are both interests held by states; one does not disappear into darkness when the other is brought to light. If standing analysis ultimately seeks to gauge whether litigants have a sufficient, appropriate stake in the adjudication of their

169. Indeed, in discussing the injury, the Court held that "[b]ecause the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner." *Id.* at 522 (internal quotation marks omitted).

170. *Id.* at 548 (Roberts, C.J., dissenting).

171. 324 U.S. 439, 450 (1945) (citations omitted) (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

172. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 606 n.13 (1982).

claims,¹⁷³ what sense could it make to say that categorically distinct interests cannot be additive—that only one or the other, and not some combination of the two, can satisfy the threshold level of party interest? Far from being a peculiar aberration in standing precedent, then, *Massachusetts v. EPA* should be seen as a welcome rejection of increasing formalism divorced from the basic purposes that ought to guide standing jurisprudence. When four Justices assert—as the dissenters did in *Massachusetts*—that the presence of additional state interests makes it *harder* for a plaintiff to establish its stake in a case (on the theory that those separate interests count only toward an alternative, supposedly tougher standing test),¹⁷⁴ it is clear that standing doctrine is in danger of coming loose from its mooring and its ostensible *raison d'être*.

As Justice Scalia and others have suggested, the desire to maintain adversarial rigor and adjudicatory clarity cannot fully account for standing doctrine, given that advocacy groups with only legally “abstract” interests in cases might pursue them quite vigorously.¹⁷⁵ Yet, this hardly suggests that standing doctrine must be directed instead in service of a formalist conception of separation of powers that discounts the value of checks and balances—to say nothing of prods and pleas.¹⁷⁶ Courts should resist such a doctrinaire

173. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”).

174. *Massachusetts v. EPA*, 549 U.S. at 538 (Roberts, C.J., dissenting) (stating that “[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant Focusing on Massachusetts’s interests as quasi-sovereign makes the required showing here harder, not easier.”). Compare *id.* (suggesting that states suing in their *parens patriae* capacity must demonstrate not only a quasi-sovereign interest distinct from a direct injury that satisfies *Lujan*, but also that its citizens’ injuries themselves satisfy Article III standing requirements—following the test for organization standing), with *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 339 (2d Cir. 2009) (“*Snapp* did not require states suing as *parens patriae* to meet the test for organizational standing [but just] the opposite, *i.e.*, that the individuals with adversely affected interests could not obtain relief via a private suit,” that the state interest be apart from its citizens’, and that the injury “affect a substantial segment of the population, not one individual.”), *rev’d and remanded*, 131 S. Ct. 2527 (2011).

175. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1215 (2002).

176. See, e.g., Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 246 (1998) (“[A] core difficulty with [Scalia’s] narrow approach to standing is that it does not discuss openly the different ways in which one often can

formulation of America's division of authority and the tightening of standing requirements for states that it might sanction. Especially in light of increasingly significant transjurisdictional harms, *parens patriae* standing offers the salutary effect of catalyzing more intra- and intergovernmental conversation and activity.

For similar reasons, courts also should reconsider their refusal to extend *parens patriae* standing to other sovereigns, such as Indian tribes and perhaps even foreign governments.¹⁷⁷ To date, courts have tended to limit *parens patriae* standing to U.S. states and territories, rather than extending it to other sovereigns in the absence of guidance from the Executive or the Congress.¹⁷⁸ Their reasoning is that only U.S. states and territories have surrendered sovereign rights to join the Union; thus, it is only U.S. states and territories that lack the power to enter treaties or wage war in furtherance of policy goals with significant foreign or transboundary aspects. The court in *Native Village of Kivalina v. ExxonMobil Corp.*, for instance, rejected *parens patriae* standing for tribes, arguing that the "special solicitude" offered by the *Massachusetts v. EPA* majority rested on the notion that states surrendered rights when they entered the Union, and that "[t]his rationale does not apply to [the *Kivalina*] Plaintiffs, which did not surrender . . . sovereignty as the price for acceding to the Union."¹⁷⁹

From a certain formalistic standpoint, the court was correct that the Native Village of Kivalina—a federally recognized tribe—maintained a degree of

understand [and characterize] the plaintiff's injury-in-fact. . . . [Nor does it] deal directly with the checks and balances principle that is central to the theory of separation of powers.").

177. See Kenneth Juan Figueroa, Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408 (2002); Cami Fraser, Note, *Protecting Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665 (2000).

178. See, e.g., *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir.), cert. denied sub nom. *Republic of Guatemala v. Tobacco Inst., Inc.*, 534 U.S. 994 (2001) (denying *parens patriae* standing to foreign nations to pursue conspiracy and fraud claims against tobacco manufacturers); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir. 2000) (denying Mexican government standing to enjoin employment discrimination against its nationals in the United States); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 617-18 (8th Cir. 1975) (denying *parens patriae* standing to foreign governments to enforce the Sherman Act), cert. denied sub nom. *Gov't of India v. Pfizer, Inc.*, 424 U.S. 950 (1976); *State of São Paulo of Federative Republic of Brazil v. Am. Tobacco Co.*, 919 A.2d 1116, 1122 (Del. 2007) (holding that foreign nations do not have *parens patriae* standing to pursue tort claims against tobacco manufacturers seeking recovery for health costs incurred in treating citizens' tobacco-related illnesses).

179. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal.), appeal docketed, No. 09-17490 (9th Cir. Nov. 5, 2009).

internal sovereignty that is different from that of the states. But, as any grade school student knows, the history and present reality of tribal sovereignty is inordinately more complicated and tragic than the district court's perfunctory analysis suggests. The "price" paid for "acceding" to federal guardianship was incalculably high. And as the Supreme Court has noted, "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."¹⁸⁰ Thus, although the tribes retain formal sovereignty in a way that states do not, it is actually of a *lesser*, not a greater, order than the sovereign rights retained by the states under the Constitution. Tribes arguably have *greater*, not lesser, need for the ability afforded by *parens patriae* standing to protect the well-being of their members through access to the federal courts.

Similar reasoning does not apply to foreign governments, but the need to develop systems of coordinated governance at the international level—coupled with the apparent exhaustion of traditional Westphalian lawmaking methods for intractable, territory-spanning problems such as climate change—suggests that *parens patriae* standing might nonetheless offer a valuable means of highlighting and challenging transboundary harm. Foreign governments can and often do sue in U.S. courts to protect their own proprietary interests. Likewise, foreign nationals can and often do sue to protect *their* interests, whether individually or through class action litigation. Extending *parens patriae* standing to foreign governments would enable the presentation of claims that do not fit neatly into either existing category of litigation, such as those relating to harms to future generations or the environment.

C. Implied Preemption and Displacement

Like the doctrines of political question and standing, implied preemption is a barrier to state common law adjudication whose reach has extended beyond any obvious demands of the Constitution's text and structure.¹⁸¹ Technically,

¹⁸⁰. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.").

¹⁸¹. The Supremacy Clause provides support for the existence of express preemption and some form of implied preemption (e.g., constitutional and federal law overriding state law where it is physically impossible to comply with both, or where there is some other sufficient measure of conflict). *See* *Wyeth v. Levine*, 129 S. Ct. 1187, 1208 (2009) (Thomas, J., concurring in the judgment). However, the Clause hardly suggests the expansive tests of implied obstacle preemption (i.e., "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312

preemption is not a barrier to merits adjudication but rather an implied revision of the substantive law governing the merits; a preempted cause of action is one that the common law can no longer cognize.¹⁸² Critically, however, this revision of the underlying substantive law does not occur through ordinary common law procedures deploying ordinary common law reasoning. Instead, preemption analysis takes the form of putative inquiry into congressional intent, albeit one whose deeper drivers remain unclear, particularly when it presents itself as implied rather than express preemption.¹⁸³ Preemption, and its close cousin displacement (which determines when a statutory enactment overrides federal common law),¹⁸⁴ are therefore quite similar to the political question and standing doctrines in the way in which they close a space where courts might have invoked the common law of tort to generate important prods and pleas. Both implied preemption and displacement are also relevant to climate change nuisance suits given that plaintiffs have pressed federal *and* state common law theories, not knowing whether courts would invoke the longstanding body of federal common law for transboundary nuisances to govern climate change claims.

At least prior to the Supreme Court's decision in *American Electric Power Co.*, analyzing the preemption or displacement of common law climate change

U.S. 52, 67 (1941))), and field preemption (i.e., where a federal regulatory regime is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Gade*, 505 U.S. at 98 (quoting *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982))) that the Supreme Court has developed.

182. See *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 608 (6th Cir. 2004).

183. See, e.g., *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (noting that congressional purpose is the "'ultimate touchstone' of pre-emption analysis" (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978))). But see Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1009-10 (2002) (arguing that, despite protestations to the contrary, the Supreme Court's jurisprudence has reflected a tacit presumption *in favor* of preemption and that "the Court's distrust of products liability actions is greater than its interest in determining congressional intent or preserving traditional state authority").

184. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 371 n.37 (2d Cir. 2009), (distinguishing preemption and displacement but noting that "courts have . . . frequently used the word 'pre-emption' when discussing whether a statute displaces federal common law"), *rev'd and remanded*, 131 S. Ct. 2527 (2011). As the Supreme Court made clear in *City of Milwaukee v. Illinois (Milwaukee II)*, legal analysis of whether federal common law has been displaced differs somewhat from that of whether state law has been preempted. See 451 U.S. 304, 316 (1981). The Court eschews the specific categories of its preemption doctrine in favor of a more simply formulated test of "whether the statute '[speaks] directly to [the] question' otherwise answered by federal common law." *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985) (alterations in original) (emphasis added in *Oneida*) (quoting *Milwaukee II*, 451 U.S. at 315).

suits was complicated by a dearth of precedent regarding the preclusive effect of the CAA. The Supreme Court in *Milwaukee v. Illinois (Milwaukee II)*¹⁸⁵ and *International Paper Co. v. Ouellette*¹⁸⁶ held that the comprehensive permit scheme established by the Clean Water Act (CWA) displaces federal common law, but allowed state common law suits arising out of water pollution to continue so long as courts apply the law of the source state in transboundary contexts. In *Milwaukee II*, the majority stressed the comprehensive nature of the CWA and the technical complexities involved in devising pollution control standards, ruling that “there is no room for courts to attempt to improve on that program with federal common law.”¹⁸⁷ In *Ouellette*, on the other hand, the Court determined that application of nuisance standards from the common law of a source state would not interfere with the CWA scheme, given that the statute permits states to impose stricter standards than required by the CWA, including standards derived from the common law.¹⁸⁸ Additionally, the Court noted that a source would not be subjected to multiple confusing standards through the preservation of source state causes of action, as it would “only [be] required to look to a single additional authority, whose rules should be relatively predictable.”¹⁸⁹

Against this backdrop, plaintiffs seemed to have strong arguments against the preemption and even displacement of their federal common law nuisance suits before the Supreme Court’s decision in *American Electric Power Co.* Unlike many conventional air pollutants, greenhouse gas emissions have not been subject to “a congressionally sanctioned scheme of many years’ duration . . .

185. 451 U.S. at 304.

186. 479 U.S. 481 (1987).

187. 451 U.S. at 319.

188. 479 U.S. at 498-99; see also *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (holding that “the [state] statutory scheme envisions a comprehensive remedial approach to water pollution problems, but preservation of common law remedies is consistent therewith—simply because preservation thereof strengthens and makes cumulative the powers of those charged with taking corrective measures”).

189. *Ouellette*, 479 U.S. at 499. Given the enormous temptation to “beggar thy neighbor” in the transboundary pollution context, sensitivity must be given to how one might incentivize a race to the top, rather than to the bottom. As Thomas Merrill has argued, transboundary pollution disputes could be aided by a system of “golden rules,” in which impacted states are entitled to the same degree of protection from source states as they apply to their own citizens, and, conversely, in which source states must extend the same degree of protection to impacted states as they apply to their own environment. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 936 (1997). The *Ouellette* holding is partially consistent with this approach.

that has set in motion reliance interests and expectations.”¹⁹⁰ Indeed, even at the time that the Supreme Court issued its *American Electric Power Co.* decision, it remained very unclear whether and in what form EPA might issue a greenhouse gas regulatory control program for existing stationary emissions sources—a prediction made all the more difficult by looming congressional threats to revoke EPA authority over greenhouse gases. Moreover, EPA has given no indication that it intends to set national ambient air quality standards (NAAQS) for greenhouse gas concentrations, despite the lack of a strong legal argument to defend that refusal.¹⁹¹ Without primary or secondary air quality standards to trigger the interstate dispute provisions of the CAA, states impacted by climate change would seem to be even more in need of alternative tools to force confrontation of the issue. Finally, the ongoing game of climate change hot potato being played by the courts, Congress, and EPA underscores a point made by Justice Blackmun in his *Milwaukee II* dissent.¹⁹² The absence of federalism concerns in the displacement context—as opposed to the preemption context—does not necessarily recommend a lesser standard for displacement of the common law by statute. Instead, as coequal branches, and in light of the inevitable incompleteness and ambiguity of statutory commands, the federal courts and Congress are best seen as partners in an ongoing colloquy over the interpretation and lawfulness of statutes.¹⁹³ Common law rulings—such as the injunction issued by the district court in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*¹⁹⁴—can be seen as an integral part of this colloquy. Indeed, because the control regime for greenhouse gas emissions remains very much in formation, one might think that the threat of common law nuisance suits should exist as part of the balance of powers that shapes what regime eventually does emerge.

Nevertheless, in *American Electric Power Co.*, a unanimous Supreme Court (with Justice Sotomayor not participating because she had originally sat on the Second Circuit panel below) ruled that the CAA, as interpreted in *Massachusetts v. EPA* to reach greenhouse gases as air pollutants, displaces any climate change nuisance claim sounding in federal common law. The Court indicated that displacement occurs irrespective of any particular details of a legislative act or

190. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010).

191. See Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 STAN. ENVTL. L.J. 283 (2010).

192. See *Milwaukee II*, 451 U.S. 304, 334 n.2 (1981) (Blackmun, J., dissenting).

193. See *id.* (“The whole concept of interstitial federal lawmaking suggests a cooperative interaction between courts and Congress that is less attainable where federal-state questions are involved.”).

194. 593 F. Supp. 2d 812 (W.D.N.C. 2009), *rev'd*, 615 F.3d 291 (4th Cir. 2010).

its regulatory implementation: “The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speak[s] directly to [the] question at issue.”¹⁹⁵ Indeed, the Court went so far as to suggest that even “were EPA to decline to regulate carbon-dioxide emissions altogether . . . , the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.”¹⁹⁶ In such a case, states and other aggrieved parties would continue to have administrative remedies available, including, in appropriate cases, judicial review. But the Court, in its words, saw “no room for a parallel track”¹⁹⁷ of federal common law litigation, especially where “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”¹⁹⁸

Regardless of the wisdom of the Court’s displacement decision, one might still presume that state common law actions will remain available under the CAA, given the longstanding presumption against preemption rooted in federalism, the Act’s expansive state law savings clause,¹⁹⁹ and *Ouellette*’s clear holding that source state common law actions survive even in the face of a comprehensive federal pollution control regime, which included many of the same interstate dispute provisions as the CAA.²⁰⁰ Nevertheless, when faced with a conventional cross-border air pollution complaint, the Fourth Circuit in *North Carolina ex rel. Cooper v. Tennessee Valley Authority* set aside a district court order that had enjoined the TVA to install enhanced pollution controls in four of its coal-fired electricity plants in order to abate the harm that TVA was causing in North Carolina.²⁰¹ In the course of a remarkably expansive ruling regarding the preemptive effects of the CAA, the court suggested that all tort law—federal or state—stands irrevocably in tension with a regulatory scheme

195. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (internal quotation marks omitted) (alterations in original).

196. *Id.* at 2538-39.

197. *Id.* at 2538.

198. *Id.* at 2539-40.

199. See 42 U.S.C. § 7416 (2006) (“Except as otherwise provided in [sections addressing automobile emissions, fuel standards, and aviation] nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . .”).

200. See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 490-91 (1987) (describing CWA provisions for affected states to address source state pollution); see also *Am. Elec. Power Co.*, 131 S. Ct. at 2540 (referring to this holding of *Ouellette* as being relevant on remand).

201. 615 F.3d 291 (4th Cir. 2010).

such as the CAA, which reflects a “carefully created system for accommodating the need for energy production and the need for clean air.”²⁰² Allowing claims to proceed under the common law would result in a “confused patchwork of standards”²⁰³ that might “scuttle the extensive system of anti-pollution mandates that promote clean air.”²⁰⁴ To the extent that a state like North Carolina faces persistent air quality problems due to interstate emissions transport, the court held that the CAA’s provisions for administrative relief provide ample recourse, opining that “there is no suggestion that the [CAA] process will fail to provide North Carolina with a full and fair venue for airing its concerns.”²⁰⁵

Despite the Fourth Circuit’s confident statement, there are good reasons to believe that the CAA interstate dispute process fails to address fully and fairly North Carolina’s grievance. To address transboundary air pollution in the 1990 amendments to the CAA, Congress adopted a somewhat effective cap-and-trade program for emissions of sulfur dioxide (SO₂), but relegated interstate transport of nitrogen oxides (NOx) to a cooperative regional process overseen by EPA.²⁰⁶ This latter program has “failed to generate anything more than data,” while “the provisions that give EPA power to require NOx reductions from pollution-creating states have led to chaotic rulemaking and litigation at every turn.”²⁰⁷ A subsequent effort by EPA to implement a cap-and-trade program for NOx in the absence of express statutory authority was struck down by the D.C. Circuit following complaints by North Carolina and others that the program failed to ensure that upwind states would actually abate

202. *Id.* at 296.

203. *Id.*

204. *Id.* at 298; *see also id.* at 312 (“No matter how lofty the goal, we are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes . . .”).

205. *Id.* at 311. In devising their implementation plans, states must consider the impact of emissions within their borders on air quality in other states. *See* 42 U.S.C. § 7410(a)(2)(D)(i) (2006). In addition, states must provide written notice to potentially affected states before any new construction or modification of existing emissions sources may begin. *See id.* § 7426(a)(1). Finally, the Act allows any state that believes its ability to meet air quality standards is being compromised by out-of-state emissions to petition EPA for relief. *See id.* § 7426(b).

206. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 401, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

207. Christina C. Caplan, Note, *The Failure of Current Legal and Regulatory Mechanisms To Control Interstate Ozone Transport: The Need for New National Legislation*, 28 *ECOLOGY L.Q.* 169, 172 (2001); *see also* Merrill, *supra* note 189, at 933 (“The Clean Air Act prohibits emission activity in one state that contributes significantly to other states’ noncompliance with air quality standards, but no state has ever secured relief under this provision.”).

unlawful emissions and cease interfering with the attainment or maintenance of air quality standards in downwind states.²⁰⁸ After numerous delays, a substitute Cross-State Air Pollution Rule was proposed by EPA and eventually finalized on July 6, 2011.²⁰⁹ The new rule undoubtedly will attract litigation challenges of its own, including questions regarding whether EPA's approach satisfies the requirements imposed by the D.C. Circuit.²¹⁰ Thus, for the Fourth Circuit to suggest in *Cooper* that the existing CAA process substitutes for or sets aside the common law interests of downwind states seems either misinformed or disingenuous.²¹¹ It is debatable whether EPA would have even proposed its new and more aggressive interstate transport rule had North Carolina and other downwind states not used every available legal tool to pressure upwind states, including the common law nuisance suit. Even at present, the success of EPA's new rule remains in doubt and, at best, many years from demonstration.

Like the Supreme Court in *American Electric Power Co.*, the *Cooper* court relied upon an agency expertise model of administrative law in reaching its decision, opining that the important questions at issue in transboundary pollution disputes concern "chemistry, medicine, meteorology, biology, engineering, and other relevant fields."²¹² In fact, the relevant scientific questions in *Cooper* were neither in dispute nor particularly complicated. To be sure, establishing NAAQS for SO₂ and NO_x is a classic matter for agency expertise and scientific resolution. But nothing in North Carolina's complaint required reevaluation of the applicable NAAQS for SO₂ and NO_x. The only fact North Carolina needed a court to find was that out-of-state emission sources were seriously impairing its air quality and its ability to achieve the

208. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). Prior to this litigation, North Carolina filed a section 126 petition with EPA, on which the agency refused to act because it felt the Clean Air Interstate Rule would address North Carolina's concerns. See Rulemaking on Section 126 Petition from North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328 (Apr. 28, 2006) (codified in scattered sections of 40 C.F.R.); Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005) (codified in scattered sections of 40 C.F.R.).

209. See *Cross-State Air Pollution Rule (CSAPR)*, EPA, <http://www.epa.gov/airtransport> (last visited Sept. 4, 2011).

210. *North Carolina*, 531 F.3d 896.

211. As the district court noted, "Although the administrative route has certainly borne some interesting fruit, it has not, thus far, resulted in the reduction of emissions from upwind, out-of-state sources that North Carolina is ultimately seeking." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 816 (W.D.N.C. 2009) (footnote omitted), *rev'd*, 615 F.3d 291 (4th Cir. 2010).

212. 615 F.3d at 305.

NAAQS. If such a finding were made, then it would constitute prima facie evidence of administrative failure. Even if it is true, as the Fourth Circuit surmised, that the power plants ordered by the district court to install new pollution control equipment were in compliance with all applicable CAA permits,²¹³ those permits themselves were not in compliance with the larger goals of the statute, including especially the requirement that upwind sources not interfere with the attainment or maintenance of air quality standards.²¹⁴ Thus, the discrepancy should have signaled to the Fourth Circuit that a breakdown in the statutory implementation process had occurred, and that EPA and other involved actors might benefit from the kind of forceful prod provided by the district court. By instead construing North Carolina's nuisance suit as an invitation to devise comprehensive, scientifically grounded air quality standards, the Fourth Circuit obscured the state's more basic complaint that neither its neighbors nor EPA were fulfilling Congress's demands under the CAA and that administrative avenues of relief had proven maddeningly unavailing.²¹⁵

To our knowledge, preemption of state common law in the CAA context was, prior to *Cooper*, unprecedented.²¹⁶ Nevertheless, the *Cooper* court oddly inferred from Congress's failure to create a nuisance cause of action in the CAA an intent to displace whatever common law causes of action already existed.²¹⁷ The court may think jettisoning tort law is good policy, but it says one thing and does another to the extent that such a policy stance leads the court to contrive or infer legislative intent. The Fourth Circuit's disdain for tort law seems driven in part by its narrow understanding of what role the common law of tort plays in our government. As with recent Supreme Court cases in the products liability preemption context,²¹⁸ the *Cooper* panel seemed to view tort

213. *Id.* at 300.

214. See *Cooper*, 593 F. Supp. 2d at 825-28 (detailing contributions by out-of-state plants to air pollutant concentrations in North Carolina).

215. *Cooper*, 615 F.3d at 304-06.

216. *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 61 (D. Vt. 1987) (“[S]tate law nuisance claims have always been available to *private parties* suing for damages for pollution that travels between state boundaries.”). For additional cases holding that the CAA does not preempt state common law claims, see *The Queen v. City of Detroit*, 874 F.2d 332, 342-44 (6th Cir. 1989); *Abundiz v. Explorer Pipeline Co.*, No. CIV. 3:00-CV-2029-H, 2002 WL 1592604, at *4-5 (N.D. Tex. Jul. 17, 2002); *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 WL 782131, at *5 (S.D. Ohio June 16, 2000); and *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992).

217. *Cooper*, 615 F.3d at 304-05.

218. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-25 (2008) (concluding that tort duties constitute “requirements” under the preemption provision of the Medical Devices

law entirely as an instrumental mechanism for regulating the incidence and severity of environmental and human health impacts from air pollution. From that perspective, the mechanism seemed to be an inelegant source of interference with the scheme devised by Congress. North Carolina's demand for injunctive rather than compensatory relief may have made such a framing more salient for the court.

As we have argued, however, a single-minded focus on tort law's capacity to deter narrows and obscures the full significance of the institution. Tort law also compensates and vindicates, and it does all of these things within a framework for the self-presentation of grievances and pursuit of redress that affords agents—including subnational government actors like states, cities, and tribes—the opportunity to act with dignity and efficacy, and not merely to submit to rules from on high. Aggressive use of the implied preemption doctrine disrupts this system, not only in its primary functioning but also in its ability to serve a prodding and pleading role. As Roderick Hills notes, a rule of construction that disfavors preemption is, at bottom, “a rule in favor of a political donnybrook—a visible and direct confrontation on a hotly contested policy issue.”²¹⁹ Political donnybrooks prompted by tort suits may or may not result in victories for plaintiffs whose claims raise the salience of an issue. The larger point, though, is that they help keep limited government alert, listening, and hopefully providing reasoned responses rooted in those basic norms of social interaction that constitute the common law of tort. Rather than “parallel track[s],” as the Supreme Court imagined in *American Electric Power Co.*,²²⁰ the common law, statutes, and regulations are better seen as nodes within a web or network of governmental authority. In a system of government such as ours, active feedback and feedforward loops are inevitable and critical.

IV. THE ACTIVE VIRTUES OF COMMON LAW ADJUDICATION

Judges and scholars often seek to decide, once and for all, which questions belong in which branch of government. Laurence Tribe and colleagues, for instance, contend that the problem of climate change must be allocated

Amendments of 1976); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005) (noting that “the term ‘requirements’ in [the Federal Insecticide, Fungicide, and Rodenticide Act] reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties”); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (“The phrase ‘[n]o requirement or prohibition’ [in the Public Health Cigarette Smoking Act of 1969] sweeps broadly and suggests no distinction between positive enactments and common law . . .”).

219. Hills, *supra* note 7, at 28.

220. See *supra* note 197 and accompanying text.

exclusively to “the pluralistic processes of legislation and treaty-making rather than to the principle-bound process of judicially resolving what Article III denominates ‘cases’ and ‘controversies.’”²²¹ In the face of many twenty-first century harms, however, “pluralism” requires not only multiple values, but also multiple institutions. Overlapping governance mechanisms help to span jurisdictions and to marshal different fact-finding competencies, remedial powers, and value orientations. They ensure a fuller and more inclusive characterization of emerging threats to social and environmental well-being. Particularly in the early stages of confronting a problem as profound and challenging as climate change, it would be unwise to disable an institution such as the tort system from engaging with the substance of the problem, even if its pronouncements ultimately are displaced by a comprehensive legislative or regulatory scheme. As this Part describes, the defense of such a role for tort law is deeply principled and traditional. As consonant as it may be with emergent theories of “new governance,” it also keeps with a nuanced understanding of separation of powers and the rule of law.

A. Separation of Powers

As Martin Flaherty makes clear in his extensive examination of historical scholarship on the separation of powers, “[t]he Founders developed separation of powers as a means to further certain purposes, including balance, accountability, and energy”²²²—critical values that may be promoted as much by the overlapped edges of authority as by the separated authorities themselves. Formalists such as Justice Scalia construct a revisionist history in which pure separation—rather than shared and competing authority—is treated as the constitutional norm, and that narrow and misleading story is taken to define, for instance, the analysis of standing.²²³ Yet, as Flaherty observes, “[T]he complex, messy, and at times contradictory ferment in constitutional thinking renders it unlikely at best that, by 1787, Americans had reached a consensus on the doctrine [of separation of powers] in anything like the precise, thoroughgoing manner that modern formalists prescribe.”²²⁴ As he concludes, “[T]he advocates of separation of powers [among the Founders]

221. See Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 4-5 (Wash. Legal Found., Critical Legal Issues Working Paper Series No. 169, 2010), http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf.

222. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1810 (1996).

223. See *supra* text accompanying notes 175-176.

224. Flaherty, *supra* note 222, at 1755.

rarely argued for keeping the three government departments absolutely distinct,²²⁵ and the doctrine “served balance rather than balance serving a rigid, formalistic view of separation of powers.”²²⁶

As many of the Founders undoubtedly recognized, pure separation of powers is as impractical as it is undesirable, given the impossibility of self-executing separation-of-powers principles.²²⁷ The enforcement of separation of powers requires that there be loci of overlapping authority that necessarily erode the purity of separation.²²⁸ Moreover, though they seek to stimulate rather than stymie government activity, prods and pleas are nevertheless simply checks and balances of a less recognized variety: they are checks against the harmful, oppressive power that may arise when the “proper” institutions for addressing a societal need are unresponsive and underreaching. Like checks and balances, prods and pleas help ensure that separate powers fulfill their proper roles by policing the margins of each institution’s capacity. Whether it is a legislature that succumbs to dysfunction or a court that abdicates its duty to adjudicate, when one branch falls down on the job, the elusive goal of

225. *Id.* at 1766.

226. *Id.* at 1767; see also Gordon S. Wood, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 59-60 (Amy Gutmann ed., 1997) (noting that “[t]he sharp distinction we recognize between legislation and adjudication is a modern one,” that in the Founding era and early years of the Republic there was deep intermingling of the judicial and legislative functions, and that “for good or for ill, judges have exercised that sort of presumably undemocratic authority [that Justice Scalia believes is incompatible with democratic theory] from the very beginning of our history”).

227. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 19 (Liberty Fund 2d ed. 1998) (1967) (explaining the limitations of the “pure” separation-of-powers theory, which led the Founders to modify it with the idea of checks and balances); Flaherty, *supra* note 222, at 1816 (“[M]ore than 200 years of practice under the Constitution suggest that the inherent fluidity and the system of checks and balances render a strict separation impossible,’ a point that scholars as diverse as [Forrest] McDonald, [Edward] Corwin, [Lawrence] Lessig and [Cass] Sunstein, and Susan Low Bloch have suggested.” (quoting FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 180 n.35 (1994))); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1167 (2000) (“The Supreme Court’s repeated invocation of separation of powers and checks and balances as a ‘self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other’ fails to identify the differences between functional separation and balance.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

228. Nor are these focal points of shared power by any means limited to those checks and balances expressly instantiated in the Constitution. Perhaps the single most important check in the entire system—the judiciary’s authority to decide the constitutionality of other branches’ actions—is not among those textually prescribed.

balance may be thwarted just as much as when one branch usurps authority entrusted to another.

Against this backdrop, the radicalism of justiciability arguments in common law suits should be clear. When a court dismisses on political question grounds a case about impeachment,²²⁹ the training and supervision of the National Guard,²³⁰ or the President's capacity to withdraw from treaties,²³¹ or when it invokes standing doctrine to prevent a litigant from asking for abstract review of a constitutional question raised by an act of Congress, another branch of government has answered, or will answer, the question at issue. The court in such cases simply refuses to subject that answer to further review—to make itself the ultimate arbiter. However, when the question posed is whether a plaintiff has a remedy at common law for an alleged harm, there is an almost tautological—though still quite meaningful—sense in which the question cannot be answered by any branch but the judiciary.²³² Perhaps this is why “the Supreme Court has never applied the ‘lack of judicially manageable standards’ prong [of the political question doctrine] to a dispute between private parties,”²³³ and why leading commentators treat the doctrine as nearly exclusively concerned with constitutional adjudication.²³⁴ If a court rejects as nonjusticiable a public nuisance suit, the legislature cannot issue a substitute opinion that the plaintiff had a valid claim *at common law*. To be sure, the legislature can create a cause of action for the plaintiff by statute, but doing so will not directly answer the common law question—rather it will only implicitly suggest that no valid action had yet been in place. Because no other branch can affirm that the plaintiff already had a successful common law cause of action, it is wrong to suggest that dismissing climate change cases as nonjusticiable political questions merely passes them on to a more suitable branch. Instead, dismissal constitutes a backdoor rejection of the substance of the plaintiff's claim without direct consideration of its merits.

229. *Nixon v. United States*, 506 U.S. 224 (1993).

230. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

231. *Goldwater v. Carter*, 444 U.S. 996 (1979).

232. *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982) (noting that “[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power” and that “the liability of one individual to another under the law as defined . . . [cannot] be removed from Article III courts and delegated to legislative courts or administrative agencies for their determination” (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932))).

233. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 684 (E.D. La. 2006).

234. *See, e.g., Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

This is a perverse result. It appears doubly so when one considers what it would mean for a common law suit to be not yet preempted, but nevertheless nonjusticiable for posing a political question. That a potential common law cause of action has not been preempted means that the other branches have left it in place—either explicitly, as through a savings clause in legislation, or implicitly, by not speaking to the question at all. Dismissing a common law claim on political question grounds is nonsensical in such a case because the branch that dismissal would redirect the question back to has already declined or failed to supplant the common law claim. The district judge in the methyl tertiary butyl ether (MTBE) litigation correctly noted this dynamic, observing that for purposes of analyzing the third *Baker* political question factor, “the only relevant policy determination would be if Congress had decided to ban the use of MTBE or grant manufacturers immunity from lawsuits asserting damages attributable to the use of MTBE.”²³⁵ Because Congress had not adopted such an immunity statute or otherwise regulated MTBE so as to preempt common law causes of action, the court properly allowed the case to proceed. Holding otherwise would have constituted deference to *inaction* by the other branches, compounding the very structural bias of American government that likely explained why plaintiffs resorted to a common law cause of action in the first place.

The effect is similar when a common law suit is dismissed for lack of standing. In essence the plaintiff is told that she has come to the wrong branch of government, even though no other branch is capable of addressing the crux of her claim: the assertion that she has a grievance actionable at common law. In contrast, when a litigant seeks abstract review of the constitutionality of a statutory provision or the legitimacy of an agency action but is turned away for lack of standing, there is a strong argument to be made that the issue already has been addressed by at least one branch of government, and the court is simply refusing additional review. This problem is distinct to the common law context. When courts invoke political question or standing doctrine to prevent common law adjudication, they self-negate in a way that is fundamentally inconsistent with the historical role of tort law as a locus for the airing of grievances. Curiously, they apply the “private-law model of public law”²³⁶ to private law itself, perhaps out of a sense that complex tort actions may have effects and implications on the scale of public law. In doing so, however, they substitute a Potemkin version for the law of civil wrongs that they have been

²³⁵ *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 300 (S.D.N.Y. 2006).

²³⁶ Sunstein, *supra* note 23, at 1436.

constitutionally entrusted to steward, leaving the core of that law at risk of rotting from neglect. That climate change tort suits seem particularly far afield from the classical model of self-contained adjudication does not alter the basic institutional argument for ready access to the law of redress. As the presumptive custodians of this body of law, courts sow unnecessary confusion when they layer private law back onto itself through indirect and confused doctrines like standing or political question.

In contrast, Laurence Tribe and colleagues argue that “courts squander the social and cultural capital they need in order to do what may be politically unpopular in preserving rights and protecting boundaries when they yield to the temptation to treat lawsuits as ubiquitously useful devices for making the world a better place.”²³⁷ Their argument evokes Alexander Bickel’s concern over the “counter-majoritarian difficulty”²³⁸ of judicial review in the constitutional context. However, even the great worriers over judicial usurpation such as Bickel and Justice Scalia typically draw a sharp distinction between constitutional judicial review and the common law process, recognizing that the latter poses considerably lesser grounds for concern.²³⁹ Common law courts do perform a quasi-constitutional function when they allow climate change tort suits to proceed to the merits, where dismissal on the merits may still at least implicitly acknowledge the possibility of basic values left unprotected by current law. Yet, they do not thereby wield the kind of power that requires an elaborate amendment process for the legislature to overrule.²⁴⁰ Nevertheless, Tribe and his colleagues appear to believe that

237. Tribe et al., *supra* note 221, at 2.

238. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986).

239. *Id.* at 20 (distinguishing between constitutional judicial review, which Bickel takes to pose a countermajoritarian problem, and the ordinary “lawmaking function of judges” akin to administrative officialdom, because the latter is “reversible by any legislative majority—and not infrequently [actually] reversed”); SCALIA, *supra* note 226, at 12 (noting that he is “content to leave the common law, and the process of developing the common law, where it is,” though he resists a common law attitude toward statutory interpretation). In the case of public nuisance suits brought by attorneys general and other popularly accountable officials, the countermajoritarian difficulty is even less present, because the plaintiffs themselves are subject to majoritarian review. See 1 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: AIR AND WATER* § 2.3, at 40 (1986); Trevor W. Morrison, *The State Attorney General and Preemption*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 81, 87 (William W. Buzbee ed., 2009).

240. Commentators ignore this basic point when they complain that even climate change suits limited to damages recovery would, because of their selectivity, “completely short-circuit[] the question of how to allocate [the climate change compensation] burden throughout the global economy.” Tribe et al., *supra* note 221, at 19. To be sure, were a climate change

common law adjudication is problematic for courts from a legitimacy standpoint when it verges on ground that is considered somehow too political.

There are numerous problems with such an argument. Although courts may sometimes rightly worry about their political capital and legitimacy, they cannot do so too strongly without radically changing (or abandoning) the meaning and function of an independent judiciary.²⁴¹ However grand in scale and implications the claims brought before it may be, tort law does not somehow transmute into a generic regulatory device for social engineering. It remains a deeply and distinctively traditional space defined precisely by the application of longstanding, gradually evolving principles to the sometimes rapidly changing conditions of interpersonal relations. Those who would hold climate change tort suits nonjusticiable may adopt the former, reductive view of tort because they believe that merely by entertaining causes of action that strain doctrinal boundaries, courts would necessarily subvert, rather than affirm, tort law's vitality. Yet, their pessimistic assumption begs the pertinent substantive question of what tort doctrine actually requires in a given case—the working out of which is very much the conventional duty of common law judges and a part of why they hold the social and cultural capital they do. Moreover, it is not at all clear that the political question doctrine and related avoidance devices actually conserve capital and legitimacy for the courts, given how messy and unprincipled they appear to be to most observers.²⁴² As

plaintiff to succeed on the merits, the Senate's de facto supermajority rule might pose a barrier to legislative correction if the public did not agree with the case's outcome. But that would be a barrier generic to Congress's current state of dysfunction and inertia—a condition that the legislature might well be jarred out of by an unexpected success for plaintiffs. The common law is not only preferable to a laissez-faire baseline of governance but may also be more conducive to the generation of legislation to improve upon it.

241. Cf. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 132 (2d ed. 2002) (“[T]he federal courts’ legitimacy is quite robust . . . and . . . in any event, the courts’ mission should be to uphold the Constitution and not worry about political capital.”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at viii (2d ed. 1988) (“[T]he highest mission of the Supreme Court . . . is not to conserve judicial credibility . . .”).

242. Consider the following summary of standing doctrine from a leading text:

It is impossible to read the complicated and conflicting opinions issued in the Court's over one hundred cases resolving standing disputes without drawing the inference that the Justices are greatly influenced by their personal political and ideological values and beliefs. The concepts of injury-in-fact, causality, and redressability are extraordinarily malleable. The Justices can, and do, manipulate these concepts to obtain results they prefer on political and ideological grounds. Some Justices are sympathetic to environmental plaintiffs, while others are not.

RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 169 (5th ed. 2009); see also STEINZOR & SHAPIRO, *supra* note 88, at 158 (quoting and discussing this passage).

Richard Fallon shrewdly notes in the political question context, the courts have failed to discover judicially manageable standards for the discovery of judicially manageable standards.²⁴³ Thus, it is not at all clear that courts would do themselves a favor by dismissing climate change suits on malleable and confused political question grounds, rather than dismissing them more forthrightly through a ruling, for instance, that the harms posed by climate change are not amenable to satisfactory allocation among responsible parties.

Finally, the argument of Tribe and his colleagues seems to suggest that the legislative branch is a straightforward representative of the people's will, in contrast to courts. In truth, the Founders were deeply skeptical of any branch's claim to represent "the People" during ordinary governance. As Gordon Wood argues in his path-breaking history of the Founding era, the great innovation of American government was devising a system wherein the people themselves (rather than say, a parliamentary body) were sovereign, and "no department was theoretically more popular and hence more authoritative than any other."²⁴⁴ Within this framework, courts serve an appropriate and essential role when they engage claims of harm and wrongdoing on the merits. If the heart of the political question and related doctrines consists of "prudential concerns calling for mutual respect among the three branches of Government,"²⁴⁵ then it is significant to note that respect can mean prodding and pleading as much as it does ducking and deferring. It overstates the case only slightly to say that such actions are akin to asking the other branches of government to live up to their better instincts, rather than succumb to an institutional bias toward

243. See Fallon, *supra* note 234, at 1278 ("To put the point provocatively, the Court makes its judgments about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable if the requirement of judicial manageability applied . . ."); see also Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) ("The 'political question' doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts. Its authentic contents have general jurisprudential validity, and nothing but confusion is gained by giving them special handling in selected cases."). As Thomas Merrill notes, preemption doctrine can be criticized on similar grounds:

In a word, the Court's preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are actually making substantive decisions in the name of preemption. The very emptiness of this doctrine also impoverishes the type of record that litigants develop for courts in preemption cases, which plausibly means these cases are not as well decided as they would have been under a different kind of doctrine.

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 742 (2008).

244. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 550 (1969).

245. *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in the judgment).

inaction. Respecting an equal need not mean simply letting alone. It can also mean signaling high expectations, which imply a belief in the other's ability to meet them.

B. Rule of Law

Any attempt to solve a problem presupposes some prior delineation of its nature and bounds. Whether courts appear inferior to other institutions in addressing the climate change problem will depend in large part on how one constructs "the problem." At least one important formulation raises a set of problems that is clearly the task of courts to address: how to square tort law's promise of freedom from unreasonable injury to body or property with the limited institutional capacity of courts to fulfill that promise in the climate change context. This question is all the more difficult given the challenges of causal proof as well as victim and tortfeasor numerosity (not to mention the difficulty of deciding whether and when a level of greenhouse gas emissions has become unreasonable). The other branches can speak to the judiciary's institutional limitations by taking on the myriad regulatory tasks that are necessitated by climate change as a public policy problem. Yet, it remains the role of the courts to interpret core common law principles in relation to the particular parties and disputes before them, even when those disputes arise against the backdrop of a monstrously complex phenomenon like climate change. Allowing such claims to proceed to the merits ensures that courts fulfill their obligation to hold open the common law as a site for the working out of private grievances unless and until they are worked out through other lawful means.

Of course, this insistence that the common law remain widely open raises the possibility that courts in intractable settings like climate change might find that plaintiffs have actually stated a valid common law claim. Given the urgency of the threat posed by climate change, environmentalists might rejoice at such an outcome, but the rule-of-law concerns underlying the political question doctrine cannot easily be dismissed. In light of the diffuse, overdetermined, and uncertain nature of harms caused by contributions to climate change, would an attempt to gauge, say, unreasonableness for purposes of nuisance or negligence necessarily implicate courts in a legislative weighing of broad social interests that courts are ill-equipped to balance? Would attempts to trace causality from the myriad sources of historical and current greenhouse gas emissions to their contribution to overall atmospheric and oceanic warming and on through to their ultimate harmful impacts necessarily

plunge courts into matters that are “delicate, complex, and involve large elements of prophecy”?²⁴⁶ More pointedly, would the imposition of civil liability for emitting greenhouse gases—a widespread and common behavior on which people and institutions have grown deeply dependent—so severely jar actors’ expectations about what the law permits and so arbitrarily single out individuals or groups of emitters for climate responsibility that such judicial action would conflict, in a basic way, with the principle of legality?

The first and narrowest response to such a concern has already been noted: if public nuisance and negligence are such malleable legal concepts that they can be stretched to encompass cases that, in fact, are not amenable to adjudication according to manageable standards, then the forthright concern to raise is with the scope of the tort doctrines themselves. There is no obvious reason why preliminary filters are necessary or desirable as an additional gatekeeper against unmanageable, would-be common law claims, above and beyond the quite significant power of courts to dismiss for legal insufficiency within the common law framework itself. The widespread failure of public nuisance claims in the handgun, lead paint, and subprime mortgage industry contexts suggests that courts have means readily available to manage nuisance doctrine from within.²⁴⁷ Indeed, it seems precisely at the point that plaintiffs are too ambitiously trying to invoke tort’s potential for “regulation through litigation” that courts hold fast to classical understandings of tort as a system of delineated responsibilities and private redress. Recent criticisms of climate change lawsuits focus only on tort’s regulatory role, arguing that the inability of courts to bind all relevant greenhouse gas emitters “automatically makes them institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope.”²⁴⁸ Whether or not that point is valid, the more germane one is that courts have ample means of addressing such concerns *within the law of tort itself*.²⁴⁹

246. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (deeming nonreviewable by the courts an executive branch denial of a certificate of convenience and necessity for foreign air travel by a domestic operator because of the President’s power over foreign affairs).

247. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009); *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000).

248. Tribe et al., *supra* note 221, at 21.

249. The Supreme Court’s recent decisions in *Twombly* and *Iqbal* articulating heightened pleading standards in federal court provide another means of addressing such concerns—though not one we are inclined to support, for reasons similar to those that underlie our

In the common law context, moreover, it is a mistake to assume that judicially manageable standards must already exist in rule-like form, awaiting application to the case at hand, when one decides whether to invoke the political question doctrine. The common law co-evolves with the social problems it is called upon to address.²⁵⁰ This active and adaptive understanding of the common law has existed since before the Founding,²⁵¹ notwithstanding persistent attempts to portray it otherwise.²⁵² Holding that climate change harms are categorically nonjusticiable would deprive the courts of an opportunity to continue tort law's evolution and would upset a basic feature of our governmental structure.

Granted, to the extent that it entails the embrace and productive use of significant legal difficulty and ambiguity, the courts' capacity to prod and plead appears to be in tension with one of the foremost values of "law" as such: ex ante clarity and consistency, on which actors can rely in shaping their behavior, and courts can rely in justifying their decisions.²⁵³ When courts take a common act such as the emission of greenhouse gases and begin to hold its perpetrators

rejection of the expansive invocation of the political question doctrine, standing, and implied preemption. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *supra* note 20. As Arthur Miller has argued, the concerns motivating heightened pleading standards focus undue attention on one side of the balance of costs and benefits created by a robust system of private litigation: "Even though private lawsuits might be viewed as an inefficient ex post method of enforcing public policies, they have dispersed regulatory authority; achieved greater transparency; provided a source of compensation, deterrence, and institutional governance; and led to leaner government involvement." Miller, *supra* note 20, at 6. In the domain of tort law, lawsuits create these benefits while also allowing an independent source of normative order to develop and operate.

250. In that respect, cries against disturbing new "transmutations" and manipulations of public nuisance doctrine ring hollow when uttered by the same individuals who assert that the doctrine has always been dangerously flexible. See, e.g., Faulk & Gray, *supra* note 106, at 947-50.
251. See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).
252. For Justice Scalia's latest attempt in this regard, see *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2606 (2010) (plurality opinion), in which the Justice asserts that "the Constitution was adopted in an era when courts had no power to 'change' the common law." In that case, Justice Scalia felt it was "contradictory" for Justice Kennedy in concurrence to assert both that "owners [of property] may reasonably expect or anticipate courts to make certain changes in property law" and that "courts cannot abandon settled principles." *Id.* (quoting *id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment)). If there is a tension here, then it is a productive one that lies at the very heart of the common law method. See *supra* text accompanying notes 90-93.
253. See, e.g., SCOTT J. SHAPIRO, LEGALITY 118-233 (2011) (setting forth a theory of laws as plans or "planlike norms").

accountable under a broad, adaptive legal standard like nuisance or negligence, there is undoubtedly a feeling of *ex post facto* or retrospective application that jars certain understandings of the rule of law.²⁵⁴

But as common as is the view that supporting legality means rendering legal authority clearer, more predictable, and more determinate, there is another side to the value of the rule of law that is especially significant in the adversarial American system: law as a structured discourse in which individuals are entitled to articulate their grievances or face their accusers, to stake their claims, and to advance reasons in support of them.²⁵⁵ Both at the state and federal levels, courts are custodians of a body of common law that must be stable enough to honor justified expectations, flexible enough to respond to changing social values, and professionally crafted enough to attract

254. For this reason, the Fourth Circuit in *North Carolina ex rel. Cooper v. Tennessee Valley Authority* seemed to expound the view that the law of public nuisance was not, in fact, law. See *Cooper*, 615 F.3d 291, 302 (4th Cir. 2010) (stating that public nuisance is “an ill-defined omnibus tort of last resort” and applies “at such a level of generality as to provide almost no standard of application”); see also Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, art. 4, at 5 (2011), <http://www.bepress.com/jtl/vol4/iss2/art4> (arguing that the closest analogy to public nuisance doctrine is criminal not tort law and that, because of a failure to abide by the distinction, public nuisance litigation has “gone off the rails”). Likewise, the Fourth Circuit panel bemoaned the plight of regulated entities faced with potential statutory and common law obligations: “[W]hich standard is the hapless source to follow?” *Cooper*, 615 F.3d at 302. The answer, though obvious, seems not to have occurred to the court: the highest standard.

255. It would be hard to put it better than Jeremy Waldron has:

[I]t is natural to think that the Rule of Law must condemn the uncertainty that arises out of law’s argumentative character.

But . . . there [i]s another current in our Rule-of-Law thinking which emphasizes argument, procedure, and reason, as opposed to rules, settlement, and determinacy. This theme sometimes struggles to be heard. But . . . it is often quite prominent in public and political use of the Rule of Law ideal. The most common political complaint about the Rule of Law is that governments have interfered with the operation of the courts, compromised the independence of the judiciary, or made decisions affecting people’s interests or liberties in a way that denies them their day in court—their chance to make an argument on their own behalf.

Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 55 (2008). To the extent that there is a tradeoff between stability and predictability on the one hand, and reasonableness and responsiveness on the other, tort law may by its nature be more comfortable than, say, contract or property law with sacrificing some certainty in exchange for propriety. See, e.g., Cornelius J. Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 2 (1983) (arguing that stability and predictability are more important to property and contract law than to tort).

respect as a reasoned scheme of justice.²⁵⁶ Though it is the courts that may undertake the role of prodding and pleading as they grapple with the grievances brought before them, in doing so they give voice to individuals and actors whose grievances have been neglected by the other branches of government, and they structure that voice within the pedigreed, rationalized discourse of law and its principles. This practice of civil redress is a distinctive one that ought not be confused with mere politics or regulation. Construing an insight of Jacques Rancière, Robert Post has noted, “[W]ithin politics wrongs can only be addressed, not redressed. To redress a wrong is already to move out of the realm of politics into other distinct social practices.”²⁵⁷

The rule-of-law objection to prods and pleas also glosses over the history of the common law of tort and the way it has been shaped by its structural relationship with American limited government. A tense relationship with the “planning” dimension of legality is not a difficulty peculiar to courts adjudicating the merits of climate change tort claims. Rather, it is a problem endemic to the common law more broadly—particularly in the field of tort.²⁵⁸ The narratives that help explain and justify prods and pleas in the tort context—the historical and institutional stories of courts applying the common law to evolving social harms, against the backdrop of structurally limited government—also point toward an understanding of American government as a hydraulic system. Restraints on the legislature’s ability to respond to a changing world can sustain themselves only by allowing for a response to surface elsewhere. The common law has often met this pressure with resilience, precisely by being notoriously flexible and by being forced to confront changing social realities. Leaving an adaptable tort law open to provide citizens with a means of civil recourse inevitably creates uncertainty and costs for actual and potential defendants. But that is a price we all pay for a social order with relatively minimal bureaucratic restraint and intrusion.

256. Cf. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1497-1500 (2007).

257. Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1338 (2010) (citing JACQUES RANCIÈRE, *ON THE SHORES OF POLITICS* 103 (Liz Heron trans., 2007) (italics omitted)).

258. As Frederick Schauer has noted, basic aspects of the common law are in tension with central ideas about the rule of law. In particular, common law rules are “nowhere canonically formulated,” are applied to cases that prompt the rules themselves, are “created by courts” rather than legislatures, and are developed by courts not just to fill gaps but also to modify existing law when it would generate undesirable results. Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 455 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)).

Again, this understanding should not feel novel or jarring. Anglo-American common law courts have long been associated with what Mirjan Damaška has called “co-ordinate” as opposed to “hierarchical” structures of authority, and common law judges have historically been less specialized and bureaucratic and more political and socially responsive than their technocratic counterparts in the Continental tradition.²⁵⁹ As Damaška puts it, “the ideology of the reactive state supports the purity of the conflict-solving process,”²⁶⁰ but “[i]t is precisely because the government is uninvolved that both space and reason are created for vigorous conflict-entailing activity by citizens’ groups.”²⁶¹ Put differently, the American commitment to limited government and a stark public-private dichotomy maintains its stability in part by allowing political pressure to surface and be worked out in nominally “private” spaces, including the private law of tort. Describing a related insight of Damaška’s, James Whitman explains: “[F]orms of legal reasoning are . . . derivative of the structure of authority in . . . societies.”²⁶² Whereas Continental “distrust of lower-level officials” promotes an insistence on definitive answers that can be hierarchically and technocratically reviewed, American resistance to strong centralized power has underpinned its embrace of diffuse, nonhierarchical courts that put comparatively less emphasis on definitiveness and more stock in correctness for particular circumstances.²⁶³

The essential point for present purposes is that the common law tradition is not simply *able* to balance definitiveness against social responsiveness because it exists within a system of coordinate authority. Rather, the common law of tort *ought* to be so predisposed as a functional reaction to structural

259. DAMAŠKA, *supra* note 87, at 29-46.

260. *Id.* at 117.

261. *Id.* at 77-78.

262. James Q. Whitman, *No Right Answer?*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA* 371, 389-90 (John Jackson, Máximo Langer & Peter Tillers eds., 2008).

263. *Id.* at 389. Damaška’s powerful descriptive work prefigured the basic rejoinder to a “lack of judicially manageable standards” argument against the adjudication of novel, politically-charged common law claims:

It is undeniable that where an imperfectly hierarchical judiciary is involved in making and implementing policy, considerable uncertainty and instability are introduced into the legal system, quite independent of the ambiguities resulting from [the] absence of a single comprehensive theory of the social good. . . . It may well be that a society conditioned to hierarchically constituted authority might find the resulting levels of dissonance, uncertainty, and instability intolerable. Americans can live with it, however.

DAMAŠKA, *supra* note 87, at 239.

checks against aggregated power—limitations that would otherwise threaten to stymie the American government’s ability to respond to an evolving world of widespread, diffuse, and seemingly unlimited civil harms. Courts should not shy from this responsibility out of overblown fears about the conduct or consequences of common law adjudication. The sky is warming, but it is not falling. Even if the unthinkable were to happen—even if a court were to rule that substantial contributions to climate change are not only amenable to challenge under the common law, but actually tortious and remediable—the result might not be as dire as critics portend. Indeed, the result might eventually be viewed as a limited but essential step in a grand transformation of power toward moral ends.²⁶⁴

CONCLUSION

If the phrase “checks and balances” classically denotes the activity-limiting mechanisms built into the organization of American governance, the banner of “prods and pleas” stands for the important capacity of divided authorities to push each other to action when changing social conditions require it—a capacity of increasing importance as the protection of foundational interests comes to depend less on hedges against governmental tyranny and more on hedges against our hedges. Prods and pleas still work within the basic system of limited power; indeed they help perpetuate it. By invoking prods and pleas when faced with external pressures that threaten the viability of a system of disaggregated governance, judges and other public officials perform their roles with a view toward catalyzing activity somewhere else in the system. They do this not necessarily for progressive or radical reasons of policy, but out of a conservative desire to preserve basic structures and principles of limited government in the face of policy challenges that call into question their continued viability. Thus, courts and other governmental institutions should see calls for prodding and pleading not as redundant or overreaching, but rather as structurally necessitated; not as ahistorical or unoriginalist, but rather in keeping with the highest ideals and aspirations of the Founders themselves.

Moreover, for all their consequentialist potential to spur lagging branches into action, prods and pleas are as much or more about getting the prodding and pleading institutions *themselves* to change—to see beyond unduly narrow conceptions of their institutional roles. Prods and pleas are important irrespective of whether (and in what direction) they tangibly or immediately move the political winds. They are as much a concept around which judges

264. Cf. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

applying the common law can gain a richer, subtler self-conception as they are a practical lever by which courts can stimulate political responsiveness to evolving social harms. Just as understanding the significance of checks and balances helps institutions to see beyond simplistic complaints about the “inefficiencies” of overlapping, competing responsibilities, grasping the role of prods and pleas can help theorists and judges alike to realize the shallowness of complaints that merely by entertaining climate change tort suits on the merits courts somehow “usurp the role of Congress and the President in addressing . . . vitally important and staggeringly complex choice[s].”²⁶⁵ To understand prods and pleas is to appreciate how and why the division of labor in American governance has never been, and should never be, so simplistic.

²⁶⁵ Tribe et al., *supra* note 221, at 20.