

12-30-2023

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Recommended Citation

Douglas A. Kysar, *The Constitutional Claim to Individuation in Tort – A Tale of Two Centuries, Part 2*, 18 Brook. J. Corp. Fin. & Com. L. 155 (2023).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol18/iss1/9>

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THE CONSTITUTIONAL CLAIM TO INDIVIDUATION IN TORT – A TALE OF TWO CENTURIES, PART 2

*Douglas A. Kysar**

ABSTRACT

This Article—drafted to honor Professor Aaron Twerski on the occasion of his festschrift at Brooklyn Law School—draws inspiration from his classic 1989 article on market share liability. In that article, Professor Twerski observed that doctrinal confusions in market share liability arose from judges who “had their feet firmly planted in two different centuries—one foot in the nineteenth century and the other in the twenty-first century.” This Article takes inspiration from Twerski’s “two centuries” metaphor to examine the rise of constitutional objections by defendants to certain doctrinal innovations that attempt to adapt tort law to modern ways of causing, identifying, and redressing harm. Many of these objections can be understood as claims that defendants are constitutionally entitled to a body of tort law that remains anchored in the nineteenth century, notwithstanding some judges’ desire to drag tort into a more modern, regulatory modus operandi. For reasons stemming from tort law’s distinctive role in our classical liberal system of government, this Article argues that courts should decline defendants’ invitation to lock tort law in anachronistic amber.

INTRODUCTION

While conducting research for a project I had in mind on constitutional objections to novel tort liability theories, I rediscovered Professor Aaron Twerski’s article from 1989 on market share liability and the analytical flaws in *Sindell v. Abbott Laboratories*.¹ It is a short but characteristically insightful and persuasive work. It argues that *Sindell* and most of the cases that followed it seemed to be the product of judges who “had their feet firmly planted in two different centuries—one foot in the nineteenth century and the other in the twenty-first century.”² Rather than hewing to either a classical private law view of tort or a modern public law view, the market share courts instead seemed to be mashing up both views confusingly in the same opinions.

* I am grateful to Jessica Huang, Yale Law School ‘23, for outstanding research assistance and to Abby Lemert, Yale Law School ‘23, for extremely helpful conversations. Braeden Hodges, David Kamins, and the rest of the *Brooklyn Journal of Corporate, Financial & Commercial Law* team provided superb editorial support. I also thank Professor Andrew Gold and other participants of this symposium for extremely helpful comments on an earlier version of this Article. Finally, I am deeply grateful to Professor Aaron Twerski for the extraordinary mentorship and inspiration that he and his longtime collaborator, Professor James A. Henderson, Jr., have provided to me throughout my career.

1. Aaron D. Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOK. L. REV. 869 (1989).

2. *Id.* at 870.

Staunchly pulling courts toward the twenty-first century was the attractive idea that if all manufacturers of a harmful product were sued by all plaintiffs and subjected to the same market share liability doctrine by all courts, then, in the end, the manufacturers would pay for precisely the amount of harm they caused and the plaintiffs would receive precisely the amount of damages they deserved.³ Stubbornly anchoring judges in the nineteenth century was the grave discomfort they felt in departing so dramatically from the classic *A-hits-B* dyad of an individual tort case, even if the net theoretical result would be the same as if all those thousands of *A-hits-B* disputes had played out individually.

What was the result of this intertemporal tussle? As Twerski memorably said, “Logic did not easily emerge the victor over tradition.”⁴ The *Sindell* court, for instance, permitted the defendants to prove themselves out of an individual market share liability case by demonstrating that they did not distribute the drugs that harmed a particular plaintiff.⁵ This ability of defendants to exonerate themselves in an individual case may have made sense to members of “the nineteenth century causation club,”⁶ but it was logically inconsistent with the theory driving market share liability that presumed the impossibility of individualized proof of causation. Likewise, the *Sindell* court required plaintiffs to name as defendants companies who together represented a “substantial share” of the relevant market before the court would shift the burden to defendants to exonerate themselves.⁷ The *Sindell* majority apparently wanted to retain the semblance of an *A-hits-B* tort suit by ensuring there was a “substantial” chance the company actually responsible for a particular plaintiff’s harm was among the defendants joined in court. But if damages are limited to proportionate market share and premised on a theory of generic wrongdoing, why should the likelihood that the “real” causal culprit was joined in any particular case matter?⁸ These and

3. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F.Supp. 740, 823 (E.D.N.Y.1984) (citing *Sindell v. Abbott Lab’ys*, 607 P.2d 924, 937, (Cal. 1980)) (“Assuming every injured person will sue, looking at the total number of successful claims, each defendant will, at least theoretically, only be held responsible for that part of the damage that it caused to the community.”).

4. Twerski, *supra* note 1, at 872.

5. *Sindell v. Abbott Lab’ys*, 607 P.2d 924 (Cal. 1980).

6. Twerski, *supra* note 1, at 873. For a defense of *Sindell* on this point from a corrective justice perspective, see John C. P. Goldberg & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214 (Gerald J. Postema, ed., 2001).

7. *Sindell*, 607 P.2d at 937. In contrast, when adopting market share liability, the New York Court of Appeals refused to permit a defendant to exculpate itself by showing its product could not have caused the plaintiff’s injury. See *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

8. Compare *Sindell*, 607 P.2d at 937 (requiring market share plaintiffs to sue defendants representing a substantial share of the relevant product market), with *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 50–52 (Wis. 1984) (holding that a DES plaintiff “need commence suit against only one defendant” without requiring that a substantial share of the relevant market be represented). At the time of this writing, a fascinating apportionment case is playing out in Germany against the daunting factual backdrop of climate change. In the case, a Peruvian farmer is suing Germany’s largest

other doctrinal oddities suggested that market share courts lacked the full courage of their convictions, resulting in “a potpourri of classic tort law and radical resolution of causation related problems” that Twerski found untenable in the long run: “We cannot continue to live in a tort world that straddles two centuries.”⁹

Re-reading Twerski’s market share piece made me realize how much I had internalized its lessons and took them to be part of the received wisdom of the field rather than the original insights and careful thinking of one incomparable scholar. The article’s framing—“a tort world that straddles two centuries”¹⁰—is both clever and profound. By capturing such foundational conceptual struggles at the heart of tort theory in an unforgettable and accessible way, the framing is illuminating for scholars while also offering a wonderful teaching device for students (as does so much of Twerski’s work, it should be noted¹¹). The article displays many other hallmark virtues of a Twerski classic. It takes doctrine seriously and attempts to clarify confusion while offering pragmatic, nuanced improvements.¹² It engages genuinely and respectfully with opposing viewpoints without abandoning the author’s own principled stances. It speaks with great clarity and precision while adding enough wit and spice to be a genuine page-turner. And it stands the test of time, continuing to hold relevance and insight for tort law today, more than three decades after it was published.

Not bad for twelve-and-a-half law review pages.

This Article will not aspire to the standard of a Twerski classic in any respect other than brevity. It takes inspiration from Twerski’s “two centuries” metaphor to examine the rise of objections to certain doctrinal innovations (including, but not limited to, market share liability) attempting to adapt tort law to modern ways of causing, identifying, and redressing harm. Many of these objections can be understood as claims that defendants are constitutionally entitled to a body of tort law that remains anchored in the nineteenth century, notwithstanding some judges’ desire to drag tort into a

electricity producer for its contributions to climate change, which in turn is causing harm to the farmer through glacier loss and other climate-related impacts. The farmer is suing for precisely 0.47 percent of the expected costs he and his village face in addressing flood risks from glacier melt—the same percentage that the defendant, RWE, is estimated to have contributed to anthropogenic greenhouse gas emissions since the beginning of industrialization. See *Essen Oberlandesgericht*, 2015, 2 O 285/15, climate change litig. (Ger.) <http://climatecasechart.com/non-us-case/liiuya-v-rwe-ag/>.

9. Twerski, *supra* note 1, at 882.

10. *Id.* at 882; see also Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473 (1986).

11. For another fabulous teaching tool, see the animating metaphors in Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1 (2008).

12. At a time when many question the relevance and value of scholarship to judicial decision making, Twerski’s work offers a remarkable counterpoint: As of April 4, 2023, Twerski’s work has been cited approximately 139 times by courts according to a Westlaw search (“Aaron /3 Twerski” within Westlaw’s ALLCASES database).

more modern, regulatory *modus operandi*. While doctrinally “[i]t is one of the axioms of tort law that a defendant may not be held liable unless [they] caused the injury about which the plaintiff is complaining,”¹³ the defense bar wants to elevate this axiom to a constitutional requirement.

Interestingly, these objections can be seen as tort defendants’ counterparts to the important argument that Professor John Goldberg makes in his own classic article, “The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs.”¹⁴ While Goldberg argues that plaintiffs have a constitutional right “to a body of law that empowers individuals to seek redress against persons who have wronged them,”¹⁵ defendants increasingly argue that a similar fundamental claim to a certain kind of tort law entitles them to immunity from venturesome theories—such as market share liability, public nuisance, and other doctrines—that might fairly be characterized as modern tort law “stretch assignments.”¹⁶ A common theme in much of the argumentation across these contexts is an assertion that tort plaintiffs are required to establish their claims in an individuated fashion. Due process, the argument goes, limits the ability of courts to award recovery in contexts that too significantly depart from a classic *A-hits-B* scenario.

This Article examines the constitutional claim to individuation in tort with its attempt to decisively anchor courts within a nineteenth-century conception of tort law.¹⁷ The venturesome tort theories that attract fundamental fairness objections from defendants share the same twenty-first-century impulses that led courts to develop market share liability. The resulting clash feels much like an awkward straddling of two centuries, as Twerski brilliantly put it. At some point, tort law’s temporal straddling must yield to gravity. The field did not endure these multiple centuries as a coherent and consistent body of law by digging in its heels amidst shifting terrain. It endured instead by altering its stance in ways that are at times

13. Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-In-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1379 (2000).

14. 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).

15. *Id.* at 529.

16. The term “stretch assignment” is used in the management literature to refer to a project or task that exceeds one’s current knowledge or skill level. The idea is that a stretch assignment will challenge the individual by placing them in an uncomfortable situation in order to learn and grow. See generally C.D. McCauley et al., *Linking Management Selection and Development through Stretch Assignments*, 34 HUM. RES. MGMT. 93, 93–115 (1995), <https://doi.org/10.1002/hrm.3930340107>.

17. This Article is by no means first to address this topic. Essential earlier contributions include Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873 (2005); Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court’s Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109 (2012); Jill Wieber Lens, *Tort Law’s Deterrent Effect and Procedural Due Process*, 50 TULSA L. REV. 115 (2014).

remarkably agile while remaining rooted in, and explicable against, the past.¹⁸

That common law capacity for evolution, however, would be impeded by the constitutional overlay that some tort defendants seek to impose. Just as the ability of legislatures to restrict tort remedies for plaintiffs might in a real sense be limited by plaintiffs' right of access to a body of law that affords civil recourse,¹⁹ judges' ability to adapt tort law in the face of new social harms would be significantly truncated if the defense bar successfully establishes a wide-ranging constitutional right to individuation. As Goldberg has shown, the former constraint is deeply rooted in our constitutional history and the basic framework of our classical liberal government.²⁰ Conversely, the latter constraint would be an inadvisable self-restriction of judicial power, at least so long as an adequate replacement for tort law has not been legislatively adopted.

I. THE DEFENDANT'S DAY IN COURT

The idea that defendants have a claim to individualized tort adjudication—a “defendant’s day in court”²¹—resonates with the view endorsed by the Supreme Court in the class action procedure case of *Wal-Mart Stores, Inc. v. Dukes*.²² In that case, lower federal courts certified a class of approximately one and a half million current and former employees of Wal-Mart who alleged employment discrimination due to the discretion the company vested in local supervisors over pay and promotion matters. The class sought injunctive and declaratory relief, as well as monetary awards of back pay. Per Justice Scalia, the Court held that the class could not be certified under the standards of Federal Rule of Civil Procedure 23. With regard to the claim for back pay, the Court rejected the lower courts’ proposal to calculate class-wide awards based on the evaluation of a statistical sample of class members’ claims. This approach, which Justice Scalia described as “Trial by Formula,”²³ was deemed impermissible because the defendant

18. See Andrew S. Gold & Henry E. Smith, *Restatements and the Common Law*, in AM. L. INST.: A CENTENNIAL HISTORY 458 (Andrew S. Gold & Robert W. Gordon eds., 2023) (describing the need for common law evolution and reform to proceed in a manner that reflects “architectural fit” with the pre-existing body of doctrine).

19. See Goldberg, *supra* note 14, at 529 (arguing the right of access to a law of redress “can and should be judicially enforced by establishing meaningful but capacious limits on the ways in which, and the reasons for which, legislatures may undertake plaintiff-unfriendly tort reform”); see also JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 146 (2020); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *Torts as Wrongs*, 88 TEX. L. REV. 917, 980–83 (2010).

20. See Goldberg, *supra* note 14, at 524 (arguing that “tort law, understood as a law for the redress of private wrongs, forms part of the basic structure of our government”).

21. Lens, *supra* note 17, at 136–50 (discussing “A Defendant’s Right to a Day in Court?”).

22. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

23. *Id.* at 367.

“Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay.”²⁴

The *Dukes* majority alluded to Due Process Clause concerns, but it did not need to resolve them because the Rules Enabling Act bars federal courts from interpreting Rule 23 to “abridge, enlarge or modify any substantive right.”²⁵ What if a defendant’s opportunity for individualized adjudication was abridged, not by a procedural rule, but rather by a change in the underlying substantive law itself? In such a case, the Rules Enabling Act and similar state procedural bars on abridging substantive rights would not be implicated. As defendants argue, however, principles of due process might still limit courts’ ability to relax individualized adjudication through the development of tort doctrine. After all, in cases such as *State Farm Mutual Auto Insurance Co. v. Campbell*²⁶ and *Philip Morris USA v. Williams*,²⁷ the Supreme Court has eagerly utilized the Due Process Clause to require state punitive damages remedies to hold a fair connection to defendants’ conduct and plaintiffs’ injury. Might judges be persuaded to follow a similar constitutional impulse to cabin tort doctrine in other contexts, such as duty and causation?

A. MARKET SHARE LIABILITY

A prominent example of such an effort came in response to the same doctrinal innovation featured in Twerski’s “Market Share Liability—A Tale of Two Centuries.” Despite initial enthusiasm, market share liability has not been adopted widely outside the context of the drug diethylstilbestrol (DES), where it was initially developed. One important exception is that of governmental plaintiffs suing multiple manufacturers of a toxic chemical that contaminates water supplies in a manner that cannot be individually traced.²⁸

24. *Id.* at 366. When the California Supreme Court interpreted its state class action procedure to require trial judges to afford individualized presentation of affirmative defenses in most instances, the court similarly cited the fact that “the class action procedural device may not be used to abridge a party’s substantive rights.” *Duran v. U.S. Bank Nat’l Ass’n*, 325 P.3d 916, 935 (Cal. 2014). Unlike *Dukes*, the *Duran* court expressly embraced a constitutional basis for its holding: “These principles derive from both class action rules and principles of due process.” *Id.* For a sophisticated defense of sampling techniques in the context of aggregate litigation, see Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

25. 28 U.S.C. § 2072(b); see also *In re Fibreboard Corp.*, 893 F.2d 706, 711–12 (5th Cir. 1990) (rejecting proposed statistical sampling of several thousand asbestos claims because “[t]hat procedure cannot focus upon such issues as individual causation, but ultimately must accept general causation as sufficient, contrary to Texas law”).

26. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (“[C]onduct must have a nexus to the specific harm suffered by the plaintiff.”); *id.* at 423 (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”).

27. *Philip Morris USA, v. Williams*, 549 U.S. 346, 354 (2007) (finding “no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others”).

28. See, e.g., *State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015) (upholding verdict for the state of New Hampshire on a market share liability basis against sellers of gasoline with the additive

In such contexts, the court's reluctance to depart from the *A-hits-B* dyad is alleviated by the aggregate nature of the public plaintiff. Although it remains impossible to demonstrate which defendant's chemical contaminated which particular water source, the governmental plaintiff sues in regard to *all* affected sources, such that market share evidence covering the relevant geographic area can be used to apportion liability for all claims in a single lawsuit.²⁹

Another important exception to the limited impact of market share liability has been the common law of Wisconsin, where the state's high court in *Collins v. Eli Lilly Co.* devised a distinctive approach premised on the fungibility of defendants' contributions to the overall risk level facing plaintiffs, rather than exclusively on the physical interchangeability of DES.³⁰ Strikingly, the court imposed joint-and-several liability, rather than proportionate damages, and thus shifted the burden to the defendants to causally exonerate themselves or implead other manufacturers to shoulder damages based on market share or other means of apportionment.³¹

Twenty-one years later, in *Thomas v. Mallett*, the court applied the risk contribution theory for a minor plaintiff alleged to have been harmed by ingesting lead paint at two different homes as an infant.³² The plaintiff could not determine which among several lead pigment manufacturers produced

methyl tertiary butyl ether (MTBE), which caused extensive groundwater contamination); Rhode Island v. Atl. Richfield Co., 357 F. Supp. 3d 129, 137–38 (D.R.I. 2018) (describing the state plaintiff's difficulty in tracing individual water source contamination back to particular defendants in the MTBE context as “[t]urtles all the way up,” but holding that “to shield tortfeasors from liability because they had the foresight (or luck) to pollute without demarcation would be contrary to Rhode Island law and policy”); Suffolk Cnty. Water Auth. v. Dow Chem. Co., 987 N.Y.S.2d 819 (Sup. Ct. 2014) (upholding denial of motion to dismiss by defendant manufacturers of perchloroethylene (PERC) in a market share water contamination suit brought by public water agency).

29. It is this factor, for instance, that seems to have led the federal district court to predict the Rhode Island Supreme Court would shift the burden of causal proof onto water contamination defendants notwithstanding the fact that the state high court previously rejected market share liability in the DES context for private plaintiffs. See *Gorman v. Abbott Lab's*, 599 A.2d 1364 (R.I. 1991). A notable market share ruling in favor of purported classes of *private* plaintiff well owners in the MTBE context is *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001). There, the court permitted a market-share theory of liability to go forward for well owners who alleged that oil companies conspired to mislead the government and public that concentrations of MTBE were acceptable. See Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151 (2004). Again, the aggregate nature of that multi-district litigation proceeding may have helped to alleviate any judicial discomfort with expanding market share liability beyond the DES context.

30. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 45–50 (Wis. 1984). The *Collins* court relied heavily on arguments developed in Rostron, *supra* note 29.

31. *Collins*, 342 N.W.2d 37 at 45–50; *but see* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So.2d 1239, 1255 (Fla. 1996) (ruling unconstitutional provisions of a Florida statute purporting to give the state authority to combine both market share liability and joint-and-several liability when recovering health care expenditures made on behalf of Floridians and occasioned by the tortious conduct of others).

32. *Thomas v. Mallett*, 701 N.W.2d 523, 551 (Wis. 2005).

the toxins he ingested “due to the generic nature of the pigment, the number of producers, the lack of pertinent records, and the passage of time.”³³ Nevertheless, the court extended its risk contribution theory to the lead pigment context, reasoning that although “[t]he procedure is not perfect and could result in drawing in some defendants who are actually innocent,”³⁴ such concerns are outweighed by the public interest in affording a remedy to wrongfully injured plaintiffs. The defendants in *Thomas* lodged a number of constitutional challenges to the extension of the risk contribution theory, but the Wisconsin high court determined that consideration of such challenges was not ripe at the summary judgment stage.³⁵

The Wisconsin Legislature later passed a statute overruling *Thomas*, stating that the case “was an improperly expansive application of the risk contribution theory of liability”³⁶ A Seventh Circuit panel subsequently found that retroactive application of the statute was barred by the Wisconsin Constitution for claims that accrued prior to passage.³⁷ The same court rejected on the merits the defendants’ arguments that Wisconsin’s risk contribution approach to market-share liability violated the defendants’ constitutional rights to property and substantive and procedural due process. In addition to concerns about retroactivity, the defendants challenged Wisconsin’s risk contribution theory because it “dispenses with the traditional tort requirement that the plaintiff prove that the defendant caused the injury at issue.”³⁸ Citing the substantial deference owed to state courts as they develop the common law—as well as the history of alternative liability theories, such as the burden-shifting approach of *Summers v. Tice*³⁹—the Seventh Circuit panel concluded “that risk-contribution theory is not arbitrary and irrational, nor is it unexpected and indefensible.”⁴⁰

In their unsuccessful attempt to petition the United States Supreme Court for review, the defendants again argued that the panel’s decision violated their due process rights “by eliminating any meaningful causation requirement,”⁴¹ which they took to be a feature of the common law so fundamental as to be constitutionally mandated:

Ignoring *Philip Morris, State Farm*, and centuries of tort law, the Seventh Circuit’s holding invites states to impose potentially limitless liability on a defendant for harms it did not cause, so long as the defendant is among a “pool” of suppliers that “could” be guilty. . . . The court’s dangerous theory

33. *Id.* at 532.

34. *Id.* at 565.

35. *Id.* The *Thomas* plaintiff later lost at trial after a jury determined he had not suffered medical injury. See *Thomas ex rel. Gramling v. Mallett*, 795 N.W.2d 62 (Wis. Ct. App. 2010).

36. WIS. STAT. §895.046 (2015).

37. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014).

38. *Id.*

39. *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948).

40. *Gibson*, 706 F.3d at 623.

41. *Am. Cyanamid Co. v. Gibson*, No. 14-849, 2015 WL 241883, at *1 (U.S. Jan. 16, 2015).

is that the Due Process Clause permits a state to dispense with a causal link tying the defendant to the plaintiff's injury.⁴²

The manufacturers also argued that the Wisconsin risk contribution theory violated due process safeguards against excessively harsh retroactive laws, relying on a test the petitioners thought could be cobbled together from the badly fractured opinions of *Eastern Enterprises v. Apfel*.⁴³ Lawmakers generally have “considerable leeway to fashion economic legislation,” including through “retroactive liability to some degree.”⁴⁴ However, retroactive economic liability becomes problematic when it is so severe, disproportionate, or unexpected as to violate the ban on arbitrary and irrational laws. Petitioners argued that the Wisconsin risk contribution theory, as applied to them, was just such a law.⁴⁵

Here, one sees the two-century straddle on full display. Not knowing whether to conceive of the risk contribution theory as a modern regulatory device or a private law doctrinal development, the petitioners attacked it from both angles. Understood as a regulatory device, the risk contribution theory calls to mind legislative funding schemes such as the coal industry health benefits law at issue in *Eastern Enterprises* or the sprawling retroactive liability for hazardous waste imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁴⁶ This line of attack was a difficult one. Although five justices found the law at issue in *Eastern Enterprises* unconstitutional, they could not agree on a rationale,⁴⁷ and retroactive economic legislation continues to enjoy a healthy presumption of constitutionality.⁴⁸ Moreover, as the Seventh Circuit noted,

42. *Id.* at *13.

43. *E. Enter. v. Apfel*, 524 U.S. 498, 499 (1998).

44. *Id.* at 528.

45. *Id.* at 529.

46. 42 U.S.C. § 9601 (2018).

47. Justice Kennedy in concurrence and the four dissenting justices agreed on the general due process standard applicable to retroactive economic liability schemes but disagreed on the application to the law at issue in *Eastern Enterprises*. The four-justice plurality opinion analyzed the challenged law as a constitutional taking, using a similar set of factors as the due process analysis that asked whether the law “imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.” *E. Enter.*, 524 U.S. 498, at 528–29.

48. *See* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (“It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”). In the early years following its passage, the Superfund liability scheme established by CERCLA was also challenged as an unconstitutional law for imposing “potentially crippling joint and several liability for actions that were neither illegal nor actionable when taken.” George Clemon Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW. 215, 215 (1986). Such challenges have been unsuccessful to date. *See* *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 188–89 (2d Cir. 2003).

“even more deference is owed to *judicial* common-law developments, which by their nature must operate retroactively on the parties in the case.”⁴⁹

Perhaps for this reason, the petitioners also argued that the common law of tort must maintain traditional causation requirements to avoid being stricken as arbitrary and irrational. Here, the petitioners embraced something like the tightly relational view of tort famously expressed by Judge Cardozo in *Palsgraf v. Long Island Railroad Co.*⁵⁰ and elaborated by Goldberg and his frequent collaborator Professor Benjamin Zipursky in their civil recourse theory of tort law. From this perspective, tort is a “gallery” of private law obligations between specific parties rather than a regulatory scheme of public law duties to society at large.⁵¹ Tort’s various doctrines of duty, breach, causation, and harm “hang together” in a very particular way: They work to constitute the relationship of wrongdoing between the defendant’s conduct and the plaintiff’s harm that justifies a court interceding into private ordering and offering a wronged victim redress.⁵² When the common law ventures too far outside that configuration—such as when a state seeks to “use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties”⁵³—the Due Process Clause steps in to restore the traditional relational structure of tort.

Or, at least, so argued the petitioners. The Seventh Circuit, in contrast, saw the Wisconsin risk contribution theory as falling comfortably within “the breathing space that commonlaw development requires.”⁵⁴ In so concluding, the court endorsed an expansive regulatory understanding of the Wisconsin court’s goal in crafting risk contribution theory:

Relaxing the standard of causation was justified in favor of the innocent plaintiff and against the risk-creating manufacturers. In addition to the culpability of the manufacturers and the innocence of the plaintiff, *Thomas* also reasoned that the manufacturers are “in a better position to absorb the cost of the injury,” because they “can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business.”⁵⁵

On this view, due process does not require the kind of tight, dyadic *A-hits-B* relation of wrongdoing typified by primitive torts like battery. The premise of Wisconsin’s risk contribution theory is that each defendant

49. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014). (emphasis in original).

50. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928).

51. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 19, at 237–38 (“Tort law is a constructed and curated gallery of wrongs.”).

52. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. L. REV. 341, 342 (2011).

53. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

54. *Gibson*, 760 F.3d at 623.

55. *Id.* at 624 (citations to *Thomas* omitted).

“contributed to the risk of injury to the public.”⁵⁶ The plaintiff must trace their injury to that aggregate *public* risk, but further tightening of the causal link to a particular defendant is not required. The Wisconsin court saw this open tolerance of rough justice as simply “the price the defendants, and perhaps ultimately society, must pay to provide the plaintiff an adequate remedy under the law.”⁵⁷

B. PUBLIC NUISANCE

Lead paint figures in another important example of the defense bar’s effort to constitutionally mandate individuated tort adjudication. A California intermediate appeals court in 2017 upheld a sizable award against three suppliers of white lead carbonate pigment for use in residential interior paint.⁵⁸ A coalition of California cities and counties sued the suppliers in public nuisance, seeking an abatement fund to assist with the massive environmental health challenge of removing lead paint from homes and apartments. The government plaintiffs argued at trial that the defendants’ conduct in aggressively promoting the use of lead paint decades earlier—despite their awareness at the time of the dangerous toxic properties of lead, particularly to infants and young children—constituted knowing assistance in the creation of a public nuisance. Sitting without a jury, the trial judge agreed and ordered the defendants to pay “\$1.15 billion into an abatement fund that would pay for lead inspections, education about lead hazards, and remediation of particular lead hazards inside residences.”⁵⁹

56. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49 (Wis. 1984) (emphasis added). This approach is similar to that which Professor Mark Geistfeld calls “evidential grouping,” a conceptualization allowing him to argue that market-share liability is not such a radical approach to causation after all. See Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 447 (2006). And it almost goes without saying that the approach also calls to mind Judge Andrews’s dissent from *Palsgraf*, equally famous as Judge Cardozo’s majority opinion, in which Andrews argued that wrongful acts are

wrong not only to those who happen to be within the radius of danger but to all who might have been there—a wrong to the public at large. . . . Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect *A, B* or *C* alone.

Palsgraf v. Long Island R. Co., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

57. *Collins*, 342 N.W.2d at 52. Several plaintiffs in this long-running consolidated litigation eventually received substantial monetary awards at trial. However, the verdicts were reversed on appeal, with the court determining that the trial judge had impermissibly allowed defendants to be held liable under the risk contribution theory in their capacity as finished product paint manufacturers rather than only as lead paint pigment manufacturers. *Burton v. E.I. du Pont de Nemours and Co.*, 994 F.3d 791, 802 (7th Cir. 2021). Late in 2022, the litigation appeared to peter out at last, with the trial judge ruling that summary judgment motions won by defendants against certain plaintiffs applied to all remaining claimants, even though the judge acknowledged that “ending the claims of 150+ injured plaintiffs under the doctrines of law of the case and issue preclusion may seem harsh.” See *Burton v. Am. Cyanamid Co.*, 588 F. Supp. 3d 890, 910 (E.D. Wis. 2022).

58. *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

59. *ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d at 525.

In addition to challenging the evidentiary basis of their liability, the defendants on appeal raised due process objections that sounded in a nineteenth-century register:

Defendants maintain that the court's finding of a "collective nuisance" deprived them of due process because they did not have the opportunity to inspect each individual property and defend against their liability on a residence-by-residence basis. They insist that plaintiff was required to identify the location of each individual property in order to establish a public nuisance. Defendants claim that the court's order cannot be upheld because there was no evidence that any individual defendant's lead was present in any specific location. . . . They contend that due process forbids requiring any one defendant to abate a nuisance created by "others' products."⁶⁰

The intermediate California appeals court rejected these arguments, reasoning that because the claim was brought by governmental plaintiffs, "[t]his is not a class action, and no individuals seek to recover anything from defendants."⁶¹ Instead, governmental entities sought to challenge the defendants' promotional activities as contributing to the lead paint public health crisis. In the court's view, that conduct could appropriately ground what might be thought of as a *Group of As-hits-Group of Bs* cause of action. To the extent that unfairness might result from collective liability of this sort, the court felt confident that any constitutional concerns could be dealt with simply by shifting the burden of proof to defendants to establish individual shares of liability.⁶²

After the California Supreme Court denied review, the defendants sought relief from the United States Supreme Court, contending that "[t]he Due Process Clause does not permit states to impose liability in the absence of meaningful proof of causation."⁶³ To support this argument, the petitioners invoked a nineteenth-century vision of society as composed nearly exclusively of individuals in a private sphere and of tort law as a means of recourse that must operate through "one-on-one traditional modes of adjudication."⁶⁴ To the petitioners, California's public nuisance law so drastically departs from this vision as to become constitutionally infirm:

60. *Id.* at 557–58.

61. *Id.* at 558.

62. *See, e.g., id.* ("[N]othing precludes a defendant from testing the lead paint at specific locations during the remediation process and seeking to hold a fellow defendant liable for a greater share of the responsibility. The same is true of evidence that the hazardous condition is 'the owner's fault' or that it is not hazardous.")

63. Reply Brief for Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84), 2018 WL 4216400, at *2.

64. Petition for Writ of Certiorari for Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84), 2018 WL 4216400, at *22 (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 710–11 (5th Cir. 1990)).

Respondent believes the “community aspect” of public nuisance law excuses the need to prove traditional causation or reliance by actual victims. But a “community” is nothing if not the aggregate of “many individuals,” and aggregate liability may not be based solely on statistical evidence (let alone the supposition that sufficed here) that the defendant caused injury to some but not all the individuals. Invoking public nuisance or “community harm” does not repeal those basic constitutional requirements. While a legislature might be able to rely on tentative and generalized suppositions or likely causes, due process does not permit a court to order defendants to part with hundreds of millions of dollars without a demonstration that the defendants’ own conduct actually caused the relevant harm. In the case of lead paint inside individual residences, that basic requirement demands actual proof of what particular harms resulted from each defendant’s own conduct.⁶⁵

Numerous amici weighed in with briefs that sounded on this theme. The Washington Legal Foundation, for instance, argued that “[t]he Due Process Clause protects deeply rooted fundamental rights,” which include “the right to be free of tort liability in the absence of causation.”⁶⁶ The Chamber of Commerce of the United States complained that “dispensing with traditional procedures [relating to causation] so that 1.5 million individual, private nuisance claims could all be decided together was patently unfair and disregarded petitioners’ due process rights.”⁶⁷ The Pacific Legal Foundation similarly contended that “[s]uch a weak and attenuated causation analysis raises serious due process concerns.”⁶⁸ Citing the court below’s joint and several liability holding and the defendant’s inability to individually examine and contest a causal connection to each affected household, the National Association of Manufacturers and co-amici decried the “due process concerns with putting all manufacturers into a causation Cuisinart, where causation for individual companies is blended together.”⁶⁹ A group of distinguished legal scholars, including Professor Twerski, argued that “imposing massive liability for conduct that is decades-old and was lawful

65. Reply Brief for Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84), 2018 WL 4216400, at *5.

66. Brief for Wash. Legal Found. as Amicus Curiae Supporting Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (No.18-84), 2018 WL 3969948, at *7.

67. Brief for Chamber of Com. of the United States of America as Amicus Curiae Supporting Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (Nos. 18-84 & 18-86), 2018 WL 4003045, at *13.

68. Brief for Pac. Legal Found. as Amicus Curiae Supporting Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84), 2018 WL 4003046, at *6.

69. Brief for Nat’l Ass’n of Mfrs. et al. as Amici Curiae Supporting Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (Nos. 18-84 & 18-86), 2018 WL 3993374, at *14.

when it occurred, without proof of any traceable injury or, indeed, any specific injury at all, violates due process.”⁷⁰

Notwithstanding this outpouring of support, the Supreme Court did not grant certiorari,⁷¹ thus leaving the constitutional status of California’s public nuisance law uncertain for the time being. With subnational government plaintiffs increasingly resorting to public nuisance litigation for widespread and unaddressed harms such as climate change, the opioid epidemic, gun violence, tobacco use, and the subprime mortgage crisis, the defense bar is likely to keep pressing constitutional arguments such as these in response. Nevertheless, with the underlying social crises receiving inadequate attention from other branches of government, at least some states and cities will not give up their courtroom efforts. The motivation of these public plaintiffs will be, admittedly, the collective one of pursuing public responses to public problems. Nonetheless, as discussed below,⁷² their efforts *can* be comfortably placed within a nineteenth-century framework of tort as a law of civil recourse.⁷³ At least, if one is willing to stretch.

C. PRODUCTS LIABILITY

The felt obligation to provide plaintiffs an adequate remedy also explains the effort of a few courts to impose failure-to-warn liability on brand-name drug manufacturers even when a plaintiff has ingested a generic alternative to the brand-name product, such that the plaintiff has no physical causal connection to the brand-name manufacturer.⁷⁴ Following the Supreme Court’s decision in *PLIVA, Inc. v. Mensing*,⁷⁵ consumers of generic drugs have little recourse at common law to challenge inadequate warnings, thus inspiring at least one court to attach liability to the brand-name manufacturer’s representations to regulators and the public in general, even without a direct physical connection to the plaintiff. Likewise, when courts reject the bare metals defense in favor of liability for manufacturers of a product that will become integrated with asbestos,⁷⁶ they do so in light of the

70. Brief for Distinguished Legal Scholars as Amici Curiae Supporting Petitioners, *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (Nos. 18-84 & 18-86), 2018 WL 3969960, at *19.

71. *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018) (denying cert.).

72. See *infra* text accompanying notes 112–116.

73. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. 350, 395 (2011).

74. See *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 677 (Ala. 2014). The *Weeks* decision was subsequently overruled by the Alabama legislature. See *Blackburn v. Shire U.S., Inc.*, No. 1210140, 2022 WL 4588887, at *6 (Ala. Sept. 30, 2022). It bears noting that cases like *Weeks* remain outliers. See *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 938 (6th Cir. 2014) (observing that “an overwhelming majority of courts, in at least fifty-five decisions from twenty-two states,” have rejected innovator liability).

75. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 604 (2011).

76. Under the component parts/raw materials doctrine—sometimes referred to as the bare metals defense—a component part manufacturer or raw material supplier is generally not liable for injuries

failure of Congress to adopt an alternative means of addressing the vast national health tragedy that asbestos has wrought. With serial bankruptcies throughout the asbestos industry depleting available funds for recovery, some courts have felt compelled to search further through the supply chain to ensure financial recourse for afflicted plaintiffs.⁷⁷ Again, liability attaches in such cases even though the defendant's product does not, strictly speaking, have a direct physical causal connection to the plaintiff's injury.⁷⁸

When the Supreme Court confronted the bare metals defense in *Air and Liquid Systems Corp. v. Devries*,⁷⁹ it led to precisely the kind of nineteenth- and twentieth-century "potpourri" that Twerski complained of in "A Tale of Two Centuries."⁸⁰ In *Devries*, Navy veterans who had developed cancer from asbestos exposure brought negligence suits against companies whose equipment required subsequent addition of asbestos insulation or asbestos parts in order to function. Writing for the majority, Justice Kavanaugh rejected the bare metals defense in favor of a tailored test that permitted failure-to-warn liability against manufacturers of integrated products in certain circumstances, even if their product was initially delivered without hazardous components.⁸¹ Justice Kavanaugh appeared to support this approach through a twenty-first-century public law view of tort: "[T]he product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product."⁸² But, in a passage that might be mistaken for mere window-dressing, the justice also

caused by a finished product into which the component part or raw material is integrated. The supplier will only be liable if the component part or material itself was defective and caused harm. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (AM. L. INST. 1998). A majority of states have either expressly adopted or cited with approval the *Restatement (Third) of Torts* formulation of the doctrine. See *Davis v. Komatsu Am. Indus. Corp.*, 42 S.W. 3d 34, 38 (Tenn. 2001) (collecting cases).

77. See *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 676 (Iowa 2022). In *Beverage*, the Iowa Supreme Court interpreted a state asbestos litigation reform statute that included a broadly worded immunity provision for non-manufacturers such that it did not bar premises liability asbestos exposure suits. In so ruling, the court emphasized that "[w]e have often repeated the rule that statutes will not be construed as taking away common law rights existing at the time of enactment unless that result is imperatively required." *Id.* at 686 (internal quotation omitted) (quoting *Ford v. Venard*, 340 N.W.2d 270, 273 (Iowa 1983)).

78. As Professor Jane Stapleton memorably documented, courts have relaxed causation doctrine in asbestos cases in other ways that depart significantly from traditional proof requirements. See Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, 74 BROOK. L. REV. 1011, 1011–12 (2009).

79. *Air and Liquid Sys. Corp. v. Devries*, 139 S. Ct. 986, 992 (2019).

80. Twerski, *supra* note 1, at 882.

81. See *Devries*, 139 S. Ct. at 996 ("In the maritime tort context, we hold that a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."). For similar state law holdings, see *In re Asbestos Litig.*, 293 A.3d 154 (Sup. Ct. Del. 2023); *Whelan v. Armstrong Int'l Inc.*, 231 A.3d 640 (N.J. 2020).

82. *Devries*, 139 S. Ct. at 994 (citing GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 311–18 (1970)).

invoked “[m]aritime law’s longstanding solicitude for sailors,” suggesting that those who undertake to “venture upon hazardous and unpredictable sea voyages” are entitled to invoke the reparative power of tort in light of their status and vulnerability.⁸³ While twenty-first-century instrumentalists dismiss such status-based tort doctrines as “legal mumbo jumbo,”⁸⁴ more classically oriented theorists recognize that the doctrines play a fundamental constitutive role in tort law.⁸⁵

In *Devries*, one also catches a glimpse of the effort to constitutionally consign common law judges to the “nineteenth century causation club.”⁸⁶ To be sure, the Court did not need to rule in a constitutional register because the case arose under admiralty law, and the pertinent substantive doctrine could be fashioned by the justices directly. But Justice Gorsuch’s dissent can be read to invoke the kind of fundamental fairness concerns that would motivate a due process challenge if the Court were reviewing a comparable state common law doctrine. After first arguing in favor of the bare metals defense through an explicitly instrumentalist lens,⁸⁷ Justice Gorsuch then switched to a nineteenth-century view to criticize the majority’s “novel duty”:

Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people’s products. It is a duty they could not have anticipated then and one they cannot discharge now. They can only pay. Of course, that may be the point. . . . The bare metal defendants may be among the only solvent potential defendants left. But how were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.⁸⁸

Not surprisingly, given the shifting temporal registers of both the majority and dissenting opinions, *Devries* has been taken by leading torts scholars from both civil recourse and instrumentalist camps as evidence

83. *Id.* at 995 (internal quotations omitted) (quoting *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 273, 285 (1980)).

84. *Cf. Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 513 (7th Cir. 2007) (discussing the heightened standard of care imposed by the innkeeper rule along with the doctrine of intervening criminal acts and dismissing both as undertheorized doctrinal platitudes); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557–58 (7th Cir. 1987) (questioning whether the innkeeper rule “is a rule” and explaining the doctrine in purely instrumental terms as based on a hotel’s asymmetric informational advantage over guests).

85. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA L. REV. 925, 947–48 (1981).

86. Twerski, *supra* note 1, at 873.

87. *See, e.g., Devries*, 139 S. Ct. at 997 (“The manufacturer of a product is in the best position to understand and warn users about its risks; in the language of law and economics, those who make products are generally the least-cost avoiders of their risks.”).

88. *Id.* at 999–1000.

supporting their approaches.⁸⁹ The obvious response, as Professor Guido Calabresi and Spencer Smith note, is that both camps are right: Tort law has a “private side” and a “public side,” and “[i]f you fixate only on one side or the other, you fail to appreciate the whole of tort law.”⁹⁰

II. CAN TORT HAVE AN ASYMMETRIC CONSTITUTIONAL BASIS?

As noted above, when the Wisconsin legislature passed a tort reform statute to overrule *Thomas*, a Seventh Circuit panel held that retroactive application of the statute to plaintiffs with already accrued claims would violate those plaintiffs’ state constitutional due process rights. The same panel rejected the defendants’ various arguments regarding the unconstitutionality of the risk contribution theory of liability, including those that were premised on the retroactive application of the theory to conduct by defendants that occurred decades earlier. On the surface, this asymmetry is puzzling given that the *Thomas* holding and its legislative override would seem to represent similarly impactful and perhaps unexpected interventions: What made one change of law unconstitutional but not the other?⁹¹

To appreciate why this constitutional asymmetry might make sense, it is helpful to note that both the *Collins* and *Thomas* cases in Wisconsin relied heavily on the state’s constitutional right to remedy provision in crafting and expanding the risk contribution theory of liability. That provision reads as follows:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.⁹²

The right to remedy provision helped inform the Wisconsin court as it grappled with thorny questions, such as how to allocate the burden of establishing shares of causal responsibility or whether to exonerate the lead manufacturers from responsibility given that the plaintiff in *Thomas* had obtained partial relief against his landlords.⁹³ Thus, when the Wisconsin court

89. See Catherine M. Sharkey, *Modern Torts: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1424 (2021); Benjamin C. Zipursky & John C.P. Goldberg, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 196–97 (2021).

90. Guido Calabresi & Spencer Smith, *On Tort Law’s Dualisms*, 135 HARV. L. REV. F. 184, 184 (2021).

91. See *Gibson v. Am. Cyanamid Co.*, 763 F.3d 600, 625 (7th Cir. 2014). The Seventh Circuit made the debatable claim that the earlier *Collins* case in the DES context meant that the *Thomas* holding was not unexpected. As the defendants pointed out, the *Collins* case itself postdated the challenged conduct by many years.

92. WIS. CONST. art. I, § 9.

93. See, e.g., *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 553–54 (Wis. 2005) (citation omitted) (“Although the right to a remedy provision does not guarantee the certainty of recovery, it cannot be turned on its head such that it becomes a vehicle to defeat the plaintiff’s right to recovery

thought about how to respond to the challenges of proof that faced plaintiffs despite the established wrongdoing of defendants, it did so with an express constitutional tilt in favor of wrongfully injured victims. Similarly, when the California court fashioned its expansive holding on lead paint public nuisance liability, it did so under the maxim that “the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.”⁹⁴

A. THE PLAINTIFF’S RIGHT OF RECOURSE IN THE TWENTY-FIRST CENTURY

Tort law has a tilt, and the tilt has a pedigree. As Goldberg argued, victims have a constitutional due process right to a certain baseline access, through tort, to civil redress—not an optimal system of deterrence and compensation, but simply an ability to channel through law an attempted response to, or retaliation against, one’s wrongdoer.⁹⁵ 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, such as the Wisconsin provision that influenced the *Collins* and *Thomas* decisions.⁹⁶ 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 our classical liberal system of limited government.⁹⁷ 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.”⁹⁸

To justify such an intentional tilt in tort’s empathetic leaning, one must reference the larger constitutional framework within which tort is situated.

for wrongs committed by one simply because some recovery has already been had against another. [The provision] is not a shield against liability in this sense.”)

94. *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 556 (Ct. App. 2017).

95. 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. POCKET PART 26, 28 (2005) (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”).

96. See John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 237–48, 284 (1991); see also Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1314 (1995); see also David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198–203 (1992). Due process objections by individual plaintiffs to tort reform statutes have tended not to attract judicial support. See, e.g., *Schmidt v. Ramsey*, 860 F.3d 1038, 1049 (8th Cir. 2017) (declining to hold “that a statute violates due process when it curtails a common law remedy without providing a just substitute”).

97. Goldberg, *supra* note 14, at 559–83.

98. Goldberg & Zipursky, *supra* note 19, at 982.

Although Goldberg and Zipursky might not necessarily agree with this characterization, access to recourse through tort law can be thought of as part of the *quid pro quo* of classical liberalism with its extensive limitations on the use of government power. The ability to legislate and regulate in furtherance of public health and safety is purposely handicapped within classical liberalism because of concerns about potential abuse of concentrated power in government hands. Still, having intentionally hobbled the political branches, we did not leave ourselves entirely to the Darwinian forces of “private” social ordering. Instead, we left ourselves tort law as a means of seeking recourse when others wrongfully harm us. As a private body of law that is victim-initiated and relatively contained to the involved parties, tort law may have seemed less concerning from the classical liberal perspective than legislation and regulation. After all, the prospect of an injured plaintiff dusting themselves off and demanding an explanation from their wrongdoer fits nicely with the underlying ideology of individualism that motivates classical liberalism.⁹⁹

Of course, we are not living in the nineteenth century. Does this depiction of tort law, its constitutional context, and its philosophical grounding still resonate? As Professor Martha Chamallas notes in her essay on Goldberg and Zipursky’s body of work, one difficulty is that the empowered victim at the heart of civil recourse theory feels very much like the privileged white male subject at the heart of classical legal theory, and is therefore subject to all of the same critiques of that theory for ignoring social context, marginalized groups, and systemic injustice: “For many potential tort claimants from less privileged groups—particularly women, racial and ethnic minorities, and low-income persons—tort law has not yet delivered on [civil recourse theory’s] promise of empowerment.”¹⁰⁰ The response to this shortcoming might be to shift to a more public law orientation and simply to view tort as the regulatory vehicle that law and economics scholars and other instrumentalists consider it to be. On the other hand, the response might be to maintain the nineteenth-century private law orientation, as Goldberg and Zipursky do, but ask judges to deploy tort in a way that recognizes and responds to the yawning gap between classical liberalism’s imagined social community of equals and the deeply complex, inequitable, and flawed social world that we actually inhabit.

The latter task may be easier said than done. Returning to the straddling two centuries metaphor, it is critical to note that the nineteenth century remains affixed in the past while the present moment of tort law stretches ever further into the future. Thus, the gap that judges must attempt to straddle

99. See Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 *IND. L. J.* 527, 530 (2013) (describing how, for Goldberg and Zipursky, “placement of the empowered tort victim at the center of their narrative upends the Realist story of an active state that provides protection for its citizens”).

100. *Id.* at 531.

while keeping a foothold in tort law's nineteenth-century heritage is constantly growing. Whether that increasing gap is problematic will depend on the nature and degree of social and technological change that judges are attempting to keep up with through the adaptation of tort doctrine. If we had remained a rural agrarian society without industrialization, a mass consumer marketplace, a vast corporate sector, and advanced technologies capable of spreading harm far and wide—not to mention a legal system that has imperfectly welcomed formerly enslaved persons, women, immigrants, and other marginalized groups into its scheme of rights and protections¹⁰¹—tort law might not have required much dynamic updating. But we did not so remain, and tort has not always fared well in keeping up with the social transformations we have wrought.

For instance, as Professor John Witt powerfully revealed, the common law came under significant conceptual strain during the late nineteenth century, as shocking rates of injury and death among industrial workers were difficult to square with prevailing tort doctrines and the free labor ideology that supported them.¹⁰² Characterized by a romantic ideal of self-possessed workers who freely and voluntarily trade their labor for gain, the free labor ideology helped to normatively underwrite tort defenses such as assumption of risk and the fellow servant rule.¹⁰³ Yet, as the American workplace changed dramatically in character, those same doctrines seemed to become primarily a shield for capital owners rather than an enabler of autonomy for labor.¹⁰⁴ Although judges did experiment with some new principles and practices for redressing the industrial carnage that came before them, they ultimately lost out to the systems of workers' compensation laws that proliferated throughout state legislatures and substantially displaced the common law of tort.¹⁰⁵

In contrast to that experience, common law judges showed nimbleness in responding to the changing character of the American consumer marketplace, perhaps in part because of lessons they learned from the industrial accident crisis. Rather than embrace a contractual ideology that seemed increasingly out of touch with the realities of commodity distribution, judges instead developed a body of case law that articulated the duties manufacturers and marketers owe to all foreseeable users of their goods. The same judicially conservative impulses that prevailed in the context of workplace torts seemed to have little force when it came to product-caused accidents. Whatever its

101. *See id.* at 534.

102. *See* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC*, 7–8 (2004).

103. *Id.* at 13.

104. *Id.* at 64–65.

105. *Id.* at 69. The classical liberal courts did not cede this territory without a fight. *See, e.g.*, *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 341 (N.Y. 1911) (ruling unconstitutional New York's workers compensation scheme as an unconstitutional taking of industry's property by altering favorable background common law rules).

normative merits, this products liability revolution had the effect of protecting the common law from the kind of wholesale displacement that occurred in the case of worker injury. Eventually, consumer-focused regulatory agencies would develop on the state and federal level, but—with the notable exception of the U.S. Food and Drug Administration—these agencies pose little if any threat to the significance of the common law as an arbiter of product safety.¹⁰⁶

The lesson of these contrasting examples is that judges, in fulfilling their obligation to steward a law of civil recourse, must adapt the law to changing circumstances. For the time being, they have breathing room to do so. As the United States Supreme Court has stated, due process principles apply differently to “common law judging” than “the interpretation of a statute.”¹⁰⁷ Courts are given more leeway to adapt the common law “as new circumstances and fact patterns present themselves.”¹⁰⁸ This is because “[s]trict application of [due process] principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system.”¹⁰⁹ Because the field of tort law is centrally devoted to offering redress to wrongfully injured members of society, courts have needed to evolve the law in line with changes in social interactions and the nature and degree of injuries that can occur through those interactions.

Much of the doctrinal strain evident in the Wisconsin and California lead paint cases, for instance, can be seen as the courts’ efforts to adapt nineteenth-century tort law, with its individualistic conceptions of duty and causation, to a context involving large, long-lived, and massively powerful corporate actors. Indeed, it is ironic that the entities pushing the individualistic conception of tort adjudication are themselves *aggregate* entities. As Professor Robert Cooter once wisely noted, “Causation in tort law is . . . a way of describing the point where personal freedom runs out and responsibility to others begins. An account of causation in tort law is necessarily an account of a society’s conception of liberty.”¹¹⁰ In that sense, the lead paint cases might be seen not as covert regulation but as expressions of a conception of liberty in which corporate actors bear a different level of responsibility than individuals in light of their greater levels of freedom and

106. Cf. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 399 (2000) (noting that certification of questions from federal court to state court is common in products liability cases because products liability is “dominated by state common law and arises frequently in federal diversity cases”).

107. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001).

108. *Id.*

109. *Id.*

110. Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 *CHI.-KENT L. REV.* 523, 524 (1987).

agency. Call it the Spider-Man principle of twenty-first-century tort law: With great power comes great responsibility.¹¹¹

B. PUBLIC PLAINTIFFS & THE RIGHT OF RECOURSE

Even the seemingly exotic governmental public nuisance suits can be situated within a traditional understanding of tort law. Subnational entities have their own distinctive legal personalities and capacities, including both the responsibility to promote their subjects' interests and the ability to advocate on their own behalf. In addition to encompassing pragmatic goals like protecting health and well-being, the role of subnational governmental entities also includes decidedly non-welfarist goals like preserving dignity and autonomy.¹¹² Significantly, even welfarist interests asserted by governmental plaintiffs occur along a public dimension that cannot be entirely broken down into corresponding private individual interests.

In the California lead pigment public nuisance case, for instance, the defendants strenuously argued that no interference with a "public right" could be shown since interior residential lead paint exists within private residences. Thus, they argued that the suit was really a private mass tort action in disguise. While some state courts have agreed with that narrow understanding,¹¹³ the California court rejected it:

Interior residential lead paint that is in a dangerous condition does not merely pose a risk of private harm in private residences. The community has a collective social interest in the safety of children in residential housing. Interior residential lead paint interferes with the community's "public right" to housing that does not poison children. This interference seriously threatens to cause grave harm to the physical health of the community's children.¹¹⁴

When states and cities sue in public nuisance to challenge the harmful conduct of powerful and largely unaccountable industries, they are not merely pursuing "regulation through litigation."¹¹⁵ Instead, these governmental plaintiffs can be seen as scaled-up versions of the empowered victim at the heart of civil recourse theory, asserting their right to equal dignity and security in the face of harmful conduct by other actors. Just as individuals are given a right of redress as part of the quid pro quo that forms constitutionally limited government, states and cities also retain a power to

111. See Ellen M. Bublick, *Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured*, 14 J. TORT L. 279 (2021).

112. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

113. See, e.g., *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274 (Pa. Commw. Ct. 2023).

114. *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017).

115. Cf. Robert Reich, *Regulation is Out, Litigation is In*, AM. PROSPECT (Dec. 19, 2001) <https://prospect.org/article/regulation-out-litigation/>.

sue in recognition of their separateness and autonomy within a federal system.

This placing of subnational public nuisance suits within a nineteenth-century framework flows from a basic fact often underappreciated by instrumentalist theorists: *We do not have a federal government that is obligated, or even permitted, to pursue optimal deterrence and compensation.* Nor have we ever had such a government. Instead, the Founders intentionally hobbled lawmakers through divisions of power along horizontal and vertical dimensions out of legitimate fear that concentrated political authority might threaten individual liberties. We still live within that constitutional framework despite everything else that has changed over the past two and nearly one-half centuries. Thus, to a nontrivial extent, states and cities have been left to fend for themselves in a system that is deliberately designed to constrain effective coordinated public action at the national level—the level that often is requisite in order for public action to be effective. Individuals, in turn, have been left to fend for themselves in a system deliberately designed to favor the purported positive externalities that flow from prioritizing freedom of action over security from harm.¹¹⁶

Understood against this backdrop, public nuisance suits by governmental plaintiffs do not appear as the alien or unfathomable beasts that some courts and commentators have taken them to be.¹¹⁷ Instead, they are the natural result of social and technological developments that have exceeded the nineteenth-century framework of tort law, such that judges have needed to adapt doctrines like duty and causation to continue offering meaningful recourse to wrongfully injured parties. The paradigmatic *A-hits-B* scenario of the nineteenth century has been joined by the *Group of As-hits-Group of Bs* scenario of the twenty-first century. However, the challenge for common law courts remains the same—to fulfill tort law’s promise of redressing wrongs with attentiveness to changing social circumstances while remaining rooted in, and explicable against, the past. That challenge, in turn, has been made all the harder by the failure of political branches to step in and address our many social needs, from the poison on our walls to the existential threat accumulating in our atmosphere.

CONCLUSION

This Article has reviewed doctrinal innovations that depart from the classic *A-hits-B* configuration of tort law, along with arguments lodged in opposition by defendants. As we have seen, one way to interpret defendants’ arguments is that they claim entitlement to a particular vision of tort law, one

116. See Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011).

117. For excellent and thorough defenses of public nuisance against such charges, see Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L. J. 702 (2023); David Bullock, *Public Nuisance is a Tort*, 15 J. TORT L. 137 (2022).

that is anchored in classical legal theory with its staunch individualism and reluctance to deploy “public” power to alter the outcome of “private” interactions.¹¹⁸ To be sure, plaintiffs usually bear an evidentiary burden in tort that comports well with this classical vision.¹¹⁹ But courts also have long retained the power to alter that burden when circumstances compel. In that sense, doctrines such as market share liability fall in the same tradition as earlier tort law “stretch assignments” that sought to adapt the common law to changing circumstances. Indeed, relaxing the direct but-for causal link between a particular defendant and a particular plaintiff is not all that dissimilar to rejecting a contractual privity barrier for negligence claims in the context of the mass consumer marketplace.¹²⁰

Twerski wrote “A Tale of Two Centuries” from the vantage point of the late twentieth century and concluded that “market share has failed because it has attempted to graft a novel theory of recovery against a matrix of tort concepts which do not easily mesh with it.”¹²¹ For Twerski, the nineteenth-century footing of tort law seemed too strong to permit the stretch needed to fully reach a twenty-first-century vision of proportionate recovery. Today, with one-quarter of the twenty-first century nearly passed, courts continue to reach toward a future in which wrongfully injured victims can obtain recourse from wrongful injurers despite the challenge of attributing harm within our vastly complex networks of interaction. Even market share liability does not appear to be dead, having found new life in the hands of governmental plaintiffs seeking to address the harms of pervasive water pollutants. Inspired by that success, myriad governmental plaintiffs now also seek recovery from major fossil fuel companies for the current and anticipated costs of climate change, offering courts what may become tort law’s greatest stretch assignment to date.

With characteristic evenhandedness, Twerski accompanied his skepticism about market share liability as a vehicle for victim recovery with recognition of the very real social harms that still needed to be addressed. He stressed that he did not believe “defendants who have brought about injury in situations where classical cause cannot be established should walk away scot free.”¹²² Instead, Twerski argued that “[a]lternative compensation systems will have to be developed to deal with the kinds of tragedies which [defendants] have brought about.”¹²³ Without such alternative compensation

118. See Chamallas, *supra* note 99, at 528–29.

119. Cf. Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 546 (1962) (“The beginning point of all tort liability is affirmative conduct, and the first step in establishing a defendant’s liability is to identify him and connect his conduct with the victim’s injury.”).

120. Alexandra D. Lahav, *A Revisionist History of Products Liability*, CORNELL L. SCH. PUB. L. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4321152.

121. Twerski, *supra* note 1, at 881.

122. *Id.*

123. *Id.*

systems, Twerski noted, “[c]ourts cannot be faulted for seeking proportional solutions to otherwise intractable problems.”¹²⁴ More to the point, he wrote that courts “cannot be expected to sit back and turn seriously injured claimants away without some hope that other responsible governmental agencies will step into the breach.”¹²⁵

This Article has argued that Twerski’s evenhandedness reflects an important constitutional insight into the status of tort law within our framework of government. Judicial reluctance to disengage from intractable problems is not just a matter of compassion. It is a matter of fulfilling the obligation to afford individuals a means of recourse within a governmental system otherwise designed to limit public control over private action. Conversely, judicial hesitancy to embrace efforts to constitutionalize nineteenth-century tort doctrine to protect defendants is not just a matter of judicial modesty. It is a matter of preserving judicial authority to evolve the common law as an effective means of recourse, unless and until the other branches offer adequate substitute means for preventing and redressing harm. This asymmetric constitutional basis of tort law obligates courts to steward a body of law that affords rights of recourse to the wrongfully injured, even as the manner and scale with which wrongful injury can occur changes dramatically. Rather than an unfairness to defendants, this asymmetric basis of tort is better understood as a counterbalance to the asymmetries found in nearly every other aspect of our framework of government.¹²⁶

Writing in 1989, Twerski concluded, “[w]e cannot continue to live in a tort world that straddles *two* centuries.”¹²⁷ From the vantage point of 2023, as we celebrate his extraordinary career, Twerski appears to have been right yet again: We must live in a tort world that straddles *three* centuries.

124. *Id.* at 882.

125. *Id.*

126. See Ewing & Kysar, *supra* note 73.

127. Twerski, *supra* note 1, at 882 (emphasis added).