

INTRODUCTION

“The most important public health litigation ever in history”—that is how Mississippi attorney general Michael C. Moore described the lawsuit he had filed on behalf of his state against the tobacco industry in 1994. He boasted to a *New York Times* reporter, “It has the potential to save more lives than anything that’s ever been done.”¹ A dozen years later, when a jury in Providence, Rhode Island, returned a verdict against manufacturers of lead pigment, which causes lead poisoning when ingested or inhaled by toddlers, local childhood activist Roberta Hazen Aaronson exclaimed, “Sometimes in this not so friendly world, the Goliaths are defeated and justice triumphs.” She added that the jury’s verdict felt “like a home run for the families devastated by lead poisoning and for a community that has borne the cost of this industry-made public health disaster.”²

Such effusive praise greeted a new phenomenon in American litigation—*parens patriae* litigation filed on behalf of states and municipalities against the manufacturers of products that have caused public health problems. It was not hard to understand why. The tobacco litigation represented the first significant occasion when manufacturers had been held accountable for the public health harms to which their products had causally contributed. The Rhode Island litigation was the first time that a jury had found product manufacturers responsible for similar public health problems, even though the trial court judgment would subsequently be reversed.³ During the preceding decades, when individual victims of tobacco-related diseases or childhood lead poisoning had sued the manufacturers, they were unable to recover damages because their cases were governed by common-law doctrines (judge-made law) that had developed during the waning decades of the nineteenth century. At that time,

courts had encountered a very different genre of cases—lawsuits claiming damages for the smashing of bones by railroad locomotives and other machines of the newly industrialized economy. Tobacco victims were unable to recover because judges and juries alike attributed the blame for smoking-related diseases to the victims themselves instead of to the manufacturers. Children suffering from childhood lead poisoning could not recover because a century after the walls of their homes were painted, neither their parents nor their lawyers could identify the specific manufacturer whose lead pigment was contained in the paint applied to those walls. Despite innovative legal doctrines that had emerged by the 1970s and 1980s, such as market share liability and the use of class actions against product manufacturers, smokers and children still were unable to recover by the mid-1990s.

The enthusiasm that greeted the litigation concerning tobacco and lead pigment also resulted from apparent failures of the legislative branches of federal and state governments and the administrative agencies they created, which had not addressed the distinct public health problems caused by tobacco, lead pigment, and handguns. The state attorneys general and their partners in filing such litigation, a small group of plaintiffs' attorneys specializing in mass products torts, consciously viewed these lawsuits as filling the void created by the abdication of regulatory responsibility by the political branches. John P. Coale, one of the leading private attorneys that assisted in government lawsuits against tobacco and gun manufacturers, explained, "They failed to regulate tobacco and they failed regarding guns. . . . Congress is not doing its job. . . . [L]awyers are taking up the slack."⁴ The State of Rhode Island's complaint in its action against lead pigment manufacturers requested the trial court to create a statewide program to "detect and abate Lead in all residences, schools, hospitals and public and private buildings within the State accessible to children,"⁵ an ambitious undertaking that administrative agencies would ordinarily undertake at the direction of the legislative branch. Thus, this new form of products litigation no longer focused primarily on compensation for victims of product-related diseases. Instead, such lawsuits emerged as tort-centered examples of what Robert A. Kagan has labeled "adversarial legalism," the uniquely American phenomenon of attempting to establish government policy through litigation.⁶ The perceived failures of legislatures and regulatory agencies to address the public health problems resulting from cigarette smoking and lead paint had created what Kagan refers to as a "mismatch" between "political pressures for total justice" and "inherited legal structures and modes of government."⁷

Part I of this book discusses the challenges that diseases resulting from

product exposure pose to the traditional principles of tort law—the body of American law governing liability for harm caused to others. In chapter 1, I begin by describing the important roles played in American society during the first three-quarters of the twentieth century by two consumer products, cigarettes and lead-based paint, as well as the growing understanding of the terrible health consequences caused by each of these products. In chapter 2, I analyze how the barriers to recovery inherent in traditional American tort law prevented victims of tobacco-related diseases and childhood lead poisoning from recovering from the manufacturers of these products. Not until victims of diseases resulting from exposure to another group of products, those containing asbestos, sued manufacturers in the 1970s did the law begin to eliminate some of these traditional roadblocks to recovery. In chapter 3, I focus on one specific obstacle to recovery—the requirement that a particular victim identify the manufacturer of the specific product to which he was exposed that caused his disease. In cases involving asbestos and other mass products that caused latent diseases, courts began to ease this requirement in carefully circumscribed circumstances. None of these novel means of bypassing the traditional requirement of proof of an individualized causal connection, however, helped the lead-poisoned child. When a child was poisoned in the late twentieth century, it was impossible for his legal representatives, as a practical matter, to identify the producer of the fungible lead pigment that was contained in the paint that had been applied to the walls of the child's home eighty or one hundred years earlier.

Part II of the book analyzes the emergence of *parens patriae* litigation filed by state and municipal governments against the manufacturers of tobacco products, handguns, and lead pigment manufacturers. During the 1970s and 1980s, critical seeds were planted that later flowered in this new genre of litigation. I explore these important precursors of government tort litigation against product manufacturers in chapter 4. The most important of these might be called the potential “environmentalization” of mass products tort law. Traditional products liability law viewed the harm suffered by each individual victim, even among those harmed by mass products, as discrete. Some lawyers and judges influenced by the emergence of the environmental law movement, however, increasingly (but controversially) began to view mass products torts not as an aggregation of injuries to discrete individuals but, instead, as a collective harm—an environmental harm arguably governed by a different body of law. During roughly the same period, personal injury attorneys first began to use product liability actions to address the injuries suffered by victims of automobile accidents as automobile accidents became increasingly to be perceived as a public health prob-

lem. These attorneys sued automobile manufacturers and asserted that their products were not “crashworthy” or were otherwise designed in an unsafe manner. In addition, a few public health experts began to see litigation against product manufacturers as yet another approach that the government could employ to address public health problems. Finally, the ongoing proliferation of claims against asbestos manufacturers yielded a small group of specialized mass plaintiffs’ attorneys who acquired both the medical and legal expertise and the resources to tackle sophisticated litigation against manufacturers of other mass products. Together, these developments paved the way for an entirely new and different form of litigation to address public health problems resulting from product exposure.

As mentioned previously, *parens patriae* litigation against product manufacturers resulted in part from a perception shared among plaintiffs’ attorneys—as well as politically ambitious state attorneys general, public health officials, and public interest advocates—that Congress, state legislatures, and administrative agencies had failed to adequately regulate products that caused disease or to address the public health consequences resulting from product use. I consider this assertion in chapter 5. It is not surprising that many lawyers and some judges, disparagingly referred to by business interests as “activist” judges, saw resort to the courts as the last best hope for public health. In the process, the principal objective of suing manufacturers of products that caused disease shifted from the compensation of victims to the regulation of the manufacturers’ products or other means of preventing harm caused by such products.

States first began to sue tobacco manufacturers to seek damages caused by cancer and other illnesses in 1994. Rhode Island’s lawsuit against lead pigment manufacturers followed five years later, shortly after the tobacco litigation had settled. The success of this novel form of litigation required abrupt changes in the law governing both the standing of the state to sue as *parens patriae* and the principal substantive claim of public nuisance. The capacity of the state to sue as *parens patriae*—literally meaning as “parent of the country”—originated in the ability of the English Crown to legally represent the rights of persons unable to represent their own legal interests because of mental incapacity or age.⁸ By the early twentieth century, the U.S. Supreme Court had also recognized a state’s ability to sue as *parens patriae* to protect its citizens from collective wrongs, such as transboundary air or water pollution.⁹

Granting the state standing to sue manufacturers for the harms inflicted by mass consumer products dramatically expanded the scope of *parens patriae* standing beyond the traditional understanding of it in

American law. In the product-focused version of *parens patriae* litigation, the state sues to collect damages it has sustained as a result of harms inflicted initially and more directly on its residents—for example, state medical assistance (Medicaid) funds already paid to the victims of tobacco-related disease for their medical expenses or the costs of abating lead-based paint hazards in tens or hundreds of thousands of private residences throughout the state. In short, the state becomes a “superplaintiff.” Instead of each individual victim suing manufacturers directly, the state sues on behalf of all victims and disburses the funds to individual citizens as Medicaid benefits or lead-hazard remediation grants. In chapter 6, I analyze this new form of products litigation as it developed in lawsuits filed against tobacco and handgun manufacturers.

This innovation within the legal system is one that would make alchemists proud, because in the process of the state assuming the right to collect damages for harms inflicted more directly on its residents, manufacturers somehow lose defenses that would have prevented their liability if they had been sued by the individual victims themselves. If the individual victim of lung cancer had sued, he would not have been able to recover, because the judge and jury would have found that he either knew about the health risks of smoking and therefore had “assumed the risks” or that the dangers of cigarette smoking were “common knowledge.” When the state sued to collect damages for the harms originally inflicted on individual victims, however, such defenses no longer applied. Don Barrett, a Mississippi attorney who may have been among the first to appreciate the advantages of the state proceeding as *parens patriae*, explained, “The State . . . never smoked a cigarette.”¹⁰ Similarly, when the lead-poisoned child and his parents sued in their own right, they were never able to identify the specific manufacturer of lead pigment contained in the paint that poisoned him, which had been applied to the walls of his residence thirty, sixty, or perhaps one hundred years ago. If the presence of lead on the walls of homes throughout a state is understood as a collective harm to the state, however, the need to prove that any specific manufacturer produced the harm to any particular child is avoided, and it probably is possible to identify at least some of the manufacturers whose pigment contributed to the statewide incidence of childhood lead poisoning.

States in the tobacco litigation asserted a broad variety of substantive legal theories of recovery, including unjust enrichment, indemnity, common-law misrepresentation, deceptive advertising, antitrust violations, state unfair trade practice claims, and violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. Mississippi, the first

state to file against the manufacturers and an important leader in coordinating most of the state lawsuits, primarily rested its case, however, on an obscure common-law tort known as public nuisance. Public nuisance later became the gravamen of many *parens patriae* actions against lead pigment manufacturers, handgun manufacturers, and automobile manufacturers. Legal scholars, judges, and lawyers from an earlier generation would have been shocked to learn that public nuisance, traditionally regarded as “a species of catch-all low grade criminal offense”¹¹ and as part of “the great grab bag, the dust bin, of the law,”¹² had become the most conspicuous weapon in the arsenal of states and municipalities seeking to address public health problems through litigation.

At the turn of the twenty-first century, some courts, mostly trial courts and a few appellate courts, expanded the boundaries of the tort to encompass any harm or annoyance that the public should not bear, even if the product manufacturer could not have been held liable under better-established claims, such as those resting on negligence, strict products liability, or misrepresentation. Mass plaintiffs’ tort attorneys, public health advocates, and some judges opined that the vantage point from which courts view mass products tort actions should be shifted from one seen through the lens of “traditional” products liability law to one categorized predominantly as environmental harms. Shortly after the parties settled the tobacco litigation, Massachusetts attorney general Scott Harshbarger predicted that *parens patriae* actions would be limited to lawsuits against tobacco manufacturers and gun manufacturers.¹³ Within a decade, however, similar lawsuits were filed against manufacturers of automobiles (seeking to hold them liable for the costs of abating the public nuisance of global warming), lead pigment and paint manufacturers, and the pharmaceutical company that produced the prescription drug OxyContin, which can be addictive if misused. In the modern consumer economy, any mass-produced product that contributes to causing harm results inherently in repetitive harms, which may then be characterized as a collective public health problem and, accordingly, in the legal context, arguably as a public nuisance. I focus on tobacco and lead pigment litigation in this book in part because these major *parens patriae* litigation cycles against product manufacturers have proceeded the furthest. Only Congress’s unusual legislation at the behest of the National Rifle Association and gun owners, which essentially ended all litigation claiming that gun manufacturers’ marketing practices in saturating inner cities with certain types of guns constituted a public nuisance,¹⁴ aborted yet another similar litigation cycle.

In chapter 7, I turn my attention to the litigation brought by the State

of Rhode Island against the manufacturers of lead pigment, where the remedy explicitly sought by the state was broad-ranging equitable relief designed to end childhood lead poisoning. In Rhode Island's action, unlike in the tobacco litigation, there was little pretense that the primary goal of the litigation was for the state to recoup as damages the funds it had been forced to spend on Medicaid payments and other past expenditures resulting from childhood lead poisoning. When the Rhode Island Supreme Court rejected the public nuisance action brought by the state against lead pigment manufacturers in 2008, just as the New Jersey Supreme Court had done a year earlier, the prospect of using public nuisance law to overcome traditional obstacles to recovery came crashing down. Because public nuisance had become the principal claim in *parens patriae* actions brought by state and municipal governments in public health litigation against product manufacturers, these decisions and others like them inflicted a serious blow, perhaps fatal, to the entire genre of litigation.

Despite the hopes of mass plaintiffs' attorneys and public health advocates that public nuisance law would provide the magical legal basis for curing product-caused public health problems, the decisions of the supreme courts of Rhode Island and New Jersey in slamming the courthouse door shut were well reasoned. Trial court judges in Rhode Island and elsewhere, in order to craft judicial solutions to public health problems, had significantly altered a number of important legal doctrines, including the appropriate boundaries of the state's *parens patriae* standing and the requirements for liability under public nuisance claims. The common law is not and should not be frozen in time. As I have written elsewhere, "Torts can be understood as the process through which courts address the issues of compensation for injuries from accidents and from wrongs in the face of changing economic and social conditions, ideologies, and scientific understandings."¹⁵ At the same time, the norms governing judgment within a common-law system—the craft of being a judge—impose requirements of principled "reasoned elaboration," particularly when the law is changed significantly. The few courts that had changed the law of *parens patriae* standing and of public nuisance seemed to have not fully appreciated the limits of this common-law tradition.

The newfound practice of employing civil lawsuits against product manufacturers to solve product-caused public health problems during the late 1990s and the first decade of the twenty-first century looked, at first blush, to have been promising. The decisions of the state supreme courts in New Jersey and Rhode Island suggest that such hope may have been more illusory than real, even though a similar action against pigment man-

ufacturers remains pending in the California courts.¹⁶ Further, even if courts were to have identified an appropriate legal basis for *parens patriae* litigation, I conclude in part III of this book that such litigation likely would be both ineffective and problematic within our constitutional structure of government.

In chapter 8, I evaluate the effectiveness of such lawsuits—whether resolved through settlement or through judicial decree—in achieving their public health objectives. Many of the public health advocates who endorsed the litigation by more than forty states against the tobacco industry were quite explicit in identifying these lawsuits as the most effective way to limit the sale and use of tobacco. A decade has passed since that litigation was settled through an agreement known as the Master Settlement Agreement (MSA). Today, many public health experts regard the MSA as a colossal failure, a capitulation that protected the tobacco industry's interests more than it did public health. The question that remains is whether the failure of this negotiated resolution was unique to the tobacco litigation or whether the characteristics of the bargaining process between government officials and their retained private attorneys, on one hand, and manufacturers, on the other hand, suggest that similar settlements are inherently likely to be unsatisfactory.

The Rhode Island experience offers no assurance that remedial decrees in cases fully litigated are more likely than negotiated resolutions to be effective in solving public health problems. Before the reversal of the Rhode Island trial court judgment in favor of the state, the trial court had begun to consider the remedial phases of the litigation. It already had become clear that the trial court's self-assigned responsibility to eliminate the conditions contributing to childhood lead poisoning in tens or hundreds of thousands of residences throughout the state was likely impossible for any trial court judge, however capable, to achieve.

In chapter 9, I consider how policy-making through *parens patriae* litigation fits within our constitutional framework for the allocation of powers among the three coordinate branches of government—the legislature, the executive, and the judiciary. In the tobacco and the lead pigment litigation, the state attorneys general, members of the executive branches of their respective states, endeavored to fundamentally alter the regulatory regimes previously enacted by Congress, the state legislature, or federal or state agencies, with ones that reflected their own visions of public welfare. Many of us would prefer a world in which fewer people smoked, childhood lead poisoning was a thing of the past, and handguns were less accessible. Yet even Robert B. Reich, former secretary of labor during President Bill Clin-

ton's administration, is troubled by the antidemocratic aspects of product regulation through litigation initiated by attorneys general.

The biggest problem is that these lawsuits are end runs around the democratic process. We used to be a nation of laws, but this new strategy presents novel means of legislating—within settlement negotiations of large civil lawsuits initiated by the executive branch. This is faux legislation, which sacrifices democracy to the discretion of . . . officials operating in secrecy.¹⁷

The state attorney general clearly has the authority to file claims on behalf of the state when the state government suffers a direct loss as a result of a defendant's conduct that violates established statutory or common-law norms. When the attorney general sues to supersede a product-regulatory structure already in place, however, he dramatically changes the traditional allocation of powers among the three coordinate branches of state government.

There can be no doubt that tobacco-related illnesses and childhood lead poisoning constitute serious public health problems. All too often in the past, Congress and state legislatures, influenced by lobbying and campaign contributions from tobacco companies and the owners of residential property, have failed in their missions to prevent or to remediate these public health problems. Resorting to the courts, sometimes a reflexive response among those of us educated in the years following the dramatic litigation successes of the civil rights and environmental law movements, seemed the logical response and the last best hope. Because the legislative process inherently involves lobbying and compromise, it appears to many scholars to be less principled and less elegant than public interest litigation. Yet legislatures and administrative agencies are the appropriate bodies within our constitutional systems of government to engage in *ex ante* macroregulation of products, and they are the only ones equipped to enact effective regulatory and financing measures to address widespread public health problems. In the concluding chapter of this book, I describe the essential features of legislatively enacted solutions to tobacco-related illnesses and childhood lead poisoning. Solutions to tobacco-related illnesses and childhood lead poisoning do exist. But when it comes to finding these solutions, when we turn to the courts, we are looking in all the wrong places.