RENDERING JUSTICE IN KEY AREAS OF TORT LAW IN THE NEXT DECADE

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I. INTRODUCTION

The future of tort law should focus on imposing liability on entities that are responsible for a wrongdoing. Liability should not be imposed on parties who bear no responsibility under the rule of law. This article focuses on three key areas of tort law where courts should focus on curbing liability without responsibility in the next decade. First, judges should act as active "gatekeepers" to assure that expert testimony is based on sound science, not guesswork. Second, judges should not engage in "deep pocket jurisprudence" where liability is imposed on an entity because it is solvent, not because it was responsible for any harm. Third, judges should not support "regulation through litigation" where judges ignore precedent and make significant changes in tort law not because of fairness, but because the judge believes that the executive and legislative branches of government are not fulfilling their public policy mission.

II. JUDGES SHOULD ACT AS GATEKEEPERS TO ASSURE THAT AN ENTITY IS NOT SUBJECT TO LIABILITY FOR HARM IT DID NOT CAUSE

In the next decade, there will be more battles over science in the courtroom. The use of experts to pinpoint the alleged cause of an injury will grow exponentially. Experts should be seen as "super power" witnesses; they can testify in ways that ordinary witnesses cannot. Experts can testify based

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on hearsay.[1] Experts can also generally testify as to an "ultimate issue" in a case, for example that a drug is defective.[2]

There is a key gateway for expert testimony that trial judges should monitor. Experts should only testify if a subject is beyond the knowledge of layperson jurors.[3] Jurors can decide whether a traffic light was red or green when determining how a plaintiff was injured, but they do not have the expertise to decide whether a chemical caused a plaintiff's illness. When the subject matter is beyond the knowledge of laypersons, however, trial judges should follow the U.S. Supreme Court's 1993 decision of *Daubert v. Merrell Dow Pharmaceuticals., Inc.* and act as meaningful "gatekeepers" in screening experts.[4] Judges' failure to act as gatekeepers against baseless expert testimony can lead to serious and adverse consequences for our society.

The *post hoc* fallacy, which provides that because one event follows another it was necessarily caused by that event, illustrates the danger of unsound expert testimony.[5] This occurred with respect to claims that the morning sickness prevention drug Bendectin® caused birth defects. The claims were unfounded as shown by carefully conducted empirical studies. Harm to society occurred when the drug was removed from the market for more than two decades, depriving pregnant women who suffered serious morning sickness of a leading medicine that could help them. If an incorrect cause of an illness is "blamed" in litigation, medical researchers may have a disincentive to look for the real cause of that type of illness. If an innocent party is subjected to liability for an injury it did not cause, this is fundamental injustice.

Some strong plaintiff lawyer advocates have argued that judges should not act as gatekeepers. They argue that it should be left to jurors to decide whether an expert is qualified to testify and evaluate the veracity of the expert's testimony. This well-worn "leave it to the weight of the evidence" argument is based on the false hypothesis that a layperson juror can umpire disputes without the expertise to do so.[6] Some plaintiffs and learned academics have argued that experts should testify even if the current science

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1. *See* FED. R. EVID. 703.

2. *See* FED. R. EVID. 704(a).

3. *See* FED. R. EVID. 702(a).

4. 509 U.S. 579 (1993).

5. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Roundup Cases May Be a New Example of an Old Problem: The Post Hoc Fallacy*, WASH. LEGAL FOUND.: LEGAL BACKGROUNDER, Aug. 9, 2019, at 1, 4, https://www.wlf.org/wp-content/uploads/2019/08/08092019SchwartzAppel_LB.pdf.

6. *See* Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 224 (2006).

does not support their conclusion at the time of trial. Basing liability on a good "emotional" argument, however, can result in a totally innocent defendant being subject to liability. Thus, there is an ever-growing present and future need for judges to perform their gatekeeping function with expert testimony.[7]

III. DEEP POCKET JURISPRUDENCE®: WHERE TORT LAW SHOULD DRAW THE LINE

A fundamental of tort law is that liability should be imposed on a wrongdoer according to the facts and law. An innocent party should not be burdened with the cost of an injury simply because the responsible party cannot pay for the harm. Most judges and courts have followed this basic principle of justice.

Nevertheless, some courts have stretched tort law to impose liability on an innocent party. Why? Because the wrongdoer is "judgment proof" or immune from suit, lacks adequate insurance, or simply cannot be located. This action should be called what it is, "deep pocket jurisprudence®." It is likely to expand in the future if it is not subject to sunlight and called out for what it is.

A. Deep Pocket Jurisprudence: What It Is and What It Isn't

It is important to differentiate "deep pocket jurisprudence" from tort law doctrines that are "pro-plaintiff" in nature. For example, the doctrine of joint and several liability has aspects of deep pocket jurisprudence, but is different than pure deep pocket jurisprudence. With joint liability, a defendant who bears some responsibility for causing a harm may pay more than its fair share in damages. Deep pocket jurisprudence, however, is a particular form of expanding tort law. A totally innocent party is made to pay the entire cost of a harm because the real wrongdoer either is not subject to liability (e.g. immune, judgment proof) or it would be impractical to subject that entity to liability (e.g. inadequate liability insurance).

Courts rarely acknowledge the real reason for holding the innocent defendant liable; their true objectives are disguised and buried in the rubric of expanded tort law principles. This is unfortunate jurisprudence. If a majority opinion engages in deep pocket jurisprudence, dissenting opinions can be both more persuasive and accurate in pointing out how the court

7. *See* EVAN TAGER ET AL., WASH. LEGAL FOUND., ADMISSIBILITY OF EXPERT TESTIMONY: MANAGEABLE GUIDANCE FOR JUDICIAL GATEKEEPING 2 (2020); Schwartz & Silverman, *supra* note 6, at 218.

expanded tort law in unsound ways and that the only rationale for doing so is that the true wrongdoer cannot be successfully sued.

B. How Deep Pocket Jurisprudence Works

Deep pocket jurisprudence is subtle. It is almost never acknowledged when engaged in by courts (either in the majority or a dissenting opinion). In 2014, the Iowa Supreme Court was the first state high court in a majority opinion to use the words, "deep pocket jurisprudence." The court used those words to discredit a plaintiff's attempt to stretch tort law to impose liability on an innocent defendant.[8] The court called deep pocket jurisprudence "law without principle."[9] In a rare true confession, a New York trial court judge openly admitted that he was using deep pocket jurisprudence (although he did not use those exact words). The judge allowed a city to proceed with a clean-up action against a company that did not dump chemicals at issue because "[s]omeone must pay to correct the problem."[10]

C. Examples of Deep Pocket Jurisprudence

1) Allowing "Innovator Liability"

Innovator liability was at issue in the Iowa Supreme Court *Huck* case. Plaintiff sued the "innovator" of a brand-name drug even though the plaintiff consumed, and was allegedly injured by, a competitor's generic drug product.[11] Why did the plaintiff's lawyer sue a branded drug company for a harm caused by a competitor's generic product? Because the U.S. Supreme Court had previously held that claims against a generic drug company are generally preempted by federal law.[12] On the other hand, the Supreme Court held that claims against a branded (innovator) drug company are, in most cases, not preempted by federal law.[13] Deep pocket jurisprudence arises because the branded drug manufacturer can be sued, while a generic drug manufacturer is generally shielded from suit due to the doctrine of preemption.

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8. Huck v. Wyeth, Inc., 850 N.W.2d 353, 380 (Iowa 2014).

9. *Id.* (quoting Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 FORDHAM L. REV. 1835, 1872 (2013)).

10. State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983).

11. *Huck*, 850 N.W.2d at 356.

12. *See* PLIVA, Inc. v. Mensing, 564 U.S. 604, 609 (2011).

13. *See* Wyeth v. Levine, 555 U.S. 555 (2009).

The innovator liability "theory" stretches product liability law beyond its basic moorings. A company is subjected to liability even though it did not make the product that injured the plaintiff. The "legal theory" used to obtain this "magic" transfer of responsibility from a generic to a branded drug company is called transferred "misrepresentation." A basic flaw in this argument is the fact that it is not the branded drug company that forces the generic drug company to use the branded drug company's warning label. Federal law requires generic drugs to carry the same warning as branded drugs.

Almost all courts have rejected this theory and innovator liability.[14] The branded drug company did not foist its warning on to the generic company; the generic company incorporated it as a matter of federal law. The Alabama Supreme Court, however, adopted an innovator liability theory in the 2014 case *Wyeth v. Weeks*, but this decision was overruled by the state legislature the following year.[15] Nevertheless, in a major decision in 2017, the California Supreme Court in *T.H. v. Novartis Pharmaceuticals Corp.* allowed innovator liability.[16] The decision is even more far reaching because the branded drug manufacturer no longer manufactured the drug at issue.[17] The court came close to conceding that if the generic drug company could have been sued, the court would not have subjected the branded drug company to liability.[18]

2) Stretching the Law of Nuisance

The tort of nuisance is often regarded as a somewhat amorphous tort, but it does have clear boundaries. Tort law recognizes both public and private nuisances. A public nuisance is an activity that unreasonably interferes with the public's use and enjoyment of a public right, for example blocking a public roadway. The party whose activity created the nuisance controls it; for example, if the party placed a large log across a public highway, he or she would be responsible for removing it. In comparison, a private nuisance is an activity that unreasonably interferes with an individual's use and enjoyment of his or her land, for example a person turns up a radio extremely loud for an extended period causing his or her neighbor to lose sleep or peace and quiet on his or her own property.

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14. *See* Victor Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 FORDHAM L. REV. 1835 (2013).

15. 159 So. 3d 649 (Ala. 2014), *superseded by statute*, Act of May 1, 2015, Act 2015-106, § 1, 2, 2015 Ala. Laws 320.

16. 407 P.3d 18, 47 (Cal. 2017).

17. *See id.*

18. *See id.* at 46.

Plaintiff's lawyers have tried to stretch the law of public nuisance against financially solvent defendants when the real wrongdoer is insolvent or unavailable. This is a form of "deep pocket jurisprudence." Cities have tried to use nuisance theory against manufacturers of guns where the real wrongdoer was a criminal.[19] These attempts have generally failed, but they have not been called out as deep pocket jurisprudence. Cities have also tried to use nuisance theory against manufacturers of lead paint where the real wrongdoer was a landlord who allowed the paint in a home to deteriorate.[20] These attempts have also generally failed, but once again, courts have not labelled the attempts as deep pocket jurisprudence.

Most of the time, courts have rejected plaintiffs' attempts to stretch the law of nuisance, recognizing that the manufacturer of a lawful product did not engage in an activity that brought about an alleged public or private nuisance. Manufacturing a product is not an "activity" for purposes of nuisance law.[21] An example of an activity leading to nuisance liability would be dumping a product that could cause serious environmental harm in a waterway.

The door on the improper "deep pocket jurisprudence" regarding nuisance law is not closed. Plaintiff's lawyers are likely to continue to try to stretch nuisance law.[22] The march to expand the law of nuisance has also been augmented where municipalities, counties, and cities that may lack the legal power to use state consumer protection laws instead use the law of nuisance, stretched beyond its rational perimeters, as their legal launch pad. Jurists should see and point out the serious pitfalls of deep pocket jurisprudence and reject it.[23]

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19. *See, e.g.,* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004).

20. *See, e.g.,* State v. Lead Industries Ass'n, 951 A.2d 428 (R.I. 2008).

21. *Id.* at 449. The court held that public nuisance law is ill-suited for product manufacturers because they are no longer in control of the instrumentality alleged to be causing the public nuisance, which is "critical in public nuisance cases." *Id.*

22. *See* Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629 (2017); Victor Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

23. *See* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 358 (2018).

IV. TRAMPLING ON THE SEPARATION OF POWERS: REGULATION THROUGH LITIGATION

A. "Regulation through Litigation:" What Is It?

The basic purpose of tort law is to compensate persons injured by another person's wrongful conduct. "Regulation through litigation" dramatically changes the purpose of tort law by having a judge expand tort liability rules to expose a company, or an entire industry, to massive new liability exposure. This exposure, as a "real world" practical matter, effectively forces "corrective" conduct similar to a statute or regulation. Judges enforce their regulatory goal through litigation by creating very strong incentives to settle. The key public policy consideration behind regulation through litigation is that this *de facto* regulatory action is not accomplished by the executive and legislative branches of government designated by law and best-equipped to set such public policies.

B. Why Regulation Through Litigation Is Likely to Expand

The current Trump Administration's policy of "deregulation" provides a strong incentive for some judges to engage in regulation through litigation. The public policy debate over regulation through litigation has two very different points of view. Those who favor it believe that judges are the "last hope" to protect the public health and safety of Americans. Those who oppose regulation through litigation believe that it improperly invades the political branches of government. Change, if needed, should come through the ballot box, not in private litigation. This debate will intensify in 2020 and beyond. It will continue at a fever pitch as long as deregulation is the view of the Administration or the U.S. Senate.

C. Examples of Regulation through Litigation in 2020 and Beyond

1) Climate Change Litigation

More than a dozen cities, counties and municipalities, as well as the State of Rhode Island, have sued energy companies for their alleged contribution to the "public nuisance" of global climate change. Some cases have been dismissed by lower courts because there is no proof that the energy companies "caused" the alleged global harm or engaged in unlawful behavior. To date, no case has been successful. Still, in 2019, several counties

in Hawaii passed a resolution to bring climate change litigation,[24] showing that cases may continue to be brought in spite of courts rejection of such claims.

This "wave" of suits by local governments should focus on a 2011 decision by the U.S. Supreme Court in *American Electric Power Co. v. Connecticut*, rejecting a public nuisance climate change case.[25] Justice Ruth Bader Ginsberg, writing for the unanimous Supreme Court, issued a broad warning against these types of suits, stating that setting national energy policy to account for climate change concerns was "within national legislative power," and that Congress and the EPA are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions.[26]

Regulation through litigation advocates endured a setback in January 2020, when the U.S. Court of Appeals for the Ninth Circuit dismissed a climate change case against the federal government brought by both individuals and an environmental organization accusing the federal government of failing to protect future generations against the adverse impacts of climate change.[27] After a strong discussion of the harms done and likely to occur from climate change, the court, in a 2-1 decision (authored by Judge Andrew Hurwitz), dismissed the case saying that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiff's remedial plan" to address climate change.[28] The court recognized that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[29] Nevertheless, climate change cases will continue. All "regulation through litigation" advocates need is one case to break through.

2) Litigation Against Gun Manufacturers

In November 2019, the U.S. Supreme Court denied cert. in *Remington Arms Co. v. Soto*,[30] allowing a 4-3 decision by the Connecticut Supreme

24. *See* Daniel Moritz-Rabson, *Honolulu Will Sue Fossil Fuel Companies for Climate Mitigation Fees: 'Big Oil Waged a Decades-Long Deception Campaign'*, NEWSWEEK (Nov. 6, 2019, 4:54 PM), https://www.newsweek.com/honolulu-will-sue-fossil-fuel-companies-climate-mitigation-fees-big-oil-waged-decades-long-1470210.

25. 564 U.S. 410 (2011).

26. *Id.* at 421, 428.

27. *See* Juliana v. United States, 947 F.3d 1159, 1164-65 (9th Cir. 2020).

28. *Id.* at 1171.

29. *Id.*

30. 140 S. Ct. 513 (2019).

Court against the manufacturers and distributors of the firearm used in the 2012 Sandy Hook mass shooting to stand. The Connecticut Supreme Court held that the federal Protection of Lawful Commerce in Arms Act (PLCAA) did not bar a suit by the victims and their families of the mass shooting against the gun manufacturers and distributors.[31] The Court relied on the "predicate" exception to the PLCAA. This exception allows claims against manufacturers if their conduct violates specific state laws directed at manufacturers of otherwise lawful weapons.[32]

The Connecticut Supreme Court held that the defendant's advertising may have encouraged the unlawful use of its products, and this was a potential violation of the Connecticut Unfair Trade Practices Act.[33] As pointed out by the dissent, however, in the 4-3 opinion, the "predicate" exception to the PLCAA targeted violations of state laws directed at guns, not laws of generality, such as Connecticut's Unfair Trade Practices Act.[34] Regardless of the merits of the *Soto* opinion, and who was right—the majority or the dissent, some believe that the U.S. Supreme Court's denial of review inadvertently sent a signal to lower courts that there may be a way around the PLCAA to allow tort claims under expanding theories of liability against gun manufacturers.

Basic questions in the *Soto* case remain. As indicated, the majority opinion would allow a claim if the defendant's advertising caused unlawful behavior. That leaves the question of whether the criminal shooter in the case even saw promotional materials? Did the advertising motivate him to act? Whatever the case, in 2020 and beyond, we will likely see more suits against gun manufacturers following mass shootings. For example, a public nuisance lawsuit has already been filed against gun manufacturers with respect to the 2017 Las Vegas mass shooting.[35] Taking its cue from *Soto*, the District Court found that Nevada's Deceptive Trade Practices Act could serve as a predicate statute under the PLCAA and survive a motion to dismiss even though the alleged connection between the defendant's advertising and the shooter's behavior was "tenuous."[36]

3) Chemicals—Roundup®/Glyphosate

Does glyphosate, an ingredient in the popular herbicide Roundup®, "cause" non-Hodgkin's lymphoma? Every major regulatory body in the

31. *See* Soto v. Bushmaster Firearms Int'l, 202 A.3d 262, 272-73 (Conn. 2019).
32. *See id.* at 302.
33. *See id.* at 285.
34. *See id.* at 327-28 (Robinson, J., dissenting).
35. *See* Prescott v. Slide Fire Solutions, 410 F. Supp. 3d 1123 (D. Nev. 2019).
36. *Id.* at 1140.

world, including the EPA, after extensive testing has said "no."[37] The International Agency for Research on Cancer (IARC), however, called glyphosate a "probable carcinogen" based on animal studies, but testing was conducted at an undetermined dose through undetermined means of exposure.[38] Nevertheless, three trial courts have awarded multimillion-dollar verdicts against the manufacturer of Roundup®, with those verdicts currently on appeal.[39] Plaintiffs' lawyers are also running advertisements around the clock to generate more litigation. We are likely to see more attempts to regulate chemicals by regulation through litigation. A burgeoning example has focused on perfluoroalkyl and polyfluoroalkyl substances (PFAS), used in fire-fighting foams and other products.[40] Lawsuits have leaped ahead of science on clean-ups and more.

4) Pharmaceutical Products

Opioid litigation is another example that involves public nuisance law. The issue of responsibility for opioid abuse is complex, but some courts such as an Oklahoma trial court have circumvented product liability law and consumer protection laws to instead pursue regulation through litigation under public nuisance theory.[41] On the other hand, courts in Connecticut and North Dakota have followed existing law and dismissed similar claims that have tried to invoke an expanded version of nuisance law.[42]

Pharmaceutical litigation has been a form of regulation through litigation for some time where branded pharmaceutical manufacturers have been subject to liability for failure to warn, even though their warnings were approved by the FDA. If public nuisance theories are used and adopted in pharmaceutical litigation, it will substantially and unfairly expand the liability of branded drug companies. The result may stifle important research

37. *See, e.g.*, Press Release, EPA, EPA Finalizes Glyphosate Mitigation (Jan. 30, 2020), https://www.epa.gov/pesticides/epa-finalizes-glyphosate-mitigation.

38. *See* INT'L AGENCY FOR RESEARCH ON CANCER, SOME ORGANOPHOSPHATE INSECTICIDES AND HERBICIDES: IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS 398 (2017).

39. *See* Patricia Cohen, *$2 Billion Verdict Against Monsanto Is Third to Find Roundup Caused Cancer*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/business/monsanto-roundup-cancer-verdict.html.

40. *See Toxic, Forever Chemicals: A Call for Immediate Federal Action on PFAS: Hearing Before the S. Comm. on Environment of the Comm. on Oversight and Reform*, 116 Cong. (2019) (statement of Sherman Joyce, President, Am. Tort Reform Ass'n).

41. *See* State v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4019929, at *11 (D. Okla. Aug. 26, 2019).

42. *See* State v. Purdue Pharma L.P., No. 08-2018-CV-01300, WL 3776653, at *1 (D.N.D. July 22, 2019); City of New Haven v. Purdue Pharma L.P., X07HHDCV176086134S, 2019 WL 423990, at *7 (Conn. Super. Ct. Jan. 8, 2019).

in this vital area of health and well-being, and increase the cost of necessary medicines.

5) Data Privacy

Regulation through litigation exists and will expand in this area. Plaintiff's lawyers are utilizing and distorting nuisance law to gain a foothold on what could be billion-dollar liability exposure.

D. Locality Litigation

A major path to expand regulation through litigation is through locality or "trickle down" litigation by cities, counties, or other local governmental entities. Harms that allegedly affect the population of an entire state should be the responsibility of the state's Attorney General. Nevertheless, "locality litigation" has already gained a foothold with respect to opioid, climate change, and data privacy public nuisance litigation.

Literally thousands of local governmental entities have hired contingency lawyers to bring the same or similar claims,[43] creating an almost impossible dilemma for businesses: either settle cases (not an easy endeavor with so many entities involved) where the business believes it has done nothing wrong, or dispute these cases, which could involve almost endless (and extraordinarily costly) litigation. In general, local governments cannot utilize state consumer protection acts; only the state attorney general can do so.[44] To bypass existing legal restrictions, local governments rely on regulation through litigation theories, including expanding the law of nuisance, to try to persuade judges to expand existing tort law.[45]

E. Curbing Regulation Through Litigation

Curbing regulation through litigation is not an easy task. Understandably, the heart of some judges can move in that direction: "If I do not act, who will?" Nevertheless, the regulation through litigation process tramples on a fundamental part of our democratic process, the separation of powers. Judges whose heart may be in the right place have shown respect for that fact as exemplified by the recent Ninth Circuit decision in *Juliana v. United States*.

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43. *See* Victor Schwartz & Markus Green, Opinion, *'Locality Lawsuits' Threaten the Civil Justice System*, LAW360 (Dec. 17, 2019, 2:26 PM), https://www.law360.com/articles/1226742.

44. *See id.*

45. *See id.*

V. CONCLUSION

Liability without responsibility should have no place in tort law now or in the future. First, judges should exercise their legitimate power to act as "gatekeepers" and shield jurors from scientifically baseless expert testimony since no entity should be subject to liability for a harm it did not cause. Second, judges should openly reject "deep pocket jurisprudence" and not place responsibility on an innocent party because the guilty party cannot be successfully sued. Third, judges should eschew regulation through litigation and not act as surrogates for the executive and legislative branches of government.