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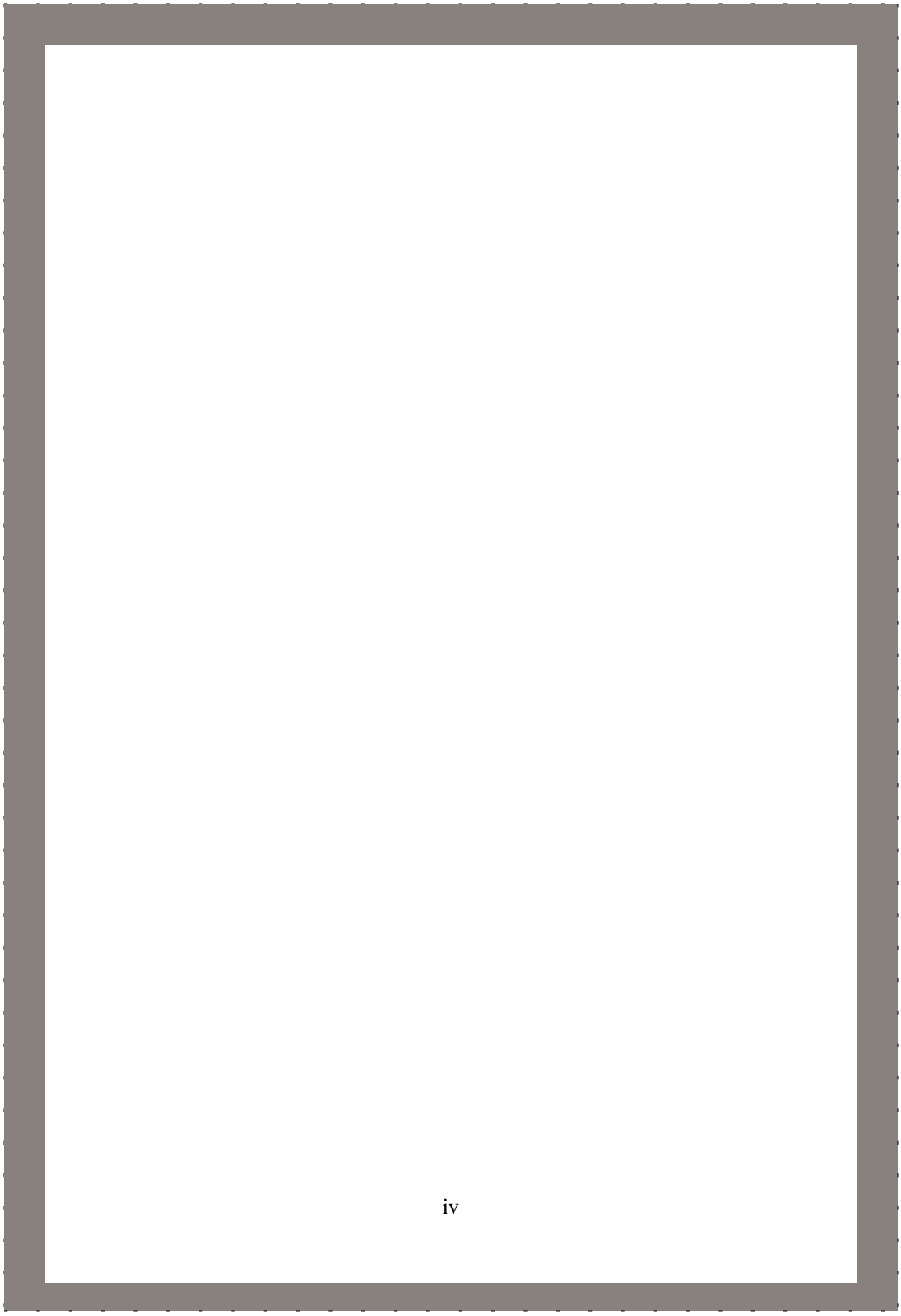

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DISPLACEMENT AND PREEMPTION OF CLIMATE NUISANCE CLAIMS

Jonathan H. Adler[*]

INTRODUCTION

New York City is concerned about the threat of climate change.[1] Rising temperatures, hotter summers, and potential sea-level rise are all anticipated to impose significant costs on the city, prompting investments in adaptive measures.[2] Like many other municipalities faced with climate risks, New York has sought recompense from those who produce and market fossil fuels, which are the primary contributor to anthropogenic climate change.[3]

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1 *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 469 (S.D. N.Y. 2018) (City of New York) (noting the conclusions of the New York City Panel on Climate Change that "climate change is already affecting New York City and will have a significant impact in the future"). The New York City Mayor's Office of Climate and Environmental Justice has an Office of Climate Resiliency tasked with developing plans to address the consequences of climate change within the city. *See About,* CITY OF NEW YORK, https://www1.nyc.gov/site/orr/about/about.page (last visited June 14, 2022) This office is advised by the New York City Panel on Climate Change, which has published several reports on the expected consequences of climate change within the city; *New York City Panel on Climate Change,* CITY OF NEW YORK, https://www1.nyc.gov/site/orr/challenges/nyc-panel-on-climate-change.page (last visited June 14, 2022).

2 *City of New York*, 325 F. Supp. 3d at 469 (noting "New York City is exceptionally vulnerable to sea-level rise due to its long coastline" and that "the City has been forced to take proactive steps to protect itself and its residents from the dangers and impacts of global warming.").

3 *See* William Neuman, *To Fight Climate Change, New York City Takes on Oil Companies*, N.Y. TIMES, Jan. 10, 2018, https://www.nytimes.com/2018/01/10/nyregion/new-york-city-fossil-fuel-divestment.html; *see also* Michael A. Livermore, *Why Cities Are Suing Oil Giants*, U.S. NEWS & WORLD REP. (June 26, 2018), https://www.usnews.com/news/national-news/articles/2018-06-26/why-cities-are-suing-oil-giants ("The cities that have joined these lawsuits will face a host of climate change-related costs, [and] . . . are looking to the major oil companies . . .to compensate the taxpayers who are currently holding the tab."); Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENVTL. L.J. 412, 414 (2019) ("[E]ach of these lawsuits is seeking monetary damages to deal with the costs of adapting to environmental change and coping with disaster events").

In January 2018, NYC filed suit in federal court against several multinational oil companies alleging trespass, private nuisance, and public nuisance by producing, promoting and selling products (fossil fuels) that contribute to global warming.[4] According to NYC, fossil fuel companies have long known of the potential consequences of producing and marketing fossil fuels, and therefore bear some responsibility for the abatement and other costs imposed on the city due to climate change.[5] Specifically, NYC filed suit for compensatory damages for both past and future costs incurred by the city to protect its property and infrastructure, as well as the health, safety, and property of city residents.[6]

Although NYC filed its case in federal court, it sought to press its claims under state law. Federal common law claims would be displaced under existing Supreme Court doctrine.[7] State law-based claims, alleging an interstate nuisance or product liability-based nuisance claims would not be precluded by Supreme Court precedent.[8] At least that is how NYC thought to frame its case. On April 1, 2021, the U.S. Court of Appeals for the Second Circuit dismissed NYC's claims, becoming the first federal appellate court to conclude that state law-based climate nuisance claims were preempted by federal law.[9]

This was not the first climate change nuisance case to reach the Second Circuit. In 2004, NYC and several like-minded states brought claims against several of the nation's largest power producers, alleging their greenhouse gas emissions contributed to the public nuisance of global warming under federal

4 *See* Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018).

5 *Id.*

6 *See City of New York*, 325 F. Supp. 3d at 470.

7 *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423-29 (2011).

8 Federal preemption of state-law-based nuisance claims is rare in the environmental law context. *See* Jason J. Czarnecki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 8-11 (2007). Among other things, courts have rejected preemption claims in cases alleging the marketing and sale of fuel additives contributed to a public nuisance, even though the additive was used to comply with federal environmental regulations. *See, e.g.*, In re Methyl Tertiary Butyl Ether Products Liability Litigation (MTBE), 725 F.3d 65, 96 (2nd Cir. 2013).

9 City of New York v. Chevron Corp., 993 F.3d 81, 95-98 (2d Cir. 2021) [herewithin *City of New York II*]. Most other courts to consider this question, to date, have focused on whether federal law is sufficiently preemptive to justify removal of climate-based nuisance claims filed in state court. *See, e.g.*, City of Oakland v. BP PLC, 969 F.3d. 895, 906-08 (9th Cir. 2020) (concluding cities' state-law nuisance claims against fossil fuel producers did not raise a substantial federal question); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1267-71 (10th Cir. 2022) (affirming district court's remand over due to lack of federal jurisdiction); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022) (same); Cnty. of San Mateo v Chevron Corp., 32 F.4th 733 (9th Cir. 2022) (same); Rhode Island v. Shell Oil Prods. Co., 2022 WL 1617206 (1st Cir. 2022) (same). An intermediate appellate court in Hawaii also recently rejected preemption claims raised by oil company defendants. *See* City and Cnty. of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 29, 2022) (order denying defendant's motion for failure to state a claim).

common law.[10] The Second Circuit had looked favorably on those claims, rejecting the corporate defendants' arguments that such federal common law claims were displaced by federal law.[11]

This victory was short-lived. In 2011, in *American Electric Power Co. v. Connecticut* (AEP), a unanimous Supreme Court held that the Clean Air Act (CAA) displaced federal common law nuisance claims for interstate air pollution—in this case, greenhouse gases.[12] Because the CAA authorizes federal regulation of greenhouse gases, and federal common law is generally disfavored, the justices concluded that federal common law public nuisance claims against greenhouse gas emitters were precluded by the CAA.[13]

The *AEP* decision put a quick end to suits alleging climate change constituted an interstate nuisance under federal common law. Efforts to distinguish *AEP*, in which the plaintiffs sought injunctions from claims seeking damages, were unavailing.[14] Yet in closing off one avenue of climate change litigation, the Court left open others, including claims that activities contributing to climate change could constitute a nuisance or otherwise actionable tort under state law.[15] It was on this basis that NYC and other local governments filed suit in 2017 and 2018 against fossil fuel producers seeking to recover for the cost of adapting to climate change under state law.[16]

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10 *See* Connecticut, et al. v. Am. Elec. Power, No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004).

11 Connecticut v. Am. Elec. Power, 582 F.3d 309, 374-81 (2nd Cir. 2009). The court also rejected claims that the plaintiffs lacked standing, that their claims were barred by the political question doctrine, or that they had failed to state a claim under the federal common law of public nuisance.

12 American Electric Power Co. v. Connecticut (AEP), 564 U.S. 410 (2011).

13 *Id.* at 415 ("The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.").

14 *See* Native Vill. Of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) ("The Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

15 *AEP*, 564 U.S. at 429 ("None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand."). The opportunity to file climate-based claims was also facilitated by continuing improvements in the science of climate attribution. *See* Michael Burger, Jessica Wentz, & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENVTL. L. 57, 191-216 (2020).

16 *See, e.g.*, Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. App. Dep't Super. Ct. Jul. 17, 2017) ; Complaint for Public Nuisance, City of Oakland v. BP P.L.C., No. RG17875889 (Cal. App. Dep't Super. Ct. Sep. 19, 2017); Complaint, City of Santa Cruz v. Chevron Corp., No. 17CV03243 (Cal. App. Dep't Super. Ct. Dec. 20, 2017); Complaint, Cty. of Marin v. Chevron Corp., No. CIV1702586 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint, Cty. of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint, Cty. of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint for Public Nuisance, City of San Francisco v. BP P.L.C., No. CGC-17-561370 (Cal. App. Dep't Super. Ct. Sep. 19, 2017); Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. App. Dep't Super. Ct. Jan. 22, 2018); Complaint and Jury

While the Congressional enactment of environmental regulatory statutes displaces federal common law actions for interstate pollution, such enactments do not necessarily preempt state common law actions, even where pollution crosses state boundaries.[17] Under longstanding precedent, it is more difficult to preempt state common law than it is to displace federal common law. And in the years since *AEP*, lower courts have largely recognized this distinction, generally rejecting claims that federal law preempts state-law based nuisance claims, even for interstate nuisances, so long as claims are based upon the law of the state in which the nuisance originated.[18]

Having accepted that claims based on federal common law are displaced, plaintiff municipalities are grounding their claims in state law, forcing courts to consider whether federal law should be interpreted to preclude state law claims the way it has displaced federal common law claims.[19] As most of these cases have been filed in state courts, carbon industry defendants have first sought to have cases removed to federal court before pressing their preemption claims. These efforts have been largely unsuccessful on both counts.[20] New York City, however filed its claim in federal court, prompting a direct adverse holding on preemption.

In *City of New York v. Chevron Corp.*, the U.S. Court of Appeals for the Second Circuit concluded the government plaintiffs may not "utilize state tort law to hold multinational oil companies liable for the damages caused by

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Demand, Bd. of Cnty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Providence Cty. July 2, 2018); Complaint, King County v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); Plaintiff's Complaint, Mayor & City of Baltimore v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. Jul. 20, 2018).

17 *AEP*, 564 U.S. at 423 ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law.") (cleaned up).

18 *See, e.g.*, Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 695 (6th Cir. 2015); Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013); Freeman v. Grain Processing Corp., 848 N.W. 2d 58 (Iowa 2014). *See also* Matthew Morrison & Bryan Stockton, *What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption*, 45 ENVTL. L. REP. 10282, 10284 (2015); Ben Snowden, *Clean Air Act Preemption of State-Law Tort Claims since* AEP v. Connecticut, 16 No. 4 ABA ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL.16, 17-18 (2015).

19 *See* Tracy Hester, *Climate Tort Federalism*, 13 FIU L. REV. 79, 85 (2019) (noting the new wave of climate suits "reflect a conscious strategic choice" to utilize state law in state courts).

20 *See, e.g.*, City of Oakland v. BP P.L.C, 969 F.3d 8895, 906-08 (9th Cir. 2020) (rejecting claim state-law claims raised substantial federal question justifying removal); City of Hoboken v. Exxon Mobil Corp., 2021 WL 4077541 (D.N.J. 2021) (remanding nuisance claims); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) (affirming district court's remand over due to lack of federal jurisdiction); Mayor & City of Baltimore, 31 F.4th 178 (4th Cir. 2022)(same); Rhode Island v. Chevron Corp., 393 F.Supp.3d 142 (D.R.I. 2019) (nuisance claims not completely preempted by Clean Air Act); County of San Mateo v. Chevron Corp., 294 F.Supp.3d 934 (N.D. Cal. 2018 (state law nuisance claims not preempted by Clean Air Act). Courts have also considered other bases for removal, including the federal officer doctrine. *See, e.g.,* BP P.L.C. v. Mayor and City of Baltimore, 141 S.Ct. 1532, 1536-37 (2021).

global greenhouse gas emissions."[21] Echoing the arguments of a prior district court opinion in a parallel suit filed in California,[22] the Second Circuit concluded that any such claims necessarily arise under federal common law, that federal common law for such claims is displaced by the Clean Air Act, and that the claims are therefore precluded.[23] In effect, the Court held that state law claims against fossil fuel companies are preempted, despite the lack of any preemptive legislative action, implicit or otherwise.

There are strong policy arguments for the adoption of broad nationwide (if not also international) policies to limit greenhouse gas emissions and mitigate climate change.[24] The combination of a carbon tax and targeted policies to spur and facilitate climate-related innovations, for example, would be superior to a polyglot of state-based lawsuits and monetary settlements.[25] Yet this would hardly justify the imposition of such a regime by judicial fiat, nor does it justify judicial refusal to hear such claims in the absence of actual legislative preemption. Whether state law nuisance actions are to be preempted is a choice for Congress to make, and is a choice Congress has not yet made.[26] Accepting that the EPA has regulatory authority over greenhouse gases,[27] there is no legislation preempting state efforts to address the

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21 *City of New York II*, 993 F.3d at 85..

22 *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).

23 The court also concluded that insofar as the suit implicated activities that cause greenhouse gas emissions overseas, such claims must also fail. *City of New York II*, 993 F.3d at 85-86.

24 *See, e.g.*, Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007) (explaining why national climate policies are preferable to state or local policies).

25 *See, e.g.*, David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming*, 18 SUP. CT. ECON. REV. 9 (2010) (arguing that treating the global climate as a common-pool resource is likely to be more effective than nuisance litigation); Joni Hersch & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 133 U. PENN. L. REV. 1657, 1659 (2007) ("Regulation through litigation is a less desirable climate change policy approach than a sound regulatory policy that reflects society's broad interests."); SHI-LING HSU, A CASE FOR THE CARBON TAX: GETTING PAST OUR HANG-UPS TO EFFECTIVE CLIMATE POLICY (2011) (making the case for a carbon tax); Jonathan H. Adler, *Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1 (2011) (discussing measures to facilitate innovation). *But see* Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827 (2008) (arguing that successful climate nuisance claims against fossil fuel companies could result in the imposition of a *de facto* carbon tax).

26 *See* ARNOLD W. REITZE, JR. AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 419 (2001) (noting that Congress never enacted measures to control the emissions of greenhouse gases); *see also* Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 1 (2009) ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted.").

27 The Supreme Court concluded that the EPA has such authority in *Massachusetts v. EPA*, 549 U.S. 497, 527-29 (2007). For a critique of that decision, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

consequences of greenhouse gas emissions themselves.[28] While other legal doctrines may constrain or complicate state common law climate nuisance claims, federal preemption should not be among them.[29]

Before discussing displacement and preemption, it is worth detailing what it is that would be displaced or preempted. Accordingly, Part I begins with a brief sketch of the common law environmental protection that preceded and matured alongside the development of environmental regulation, including the rise of federal common law actions for interstate pollution. With an eye toward preemption, and its role within our federalist system, Part II sketches the system of state and local environmental regulation that served as the background for the adoption of federal environmental law. While federal environmental laws are quite comprehensive and far-reaching, they operate alongside state and local efforts, often in collaborative fashion, and rarely preempt state regulation or litigation.[30] The result is a system of "cooperative federalism" under which state governments retain the laboring oar in environmental policy, even if denied the helm. Federal law routinely imposes a prescriptive floor of regulatory stringency, but rarely imposes a prohibitory ceiling. Federal environmental law largely leaves questions of institutional choice to state policy makers as well, including the choice between adopting administrative regulations and relying upon common law causes of action to police potentially polluting behavior.

Parts III and IV discuss displacement and preemption respectively, in the context of environmental law. Under current doctrine, displacement and preemption are distinct doctrines with distinct rationales and divergent standards. Displacement concerns which branch of the federal government is responsible for the development of legal standards. Preemption concerns the effect of federal law on the laws of the several states. As federal common law is disfavored under the *Erie* doctrine,[31] the requirements for displacement

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28 Many of the recent suits seek damages to compensate plaintiff jurisdictions for the costs of climate change and the need to adapt to such changes. These suits do not seek to impose emission reduction obligations on any fossil fuel companies directly. It is certainly possible, however, that when faced with the costs of compensating jurisdictions harmed by climate change, some companies may opt to change their behavior so as to reduce their liability.

29 Depending on how a given climate nuisance claim is pled, it could raise Dormant Commerce Clause or Due Process issues insofar as it targets or affects wholly out-of-state conduct. Such questions, however, are wholly distinct from the preemption question addressed in this article. Whether a given climate nuisance claim is viable under the law of a given state is also a question beyond the scope of this article. For an overview of some of the issues involved, see Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

30 *See* Denise Antolini, *Attacking Bananas and Defending Environmental Common Law*, 58 CASE WSTRN L. REV. 663, 665 (2008) (noting the range of environmental nuisance actions that are filed despite the existence of state and federal environmental regulation).

31 As the Court declared in *Erie* (in a bit of overstatement), "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As the Court noted in *AEP*, since *Erie* "a keener understanding developed," 564 U.S. at 421, albeit one that has been subject to substantial criticism. *See,*

are rather meek, and satisfied by the mere presence of a legislative enactment. In this context, legislative action is understood to reflect the legislature's preference for some alternative to leaving a question for judicial resolution.

As discussed in Part IV, preemption is quite different from displacement. Unlike federal common law, state law is quite favored, as befits a system in which federal powers are defined and limited while state police powers are plenary.[32] Establishing preemption requires a heavier lift, grounded in federal supremacy and legislative intent. So, while the enactment of federal environmental statutes may have broadly displaced the federal common law of interstate nuisances, little state common law of nuisance (or other state environmental law, for that matter) is preempted by federal environmental regulation. The foregoing suggests a rather straightforward application to the problem of climate change: Federal common law actions are displaced but state law actions are not preempted. Whatever legal obstacles such suits may face, federal preemption is not (yet) among them.[33]

Whether to rely upon federal or state law to address a given environmental concern is a vertical separation of powers question. As Part V explains, climate change presents a different set of incentives and constraints on state policymaking than states may face in other areas. Such incentives and constraints might serve as a policy justification for federal climate legislation and the preemption of alternative state approaches. Yet not only has Congress not enacted climate-specific regulatory measures, the provisions of federal environmental law under which greenhouse gases may be controlled are the same provisions that are applied to traditional air pollutants.

In the absence of preemptive federal legislation, state-law based climate nuisance claims should not be preempted, even if federal common law actions should be displaced. This would seem to be evident from the doctrine, but not every federal court has recognized it. As discussed in Part VI, the U.S. Court of Appeals for the Second Circuit misapplied current doctrine in holding that New York's nuisance claims were first, preempted by federal common law, and then displaced by the Clean Air Act. Other circuits to have faced related questions (albeit in the context of removal) have not made the same mistake.[34] As discussed in Part VI, the Second Circuit's opinion misapplied existing law, relying on mistaken assumptions about the

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e.g., Robert R. Gasaway & Ashley C. Parrish, *In Praise of* Erie*—And Its Eventual Demise*, 10 J. L., ECON. & POL'Y 225 (2013). For a defense of *Erie*, see Ernest A. Young, *A General Defense of* Erie Railroad v. Tompkins, 10 J.L., ECON & POL'Y 17 (2013).

32 *See* Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249-70 (Richard A. Epstein & Michael S. Greve eds. 2007). For a broader argument against federal preemption, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

33 Should Congress enact new legislation focusing on greenhouse gas emissions or the threat of climate change, this could well affect the analysis and alter this Article's conclusion.

34 *See, supra* note 9 and cases cited therein.

nature of our federal system. Other legal arguments for preemption of state-law-based nuisance claims for climate-related damages are equally unavailing. While there may be grounds to dismiss state-law-based nuisance claims filed by local governments against fossil fuel producers, displacement and preemption are not among them.

To close, the paper offers some concluding thoughts and poses questions for further consideration as to the proper relationship between federal environmental law and litigation over interstate air pollution generally, and climate change in particular.

I. COMMON LAW ENVIRONMENTAL PROTECTION

Before there was federal environmental regulation, many environmental problems were handled through common law protections of private property from interference by others.[35] For centuries, the common law doctrines of nuisance and trespass aided landowners who sought to protect their property—and, by extension, their persons—from interferences caused by the activities of others. Nuisance law, in particular, was a means through which landowners could protect against environmental harms.[36]

The underlying principle of nuisance in Anglo-American law dates back to at least the mid-thirteenth century, when the noted jurist Henry of Bracton wrote that "no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbor."[37] So, for example, it was not

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35 *See generally*, Steven J. Eagle, *The Common Law and the Environment*, 58 CASE WEST. RES. L. REV. 583 (2008). *See also* J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE WEST. RES. L. REV. 753, 753 (2008) ("Common law nuisance doctrine has the reputation of having provided much of the strength and content of environmental law prior to the rise of federal statutory regimes in the 1970s."); Morrison & Stockton, *supra* note 18, at 10282 ("Until the 1970s, individuals and states frequently used state common-law torts such as nuisance to protect the environment and individual property rights"); CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT (Clifford L. Rechtschaffen & Denise E. Antolini eds. 2007).

36 *See* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10292, 10293 (1986))("The public nuisance action is particularly useful to remedy environmental hazards."); G. Nelson Smith III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 40 (1995) ("Since the early seventeenth century, courts have recognized nuisance and trespass theories in environmental matters.); *see also* WILLIAM H. RODGERS JR., HANDBOOK ON ENVIRONMENTAL LAW §2.1, at 100 (2d ed. 1977) ("[T]he deepest roots of modern environmental law are found in the principles of nuisance. . . . [N]uisance theory and case law is the common law backbone of environmental and energy law.").

37 *See* Elizabeth Brubaker, *The Common Law and the Environment: The Canadian Experience*, *in* WHO OWNS THE ENVIRONMENT? 88-89 (Peter J. Hill and Roger E. Meiners eds., 1997). By some accounts, the origins of nuisance may be traced back to the writ of novel disseisin and 1166. *See* Julian Morris, *Climbing Out of the Hole: Sunsets, Subjective Value, the Environment, and the English Common Law*, 14 FORDHAM ENVTL L.J. 343, 347-48 (2003); *see also* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 765-72 (1979).

permissible for one landowner to emit noxious odors or fumes onto the land of another or to cause a neighbor's land to be flooded.[38] This principle became embodied in the Latin maxim s*ic utere tuo ut alienum non laedas*, or "Use your own property so as not to harm another's," which was famously embraced in *William Aldred's Case* in 1611.[39]

William Aldred's case may be ancient history, but the underlying dispute should resonate today. A businessman built a hog sty in a residential neighborhood, allegedly fouling the air for local residents. When suit was brought, the defendant claimed the plaintiffs were oversensitive—"one ought not to have so delicate a nose, that he cannot bear the smell of hogs"[40]—and any inconvenience or intrusion was outweighed by the public benefit of hog production. After all, "the building of the house for hogs was necessary for the sustenance of man."[41] The court rejected this defense, however, on the grounds that no landowner has the right to use his or her property in manner that will prevent the quiet enjoyment of other nearby properties. Otherwise "good and profitable" uses of property may be enjoined as nuisances where they cause pollution that prevents others from enjoying the property of their own.[42] As Blackstone would describe the rule:

> [I]f one erects a smelting-house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. . . . [I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of ' 'another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act where it will be less offensive.'[43]

Grounded in the *sic utere* principle, the law of nuisance operated as a powerful constraint on potentially noxious land uses for many centuries, at least where the harms were readily observable and traceable, and the numbers of properties involved were sufficiently small to avoid coordination problems and excessive transaction costs.[44]

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38 *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 555 (2008) ("It has long been understood that the discharge of noxious substances into the air or the water lay at the core of the law of nuisance."); Sanford v. Univ. of Utah, 488 P.2d 741 (1971) (recognizing flooding caused by diversion of flow of surface waters may constitute a nuisance).

39 *See* 9 Coke 57b, 77 Eng. Rep. 816 (K.B. 1610). This case, involving a dispute between a landowner and the owner of a neighboring pig sty, is the first known reported case to expressly rely upon this rule for its decision. For more background on the case, see Coquillette, *supra* note 37, at 772–77.

40 9 Coke 58a, 77 Eng. Rep. at 817.

41 *Id.* According to Coquillette, "[n]ever before had a defendant so clearly claimed social utility as a defense to a nuisance action." Coquiellete, *supra* note 37, at 775.

42 9 Coke 58b-59a, 77 Eng. Rep. at 821.

43 3 WILLIAM BLACKSTONE, COMMENTARIES *217-218.

44 *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 661 (1986) ("Land is such a fundamental natural resource that most environmental threats, whether directed at natural resources or

During the 19th century, however, many courts were more willing to engage in the sort of balancing the court in *Aldred's Case* eschewed.[45] Nonetheless, nuisance law remained a powerful means of constraining polluting activities, as well as encouraging the siting of potentially polluting activities away from where they might cause harm. During the Progressive Era, for instance, anti-smoke activists targeted individual facilities, raising complaints and occasionally filing nuisance suits.[46] Such suits were often successful, and they created powerful incentives.[47] The threat of nuisance liability, and a court order that could force a facility to clean up or close, encouraged firms to locate potentially polluting facilities farther away from residential communities to avoid complaints and litigation.

The law of private nuisance focused on those activities that interfered with the use or enjoyment of private land. By contrast, the doctrine of public nuisance developed to address those activities which interfered with the rights of the public at large, such as by obstructing a highway, disrupting a public market, or fouling the air of the town square.[48] Because public nuisance actions are filed to protect rights common to the public, they are most often filed by public authorities, acting on behalf of the state in its sovereign capacity.[49] Those activities subject to suit as public nuisances are also subject to regulation under the sovereign police power.[50]

The *Restatement (Second) of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public."[51] Though it does not provide a precise definition of what would constitute an "unreasonable" interference, the *Restatement* notes that public nuisances are typically characterized by one or more of the following characteristics: 1) the offending conduct creates a "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience"; 2) the conduct is "proscribed by statute, ordinance or administrative regulation"; and 3) the conduct is "of a continuing nature or

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public health, can easily be read as interfering with the land's use and enjoyment, and thereby potentially raising private nuisance claims."); *see also* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, §2.1 at 112-13 (2d. ed. 1994) ("Nuisance actions reach pollution of all physical media—air, water, land, groundwater—by a wide variety of means. Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation.").

45 *See* Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions – Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 656 (1976).

46 DAVID STRADLING, SMOKESTACKS AND PROGRESSIVES: ENVIRONMENTALISTS, ENGINEERS, AND AIR QUALITY IN AMERICA, 1881-1951 3 (1999).

47 *Id.* at 41.

48 *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-999 (1966); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 328–29 (2005).

49 Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 362, 364–65 (1990).

50 Private parties may also file suits alleging public nuisances, but only if they are able to demonstrate that they have suffered a "special injury" to distinguish their interest from that of the public at large. *See id.* at 364.

51 Restatement (Second) of Torts § 821B (1977).

has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[52] As Professor Thomas Merrill observes, this only provides the most general guidance for resolving nuisance claims as it does not, for instance, make clear whether courts should balance the degree of harm against the utility of the defendant's conduct or adopt something closer to a strict liability rule.[53]

Although public nuisance claims in federal court are not particularly common, states have repaired to the federal common law of interstate nuisance in seeking to reduce or eliminate pollution emanating from other jurisdictions. In the noted case of *Georgia v. Tennessee Copper Company*, for example, the state of Georgia sought relief from the "noxious gas" emitted by copper companies in an adjoining state.[54] These emissions, Georgia claimed, caused the "wholesale destruction of forests orchards and crops" within its territory.[55] In an opinion by Justice Oliver Wendell Holmes, the Supreme Court agreed that Georgia was entitled to relief, explaining:

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.[56]

In other cases, the Supreme Court recognized public nuisance claims against upstream discharges of untreated sewage and ocean dumping of waste, among other things.[57]

The gradual adoption of environmental regulations at the local, state, and federal levels did not put an end to nuisance litigation. Far from it. The number of environmental nuisance cases continued to rise through the late 20th century, even as environmental regulations proliferated at all levels of government.[58] Rather than eliminate nuisance litigation, environmental regulations served as a complement. Both regulation and litigation appear to

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52 Restatement (Second) of Torts § 821B (1977).

53 *See* Merrill, *supra* note 48 at 329; *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987) ("[N]uisance standards often are vague and indeterminate"); North Carolina ex rel Cooper v. Tennessee Valley Auth., 615 F.3d 291, 302 (4th Cir. 2010) ("[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application.").

54 Georgia v. Tennessee Copper Co., 206 U.S. 230, 236 (1907).

55 *Id.*

56 *Id.* at 238.

57 *See, e.g.*, Missouri v. Illinois, 180 U.S. 208 (1901); New Jersey v. City of New York, 283 U.S. 473 (1931).

58 *See* Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies of Environmental Decline*, 14 FORDHAM ENVTL. L.J. 55, 64 (2002) (documenting a dramatic increase in environmental public nuisance cases in both state and federal courts between the 1960s and 1990s).

have been responses to the same underlying concerns and an increased demand for action to control the environmental consequences of industrial and other activity. Accordingly, where environmental regulations are absent or inadequate, the filing of nuisance suits should be no surprise.[59]

II. COOPERATIVE FEDERALISM IN ENVIRONMENTAL LAW

While not as old as nuisance law, state and local regulation of pollution-generating activities and other environmental concerns long predate the enactment of major federal environmental laws. Such regulations were often not only concerned with locally undesirable land uses or activities that could be considered nuisances but also addressed some resource conservation concerns. By the time of the post-World War II environmental awakening, state and local governments had been active in various forms of environmental regulation for decades. The groundswell of public support that induced federal legislative action encouraged the adoption of more aggressive policies at the state and local level as well.[60]

At the same time as Progressive Era anti-smoke activists sought to harness nuisance law, local governments began adopting smoke-control ordinances to improve local air quality. As environmental historian David Stradling recounts, "the late 1800s and the early 1900s contain abundant examples of urban and suburban environmental activism, much of it successful."[61] Philadelphia, for example, enacted a smoke-control ordinance in 1905, which quickly reduced smoke levels in the heart of the city.[62] The City of Brotherly Love was not alone. By 1920, some forty cities had local smoke control ordinances in place.[63] By 1960, the number had more than doubled, and by 1970, when the Clean Air Act was enacted, it topped 100.[64] County-level air pollution control efforts likewise increased dramatically in the post-war period, rising from 2 in 1950 to 81 in 1970.[65] State regulations also followed in much of the country, beginning with Oregon in 1951.[66] By

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59 *See* Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling Regulatory Floor*, 68 FLA. L. REV. 1597, 1600 (2016) ("Environmental statutory schemes often lack mechanisms for addressing damages to individuals or their property, forcing litigants to explore the utility of environmental claims."). In this fashion, nuisance law continues to operate as a "backstop to pollution statutes." *See* Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOL. L.Q. 113, 147 (2005).

60 *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

61 STRADLING, *supra* note 46, at 4.

62 *Id.* at 76.

63 *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 44 (1982).

64 *Id.*

65 *Id.*

66 *Id.* at 47.

1970, every state had an air pollution control program of some sort, albeit of varying stringency.

A similar story could be told with water pollution. Throughout the country, "local public indignation over the filth of local waters" triggered state legislative responses.[67] By 1966, every state had adopted water pollution legislation of some sort.[68] Just as Cleveland residents took the lead at the beginning to clean the Cuyahoga River before its infamous (and often misunderstood) 1969 fire,[69] other communities made strides to protect local resources well before meaningful federal regulation was adopted. As would be expected, some states' efforts were clearly more comprehensive and more successful than others. Then, as now, the adopted measures were imperfect, and environmental goals were often balanced against other concerns. Nonetheless, as the nation's environmental consciousness blossomed in the post-war period, state and local governments began to act.

Those federal environmental statutes enacted prior to 1970 were rather limited, largely focusing on the conduct of the federal government itself, rather than private industry.[70] Yet beginning in 1969, Congress began to erect a broad environmental regulatory architecture, including the Clean Air Act in 1970[71] and the Clean Water Act in 1972.[72] These laws, and others adopted during the same time period,[73] were adopted against the background of state and local environmental measures.

Congress's environmental lawmaking did not seek to supplant pre-existing state and local efforts. Rather, the express purpose of many federal statutes was to supplement incomplete or insufficiently protective state and

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67 *See, e.g.*, N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 234 (1966).

68 *See id.* at 215.

69 *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 105–13 (2002).

70 *See* Percival, *supra* note 60, at 1158 ("To the extent that federal law was regulatory in character prior to 1970, the primary targets of environmental regulation were federal agencies rather than private industry.").

71 42 U.S.C. §§ 7401-7661f (2000). It is worth noting that the first federal clean air legislation was enacted in 1955 (Pub. L. No. 80-159), and amended in 1963, 1965, 1966, and 1967. With a few exceptions, such as the creation of federal emission standards for new automobiles mandated in 1967, the pre-1970 statutes were largely non-regulatory in nature. Although the 1970 Act was itself, technically, a series of amendments to the prior statutes, it is commonly referred to as *the* Clean Air Act, as it provides the foundation for the contemporary regulatory structure.

72 33 U.S.C. §§ 1252-1385 (2000). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

73 Other major federal environmental laws enacted during this time period include the National Environmental Policy Act (1969), 42 U.S.C. §§ 4321-4347, the Endangered Species Act (1973), 16 U.S.C. §§ 1531-1544, the Federal Environmental Pesticide Act (aka, the Federal Insecticide Fungicide, and Rodenticide Act 1972), 7 U.S.C. §§ 136-136y, the Safe Drinking Water Act (1974), 42 U.S.C. §§ 300f-before th300j, the Resource Conservation and Recovery Act (1976), 42 U.S.C. §§6901-6992k, and the Toxic Substances Control Act (1976), 15 U.S.C. §§ 2601-2671.

local efforts.[74] As made clear in the findings of the major federal environmental statutes, states were to retain their primary role. The congressional findings in the Clean Air Act, for example, declare that "air pollution control at its source is the primary responsibility of States and local governments."[75] Major pollution control laws like the CAA and CWA also contained broad savings clauses expressly preserving state authority to enact and enforce laws controlling pollution.[76] Outside of the regulation of vehicles and consumer products sold in interstate markets, states largely retained the ability to adopt more stringent standards of their own.[77]

While federal environmental laws grant expansive regulatory authority to federal agencies, most environmental statutes are implemented following a "cooperative federalism" model.[78] Under this model, the federal government outlines the contours of a given regulatory program, typically

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74 The history of these statutes generally supports the same conclusion. *See* Kalen, *supra* note 59, at 1597.

75 42 U.S.C. §7401(a)(3). Even more emphatically, the Clean Water provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b).

76 42 U.S.C. §7416 (providing that, "[e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.") and 33 U.S.C. §1370 (providing that, "[e]xcept as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

77 *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 178 (Richard A. Epstein & Michael S. Greve eds. 2007) (observing that federal environmental laws "aim to eliminate state regulation where it would undermine the efficient scope of markets for particular commercial commodities").

78 *See* New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. . . . This arrangement . . . has been termed cooperative federalism." (internal citations and quotations omitted)). Statutes that employ the cooperative federalism model include the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, portions of the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act.

through statutory mandates elaborated upon by regulatory measures.[79] States are then encouraged to implement the program in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor – albeit sometimes a highly prescriptive one – and states remain free to adopt more stringent measures.[80] State programs that meet federal standards are typically eligible for federal financial assistance.[81] States that fail to adopt adequate programs are not only denied the relevant federal funding—they can also be subject to various sanctions and federal preemption of their programs.[82]

This cooperative model was explicitly adopted so as to ensure continued state involvement in environmental protection.[83] Though federal policymakers wish to call the shots and set major environmental policy priorities, the major environmental laws are structured so as to continue to rely upon the ability of state policymakers to identify, implement and enforce environmental requirements.[84] The geographic and economic diversity of the nation requires local knowledge and expertise that is often unavailable at the federal level.[85] Environmental problems, and their solutions, will vary from

79 *See* John Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995); *see also* DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION (1997).

80 Whether federal intervention discourages greater state or local regulation by altering the incentives faced by state and local policymakers is a separate question, explored in Jonathan H. Adler, *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67 (2007).

81 *See, e.g.*, 33 U.S.C. § 1256 (2000) (authorizing financial support for state water pollution control programs that adopt desired pollution control policies); *see also* Percival, *supra* note 60, at 1173 (noting the use of federal funding to encourage land-use planning and solid waste management).

82 *See, e.g.*, 42 U.S.C. §7509 (2000) (detailing sanctions for failure to attain National Ambient Air Quality Standards under Clean Air Act); *see also* Percival, *supra* note 60, at 1174 (noting under most environmental laws, the federal government will adopt and enforce a federal regulatory program in the absence of a sufficient state program). For a discussion of whether these conditions transgress constitutional bounds, see Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism, and Conditional Spending after* NFIB v. Sebelius*,* 43 ECOLOGY L.Q. 671 (2016).

83 Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) ("The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.").

84 *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977) (noting that the federal government "is dependent upon state and local authorities to implement [environmental] policies because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources.").

85 *See* Dwyer, *supra* note 79, at 1218 (noting that "the knowledge necessary to administer any air pollution control program . . . can be found only at the local level."). *See also* HENRY N. BUTLER &

place to place, limiting the federal government's ability to adopt nationwide solutions to environmental concerns that are equally applicable to multiple parts of the country.[86]

As a general matter, federal preemption of state environmental law is the exception. Congress was quite explicit in those few instances in which it sought to preempt state environmental law-making, whether by state legislatures, agencies, or courts.[87] The Clean Air Act, for instance, makes explicit that various emission control requirements for stationary sources and planning requirements for local governments only establish federal floors, leaving states with the discretion to pursue more aggressive measures of their own. When it comes to the regulation of motor vehicles, however, the Clean Air Act explicitly provides that only the federal government and California may impose emission control requirements on cars and trucks.[88] Likewise, when the Clean Air Act seeks to preempt state and local regulation of emissions from various consumer products, so as to prevent the balkanization of relevant product markets, it is also quite explicit about it.[89]

JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources."). This observation is based on the insights of Nobel Laureate economist F.A. Hayek, who observed "[t]he knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519, 519-20 (1945).

86 Stewart, *supra* note 84, at 1266 (noting the "sobering fact" that "environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington").

87 *See, e.g.*, Clean Air Act, 42 U.S.C. 7543, 7573 (prohibiting states from adopting or enforcing emission control standards for aircrafts or new motor vehicles); Price-Anderson Act, 42 U.S.C. 2210(n)(2) (2000) (granting original jurisdiction to federal district courts for any public liability action arising out of or resulting from a nuclear incident). Rather than completely preempting state environmental law in a particular area, Congress commonly includes preemptive federal requirements for product design or engineering specifications. *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1561–64 (2007).

88 *See* E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 330 (1985); *see also* Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1101 n.1 (D.C. Cir. 1979) (noting that Congress intended California to "act as a kind of laboratory for innovation" with regard to the Stale's "pioneering efforts at adopting and enforcing motor vehicle emission standards"). *See, e.g.*, 42 U.S.C. § 7543(a) (2000) (preemption of state automobile emission standards); 42 U.S.C. § 7545(c)(4)(A) (2000) (preemption of state fuel standards). EPA may waive preemption of emission standards adopted by California, subject to certain conditions. *See* 42 U.S.C. § 7543(b) California's ability to adopt its own standards was a consequence of California adopting vehicle emission controls prior to the adoption of federal standards.

89 Perhaps paradoxically, other aspects of the Clean Air Act, such as its fuel regulations, facilitate if not actually require the balkanization of interstate markets. *See generally* Andrew P. Morriss & Nathaniel Stewart, *Market Fragmenting Regulation Why Gasoline Costs So Much (and Why It's Going to Cost More)*, 72 BROOK. L. REV. 939 (2007).

Federal intervention is probably most needed to address interstate spillover concerns. Yet only a small portion of current federal regulations can be justified on these grounds.[90] Over the past half-century, federal regulation of intrastate air and water pollution has been more extensive than federal regulation of interstate spillovers, making it more difficult to argue that such provisions have the purpose or effect of preempting state-law-based protections. Moreover, the few provisions of federal environmental law targeted at interstate spillovers were rarely invoked in the first three decades after the major federal pollution control statutes were adopted.

While the Clean Air Act contains a few provisions that specifically address interstate pollution concerns, the EPA largely ignored these measures for many years. Indeed, where states sought to invoke the Act to obtain relief for upwind contributions to local air pollution, the EPA refused to act and federal courts largely validated the federal government's desire to ignore interstate air pollution.[91] Only since the turn of the last century has the EPA meaningfully responded to states seeking to control emissions from upwind states that contribute to downwind nonattainment of federal air quality standards.[92] The Clean Water Act also authorizes the EPA to address transboundary pollution, but here again the federal government has been largely absent, rarely invoking the relevant provisions.[93]

III. DISPLACEMENT

For over a century, states brought interstate pollution disputes to the Supreme Court, often under the Court's original jurisdiction.[94] While the total number of cases was not particularly significant, the Court considered common-law-based interstate pollution claims and, where appropriate, provided relief.[95] If the Court concluded that upstream or upwind jurisdictions failed to respect the territory of their downstream or downwind

90 *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1998); *see also* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVTL L.J. 130 (2005).

91 *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 959 (1997); DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE 126 (2005).

92 *See* Michigan *v.* EPA, 213 F.3d 663 (D.C. Cir. 2000)*;* Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001).

93 *See* Merrill, *supra* note 91, at 960-61.

94 The Supreme Court first took jurisdiction over an interstate pollution dispute in *Missouri v. Illinois*. *See* Missouri v. Illinois, 180 U.S. 208 (1901); Missouri v. Illinois, 200 U.S. 496 (1906). For a thorough discussion of this history, see Robert Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004). For a fuller exploration of the Court's use of original jurisdiction in environmental cases, see Robert D. Cheren, *Environmental Controversies "Between Two or More States*,*"* 31 PACE ENVTL. L. REV. 105 (2014).

95 *See* Rothschild, *supra* note 3, at 424 (noting that the Supreme Court had allowed cases concerning interstate pollution to proceed under both state and federal common law).

neighbors, the Court issued injunctions against pollution sources[96] and, in some cases, even ordered states to construct necessary facilities for adequate waste management.[97] Upon the adoption of federal environmental regulatory statutes, however, this practice came to an end. Resting on the assumption that federal common law should be no more than a gap-filler of last resort, the Court concluded that the enactment of federal environmental laws eliminated any need for a court-crafted federal common law of interstate nuisance. Whereas demonstrating preemption of state law may be difficult, as discussed in the next section, the Court concluded that demonstrating displacement of federal common law should be easy.

The Court's change of heart came about in its consideration of a long-running water pollution dispute between the state of Illinois and the City of Milwaukee.[98] Prior to the enactment of the Clean Water Act, Illinois filed a bill of complaint with the Supreme Court alleging that several Wisconsin localities, including the sewage commissions of Milwaukee city and county, were discharging pollution into Lake Michigan.[99] Illinois claimed "some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone," creating a public nuisance.[100] As it had in prior cases, the Court recognized that Illinois' claims arose under federal common law.[101] Although Congress had enacted laws "touching interstate waters" and urging their protection, the Court did not find that these enactments had displaced its responsibility to adjudicate the dispute between Illinois and Milwaukee, even though federal

96 *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230, 239 (1907) (issuing an injunction against the discharge of noxious gasses that crossed state lines and harmed Georgian land); Wisconsin v. Illinois, 278 U.S. 367, 420–21 (1929) (enjoining the defendants from excessively diverting waters from the Great Lakes to the Chicago Drainage Canal for the purpose of sewage disposal); New Jersey v. City of New York, 283 U.S. 473, 476, 482–83 (1931) (issuing an injunction restraining New York City from dumping garbage into the ocean).

97 *See, e.g.*, Wisconsin v. Illinois, 278 U.S. 367, 420–21 (1930) (requiring the Sanitary District of Chicago to construct and operate suitable sewage plants); New Jersey v. New York, 283 U.S. 805 (1930) (requiring New York to build a sewage treatment plant at Port Jervis before diverting water from the Delaware River to the New York City water supplies).

98 *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (Milwaukee I); Illinois v. City of Milwaukee, 451 U.S. 308 (1981) (Milwaukee II); *see also* Percival, *supra* note 94, at 758-65.

99 The jurisdictions included four Wisconsin cities, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. *Milwaukee I*, 406 U.S. at 93.

100 *Id.*

101 *Id.* at 103 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). Interestingly enough, when Illinois first sought to bring its claims before the Supreme Court, some of the justices were skeptical of the claims. Justice Harry Blackmun, in particular, cautioned that hearing such claims "will be a big headache for the Court." *See* Zasloff, *supra* note 25, at 1844 (quoting Memorandum from Harry A. Blackmun to the United States Conference (Sept. 16, 1971)).

law authorized suits by the Attorney General for the abatement of pollution.[102]

Relying upon *Georgia v. Tennessee Copper*,[103] and recognizing the "federal interest in a uniform rule of decision,"[104] the Court accepted the responsibility of adjudicating the dispute and considering whether to enjoin the nuisance of which Illinois complained. The Court noted the need for a uniform, federal standard, as opposed to the "varying common law of the individual States."[105] At the same time, the Court also acknowledged that the passage of "new federal laws and new federal regulations" could make this role obsolete.[106] "But until that comes to pass," wrote Justice Douglas for the Court, "federal courts will be empowered to appraise the equities of the suits alleging the creation of a public nuisance by water pollution."[107]

What Justice Douglas suggested might come to pass did—and right quick. *Milwaukee I* was decided in April 1972. The Federal Water Pollution Control Act Amendments of 1972, what we commonly refer to as the "Clean Water Act," was passed over President Richard Nixon's veto only six months later.[108] With this enactment Congress dramatically expanded the federal role in water pollution regulation, even if it did not do much to address the particular concern of interstate water pollution.

In 1980, the *Milwaukee I* defendants returned to the Supreme Court seeking relief from judicially imposed orders to abate their pollution of Lake Michigan.[109] This gave the Court an opportunity to consider the implications of the Clean Water Act's passage and to extricate itself from continuing involvement in interstate pollution disputes. It was an opportunity the Court would not pass up.

While acknowledging the need to provide a federal rule of decision under federal common law in a "few and restricted" instances, the Court rejected the idea that resolving interstate disputes—and fashioning and

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102 *Milwaukee I,* 406 U.S. at 103-04. Indeed, while the authority for the Attorney General to act was longstanding, it had rarely been invoked prior to the 1960s. *See* Adler, *supra* note 69, at 134; *see also* William H. Rodgers, Jr.*, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 772–74 (1971) (discussing how federal authority had previously been understood).

103 *Tennessee Copper Co.*, 206 U.S. at 230.

104 *Milwaukee I*, 406 U.S. at 105 n.6.

105 *Id.* at 107 n.9.

106 *Id.* at 107. While stressing the need for a uniform rule of decision, the Court also acknowledged that equitable concerns could justify the consideration of state-specific concerns, including whether one state had voluntarily adopted more "strict standards" than did its neighbors.

107 *Id.*

108 The Clean Water Act, Pub. L. No. 92-500 (1972) was enacted in October 1972 following a veto by President Nixon. *See Clean Water: Congress Overrides Presidential Veto*, *in* CQ ALMANAC 1972, at 11-17 (28th ed. 1973)

109 *See* Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 311–12 (1981).

enforcing standards under federal common law—was its responsibility.[110] Instead, the Court explained, resolution of such disputes should be guided by legislative action.[111] And although nothing in the text or history of the Clean Water Act indicated Congress's intent to displace the Court's role in adjudicating interstate pollution disputes, the majority of the Court concluded that the enactment of a comprehensive federal regulatory regime for water pollution obviated any need for judicial intervention.[112]

Leaning heavily on the idea that federal common law is disfavored,[113] the Court explained it need not wait for Congress to enact a law expressly depriving the judiciary of the power to act. Rather, the mere presence of a federal statute occupying the relevant space and assigning primary responsibility for pollution control to the executive branch would be sufficient.[114] As the Court explained, "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law.[115] Whereas the latter requires due regard for state prerogatives, "[s]uch concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required."[116] To the contrary, Justice Rehnquist explained, the Court should "'start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," and thus the presumption is that federal common law should be displaced.[117]

The Court would not affirm that this conclusion applied equally to interstate air pollution until deciding *AEP* in 2011, but the logic of the Court's displacement doctrine was clear. Few doubted the principle underlying *Milwaukee II* would dictate an equivalent result in an air pollution case, even one involving greenhouse gases. Thus, in *AEP*, the Obama Administration

110 *Id.* at 313 ("Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable").

111 *Id.* ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.").

112 *Id.* at 314 ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of lawmaking by federal courts disappears").

113 *See id.* at 312 ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision.").

114 Though, as noted above, the field of water pollution control was not entirely free of federal involvement when *Milwaukee I* was litigated. *See supra* note 102 and accompanying text.

115 *Milwaukee II*, 451 U.S. at 316.

116 *Id.*

117 *Id.* at 317.

did not even try to argue against displacement, its commitment to an aggressive climate policy notwithstanding.[118]

The state plaintiffs in *AEP* brought a federal common law claim of interstate nuisance against the nation's largest emitters of carbon dioxide seeking broad injunctive relief. Although litigated in tandem with the suit that would become *Massachusetts v. EPA*,[119] the *AEP* case languished in the lower courts long after *Massachusetts* was decided.[120] Once it reached One First Street, however, the case was quickly and easily resolved in a unanimous opinion by Justice Ruth Bader Ginsburg.[121]

Reaffirming the rationale of *Milwaukee II*, Justice Ginsburg explained that whether a federal regulatory program displaces preexisting federal common law claims turns on the action taken by Congress. The enactment of regulatory legislation, in particular, is the basis of displacement, not any other indicia of legislative intent, nor not any judicial assessment of whether such legislation is effective or sufficient to address the downstream or downwind state's concerns. How (or even whether) such legislation has or would be implemented by federal regulatory agencies was not the Court's concern: "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."[122]

Given that the Court had decided four years earlier that the CAA applied to greenhouse gases,[123] it was rather obvious that federal common law claims against GHG emitters would have to be displaced under this test. "As *Milwaukee II* made clear," Justice Ginsburg wrote, "the relevant question for purposes of displacement is 'whether the field has been occupied, not

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118 The Solicitor General's merits brief urged the Supreme Court to reverse the lower court's conclusion that plaintiffs had standing on prudential, rather than constitutional, grounds, and recommended remand so the Second Circuit could reconsider its displacement holding in light of subsequent regulatory events. *See* Steven Mufson, *Obama Administration Sides with Utilities in Supreme Court Case about Climate Change*, WASH. POST (Aug. 26, 2010) available at http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606632.html.

119 It is worth noting that the underlying legal theories in the *Massachusetts* litigation and *AEP* litigation operated in tandem to place the federal government in a difficult position. Insofar as the federal government argued that the EPA lacked authority to regulate greenhouse gases under the Clean Air Act, this undermined the arguments that nuisance claims were displaced. At the same time, if the EPA lacked the authority to regulate greenhouse gases, it would be more difficult to argue that nuisance suits were displaced. *See* Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit:* American Electric Power v. Connecticut, 2010-11 CATO SUP. CT. REV. 295, 301–02 (2011).

120 Indeed, *AEP* sat at the U.S. Court of Appeals for the Second Circuit for an extraordinarily long time after oral argument. *See* Marcia Coyle, *Questions Arise About Long Delay by Sotomayor-Led Panel in Climate Case*, NAT'L L. J., (May 29, 2009), https://www.law.com/almID/1202431051311/. The court's decision was eventually issued over three years after oral argument with only two of the original panel members participating. The third, Sonia Sotomayor, was by then a justice on the Supreme Court. *See* Connecticut v. Amer. Elec. Power, 582 F.3d 309 (2d Cir. 2009).

121 564 U.S. 410 (2011).

122 *Id.* at 424 (cleaned up).

123 *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

whether it has been occupied in a particular manner.'"[124] And because greenhouse gases were air pollutants subject to regulation under the CAA, displacement followed. As Justice Ginsburg explained:

> the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act . . . And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants.[125]

The "critical point" was that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants,"[126] not whether the resulting regulations were effective or desirable.[127] Indeed, Justice Ginsburg noted, were EPA to adopt inadequate regulations, or even to "decline to regulate carbon-dioxide emissions altogether," it would not matter for displacement purposes.[128] Even if the Clean Water Act could be said to impose a more comprehensive system of effluent controls than the CAA, this too was irrelevant, for "[o]f necessity, Congress selects different regulatory regimes to address different problems."[129]

In enacting the CAA, as interpreted in *Massachusetts v. EPA*, Congress made the scope and stringency of GHG emission controls something for the EPA to determine in the first instance. Should states or private groups disagree with the EPA's policy conclusions, or believe that the EPA's regulations are insufficiently stringent, they would retain the ability to petition the agency or file suit in federal court, much as the states and environmentalist groups did in *Massachusetts*. What they could not do is seek to transfer authority over emission controls from the political branches to the courts through the use of federal common law.

The Court's opinion emphasized that federal common law is disfavored. "There is no federal general common law," the opinion noted, quoting *Erie Railroad v. Tompkins*.[130] Rather, most questions governed by the common

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124 American Electric Power Co. v. Connecticut (AEP), 564 U.S. 410, 426 (2011) (*quoting* Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 324 (1981)).

125 *AEP*, 564 U.S. at 426..

126 *Id.* at 426. To this, Justice Ginsburg added, somewhat cheekily, "Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing." *Id.*

127 There are plenty of reasons to believe EPA regulation of greenhouse gases under the Clean Air Act is not desirable. *See* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011). Nor is such regulation likely to be a particularly efficient way to reduce GHG emissions. *See* Jonathan H. Adler, *The Legal and Administrative Risks of Climate Regulation*, 51 ENVTL. L. REP. 10485 (2021).

128 *AEP*, 564 U.S. at 426 ("As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" (citation omitted)).

129 *Id.*

130 *Id.* at 420 (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

law are left to the states. Federal common law is reserved for "'subjects within national legislative power where Congress has so directed,'" such as in the case of antitrust law, or "where the basic scheme of the Constitution so demands," such as where it is necessary to resolve interstate disputes and Congress has not addressed the concern through legislation.[131] Interstate air and water pollution could be governed by federal common law, but only in the absence of regulatory legislation. The federal common law of interstate nuisance is thus a contingent backstop—a means of filling interstices insofar as is necessary to enable states to safeguard their sovereign interests in their own territory. Yet as the Court had held in *Milwaukee II*, "when Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears."[132]

Whereas the Court has adopted (though not always applied) a presumption against the preemption of state law causes of action, no such presumption applies with displacement. If anything the constitutional structure would warrant a "special presumption" *against* the use of federal common law.[133] Preemption of state law must be clearly shown so as to protect the states' sovereign interests within the federal system of dual sovereignty.[134] No such interest protects the policymaking power of the federal courts. "[I]t is primarily for the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," Justice Ginsburg explained for the Court.[135] Thus, whereas the justices routinely disagree and divide over the preemptive effect of various federal laws, they were of one mind on the question of displacement, unanimously rejecting the use of federal common law to control emissions already subject to administrative control under federal law,[136] while leaving the question of CAA preemption of state law based suits to another day.[137]

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131 *Id.* (citation omitted).

132 Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 314 (1981)).

133 *See* Merrill, *supra* note 48 at 314.

134 *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("In all pre-emption cases ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (cleaned up).

135 *AEP,* 564 U.S. at 423–24.

136 It is certainly possible that Justice Sotomayor disagreed with her colleagues on this point, as she was recused from the case due to her participation in the panel that heard arguments in *AEP* on the Second Circuit. The case had been argued years prior to her nomination, but was only issued later, with both participating judges on the panel rejecting the arguments for displacement. *See* Connecticut v. Amer. Elec. Power, 582 F.3d 309 (2nd Cir. 2009). There is no way to know whether then-Judge or Justice Sotomayor agreed with that opinion.

137 *Id*. at 429; *see also* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 866 (9th Cir. 2012) (Pro, J., concurring) ("Displacement of the federal common law does not leave those injured without a remedy. Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.").

IV. PREEMPTION

The enactment of a federal statute that "speaks directly" to the issue at hand may be sufficient to displace federal common law. Far more is required to preempt state law.[138] Federal common law may be disfavored, but so too is the federal preemption of state law. The displacement of federal common law implicates a different legal standard than does the preemption of state-law-based claims.[139]

As a constitutional matter, Congress has the power to preempt state law, as federal law is supreme.[140] The question in preemption cases is whether Congress has, in fact, preempted state law.[141] This is not to be presumed, as the preemption of state laws is always "a serious intrusion into state sovereignty."[142] As a general matter, preemption will not be found unless the Court concludes preemption "was the clear and manifest purpose of Congress"[143] or that "a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[144] This more stringent standard protects the states' sovereign interests in maintaining their police powers free of federal interference.[145]

Federal preemption comes in two forms, express and implied. Express preemption is straightforward. Where Congress, or a federal agency, explicitly preempts state laws on a given subject, states are barred from adopting and enforcing their own regulations.[146] Yet Congress need not be so explicit for courts to find preemption. Preemption may be implied either "where the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to

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138 *See* Zasloff, *supra* note 25, at 1852 ("displacement of federal common law hardly implies the preemption of state common law."); Epstein, *supra* note 38, at 553 ("the presumption on preemption differs from the federal-federal to the federal-state context. On matters of federal-state regulation, the basic presumption is one against preemption, subject to some key exceptions.").

139 *See* Merrill, *supra* note 48 at 314.

140 *See* U.S. CONST. art. VI, cl. 2 (providing federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Pursuant to the Supremacy Clause, "Congress has the power to preempt state law." Arizona v. United States, 567 U.S. 387, 399 (2012).

141 *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone.").

142 Medtronic, Inc., v. Lohr, 518 U.S. 470, 488 (1996) (plurality opinion) ([P]reemption is "a serious intrusion into state sovereignty").

143 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

144 Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm., 461 U.S. 190, 203-04 (1983).

145 *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts.").

146 *See Pacific Gas & Elec. Co.*, 461 U.S. at 220 ("It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms.").

supplement it,"[147] (so-called "field preemption") or where state and federal law conflict or compliance with state law would obstruct, if not preclude, compliance with federal law (so-called "conflict preemption").[148] In all such instances, Congressional intent is "the ultimate touchstone" of preemption analysis.[149]

Although courts may find federal preemption where Congress has not made its intent to preempt state law explicit, they are generally reluctant to do so.[150] Explicit statutory language will do the trick, but other sources of statutory meaning may require a heavier lift. Likewise, there is no question that federal law must trump when state and federal requirements directly conflict, but mere difference in policy or purpose is unlikely to demonstrate a legislative intent to preempt state lawmaking.

Preemption operates to prevent state regulatory activity, whether through state-level administrative regulations or the state's common law. The net effect of federal preemption is for there to be less regulation than there would have been otherwise.[151] Federal laws precluding state regulation of automobile design mean that manufacturers need only comply with one regulatory standard. Federal regulations in such cases serve as a regulatory "floor" and a regulatory "ceiling" at the same time. In other cases, preemption may serve to ensure that there is no regulation of a given type or governing particular subject matter, as where federal law precludes states from adopting particular rules, but the federal government does not adopt rules of its own.[152] Where implied preemption is found, this will typically

147 Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

148 *Id.*

149 Medtronic v. Lohr, 518 U.S. 470, 485 (1996); Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 162–63 (2016) (same); *see also* CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) (explaining that courts should "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent").

150 *See, e.g.*, Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) (holding the Atomic Energy Act does not preempt state laws prohibiting uranium mining).

151 *See* PAUL TESKE, REGULATION IN THE STATES 15 (2004) (noting federal preemption has often been "designed to facilitate greater total *de*regulation" (emphasis in original)). In some cases, the purpose of federal preemption is to replace one type of regulation with another. This still results in less regulation than if the federal regulation was adopted *in addition to* the state regulation. The effects of preemption across states may not be uniform, however. A federal statute that imposes a federal standard when only a handful of states have regulated will increase regulation in some jurisdictions at the same time that it reduces regulation by preempting preexisting rules elsewhere. For more on the effects of federal environmental regulation on the ability of states to pursue their own environmental regulatory policies, see Adler, *supra* note 80.

152 The most obvious example, albeit a case of constitutional rather than statutory preemption, occurs under the "dormant commerce clause." States are precluded from adopting measures that discriminate against out-of-state trade not because it is assumed that such regulations will be adopted by Congress. Rather, there is a constitutional presumption against the adoption of such rules by *any* level of government, though Congress does retain the authority to adopt laws limiting the flow of interstate commerce or even delegating authority to the states to adopt such measures themselves. This division of authority "creates

preclude any state or local regulation whatsoever.[153] Where Congress explicitly preempts state regulation, however, the scope of the preemption usually will be limited to the extent provided for in the statutory text.

Given that preemption generally operates to reduce aggregate regulatory burdens, it should be no surprise that federal preemption of state environmental regulatory standards is often sought by business interests seeking to establish regulatory uniformity, a "ceiling" on regulatory stringency, or both.[154] Federal preemption of state automotive emission regulations, for example, resulted from lobbying by U.S. automakers fearing the potential for different emissions standards to be adopted in different states—and believing that federal standards would be less stringent than those developed in the states.[155] This is not to say that there are not sometimes economic justifications for preempting variable state standards with a single federal standard, only to note that this pressure for federalization often comes from industry.[156]

The mere adoption of a federal regulatory standard that operates as a regulatory "floor" does not necessarily preempt state regulation as a legal matter (though it may well have that practical effect).[157] For example, a federal regulation imposing emission limitations on an industrial facility will not necessarily preempt a less stringent or differently structured state regulation governing emissions from the same facility. As a practical matter, regulated facilities are required to meet the more stringent standard, but the existence of two standards does not mean the two conflict. In most cases, meeting the more demanding requirement will satisfy the less stringent one

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obstacles to states' enacting laws that are more protective of the environment." RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 38 (2004). For more on the potential consequences of the Dormant Commerce Clause on state-level environmental regulation, and climate regulation in particular, see Brannon P. Denning, *Environmental Federalism and State Renewable Portfolio Standards*, 64 CASE. WEST. RES. L. REV. 1519 (2014).

153 *See* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 258-59 (2000).

154 *Id.* at 242 ("By creating a ceiling, environmental laws may allow the private sector to operate within a predictable and uniform environment"). Similar arguments have been used to support federal preemption of state regulations and tort suits in other areas as well. *See, e.g.*, Caroline E. Mayer, *Rules Would Limit Lawsuits*, WASH. POST, Feb. 16, 2006 at D01 (preemption by Consumer Product Safety Commission); Gary Young, *FDA Strategy Would Preempt Tort Suits*, NAT'L L.J., Mar. 1, 2004 (preemption by food & Drug Administration).

155 *See* Elliott et al., *supra* note 88.

156 *See, e.g.*, ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr. eds. 1992) (documenting examples of interest group rent-seeking in environmental policy); POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (Terry L. Anderson, ed. 2000) (same).

157 For a more in-depth discussion of how regulatory floors may place downward pressure on state regulatory standards, see Adler, *supra* note 80, at 94–106.

as well.[158] If permits are required from both federal and state agencies for facility operation, then both permits are required even if compliance with one should make compliance with the other a foregone conclusion, unless the less stringent standards are explicitly or otherwise preempted by the federal regulation.[159] Conflict preemption only occurs if, for some reason, compliance with both permits is impossible, such as would occur if state law required the installation of a type of pollution control that federal law prohibited, or that could not be installed in a manner that would allow for compliance with federal law as well.

As noted above, most preemption in environmental law occurs with the regulation of products that are manufactured for sale in interstate commerce.[160] For example, section 209(b) of the Clean Air Act prohibits states from adopting "any standard relating to the control of emissions from new motor vehicles."[161] The Energy Policy Conservation Act preempts any state regulation of automotive fuel economy.[162] Other preemption provisions can be found in the Federal Insecticide, Fungicide, and Rodenticide Act,[163] and the Toxic Substances Control Act,[164] among other statutes.

As also noted, the structure of most federal pollution control laws is to establish a prescriptive federal floor, invite state participation in the administration and enforcement of federal standards, while also leaving room for states to adopt more stringent requirements where state policymakers conclude local conditions or preferences warrant.[165] This is particularly true

158 An exception to this will be if the standards are defined in terms that require the adoption of particular control technologies or methods, in which case compliance with one standard might well preclude and conflict with compliance with the other.

159 *See, e.g.*, 42 U.S.C. § 7416 (preempting state enforcement of emission standards less stringent than existing federal standards).

160 *See* Ann Carlson, *Federalism, Preemption and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 306 (2003) ("environmental regulation – in which both the states and the federal government play an active role – frequently raises preemption questions").

161 *See* 42 U.S.C. § 7543(a). There are exceptions to this rule. The EPA may waive preemption of emission standards adopted by California, subject to certain conditions. 42 U.S.C. § 7543(b). Where the EPA has approved a waiver for California, other states may adopt the California rule. In all cases, however, the other 49 states may not adopt a "third" standard. The Clean Air Act contains similar provisions governing standards for gasoline. 42 U.S.C. § 7545(c)(4).

162 *See* 49 U.S.C. § 32919(a). Unlike with emission standards, there is no conditional exemption for California. At the time of this writing there is also litigation concerning whether another provision of EPCA, 42 U.S.C. §6297, preempts local ordinances that ban new natural gas hookups. *See* Cal. Rest. Ass'n v. Berkeley, 2021 WL 2808975 (July 7, 2021).

163 *See* 7 U.S.C. § 136v(b). There has been a significant amount of litigation about the scope of preemption under this provision, in part because FIFRA also contains a savings clause at 7 U.S.C. § 136v(a). *See generally* Alexandra B. Klass, *Pesticides, Children's Health Policy, and Common Law Tort Claims*, 7 MINN. J. L. SCIENCE & TECH. 89 (2005).

164 *See* 15 U.S.C. § 2617.

165 *See supra* Part II.

of the CAA which, in important respects, is less prescriptive than the CWA.[166] These laws both contain broad (if not overly specific) savings clauses, and include no language presuming to dictate the form or nature of state regulatory measures. Just as the CWA and CAA leave room for states to adopt more stringent controls on air and water pollution through legislation and regulation, they also leave room for states to impose more stringent requirements on facilities through the state common law of both public and private nuisance.[167] In the absence of a preemptive legislation, instrument choice is also left to state policy makers.

The recent case of *Merrick v. Diageo Americas Supply, Inc.* is illustrative.[168] In *Merrick*, local landowners complained that ethanol emissions from a whiskey distillery caused the growth of "whiskey fungus" on their properties.[169] Although it was undisputed that the plant's emissions were within the limits set by relevant federal, state, and local regulations,[170] the U.S. Court of Appeals readily concluded that the Clean Air Act did not preclude the plaintiffs from pursuing nuisance claims against the plant, any more than the satisfaction of federal emission standards would preclude the state from adopting more stringent regulations. "State courts are arms of the 'State,' and the common law standards they adopt are 'requirement[s] respecting control or abatement of air pollution," the court explained, rejecting any claim that the CAA would preempt state common law nuisance suits while not preempting state regulations.[171] This conclusion was

166 The CWA prohibits all discharges of pollutants from point without a permit, which is often obtained from s state agency exercising delegated authority to administer the CWA. Under the CAA, by contrast, the baseline default is the opposite: Emissions are presumptively allowed unless subject to a relevant state or federal regulatory standard.

167 Some courts have held that common law nuisance actions are preempted by state environmental regulations as a matter of state law, but this presents a separate question from whether such actions are preempted by federal law. *See, e.g.*, Fricke v. Guntersville, 36 So. 2d 321 (Ala. 1948) ("there can be no abatable nuisance for doing in a proper manner what is authorized by law"); City of Birmingham v. City of Fairfield, 375 So.2d 438, 441 (Ala.1979) (same). In some cases, preemption is justified because the permitting process considers those factors that would cause a facility to be considered a nuisance. *See, e.g.*, Fey v. Nashville Gas & Heating Co., 16 Tenn.App. 234, 64 S.W.2d 61, 62 (1933). *See also* New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d Cir.1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."); North Carolina, ex rel. Cooper v. Tenn. Valley Auth, 615 F. 3d 291, 309-10 (4th Cir. 2010) (concluding facilities permitted under state law cannot constitute nuisances within those states). Some states also have so-called "no more stringent" laws which bar the imposition of pollution controls more stringent than are required by federal law. Such laws may also preempt state law nuisance actions. *See* Morrison & Stockton, *supra* note 18, at 10286.

168 Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015).

169 *See* Merrick v. Diageo America's Supply, Inc., 5 F. Supp. 3d 865, 867–68 (W.D. Ky. 2014).

170 *Id.* at 868.

171 *Merrick*, 805 F.3d at 690.

supported by both the CAA's text and its purpose.[172] It is also the approach most lower federal courts have taken.[173]

That the federal pollution control laws do not preempt *intrastate* nuisance claims does not necessarily mean that interstate pollution claims are not preempted. After all, prior to *Milwaukee II*, any such claims would have been brought under the federal common law, and now such federal common law claims are displaced.

The Supreme Court addressed this question shortly after *Milwaukee II* in *International Paper Co. v. Ouellette*, concluding that while federal common law claims for interstate water pollution are displaced under *Milwaukee II*, this did not leave downstream states without nuisance-based remedies.[174] Even though the Court had held previously (in *Milwaukee I*) that nuisance claims for interstate pollution arose under federal common law, and (in *Milwaukee II*) that the CWA displaced such federal common law, *Ouellette* held that state common law actions remained insofar as they were not preempted by the Act. Turning to the question of preemption, the Court recognized that state law claims based upon the law of the plaintiff-state were preempted, as conflicting with the CWA, but state law claims based upon the law of the source state were not.[175]

Recognizing that the CWA allowed states to impose more stringent standards on pollution sources within their jurisdiction, and that common law could be the source of such standards, the Court saw nothing in the act that would preclude downstream states from seeking to take advantage of whatever standards apply to sources of pollution in other states.[176] "Because the Act specifically allows source States to impose stricter standards," the *Ouellette* Court explained, "the imposition of source-state law does not disrupt the regulatory partnership established by the permit system."[177]

The principle underlying *Ouellette* is that states may not seek to extraterritorialize their environmental preferences through nuisance litigation, but they may seek protection from an upstream state's failure to

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172 *Id.* at 691 ("Allowing states to apply their common law to emissions advances the Act's stated purposed by empowering states to address and curtail air pollution at its source.").

173 *See, e.g.*, Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013) (CAA does not preempt class action nuisance claims for air pollution); Her Majesty v. City of Detroit, 874 F.2d 332, 342 (6th Cir. 1989) ("nothing in the [Clean Air] Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state"). *See also* Freeman v. Grain Processing Corp., 848 N.W. 2d 58 (Iowa 2014) (rejecting Clean Air Act preemption claim); Morrison & Stockton, *supra* note 18.

174 *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987).

175 *Id.* at 497 ("The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.").

176 *Id.*

177 *Id.* at 499.

enforce its own environmental standards to sources of interstate pollution.[178] This means that a state can adopt an environmental standard internally for the benefit of its own citizens without also committing to provide the same degree of protection to those in downstream states. Thus, insofar as federal environmental regulation fails to account adequately for the interests of downstream states, *Ouellette* preserves a limited means of protecting their interests, by preventing upstream states from acting opportunistically at the expense of those downstream.

As the CAA contains a savings clause that is quite similar to that contained in the Clean Water Act,[179] there is no reason the principle articulated in *Ouellette* should not apply equally in the air pollution context. If anything, the CWA is more prescriptive than the CAA, and the CAA's savings clause is, if anything, more expansive. There is also no statutory basis to think this principle would not also apply to climate change. Greenhouse gas emissions are subject to regulation under the CAA, but to no greater extent than other pollutant emissions for which nuisance actions are not preempted. There may be sound policy reasons to treat greenhouse gases differently, as discussed in the next section, but this is a determination that should be made by legislators, not judges. Congress has yet to enact legislation distinguishing greenhouse gas emissions for the purposes of federal regulation, so there is no basis for courts inventing or embracing such a distinction on their own.

Some have suggested that all interstate pollution claims should be preempted so as to prevent opportunistic behavior.[180] After all, states have every incentive to capture benefits for themselves and export costs onto other jurisdictions, and whichever state's law controls an interstate dispute may seek to revise its law accordingly. If a downstream state can sue an upstream neighbor under the downstream state's laws, the downstream state has an incentive to adopt more stringent requirements and export the costs of pollution control onto its upstream neighbor. Conversely, if the upstream state's law controls, there is an incentive to relax its standards, so as to capture the benefit of polluting activity, while exporting the costs downstream. This may be accomplished by adopting lax nuisance standards or, perhaps, by adopting a permit-based pollution control law that preempts state law nuisance claims.[181] A well-designed uniform federal rule can restrain such opportunistic behavior.

Even if one were to accept this assessment of the relevant incentives, it does not establish that the preemption of all interstate nuisance claims would be preferable to the *Ouellette* rule. Under complete preemption, downstream

178 For a thorough exploration of cross-boundary pollution concerns, see generally Merrill, *supra* note 91.

179 *Compare* 33 U.S.C. § 1365(e), with 42 U.S.C. § 7604(a)(1).

180 *See* Merrill, *supra* note 77 at 180-81.

181 *See, e.g.*, North Carolina *ex rel.* Cooper v. TVA., 615 F.3d 291, 309-10 (4th Cir. 2010) (concluding that Alabama and Tennessee law preclude nuisance suits against permitted facilities).

(and downwind) states would be left at the mercy of upstream (and upwind) jurisdictions and federal regulators. In practice, this has meant that the interests of downstream jurisdictions have been under-protected, and often ignored. Under the *Ouellette* rule, by contrast, the downstream jurisdiction has an added opportunity to protect its interests, even if only by limiting the ability of upstream jurisdictions to expose downstream jurisdictions to levels of pollution the upstream jurisdictions would not accept for themselves.[182] In short, the *Ouellette* rule increases the protection of downstream and downwind jurisdictions without magnifying the risk of opportunistic behavior by those same jurisdictions, as they cannot impose standards on upstream jurisdictions that are more constraining than the upstream jurisdictions would impose upon themselves for the benefit of their own residents.[183] Much like the intrastate nuisance actions that have not been preempted, nuisance actions for interstate pollution would reinforce the purpose of federal pollution control laws without exposing sources to the risk of potentially conflicting regulatory requirements.

V. CLIMATE CHANGE

Global climate change presents a unique and particularly difficult environmental challenge. It has been called a "super wicked problem," because it is the sort of public policy challenge that "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution," that also becomes more difficult to address over time and lacks a ready governance framework through which to pursue policy solutions.[184] Because climate change presents distinct challenges, it may require distinct policy responses. One relevant question this raises is whether the distinct nature of the climate challenge justifies a departure from traditional legal doctrines, such as preemption. Another is whether Congress has enacted legislation that would justify courts taking a different approach.

Global climate change is anything but a local or regional problem. To the contrary, global climate change is just that – a *global* environmental

182 Note that there is also the potential for opportunism in the enforcement of standards, such as would occur if an upstream state enforced its own laws less stringently against in-state polluters that predominantly cause pollution in downstream jurisdictions. *See* Daniel L. Millimet, *Environmental Federalism: A Survey of the Empirical Literature*, 64 CASE WEST. RES. L. REV. 1669, 1710-12 (2014) (surveying empirical literature on state-level enforcement of environmental laws where interstate spillovers are implicated).

183 *See* Catskill Mts Chapter of Trout Unlimited v. EPA, 846 F.3d 492, 517 (2d Cir. 2017) (noting CWA does not preclude states from pursuing nuisance-based remedies, but that such remedies may be "less robust" than regulations could provide).

184 *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–61 (2009) (explaining why climate change may be understood as a "super wicked" problem).

concern. As a consequence, the traditional arguments for allowing state and local governments a relatively free hand to protect their own backyards may not apply with equivalent force. Under principles of subsidiarity, the global nature of climate change would counsel greater centralization of policy decisions into national, if not international, hands, and *less* authority for state and local governments.

State or local jurisdictions wishing to combat global climate change are confronted with an archetypal "commons" problem.[185] The global climate is a vast global commons to which everyone contributes greenhouse gas emissions. Emissions anywhere on the globe contribute to the increase in atmospheric concentrations of greenhouse gases and the eventual warming of the atmosphere. Any state that reduces emissions within its jurisdiction will bear the costs of such reductions, but not reap equivalent benefits. Whatever benefits accrue from greenhouse gas emission controls accrue globally.[186] As a consequence, states have every incentive to "free ride" on the efforts of their neighbors, rather than suffer costs that will yield few internal benefits. Absent cooperation or the imposition of federal (or international) requirements, state and local efforts are unlikely to provide anything approaching the optimal level of greenhouse mitigation measures.[187]

The disincentive for states to take meaningful action to address climate change are even greater than in the typical commons context, however. No state, acting alone, is even capable of adopting emission controls capable of making a dent in global emissions, let alone global atmospheric concentrations, of greenhouse gases.[188] Even working together, states are not capable of reducing projected climate change and its anticipated effects to any meaningful degree. This may help explain why outside of California, most state-level climate change policies until relatively recently have been largely symbolic or structured so as to advantage in-state interests. Few imposed meaningful and enforceable emission targets in the short term,[189] though this has started to change as the need for climate action has increased.

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185 *See generally*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (describing the commons problem); *see also* Dana, *supra* note 25 (suggesting climate change should be understood as a commons problem).

186 *See* Wiener, *supra* note 24, at 1965 (2007) ("[L]ocal abatement actions pose local costs, yet deliver essentially no local climate benefits.").

187 *Id.* at 1962 ("[L]ocal action is not well suited to regulating mobile global conduct yielding a global externality.").

188 *Id.* at 1966 ("[N]o state could effectively control its own ambient level of carbon dioxide or other GHGs, because that ambient level is determined by the worldwide concentration of GHGs in the atmosphere."); Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives and State and Local Climate Change Initiatives*, 2 HARV. L. & POL'Y REV. 119, 120 (2008) ("[R]eductions in greenhouse gas emissions at the…state level are generally too small to affect global concentrations.").

189 *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1522 (2007) ("Few states have set clear emissions reduction targets, and fewer still have designed policies to achieve them.").

In the case of a nationally or globally dispersed pollutant, state regulation will often be less efficient than available alternatives. Localized measures are also likely to be more costly, and less cost-effective, than national measures. A local cap-and-trade system, for example, will cover a more limited set of sources, and fewer savings opportunities, than a national system with a broader base.[190] Subjecting businesses to a variety of state standards may also be less efficient than a standardized federal regulatory regime.[191]

States are more likely to adopt meaningful emission reductions if they can externalize the costs of such measures on other jurisdictions. Such regional rent-seeking has been well-documented in environmental law,[192] and almost certainly occurs in the climate context as well.[193] In the context of public nuisance suits, it is reasonable to fear that state officials who file such suits get the political benefits of appearing to take action against climate change, without having to bear the costs of imposing economic burdens on in-state firms.

Allowing individual states to act as environmental "laboratories" can produce useful information about the relative cost-effectiveness of various mitigation measures.[194] If states are free to experiment with competing policy designs, other states and the federal government can learn from state policy

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190 Wiener, *supra* note 24, at 1967 (noting a national emissions control regime "forfeits the greater cost savings obtainable in a larger allowance trading market encompassing more countries.").

191 DeShazo & Freeman, *supra* note 189, at 1531 ("Firms operating in multiple states may well find that the states are adopting different approaches to achieve the same objective, making compliance confusing and potentially costly."); Robert B. McKinstry, Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Legislation: How to Function in a Global Marketplace when States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 89 (2007) ("A multiplicity of contrasting state programs can pose particular difficulties for the regulated community, which operates in markets throughout the United States and the world."); Wiener, *supra* note 24, at 1974.

192 *See, e.g.*, BRUCE ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR (1981) (chronicling regional rent-seeking another special interest influence on Clean Air Act Amendments); B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985).

193 *See* Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 207 (2002)

194 Some scholars have questioned the value of such experimentation. *See, e.g.*, Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636 (2017); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, (January 29, 2022). GWU Law School Public Law Research Paper No. 2021-46, Available at SSRN: https://ssrn.com/abstract=3902092 or http://dx.doi.org/10.2139/ssrn.3902092. Interestingly enough, these critiques do not engage much with the empirical literature on state experimentation. *See, e.g.*, TESKE, *supra* note 151. For a review of the literature in the context of environmental policy, see Millimet, *supra* note 182; *see also* Bruce G. Carruthers & Naomi R. Lamoreaux, *Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards*, 54 J. ECON. LIT. 52 (2016); Wallace E. Oates, *A Reconsideration of Environmental Federalism*, *in* RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS 1, 11-17 (John A. List & Aart de Zeeuw eds., 2002) (summarizing empirical literature).

successes.[195] Several federal environmental statutes are modeled, at least in part, on state programs.[196] Even where such experiments fail, useful information will result.[197] Experience in other contexts has shown that interjurisdictional competition can encourage policy innovation as policymakers seek to meet the economic, environmental and other demands of their constituents.[198] In this way, state experimentation in the climate context could improve federal climate policies.

Some advocates of more aggressive climate policy measures note that the adoption of state environmental measures has often prompted the enactment of federal policies. If a state initiative is particularly successful, it may encourage federal regulation. Even if state measures are not so successful, they may still create incentives for federal action, even if only to preempt state rules with a uniform federal standard.[199] As has occurred in the past, state greenhouse gas regulations could prompt industry support for national standards that would preempt variable state controls.[200] Indeed, the prospect of nuisance suits themselves may prompt support for federal legislative action.

The above suggests that there are serious arguments for centering climate change policy at the federal level, but these are policy arguments, not legal ones. While federal climate legislation that constrains state-level regulation and common law litigation may be desirable, no such legislation has been adopted. To the contrary, Congress has studiously avoided adopting meaningful federal climate legislation.[201] The only reason federal greenhouse gas regulation exists is because the Supreme Court concluded the CAA's language was capacious enough to reach such emissions[202]—a conclusion the

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195 *See* Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 FORDHAM ENVTL L. REV. 63 (2013).

196 *See* Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 16 (2004) (citing examples of federal environmental laws modeled on state predecessors).

197 *See* TESKE, *supra* note 151, at 240 (noting that even when state experiments "fail, they provide important information for other states and for national policy."); McKinstry & Peterson, *supra* note 191, at 88 ("An innovation in a particular state that fails will have less of an impact on the national economy than a federal experiment that fails. Innovative state programs can provide examples of what to do or what not to do.").

198 *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956).

199 *See* Elliott et al., *supra* note 88.

200 *See* DeShazo & Freeman, *supra* note 189, at 1533–38. California's adoption of emission standards for new motor vehicles in the 1960s prompted the U.S. auto industry to support federal emission standards that would preempt state rules. *See* Elliott, et al., *supra* note 88.

201 *See* Arnold W. Reitze Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 1 (2009), ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted.").

202 Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (holding greenhouse gases constitute air pollutants subject to regulation under the Clean Air Act).

Court has seemed to back away from in subsequent cases.[203] Given the standards of federal preemption, this is a thin reed upon which to find that state common law climate nuisance cases cannot proceed in court.

VI. PREEMPTION OF CLIMATE NUISANCE CLAIMS

Whether or not nuisance suits represent the most appropriate or effective approach to climate change, the lack of meaningful federal action and prospect of substantial climate change-induced costs prompted a resurgence of climate change litigation by local governments. Because suits under federal common law were foreclosed by the Supreme Court's *AEP* decision,[204] these suits rely upon state-law causes of action, including public and private nuisance. And unlike the claims rejected in *AEP*, these suits generally seek compensatory damages for current and expected costs of climate change and climate adaptation measures.[205]

Much of the litigation in these cases to date has focused on procedural and jurisdictional wrangling, focused in particular on whether these cases belong in state or federal court. The defendant fossil fuel companies would like to see these cases dismissed on federal preemption or other grounds,[206] and have sought to remove cases to federal court where they expect such arguments to receive a more sympathetic hearing. One such case, *BP P.L.C. v. Mayor and City of Baltimore*, reached the Supreme Court, but did not produce an opinion that touched on any of the substantive claims.[207]

Unlike most of the municipal plaintiffs filing state law-based nuisance claims, New York City filed its case in federal court. Without the need for wrangling over removal, the district court proceeded to consider (and grant)

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203 *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (limiting the EPA's authority to regulate greenhouse gas emissions under the Prevention of Significant Deterioration provisions of the Clean Air Act); West Virginia v. EPA, 577 U.S. 1126, 1126 (2016) (granting a stay of the EPA's Clean Power Plan regulating greenhouse gas emissions from power plants).

204 American Elec. Power Co., Inc. v. Connecticut (AEP), 564 U.S. 410, 424 (2011).

205 In the wake of the *AEP* decision, the U.S. Court of Appeals for the Ninth Circuit concluded that federal common law claims for money damages due to the interstate nuisance of climate change were also displaced by the Clean Air Act. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) ("[T]he Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

206 Other grounds for dismissal pressed by defendants have included lack of personal jurisdiction and the political question doctrine, among others. *See, e.g.*, City of N.Y. v. BP P.L.C., 325 F. Supp. 3d 466, 470 n. 1 (S.D.N.Y. 2018) (noting defendants moved to dismiss due to lack of personal jurisdiction and political question doctrine); City of Oakland v. BP P.L.C., No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 126258, at *8 (N.D. Cal. July 27, 2018) ("BP, ConocoPhillips, Exxon, and Royal Dutch Shell moved to dismiss for lack of personal jurisdiction.").

207 *See* BP PLC v. Mayor and City Council of Baltimore, 141 S.Ct. 1532, 1543 (2021) (concluding appellate court has jurisdiction under 28 U.S.C. §1447(d) to consider all grounds for removal raised by defendant).

the defendants' motions to dismiss on the grounds that global warming tort claims may only be pursued under federal law, and that any such claims under federal law are displaced by the Clean Air Act.[208] Allowing New York City to bring state law claims would be "illogical," Judge John Keenan concluded, given the inherently "interstate nature" of the claims.[209] Further, to the extent the City's claims sought to hold defendants liable for foreign emissions, allowing them to proceed would potentially implicate questions of foreign policy beyond the ken of federal courts.[210]

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed, citing the "nature of the harm and the existence of a complex web of federal and international law" regulating greenhouse gas emissions.[211] Although, at the time of the case, only a fraction of domestic greenhouse gas emissions were subject to federal regulation, and no international agreement imposed any binding limits on such emissions at all, the court concluded that allowing New York City's claims to proceed would threaten replacing the "carefully crafted frameworks" of federal and international climate regulation with "a patchwork of claims under state nuisance law."[212] Accordingly, the Second Circuit ordered the claims dismissed.[213]

City of New York v. Chevron was the first federal appellate decision to directly consider the viability of state law-based nuisance claims. In *City of Oakland v. BP PLC*, the U.S. Court of Appeals for the Ninth Circuit considered whether similar state-law claims should be removed to federal court on the grounds that they arise under federal law for purposes of 28 U.S.C. §1331.[214] In the process of considering this question, the Ninth Circuit considered and rejected the defendant fossil fuel companies' arguments that Oakland's climate tort claims should be considered to raise substantial federal questions[215] or were completely preempted by the Clean Air Act.[216] On this basis, the Ninth Circuit concluded that the district court had been wrong to remove and dismiss the cities' claims.[217] More recently, the U.S. Courts of Appeals for the Tenth Circuit, Fourth Circuit, and First Circuit

208 BP P.L.C., 325 F. Supp. 3d at 466.
209 *Id.* at 474.
210 *Id.* at 475.
211 *City of New York II*, 993 F.3d at 85.
212 *Id.* at 86.
213 *Id*.
214 City of Oakland v. BP PLC, 969 F.3d 895 (2020).
215 *Id*. at 907.
216 *Id.* at 907-08. It should be noted that "Complete preemption" as a basis for removal to federal court presents a slightly different question from whether federal law preempts an applicable state law or cause of action. Complete preemption is jurisdictional, as it precludes any state-law claim in the regulated area, and thus serves as a basis for removal. *See* Rhode Island v. Shell Oil Products Co., 2022 WL 1617206, *2 n.4 (1st Cir. 2022) (providing a "cheat sheet" on complete preemption). Under current law, courts should be "reluctant" to find complete preemption. *See* Metro. Life Ins. v. Taylor, 481 UY.S. 58, 65 (1987).
217 *See also* County of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022) (rejecting multiple arguments in favor of removal, including complete preemption).

reached the same conclusion.[218] While these decisions focused on complete preemption, which would have justified removal to federal court, and not on regular preemption as a defense, the analyses adopted by these courts conflict with that of the Second Circuit.[219] Among other things, they rejected the defendants' claim that there was any conflict between the state law claims and meaningful federal interests.[220]

The Second Circuit did not have to consider the question of removal, however, and could focus directly on the question of whether federal law allows a municipality to pursue nuisance claims against fossil fuel producers for the marketing and sale of fossil fuels and the climate change damages that result.[221] From the outset, the Second Circuit's opinion dismissing NYC's claims makes clear that the court did not consider climate change-related claims to be fit for federal judicial resolution.[222] In reaching its ultimate conclusion, the court stretched existing doctrine and distorted the broader legal context by, among other things, misconstruing the relationship between the federal and state governments in environmental law, exaggerating the extent to which climate change is subject to regulation under "carefully drafted frameworks" adopted through the "political process"[223] and largely ignoring the lessons of *Milwaukee II* and *Ouellette*.

Although NYC brought its claims under state law, the Second Circuit's analysis of the claims begins with federal common law, and a strained reading of *Milwaukee II.* After noting that there is no general federal common law post *Erie*, the Court pointed out that "*specialized* federal common law" continued to exist in which it continues to "pre-empt and replace" state law where distinct federal interests or legislative instruction so require.[224] Yet such federal common law only exists in "few and restricted" areas in which federal courts are required to answer inherently federal questions that are not controlled by existing federal statutes.[225] In this fashion, the court noted, "federal common law functions much like legal duct tape – it is a 'necessary expedient' that permits federal courts to address issued of national concern until Congress provides a more permanent solution."[226]

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218 *See supra* note 9 and cases cited therein.

219 As the U.S. Court of Appeals for the First Circuit noted, the Second Circuit had "considered the fossil fuel producers' 'preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.'" Rhode Island v. Shell Oil Products Co., 2022 WL 1617206 *5 (1st Cir. 2022).

220 *See id.* at *4 ("even assuming (without granting) that these concerns constitute 'uniquely federal interests,' we — like the Fourth Circuit in *BP P.L.C.* — find that the Energy Companies (despite being the burden-bearer on the removal issue) never adequately describe how 'any significant conflict exists between' these 'federal interests' and the state-law claims." (cleaned up)).

221 *City of New York II*, 993 F.3d at 93-94.

222 *Id.* at 85-86.

223 *Id.* at 86.

224 *City of New York II*, 993 F.3d at 89.

225 *Id.* at 93-94.

226 *Id.* at 89-90.

Claims based on climate change, the Court concluded, necessarily fall into the category of matters subject to federal common law. This is due to the cross-boundary nature of the alleged harms and the resulting "overriding . . . need for a uniform rule of decision," as well as the "basic interests of federalism."[227] In other words, while disclaiming federal common law, the court relied upon federal common law to conclude state-law-based claims were preempted, so as to set the stage for a displacement analysis. In the process, it ignored the lesson of *Milwaukee II* that federal common law concerning interstate pollution no longer exists because it has been displaced,[228] and omitted consideration of *Ouelette*'s implicit conclusion that a uniform *federal* rule is unnecessary for the resolution of pollution problems that implicate more than one state.

To buttress its conclusion that New York City's claims implicated federal interests, the Court referenced irrelevant considerations—such as the fact that multiple states filed amicus briefs in the case[229]—and claimed that allowing litigation over fossil fuel production would "upset[] the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other."[230] This is a fine list of policy considerations that might inform legislative policy on climate change, but such a policy has never been enacted—at least not by Congress—so there is no "careful balance" to be preserved. Contrary to the Second Circuit's claim, Congress has never enacted or ratified any "carefully crafted frameworks" to govern greenhouse gas emissions.[231] Even assuming the Supreme Court was correct in *Massachusetts v. EPA* to conclude that the greenhouse gases are air pollutants subject to regulation under the Clean Air Act,[232] none of the relevant statutory provisions were written with greenhouse gases in mind, let alone were crafted to strike a "careful balance" between economic and environmental concerns.[233] Yet under the Second Circuit's logic, Congress's inaction—specifically its failure to enact climate change legislation of any sort—somehow represents the sort of "careful balance" between economic

227 *Id.* at 91-82 (*quoting* Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)).

228 *Cf.* Mayor and City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 204 (4th Cir. 2022) ("We cannot conclude that any federal common law controls Baltimore's state-law claims because federal common law in this area ceases to exist due to statutory displacement[.]").

229 Among other things, if states (or any other litigants) could alter a court's consideration of substantive questions merely by filing amicus curiae briefs, this would create significant incentives and opportunities for strategic behavior to manipulate case outcomes.

230 *City of New York II*, 993 F.3d at93.

231 *Id*. at 86.

232 For a critique of this holding, see Adler, *supra* note 27.

233 *See* Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 15, 30 (2014) ("Climate change is perhaps the quintessential example of a new environmental problem that the Clean Air Act did not contemplate.").

and environmental interests that federal courts are obliged to respect by turning away state-law-based tort claims.

While noting that "the necessary conflict need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the [s]tates have traditionally occupied," then the Court acknowledged that "conflict there must be."[234] The "mere existence of a federal interest," without more, "does not intrinsically call for a corresponding federal rule."[235] Yet as noted by the First and Fourth Circuits, the Court identified no meaningful conflict between federal and state law at all (let alone with the degree of specificity necessary for complete preemption to justify removal).[236]

Having concluded that NYC's claims could only proceed under federal common law, the Second Circuit easily reached the conclusion that any such claims are displaced by the Clean Air Act. As the Second Circuit saw it, this case was simply *AEP* round two, despite NYC's attempt to plead state law claims, and because (as the Second Circuit framed the case) the Clean Air Act had not authorized NYC's suit, it was preempted.

The Second Circuit's analysis is difficult to square with *Ouellette*. At issue in *Ouellette* was an interstate conflict over water pollution, precisely the sort of conflict the Supreme Court had held was the proper subject of federal common law in *Milwaukee I*. Under the logic of the Second Circuit's opinion, the proper approach to the *Ouellette* claims would have been to first, note that the claim was of the sort that should properly arise under federal common law, and then second, hold that any such claim is displaced under *Milwaukee II*. Yet that is not at all what the Supreme Court did in *Oullette*. Instead, in recognizing the federal common law was displaced, the Court allowed the downstream plaintiffs' claims to proceed, albeit under the law of the source state.[237] As it happened, this did not result in the application of a less stringent standard, and the defendant polluter, International Paper, agreed to a substantial settlement after trial.[238]

Under *Ouellette,* the displacement of federal common law does *not* mean that claims of an interstate or cross-boundary character are to be dismissed as beyond the province of the courts. Rather, displacement means that federal common law is unavailable, either to resolve or preempt the downstream or downwind plaintiffs' claims. Accordingly, state law claims may proceed, so long as they rely upon the law of the source state (to which the defendants have presumably acceded).

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234 *City of New York II*, 993 F.3d at 90 (alteration in original) (citation omitted) (quotation marks omitted).

235 *Id.*

236 Rhode Island v. Shell Oil Prods. Co., 2022 WL 1617206, *4–5 (1st Cir. 2022); Mayor and City Council of Baltimore v. BP P.L.C., 31 F. 4th 178, 204 (4th Cir. 2022).

237 *Rhode Island*, 2022 WL at *4-5; *Mayor of Baltimore*, 31 F. 4th at 204.

238 *See* Percival, *supra* note 94, at 768 (summarizing the proceedings on remand and eventual settlement).

While the Second Circuit was convinced there needed to be a uniform federal law to guide resolution of the interstate dispute, *Ouellette* reached the opposite conclusion. Due to displacement, there is no "neutral" federal rule to be had beyond that provided by any applicable federal statute, so states must instead press their claims under the source state's law (law, it should be repeated, which has not been preempted by the relevant federal statutes). Little in the Second Circuit's opinion is responsive to this point, other than a brief suggestion that a bilateral water pollution dispute of the sort at issue in *Ouellete* was "more bounded," and thus less threatening to what the Second Circuit imagined was a detailed and carefully balanced federal regulatory regime. The dispute in *Oulette* may well have been "more bounded" in that it concerned a dispute concerning pollution within a discrete water body, and not the global atmosphere. There is also little question that the transaction costs involved in bilateral pollution disputes are lower than when more entities are involved.[239] Yet there is nothing in the applicable Supreme Court precedent to make this fact remotely relevant to the question of preemption. As a doctrinal matter, this basis for distinguishing *Oullette* is invented from whole cloth. Further, as noted above, however carefully balanced one believes the Clean Air Act may be in its approach to conventional air pollutants, there is nothing in the Act representing any sort of conscious legislative balance of the interests implicated by greenhouse gas emissions and climate change. Those CAA provisions applicable to greenhouse gases were not drafted with an eye toward the control of globally dispersed pollutants, and they have never been held to preempt state law.

The Second Circuit compounded the error by suggesting that whether NYC could press state law claims was dependent upon what powers federal law "granted" or "permits" states to exercise in environmental law.[240] This characterization betrays a fundamental misunderstanding of the underlying cooperative federalism framework. Under federal environmental laws, states are not "granted" power or discretion to control pollution. Such power is not the federal government's to grant. Such power preexisted the adoption of federal pollution control statutes and, on accord of the broad savings clauses, is generally preserved, whether such power is exercised through state statutes, regulations, or common law. Likewise, the Clean Air Act does not "permit" or "authorize[]"[241] states to adopt their own, more stringent air

239 *See* Ronald. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing how rights holders may bargain to resolve pollution-related disputes); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Law Cannot Duplicate*, 41 WASH. L.J. 583, 599 (2002) (noting how such solutions become more difficult as the number of parties increases); *see also* Jonathan H. Adler, *Is the Common Law the Free Market Solution to Pollution?* CRITICAL REVIEW, vol. 24, no. 1 (2012).

240 *City of New York II*, 993 F.3d at 99.

241 *Id.* at 100.

pollution controls, as the Second Circuit claims.[242] It rather leaves such preexisting police power authority undisturbed. Yet by inverting the structure of federal environmental law—suggesting that state actions must be authorized or permitted by the federal government—the Second Circuit effectively flipped the presumption, enabling it to dispatch NYC's claims as if they were subject to displacement, instead of conducting a more serious and subtle preemption analysis. In the process, the Court embraced a degree of phantom federal hegemony that devalues the federalism concerns protected by the Supreme Court in *Ouellette*.

More broadly, the Second Circuit's language represents a view of state authority that is wholly at odds with the Supreme Court's federalism jurisprudence of the past thirty years. States are not units of the federal government, limited to adopting those environmental measures the federal government delegates to them. States do not need—and have never needed—federal permission to enact and enforce their own environmental laws or to enforce state common law limitations on polluting activity. As discussed earlier, states have been engaged in such efforts far longer than has the federal government.[243]

Interestingly enough, the Second Circuit had previously rejected preemption defenses against litigation New York City and other jurisdictions filed against producers of methyl tertiary butyl ether (MTBE).[244] As in the climate litigation, the municipal plaintiffs maintained that MTBE's producers had produced, distributed and sold a product with knowledge of the environmental harms it could cause.[245] And as in the climate cases, the defendants sought to argue that such state law claims were preempted by federal law. It is not clear why claims against producers of fossil fuels should have been treated differently. While there may be sound policy reasons for treating climate change differently from other sorts of pollution problems, that is a choice left to the political branches.

Some have argued that allowing states to impose liability on emitters or producers of fossil fuels would frustrate "Congress's design," as it would induce defendants to alter their behavior beyond that which is required by federal law.[246] It is certainly true that the imposition of liability for emissions might have the same effect as the imposition of more stringent state-level

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242 Other supporters of federal preemption of state-law-based claims have also adopted this erroneous formulation. *See* Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENVTL. L. 853, 881 (2019) ("Congress can *authorize* rather than preclude the states to regulate, as it has done on a cooperative basis to address a hose of environmental issues.") (emphasis added).

243 *See supra* Part II.

244 *See* In re M.T.B.E. Products Liability Litigation, 725 F.3d 65 (2nd Cir. 2013).

245 *Id.* at 82.

246 *See* Schiff & Beard, *supra* note 242, at 878 ("Imposition of liability for directly emitting or contributing to the emission of greenhouse gases otherwise regulated by the Act would, contrary to Congress's design, require the state-law-based climate defendants to conform their activities (or be punished for not having conformed their activities) to multiple and varying greenhouse gas standards.").

emission standards on defendants, but this is insufficient to make the point. The CAA does not preempt the imposition of more stringent state air pollution controls. To the contrary, consistent with most federal environmental laws, the CAA allows states to impose more stringent environmental controls on federally regulated facilities, as well as to regulate emissions not subject to CAA limitations. Under the "cooperative federalism" model, state authority to use the police power to control pollution is left undisturbed, as this was Congress's express intent. As discussed earlier, if a given facility is subject to both federal and state standards, the more stringent standard controls (save in those rare instance in which compliance with one standard would affirmatively preclude compliance with the other). Failure to enact climate-specific legislation is hardly evidence of any legislative "design." Failure to enact legislation is just that: A failure to enact legislation.[247]

Some might argue that it should be easier to preempt state tort law than state-level administrative regulation, but such a principle cannot be derived from existing doctrine, the history of federal preemption, or the history of environmental protection. Given that states are allowed to adopt more stringent pollution controls on federally regulated facilities, the state's choice of regulatory instrument should make little difference. Whether a state wants to adopt technology mandates through administrative regulation, pollution fees or taxes through legislation, or some form of liability to be adjudicated in court should have no bearing on the preemption question. Nothing in the Clean Air Act indicates Congress sought to prevent states from complementing administrative regulation with common law or other litigation. As a policy matter, some may believe that the preemption inquiry should track that for displacement.[248] But this is not the doctrine, nor has Congress legislated such a choice.

As a legal matter, the lack of preemption of state-law suits concerning conventional air pollutants should settle the question. As noted above, the relevant provisions of the Clean Air Act were not written to address greenhouse gases. Instead, they were written to address conventional air pollutants. Given the centrality of legislative intent in the preemption analysis, if none of these provisions preempts preempt state-law-based nuisance claims concerning the sorts of pollution for which these provisions were crafted, it is hard to see how they could preempt other types of pollution which were scarcely on the legislature's radar.

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247 *Cf.* American Bus Ass'n v. Slater, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring) ("Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a denial of that power to the agency.").

248 *See* Richard Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism* 17 J.L. ECON. & POL'Y 66 (2022).

Broader doctrinal currents, including the canon disfavoring statutory interpretations the intrude upon state prerogatives[249] as well as the Supreme Court's apparent embrace of a "major questions" doctrine, under which Congress is presumed not to have remained silent when resolving significant policy questions reinforce this conclusion.[250] Preempting longstanding state authority to protect state citizens from air and water pollution is not something one would expect Congress to do without being explicit about it.[251] Such preemption would be the proverbial "elephant" that is not to be hidden in a mousehole.[252] Congress undoubtedly has the power to preempt state laws concerning such questions, but it is a power that should actually be exercised before such preemption can be found.

The outcome of the Second Circuit's decision may be desirable as a policy matter. A carefully constructed and balanced federal regulatory regime may well be preferable to a bevy of state-law-based suits brought by various jurisdictions around the country.[253] Yet under existing preemption doctrine, not to mention the structure of the Constitution, this choice is to be made by the legislature, not the courts.[254] The Second Circuit's blithe characterizations notwithstanding, that is not a choice Congress has yet made in the context of climate change.

CONCLUSION

Under existing doctrine, federal common law claims alleging climate-related harms are displaced, but state law claims are not preempted. Suits alleging that various activities cause or contribute to climate nuisances

249 *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (requiring a "clear statement" of Congressional intent to preempt state authority); *see also* United States v Bass, 404 US 336, 349 (1971) (stating that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

250 *See* Natl Fed. Indep. Bus. v. Dept. of Labor, 142 S.Ct. 661, 665 (2022) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."); Ala. Assn. of Realtors v. Dept. of Health and Human Servs., 141 S.Ct. 2485, 2489 (2021) (same).

251 *See* Kalen, *supra* note 59, at 1604 ("Because health and the environment are areas where states traditionally exercised either common law or statutory jurisdiction to protect their citizens, judges are hesitant to upset that balance.").

252 *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). *See also* MCI Telecom. Corp. v. AT&T., 512 U.S. 218, 231 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000); Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1626–27 (2018).

253 *See supra* note 25 and sources cited therein.

254 *See* Virginia Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1901 (2019) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a 'constitutional text or a federal statute' that does the displacing or conflicts with state law.").

should rise and fall on other questions and, as noted at the outset, there are many concerns that can be raised about such claims under state law. It is also possible that the prospect of ongoing climate litigation, if not the threat of climate change itself, will eventually prompt the enactment of federal climate legislation that preempts such suits in the course of enacting a federal climate policy. But in the meantime, courts should adhere to the choices Congress has made, and not find creative ways to displace or preempt state-law-based nuisance claims that Congress has not yet seen fit to prevent.

Much of the Second Circuit's analysis seems to be driven by the well-founded intuition that interstate pollution conflicts, like interstate water disputes, should be governed by a federal standard, such as could be provided by federal common law. After all, only a federal rule is capable of providing a uniform and neutral rule for the resolution of such interstate disputes. This was the approach once embraced by the Supreme Court. Since *Milwaukee II*, however, the option of using federal common law for the provision of such a rule has been taken off of the table.

With that most appropriate judicial means of addressing interstate common law claims is unavailable, litigants are forced to rely upon state law, with all of the attendant limitations and potential biases. This may be a problem, but the answer is not for courts to declare unilaterally that such remedies are preempted. The law of preemption is not the source of the anomaly, however, nor has Congress sought to address it. Congress *could* eventually choose to enact comprehensive measures for the control of greenhouse gas emissions, and preempt all state law claims. It could also, if it so chose, reopen federal courts to claims based on federal common law. To date, Congress has done neither, and courts should respect that choice.

This is not to say there are not steps courts could take to facilitate more effective means of accounting for transboundary environmental harms. The Court's rush to displace federal common law nuisance claims in *Milwaukee II* was not dictated by legislative enactment nor grounded in any principled concern for the inherent unworkability of federal common law. The Court had adjudicated dozens of interstate environmental claims going back over a century and did so without much difficulty.[255] There is also no problem with allowing continued nuisance litigation against the backdrop of environmental regulation. This has been the norm under state law the whole time. Sometimes state environmental laws preempt common law claims for nuisance or trespass, and sometimes they do not.[256] In such cases it is a question of what sorts of environmental measures the state legislature enacted and whether such measures leave room for the common law. There is no reason the same approach could not be adopted at the federal level.

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255 *See* Cheren, *supra* note 94.

256 And sometimes such preemption creates takings concerns. *See, e.g.*, Bormann v. Bd. of Sup'rs In and For Kossuth County, 584 N.W. 2d 309 (Iowa 1998) (state law providing immunity from nuisance suits constituted an uncompensated taking of property).

The only barrier to such an approach was the Court's distaste for federal common law. As the Court has at times acknowledged, in the absence of applicable legislation, interstate disputes properly arise under federal common law, and not the law of either state. This is what the Court recognized in the first interstate pollution cases. Since *Erie*, however, the Court has resisted relying on federal common law, even where that means disarming states from the ability to protect themselves from upstream or upwind harms.[257] This may be driven by an understandable impulse. Yet as some commentators have noted, some resort to federal common law is inevitable.[258] (Indeed, the Second Circuit relied upon the very federal common law it claims is displaced to conclude New York's state law claims were preempted.) Unless and until Congress has actively and explicitly displaced federal common law, it is questionable whether the Court should do so on its own accord. Relaxing its antipathy for federal common law would further allow the Court to adopt parallel standards for preemption and displacement of interstate nuisance actions, and apply a consistent principle to interjurisdictional harms. Climate change would be as good a context as any in which to take this step.

Unless and until the Supreme Court or Congress approves such an approach, and precludes further state-law-based litigation, there is no warrant for lower courts to dismiss cases on the grounds that they must be displaced or preempted by federal environmental statutes that have never been understood to displace or preempt properly pled state common law claims.[259] Whatever the policy merits of clearing the field for federal regulation, neither current doctrine nor existing federal statutes support such an approach. While there may be other bases upon which to challenge the viability of state common law claims, statutory preemption or displacement are not among them.[260] Under current doctrine, there is nothing in the law of preemption or displacement to stop such claims from proceeding.

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257 As Richard Epstein notes "it is hard to see why any comprehensive statute that is passed to control pollution should leave states more vulnerable than they were before the passage of the statute." Epstein, *supra* note 38, at 570. Yet that is the precise effect of the Court's displacement jurisprudence.

258 It should be noted that reliance upon federal common law need not entail judges "making" as opposed to "finding" law. *See* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

259 It is of course perfectly appropriate for courts to dismiss claims that are not properly grounded in relevant state law, or that face other jurisdictional defects. So, for example, it may have been perfectly appropriate for a federal district court in California to dismiss climate-based claims for lack of personal jurisdiction. *See* City of Oakland v. BP P.L.C., 2018 WL 3609055 (N.D. Cal. 2018).

260 There are various doctrines, other than preemption, that seek to prevent states from extra territorializing their policy preferences. *See generally*, Cassandra Burke Robertson, *The United States Experience*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW (Austen Parrish and Cedric Ryngaert, eds. 2022) (on file with author) ("[I]t is no surprise that the scope of state power remains unclear. At one end of the spectrum, one can reliably predict that state regulation clearly at odds with federal policy will be struck down. It is much less clear, however, whether states are empowered to engage in extraterritorial regulation when such action seeks merely to supplement or complement federal policy.").

Should policymakers conclude state-law-based tort suits are a poor way to make climate policy, they remain free to enact some alternative. Indeed, the proliferation of state-common-law suits may well encourage such a step.[261] But unless and until they do, claims like those brought by New York City and other municipalities should not be dismissed on preemption grounds.

261 *See* Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1649 (2007) ("Realistically, the greatest function of litigation may be to prod legislative action.").

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STATE ATTORNEYS GENERAL AND THE PUBLIC NUISANCE DOCTRINE: LESSONS TO BE DERIVED FROM *STATE EX REL. ATTORNEY GENERAL OF OKLAHOMA V. JOHNSON & JOHNSON*[1]

Dr. John S. Baker, Jr.[*] *and Joanmarie I. Davoli*[†]

INTRODUCTION

A number of state attorneys general—both Democrats and Republicans— have been making expansive claims about their common-law powers, specifically claiming that the common-law "public nuisance" doctrine allows them to seek damages for the manufacturing, marketing, and sale of opioids. This article responds to an appellate amicus curiae brief filed on behalf of 29 states attorneys general and the attorney general for the District of Columbia.[2] It is the first case to enter a trial-court judgment for a state attorney general, which was then reversed in the first state supreme court case ruling on such claims.[3]

The argument by these 30 attorneys general is quite amazing. Insofar as their brief deals with Oklahoma law, it cites few cases from Oklahoma. Virtually all case-law authority comes from other states and a few federal cases. Their argument presumes the existence of a nation-wide, common-law standard for the powers of states' attorneys general. In doing so, the brief ignores differences among the states in their adoption and development of the Common Law of England.[4] The point of federalism is that each state,

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1 State *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, 499 P.3d 719.

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2 *See generally* Brief of Alabama, Washington, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin as *Amici Curiae* in Support of Oklahoma, *State* ex rel. *Hunter v. Johnson & Johnson*, 2021 OK 54, 499 P.3d 719 (No. 118,474) [hereinafter Brief of Alabama]. The signing attorneys general are Steve Marshall, Robert W. Ferguson, Xavier Becerra, Philip J. Weiser, William Tong, Kathleen Jennings, Karl A. Racine, Clare E. Connors, Lawrence Wasden, Kwame Raoul, Thomas J. Miller, Daniel Cameron, Aaron M. Frey, Brian E. Frosh, Maura Healey, Dana Nessel, Keith Ellison, Lynn Fitch, Jane Young, Hector Balderas, Letita James, Wayne Stenehjem, Dave Yost, Ellen F. Rosenblum, Peter F. Neronha, Jason Ravnsborg, Thomas J. Donovan, Jr., Mark R. Herring, Patrick Morrisey, and Josh Kaul, respectively.

3 *State* ex rel. *Hunter*, 499 P.3d at 721-23.

4 *State* ex rel. *Hunter*, 499 P.3d at 721-23.

within the limits set by the US Constitution, enjoys the authority to modify the Common Law and to create its own constitution and legislation.

In one of the few Oklahoma cases cited by the state's attorney general, *State* ex rel. *Cartwright v. Georgia Pacific Corp.*,[5] the Oklahoma Supreme Court explained that the states vary in terms of the common-law powers of their attorney general.

> The paucity of constitutional enumeration of the duties of the state's Attorney General is more typical than rare among the states, and it has been said that there are twenty-seven state constitutions which invest upon the Attorney General duties "prescribed by law" or make use of words of similar import, the judicial construction of which has led to three divergent views:
>
> (1) The Attorney General is invested with those duties which existed at the common law; but the legislature has the power to not only add to them, but may lessen or limit the common law duties which attached to the office under common law.
>
> (2) The Attorney General has no common law duties, and the legislature may deal with the office at will.
>
> (3) The Attorney General not only is invested with common law duties, such duties are inviolable and cannot be diminished by the legislature.[6]

In its recent reversal of the district court in the case against Johnson & Johnson, the Oklahoma Supreme Court refused to accept the district court's expansion of the public nuisance doctrine. It concluded that:

> [T]he district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law. The district court erred in finding J&J's conduct created a public nuisance.[7]

Thus, the Oklahoma case focused on the district court infringing on the legislature's power, which is a matter of separation of powers. The brief of the state attorneys general completely ignored separation of powers, which is the focus of this response.

Before taking aim at the attorneys general, however, we first want to empathize with some of their frustrations. As the states' chief legal officers, most of whom are elected by state voters, they seek to be, and rightly deserve the title, 'public interest lawyers.'

For decades now, however, state attorneys general have been defending countless constitutional claims brought by self-styled, unelected lawyers who

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5 663 P.2d 718 (1982).

6 *Id.* at 720.

7 *State* ex rel. *Hunter*, 499 P.3d at 731.

have appropriated the term, 'public interest lawyers.' Several private lawyers who claim to represent the public actually represent tax-exempt organizations, often funded at least in part by tax-exempt foundations and some by federal tax money. Regardless of the specific claims made in litigation by these organizations (both left-leaning and right-leaning), virtually all suits filed also seek attorneys' fees, billed on an hourly basis comparable to rates charged by local private lawyers, despite the fact that many, if not most, of these attorneys are salaried employees and often volunteers for the organization. If successful in the litigation, the organization will receive tax monies which need not be paid to their salaried or volunteer lawyers.

Given such distortions in the meaning of the term 'public interest,' it is quite understandable that the states' lawyers, elected by the voters to represent their (the public's) interests would be tempted to follow in the footsteps of some *faux* 'public interest lawyers.' Many partnered with plaintiffs' attorneys in tobacco litigation. The states of those AGs who joined the litigation reaped great financial rewards. That litigation, however, was led and bankrolled not by 'public interest lawyers,' but by large plaintiffs' firms. Even though tobacco litigation fattened state coffers, it was not the work of 'public interest lawyers.'

Public nuisance suits, as reimagined, are enticing. They offer attorneys general the benefits of being on the plaintiff side and possibly reaping financial windfalls available in private tort litigation. If they do not bring in outside plaintiff attorneys, any damages recovered would benefit the public.

Having one's client, a state, sued so many times, AGs naturally would prefer to litigate as plaintiffs. For some time now, state attorneys general have been doing just that. During the Trump Administration, Democrat AGs brought and supported much litigation against the federal government. Now during the Biden Administration, Republican AGs are doing likewise. The kinds of litigation they can bring are limited,[8] however. Success may save the state from spending money, but rarely—if ever—results in a financial windfall.

Public nuisance litigation by state attorneys general stretches the concept of a 'public-private partnership.' Public nuisance suits generally must be brought by a public official. It is a criminal, or at least quasi-criminal, action on behalf of the public. Tort actions are brought by individuals or classes of individuals in their private capacities. These AGs are blending—but really blurring the distinction between—public and private legal actions. To succeed, AGs must convince courts to redefine public nuisance as a "public tort." If at some point successful, AGs and other public officers would have the best of both public and private litigation.

The Oklahoma Supreme Court rejected the attempt to combine public nuisance and product liability. Citing the *Restatement*, the Court wrote:

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[8] *See generally* Jim Ryan & Don R. Sampen, Suing on Behalf of the State: A Parens Patria Primer, 86 ILL. B.J. 684 (1998) (discussing the parameters of the parens patriae standing doctrine).

"[P]ublic nuisance and products liability are two distinct causes of action, each with boundaries that are not intended to overlap."[9] The *Restatement* explains as follows:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.[10]

As the concurring opinion in *State* ex. rel *Hunter* observes, affirming expansion of the public nuisance as done by the district court would create "the newest fictional shape-shifting monster."[11] Hammering that message home to state attorneys general is the reason for publishing this article. Lest the Oklahoma Supreme Court decision be dismissed by some AGs as just that of a single state, we are focusing not only on over-reaching of the Oklahoma Attorney General, but more generally on the fundamentally distorted understanding of law and the legitimate powers of office reflected in the *Amicus* Brief filed by several state attorneys general, both Democrats and some Republicans.

The Oklahoma Supreme Court's discussion of the common-law meaning of public nuisance completely contradicts the view offered in the AG Brief. How could that be? Certainly, these attorneys general are not incompetent. No, rather they have adopted the Legal-Realist view that law is whatever a judge decides the law should be, regardless of the law as it currently stands.[12] Moreover, the state AGs are viewing their own power through the Legal-Realist lens by distorting current law to achieve their desired end. Rather than defending state law as it stands, they are willing to encourage state courts to circumvent the legislative power to achieve what they have determined is desirable law. Indeed, these state attorneys general are so bold at to band together for the purpose of having state judiciaries nationwide usurp state legislative powers to modify law, namely the Common Law.

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9 *State* ex rel. *Hunter*, 499 P.3d at 725.

10 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (Am. Law. Inst. 2020)).

11 *State* ex rel. *Hunter*, 499 P.3d at 732 (Kuehn, J., concurring).

12 *Legal Realism*, Legal Information Institute, https://www.law.cornell.edu/wex/legal_realism (last visited Jan. 17, 2022) ("A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case.").

The Legal-Realist's willingness to manipulate law is grounded in the Progressive rejection of Separation of Powers, led by Woodrow Wilson.[13] Not all state attorneys general consider themselves Progressives. Those AGs and their solicitors' general who think they reject Progressivism either have a poor understanding of separation of powers or have chosen to ignore the doctrine for political reasons.

As presumably every lawyer should know, the structures of both the United States Constitution and the states' constitutions separate governmental powers into three branches: Legislative, Executive and Judiciary. Each branch of government has specific, distinct duties. This design was intentional. As stated in *The Federalist*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[14] The purpose of separation of powers is the protection of liberty through the proper allocation of powers among the three branches of government.[15]

In both the United States and the state constitutions, the powers of the Attorney General fall under the Executive Branch of Government. The states vary somewhat in the powers provided to state attorneys general according to each state's constitutional and statutory law, as discussed above. Therefore, it is wrong for this group of state attorneys general to claim the existence of a nationwide standard as to their powers. Their united front does not hide their attempt to expand their own common-law powers not only within, but also outside of, the borders of the states they individually represent. So much for federalism.

Accordingly, the approach taken here is quite straightforward. It rests on the basic principle of separation of powers, ignored by the states' attorneys general. It uses the opinion of the Oklahoma Supreme Court opinion to restate matters of law which should be obvious. Much of this is very basic. We emphasize the basics in order to discredit the nationwide efforts of those attorneys general represented on the *Amicus* brief.

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13 *See* Thomas Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 684-88 (1993).

14 THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2003).

15 *See* THE FEDERALIST NOS. 47, 48 (James Madison) (George W. Carey & James McClellan eds., 2003).

I. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

The powers of the Oklahoma Office of the Attorney General are exclusively derived from the Oklahoma Constitution, Oklahoma Statutory Law, and the state's Common Law. Unlike the federal Attorney General, Oklahoma's Attorney General is elected. Nevertheless, that office is not independent from, but is part of, the executive branch. Separation of powers forms the foundation of the Oklahoma government. As the power to write laws lies with the Legislature, and as no branch may infringe upon the powers of another, therefore, the Executive branch may not write new laws. The Attorney General cannot operate as a free agent, even though the powers of the office are not specified in the Oklahoma Constitution.

A. *Oklahoma State Constitution*

The Oklahoma Constitution provides not only for the allocation of powers, but more significantly, the limitations of those powers:

Departments of government - Separation and distinction.

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.[16]

Thus, the Oklahoma Constitution specifically prevents one branch of government from assuming the powers of the other. As only the legislature has the power to write laws, neither the executive nor the judicial branches of government may assume that power.

The Oklahoma Constitution has a further check on the law-making power, as it grants the power of law-making to both the Legislative branch as well as to the people of the state of Oklahoma.

Legislature - Authority and composition - Powers reserved to people.

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the

16 OKLA CONST. art. IV, § 1.

> power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.[17]

Furthermore, the Oklahoma Constitution firmly places the role of the Attorney General into the Executive Branch of the state government.

> The Executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, . . . and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.[18]

As part of the executive branch, Oklahoma's Attorney General cannot operate as a free agent, even though the powers of the office are not specified in the Oklahoma Constitution. Instead of delineating the specific powers of the Attorney General, the Oklahoma Constitution assigns the Legislature the authority to write laws defining those powers. At no point in the Oklahoma Constitution is the Attorney General granted authority to determine or expand its own powers.

Therefore, because the Oklahoma Attorney General is a constitutional executive officer and because that position is constitutionally prohibited from assuming any of the powers of the Judiciary or the Legislature, the Oklahoma Constitution specifically prevents the Oklahoma Attorney General from exercising law-making powers. Likewise, the Oklahoma Constitution specifically directs the Oklahoma Legislature to write laws defining the Attorney General's duties and responsibilities.

B. *Oklahoma Statutes*

As empowered by the Constitution, the Oklahoma Legislature drafted laws defining the duties of the Attorney General. Oklahoma law defines the Attorney General as the "chief law officer of the state" and lists the specific duties assigned to that office.[19] The code thoroughly and specifically details the powers of the Attorney General.[20] Those powers range from subpoena and investigatory to the ouster of those who openly and notoriously violate penal laws.[21] None of these delineated powers includes an ability to unilaterally develop new duties, invent novel causes of action or to write new

17 OKLA CONST. art. V, § 1.
18 OKLA CONST. art. VI, § 1.
19 OKLA. STAT. tit. 74, §§ 74-18 to 74-19.3, 74-20, 74-20(f) to (1) (2021).
20 OKLA. STAT. tit. 51, §§ 51-100 (2021).
21 OKLA. STAT. tit. 51, §§ 100-102 (2021).

laws. Taken together, these laws demonstrate that the role of the Attorney General is not open for expanding the power of that office. Instead, pursuant to the Oklahoma Constitution, the Legislature has clearly defined and thus limited the role of the Attorney General.

C. *Oklahoma Common Law*

The common-law powers of the Oklahoma Attorney General are those of long-use and custom and not subject to expansion by that office. The Executive Branch has no common-law authority to expand its power. Only the legislature can write new laws expanding the powers of the Attorney General. The common-law duties of the Oklahoma Attorney are limited to enforcing those matters that existed under the Common Law. The AG Brief correctly states that the Oklahoma Attorney General office developed from "the original nature of the office in England, where the Attorney General was the chief legal advisor of the Crown and was entrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested."[22] But the AG Brief ignores the language in the same case that states limitations on the role of the Attorney General.

> The correct rule appears to be that, where the office of Attorney General is created in states where the common law prevails, without any reference to the duties of such office, the word is used with its accepted meaning under the common law, and carries with it such duties and powers as were usually incident to the office of Attorney General in England under the common law, when not locally inapplicable.[23]

Thus, the "Crown's" interests derived from the Common Law do not include the ability of the Attorney General to *sua sponte* expand its own role. Instead, the role of the office of the Attorney General remains limited by Common Law as well as actions by the Oklahoma Executive or the Legislature.

The Oklahoma Supreme Court stated that "it was not the intention of the lawmakers that the Attorney General should have control of litigation in which the state was interested or a party, either civil or criminal, in the district courts of the state, except when requested by the governor or either branch of the legislature."[24] The Court specifically emphasized that whether the system best protects the citizens of Oklahoma, "it is not for us to determine. This is a legislative power and policy, and not within the province of the

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22 Brief of Alabama at 2, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (2021) (citing State *ex rel.* Cartwright v. Georgia-Pac. Corp., 663 P.2d 718).

23 State *ex rel.* Cartwright v. Georgia-Pac. Corp., 663 P.2d 718, 720 (citing State v. Huston, 97 P. 982, 992 *dismissed sub nom.* Huston v. State of Oklahoma *ex rel.* Haskell, 215 U.S 592 (1910)).

24 *Huston*, 97 P. at 994-95.

judiciary."[25] The Court recognizes that neither the Executive nor the Judiciary is empowered to write new laws.

The common-law power of the Attorney General extends to enforcement of matters historically within the Common Law. According to statute, even statutory changes to the Common Law are to be strictly construed.[26] Thus, the common-law power extends no further and is not subject to developing new causes of action without statutory or Constitutional grants of such authority. Neither the abuse of opioids leading to widespread addiction, nor the Attorney General's plan to finance state sponsored programs designed to combat opioid addiction fit within the Common Law. Therefore, the Oklahoma Attorney General has no authority to commandeer nuisance statutes as a vehicle to expand the Common Law.

II. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

The action of the Oklahoma Attorney General in filing the suit filing a novel application of public nuisance had neither basis in the Common Law nor in an act of the Oklahoma Legislature.[27] By invading the province of the Oklahoma Legislature, Oklahoma's Attorney General and the other state attorneys general who supported him completely disregarded Separation of Powers.

The AGs Brief[28] filed by the Attorneys General misrepresented Oklahoma jurisprudence concerning the public nuisance doctrine. It relied upon the 1982 case, *State* ex rel. *Cartwright v. Georgia-Pac. Corp.*,[29] for the assertion that the states Attorneys General have "long been responsible for protecting the public's health and safety."[30] However, the *Cartwright* court was specifically limiting the common-law power of the Attorney General, not embracing an expansion of that power.

In discussing the merits of the nuisance case for polluting the waterways of Oklahoma, the *Cartwright* Court specifically noted that "The action was brought without the Attorney General's having first procured the approval or

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25 *Id.* at 995.

26 OKLA. STAT. tit. 12, § 12-2 (2021) ("The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed.").

27 If indeed a legislative basis did exist, it would be unconstitutional. *See* Steed v. Bain-Holloway, 2015 OK CIV APP 68, 356 P.3d 62.

28 Brief of Alabama as *Amici Curiae* in Support of Oklahoma, State *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, 499 P.3d 719 (No. 118,474).

29 *Id.* at 2 (citing State *ex rel.* Cartwright, 663 P.2d at 721).

30 *Id.*

consent of the Governor of the State of Oklahoma or of either branch of the Oklahoma Legislature."[31] The *Cartwright* Court considered proposed changes to authorize the Attorney General to bring such claims, and concluded that the legislative history demonstrated that the Attorney General's powers had not been expanded.[32]

Furthermore, the *Cartwright* Court followed precedent set in *State ex rel. Haskell v. Huston*,[33] a case concerning the supposed nuisance created by the Prairie Oil & Gas Company by allegedly improper use of state highways. The *Huston* Court explained the limited power of the Oklahoma Attorney General.

> In Huston, C.N. Haskell, as Governor of the State of Oklahoma, filed an action for a writ of prohibition against a district court judge and the Attorney General to prohibit the prosecution of an action brought by the Attorney General in the district court to enjoin the Prairie Oil & Gas Company from committing a nuisance . . . . The Governor's suit challenged the standing of the Attorney General to bring and maintain the action without having first procured the Governor's consent to the filing of the action.[34]

The *Huston* Court found that the Attorney General was not acting pursuant to the Governor's request. Instead, the Attorney General exceeded his powers by proceeding to claim powers not granted by Oklahoma constitutional or statutory law. Even when new statutes are passed amending the power of the Attorney General, it is still the legislature that must bestow those powers, not the Executive.

The *Huston* Court emphasized that the Oklahoma Constitution does not enumerate the powers of the Attorney General, but does locate that office in the executive branch,[35] the head of which is the governor. The Court further interpreted Oklahoma statutory law concerning the duties of the Attorney General.

> It would seem that a proper construction of the words as used in that section "when requested" should be "if requested," thereby making the right of the Attorney General to bring a suit in the name of the state in the district court to depend, as a condition precedent, upon executive discretion to be exercised by the Governor. We are clearly of

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31 *Cartwright*, 663 P.2d at 720.

32 *Id.* at 724 ("In the case before us, the previous legislative amendment of what has now become 74 O.S. 1981 § 18b by the reenactment of words having like import to the words replaced, coupled by a clear legislative rejection of proposed legislative language which would have conferred upon the Attorney General the discretion to initiate the type of suit brought by the Attorney General without first obtaining the approval of the Governor or of either branch of the legislature, manifests a clear legislative intent not to confer such powers, duties and standing upon the Attorney General, thereby reaffirming the authority of *State v. Huston*.").

33 *Huston*, 1098 OK 157, 97 P. 982.

34 *Cartwright*, 663 P.2d at 722.

35 *Id.* at 722 ("The Oklahoma Constitution then, as now, provided (Art. 6, § 1 A): 'The executive authority of the State shall be vested in a Governor, . . . Attorney General . . . each of whom . . . shall perform such duties as may be designated in this Constitution or prescribed by law.'").

> the opinion that the word "when," as used in this connection means no more than "in case" or "if," and this construction is supported by the authorities.[36]

Both *Cartwright* and *Huston* stand for the proposition that the Oklahoma Attorney General's powers are specifically enumerated in law. In both cases, the law at that time provided that the Attorney General could only act at the request of the Governor and may not *sua sponte* bring claims or develop new causes of action. Additionally, both cases expressly limit the power of the Attorney General. Even though the Oklahoma Attorney General retains some common-law powers, those powers are limited by Oklahoma constitutional and statutory law and may not be expanded by the Attorney General.

By bringing *State* ex rel. *Hunter v. Johnson & Johnson*, the Attorney General also prompted the District Court to exceed its own powers in violation of separation of powers. Unless the District Court is one committed to changing law regardless of being reversed by the Oklahoma Supreme Court, the Attorney General has misled the District Court and undercut its credibility with a majority of the Supreme Court. The Attorney General also likely undercut the credibility of his office both before the district court judge and most members of the Supreme Court.

Neither the Oklahoma Attorney General nor those who signed the AG Brief seem to have thought through the consequences of the District Court's acceptance of the Attorney General's argument. The District Court ruled that Oklahoma's nuisance statue covers literally any conduct that "annoys" or "endangers" the health, safety or comfort of a large number of Oklahomans.[37] If this rationale had been accepted by the Oklahoma Supreme Court, every manufacturer of alcohol, of automobiles, of firearms, of motorcycles, of butter, of glue, of trampolines and of many other products would have been liable for "abatement" if the Attorney General deemed the particular product to be a public nuisance.

How many of these Attorneys General realized how radical is the position they have endorsed? Instead of elected legislative representatives weighing arguments for a change in policy, the judiciary enticed by the Attorney General would regulate Oklahoma's economy with no notice to the public and corporate producers or marketers of legal products until long after the production and distribution of the products. Such a blatant violation of the separation of power should become the poster child for state attorneys general abusing power by attempting to legislate through adjudication.[38]

The AG Brief demonstrated a willingness deliberately to misrepresent Oklahoma precedents. It quoted the following language from *State* ex rel.

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36 *Cartwright*, 663 P.2d at 722 (internal quotation marks omitted) (quoting Huston, 97 P. at 986).

37 State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816., 2019 WL 9241510, (Dist. Ct. Okla. Nov. 15, 2019).

38 *See* Amicus Brief of Professors John Baker and Michael Krauss at 23, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

Derryberry v. Kerr-McGee Corp:[39] "In the absence of express statutory or constitutional restrictions, the common-law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government."[40] Rather than lending support, *Derryberry* undermines the claims of the AG Brief in two ways.

First, in *Derryberry* the Supreme Court of Oklahoma focused on the specific power of the Attorney General to settle and dismiss a suit brought on behalf of Oklahoma. In this case alleging a conspiracy to fix asphalt prices in sales to the state, the *Derryberry* Court reviewed both statutory and common-law powers of the Attorney General.

> As an incident to the dominion the Attorney General possesses over every suit instituted in his official capacity, he has the power to dismiss, abandon, discontinue, or compromise suits brought by him either with or without a stipulation by the other party and to make any disposition of such suits as he deems best for the interest of the state.[41]

The Court found specific *statutory* authority for the Attorney General's settlement of the asphalt cases.[42]

Second, the *Derryberry* court did not assert common-law powers as broad as those claimed by the AG Brief. Instead, the court specifically noted that the common-law powers of the Attorney General were subject to statutory limitations. "We conclude…that the Attorney General's powers are as broad as the common law *unless restricted or modified by statute*, and that his authority to dismiss, settle or compromise the litigation in question, in the absence of fraud or collusion, is undisputed."[43] Thus, the very case that AG Brief claims supports an unrestricted ability of Oklahoma's Attorney General to expand common-law powers in fact demonstrates the opposite. The Attorney General does not have such authority. As the Oklahoma Legislature has never expanded the Attorney General's authority as to create the tort of public nuisance, there was no authority to proceed in *State* ex rel. *Hunter v. Johnson & Johnson*.[44]

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39 State *ex rel.* Derryberry v. Kerr-McGee Corp, 516 P.2d 813.

40 Brief of Alabama as *Amici Curiae* in Support of Oklahoma at 3, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

41 *Derryberry*, 516 P.2d at 818.

42 *Id.* ("The Attorney General has authority to bring law suits by virtue of 74 O.S. 1971 § 18b and to assume and control the prosecution thereof in the state's best interest. It must logically follow that he has authority to compromise and dismiss the suit.")

43 *Id.* at 819 (emphasis added).

44 *See* State *ex rel.* Hunter, 499 P.3d at 731.

III. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

In *State* ex rel. *Hunter v. Johnson & Johnson*, the district court exercised law-making powers properly within the province of the Oklahoma Legislature when it extended "the public nuisance statute to the manufacturing, marketing and selling of prescription opioids."[45] The Oklahoma Supreme Court rejected the District Court's intrusion on legislature's power. Judging from the apparent ease with which it issued its breath-taking order, the district judge seemed totally unaware of, or at least unconcerned about, Separation of Powers.

In defense of the district court, the AG Brief made two separate and equally erroneous claims, in response to the *Amicus* Brief filed by Professors Michael I. Kraus and John S. Baker, Jr.[46] The Krauss/Baker Brief asserted that the underlying case "amounts to an abuse of power by the Attorney General, who initiated a judicial action abased on a novel application of public nuisance that has neither basis in the Common Law nor in an act of the Oklahoma Legislature."[47]

A. *The AG Brief Mischaracterizes the Krauss/Baker argument.*

The AG Brief incorrectly claims that the Kraus/Baker brief alleges that "modern State Attorneys General can abate only minor nuisances – road construction and the like – but must wait for legislation or federal agency action to abate the more severe harms at issue in this case."[48] Yet, the Krauss/Baker Brief makes no such claim. Indeed, the AG Brief mistakenly conflates an example of a public nuisance with severity of damage, an issue never raised.

In actuality, the Krauss/Baker Brief explains the difference between private nuisances and public nuisances, using the road construction example to illustrate a public nuisance. Private ordering is initiated by private, civil litigation, whereas public ordering is the province of the legislative and executive branches. The road construction example demonstrated that when a road is blocked, preventing or hindering travel, many individuals may

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45 *Hunter*, 499 P.3d at 723.

46 *But see* Amicus Brief of Professors John Baker and Michael Krauss at 23, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d. 719

47 *Id.* at 22.

48 Brief of Alabama as *Amici Curiae* in Support of Oklahoma at 4-5, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (citing Appellants' Brief in Chief at 16, 20, 27-28, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719; Amicus Brief of Professors John Baker and Michael Krauss at 13-14, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719).

suffer minor inconvenience even if no one suffers substantial personal damage. The road construction example distinguishes private nuisances from public nuisances. Public nuisances potentially affect masses of people. Because public nuisance suits are intended to protect rights common to the public, they are most often filed by public authorities acting on behalf of the state in its sovereign capacity.[49]

Instead of acknowledging the legal difference between private and public nuisances, the AG Brief misstates the distinction as nuisances that cause minor injury versus those that cause more severe harms.[50] There is no such legal distinction. A private nuisance may in fact cause severe harms, while a public nuisance might cause only minor injury. The severity of the harm is not what differentiates a private nuisance from a public one. Instead, the legal definitions of the two types of nuisance illustrate their differences.

Public nuisances historically sounded in criminal law (part of public ordering); private nuisances in tort.[51] The cause of action for indirect harm caused by a private nuisance result in a civil lawsuit, which is distinct from the criminal case that can be brought against the offender by the state government. The AG Brief fails to comprehend the nuanced distinction between public and private nuisances.

In particular, the AG Brief simply disregards the requirement that public nuisance actions for damages require a crime. As explained by the Oklahoma Supreme Court, "The State's allegations in this case do not fit within Oklahoma nuisance statutes as construed by this Court. The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict."[52] Since the allegations in the *State* ex rel. *Hunter v. Johnson & Johnson* case neither contain criminal allegations nor property-based conflict, there is no public nuisance cause of action.

The AG Brief further claims that the Krauss/Baker Brief argues "that the district court erred by expanding public nuisance to encompass actions that do not directly affect individual property rights."[53] The AG Brief simply misconstrues the following statement made in the Krauss/Baker Brief summarizing the holding by the lower court: "The District Court abused its powers by ruling that Oklahoma's nuisance statue does not require harm to property[.]"[54] That summary is not an assertion by Krauss/Baker that to constitute a nuisance there must be an impact on private property rights. To allege otherwise is absurd, especially in light of the Krauss/Baker Brief's

49 Amicus Brief of Professors John Baker and Michael Krauss, *supra* note 46, at 5.

50 Brief of Alabama et al. as Amici Curiae in Support of Oklahoma, *supra* note 48, at 4-5.

51 Amicus Brief of Professors John Baker and Michael Krauss, *supra* note 46, at 5.

52 *Hunter*, 499 P.3d at 725.

53 Brief of Alabama et al. as *Amici Curiae* in Support of Oklahoma at 8-9, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

54 Amicus Brief of Professors John Baker and Michael Krauss at 20, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (citing State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816., 2019 WL 9241510, (Dist. Ct. Okla. 2019).

detailed explanation that public nuisances require a crime, as distinguished from a tort.

The Krauss/Baker Brief explains that public nuisance, damage actions for civil liability require a crime. Criminal statutes or municipal ordinances might seem to have nothing to do with public nuisance. But in fact, an action for damages for a public nuisance follows from, and depends on, a crime of public nuisance. As recognized by a University of Oklahoma law professor and others, a public nuisance action requires a violation of some criminal law.[55] Assessing relatively recent attempts to create a tort of public nuisance, Professor Thomas Merrill concludes: "public nuisance is always a crime . . . .[It] is not, and never was, a tort.[56]

> A tort is a remedy for a private wrong. Public nuisance is not a tort because
>
> 1. Public nuisance law protects public rights, not private rights.
>
> 2. Public nuisance liability was historically said to lie for activity indictable as a crime.
>
> 3. Public nuisance is normally enforced by public officials, not private claimants.
>
> 4. Public nuisance traditionally focused on the existence of a condition, not solely on defendant's conduct.
>
> 5. Public nuisance liability typically did not result in an award of damages other than damages for abatement when the criminal declines to abate.[57]

That some attorneys general posited a so-called "tort" of public nuisance does not make it the case. Nor does the fact that judges think they have a common-law power to create innovative torts justify their abandonment of tort law's crucial requirements of wrongfulness and causation. Without a public nuisance crime, state attorneys general cannot lawfully seek damages for what they choose to label a public nuisance 'tort.' The identification of public nuisance as grounded in a type of criminal liability reinforces the conclusion that public nuisance is a public action, not a tort. This AG Brief completely misstates the criminal versus tort distinction.

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55 Osborne M. Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA L. REV. 318, 323 (1978) (quoting W. Prosser, TORTS 573 (4th ed. 1971). *Cf.* P. Winfield, TORT 466 (1937)) ("But public nuisance is unusual in that violation of the criminal law is often treated as a required element of the tort action, and it has been reliably reported that '[n]o case has been found of tort liability for a public nuisance which was not a crime.'").

56 Amicus Brief of Professors John Baker and Michael Krauss, at 7, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

57 *Id.* at 7-8 (quoting Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 11 (2011)).

The Court goes on to reject the attempt by the Attorney General to expand the law to novel situations not contemplated in the relevant statutes, and notes that the cause fits within another area of tort law: product liability. "Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products."[58] The Court decisively rejects the State's power grab and attempt to have the court legislate from the bench. "The common-law criminal and property-based limitations have shaped Oklahoma's public nuisance statute. Without these limitations, businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products . . . We follow the limitations set by this Court for the past 100 years."[59]

B. The AG Brief overstates their powers by claiming "[t]he authority to bring public nuisance suits has long resided with Attorney General at Common Law and Oklahoma has likewise long recognized that authority by statute."[60]

The AG Brief conflates two separate powers and does not cite authority for either one. As demonstrated in Section II of this article, there is no such power at Common Law for the Attorney General to bring a public nuisance suit against manufacturers of lawful products.

Additionally, the Oklahoma Supreme Court held that there is no statutory authority for the claims brought in *State* ex rel. *Hunter v. Johnson & Johnson*. "For the past 100 years, our Court, applying Oklahoma's nuisance statutes, has limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable."[61] The Court noted that Oklahoma statutory law specifically defines nuisance:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
>
> Second. Offends decency; or

58 *Hunter*, 499 P.3d at 725.

59 *Id.* at 731.

60 Brief of Alabama et al. as *Amici Curiae* in Support of Oklahoma at 5, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

61 *Hunter*, 499 P.3d at 724.

> Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
>
> Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[62]

Absent from this definition is authorization for the Attorney General to unilaterally expand the definitions and bring a nuisance lawsuit against a company for manufacturing and selling legal products.[63]

CONCLUSION

The Supreme Court of the State of Oklahoma ruled that "the district court's expansion of public nuisance law went too far."[64] The Court pointed to a clear violation of the separation of powers, albeit limiting its ruling to the abuse of power by the lower court. "The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interest at play in society problems."[65] The Court forcefully made clear that the district court had absolutely abused its judicial power.

> The State's Abatement Plan is not an abatement in that it does not stop the act or omission that constitutes a nuisance . . . It is instead an award to the State to fund multiple governmental programs . . . Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health and criminal issues arising from conduct alleged to be a nuisance.[66]

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62 *Hunter*, 499 P.3d at 740 (Edmondson, J., dissenting).

63 *Id.* at 725 ("Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.").

64 *Id.* at 721.

65 *Id.* at 731.

66 *Id.* at 729. Emphasizing its discomfort with the activist nature of the lower court's ruling, the Oklahoma Supreme Court footnoted the specific line-items ordered by the district court. *Id.* at 722 n.12. ("The district court appropriated the funds to the following governmental programs:
Opioid Use Disorder Treatment Program $232,947,710
Addiction Treatment -- Supplementary Services $ 31,769,011
Public Medication and Disposal Programs $ 139,883
Screening, Brief Intervention and Referral to Treatment (SBIRT) Program $ 56,857,054
Pain Prevention and Non-Opioid Pain Management Therapies $103,277,835
Expanded and Targeted Naloxone Distribution and Overdose Prevention Education $ 1,585,797
Medical Case Management/Consulting (Project Echo) $ 3,953,832

The Court clearly interprets the District Court's actions as improperly invading the province of the other branches of government.

The Court's ruling in *State* ex rel. *Hunter v. Johnson & Johnson* focuses on the District Court. It does not specifically comment upon the fact that it was the state's Attorney General who urged the District Court to make the ruling it did. Nevertheless, the Supreme court's decision stands as a rebuke to the Attorney General's attempted power grab. The Oklahoma Attorney General attempted to justify the expansion of his own powers with the following statement: "To address this problem, the State of Oklahoma *ex rel.* Mike Hunter, Attorney General of Oklahoma . . . sued three prescription opioid manufactures and requested that the district court hold opioid manufacturers liable for violating Oklahoma's public nuisance statute."[67] The District Court would not have had the occasion to attempt to expand the public nuisance law without the Attorney General first filing what the Oklahoma Supreme Court could have and should have labelled a frivolous case—one without a credible legal basis that wasted both the state's and the defendant's time and much money.

The Oklahoma Supreme Court's ruling in *State* ex rel. *Hunter v. Johnson & Johnson* confirms the significance of separation of powers as guarding against the tyranny of governmental power. The Framers of the U.S. Constitution understood that "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[68] Separation of powers is the primary protection against the abuse of governmental power. The doctrine of Separation of Powers has not always been respected even by federal courts. Yet, few federal courts have been as brazen as was this Oklahoma district court in disregarding such a fundamental constitutional doctrine. By

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Developing and Disseminating NAS Treatment Evaluation and Standards $ 107,683
Development of NAS as a Required Reportable Condition $ 181,983
Implementing Universal Substance Use Screening for Pregnant Women $ 1,969,000
Medical Treatment for Infants Born with NAS or Opioid Withdrawal $ 20,608,847
Investigatory and Regulatory Actions $ 500,000
Additional Staffing for OBN
Additional Staffing for Oklahoma Licensure Boards
Additional Staffing for Oklahoma Veterinary Board
Additional Staffing for Oklahoma State Osteopathic Board
Additional Staffing for Oklahoma Board of Nursing
Additional Staffing for Oklahoma Board of Medical Licensure and Supervision
Additional Staffing for Oklahoma Board of Dentistry
Additional Staffing for Office of the Chief Medical Examiner
Additional Staffing for Office of the Attorney General
Additional Staffing for Medicaid Fraud Control Unit $ 11,101,076
TOTAL $465,026,711").

67 *Id.* at 721.

68 THE FEDERALIST NO. 48, at 260 (James Madison) (George W. Carey & James McClellan eds., 2003).

rebuking the district court's clear abuse of power, the Oklahoma Supreme Court's decision provides hope that other state supreme courts may follow.

THE PRIVATE LAW CONNECTIONS TO PUBLIC NUISANCE LAW: SOME REALISM ABOUT TODAY'S INTELLECTUAL NOMINALISM

Richard A. Epstein[*]

> For the reason that the law, in a case of this kind, declared such an offence to be manifest theft, there are some writers who hold that manifest theft may be either that defined by law, or that established by nature; that defined by law being what we are discussing, and that established by nature being what we have previously explained. The better opinion, however, is that manifest theft should be understood to be that which has been actually committed, for the law cannot cause a non-manifest thief to become a manifest one, any more than it can cause one who is not a thief at all, to become a thief, or anyone who is not an adulterer, or a homicide, to become an adulterer, or a homicide. The law, however, can cause anyone to be liable to a penalty, just as if he had committed theft, adultery, or homicide, even though he had not been guilty of any of these crimes.[1]

IN SEARCH OF DOCTRINAL CLARITY

I have long believed that Roman law texts supply sophisticated philosophical observations that have anticipated much of what has gone wrong in modern law. The quotation above from Gaius's Institutes, on its face, concerns the question of how to define a particular kind of theft—what we would roughly call theft by those caught red-handed. It notes that in a case of this sort, as well as in those dealing with adultery and homicide, the correct definitions of crimes are fixed as a matter of linguistic truth and cannot be altered by judicial fiats to the contrary. As Gaius says, it is always possible to treat some other form of conduct *as if* it were a form of adultery, theft, homicide, or, I shall add, nuisance, even if it is not.[2] But that supposed equivalence comes at a price, for the key question is whether, under sound principles of deterrence or compensation, the severity of these newfound offenses independently justifies the same (severe) penalties applicable to traditional public nuisance cases.

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[*] The Laurence A. Tisch Professor of Law, The New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, the Hoover Institution, and the James Parker Hall Distinguished Service Professor and Senior Lecturer, the University of Chicago. This paper is prepared for a Research Roundtable on Public Nuisance organized Henry G. Manne Program in Law and Economic Studies sponsored by the Law and Economics Center at George Mason University held between May 16 and May 19, 2021, on Amelia Island Florida. I greatly benefitted from the comments of Sarah Schlinder and Erin Ryan on an earlier draft of the paper, as well as the remarks of the other conference participants. My thanks to Matthew Phillips and Elle Rogers, the University of Chicago Class of 2023 for their excellent research assistants.

[1] Gaius, Institutes Bk III, ¶ 194.

[2] *Id.*

That issue—the scope of the public nuisance doctrine—has come to the fore today in connection with a highly insightful account of the wrong found in an influential anonymous decision dating back to 1535 or 1536 (hereafter "*Anonymous*").[3] Its analysis is as sound today as it was nearly 500 years ago. The case involved a blockage of a public road, from which (arguably) one party suffered either personal injury or property damage, while many other individuals only suffered the real, but relatively minor, losses of delay. The solution was to allow the private right of action for the special damages but to use an administrative remedy (through the Court of Leet) to fine the defendant to provide both for general deterrence and for additional funds to keep the highways open. This same solution has been applied to polluters, where their direct targets get compensated for their losses, but indirect parties (i.e., those who bought or sold goods from the parties who were polluted) get no private damages.

The secret of that early decision was that it used the same definition of nuisance to cover both public and private nuisances, where the only relevant difference between the two wrongs was (and is) found in the party or parties targeted by the activities undertaken by the defendant.[4] One key virtue of this position is that the continuous movement from public to private reduces the pressure on the distinction, which would increase if the substantive standards were radically disjointed in the two cases. In principle, it is always wise to avoid making unnecessary distinctions that do not serve any conceptual or practical function. Put otherwise, every legal distinction has to pay its own way.[5] In particular, the *Anonymous* framework allowed for the smooth transition from public to private nuisance, thereby simplifying the overall structure of the legal system.

That unifying theme of a singular nuisance definition carries through the development of the entire nuisance field. Thus, William Blackstone in his *Commentaries* also stresses the parallelism between the two types when he writes:

> A THIRD species of real injuries to a man's land and tenements, is by nuisance. Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds; public or common nuisances, which affect the public, and are an annoyance to all the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and

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[3] Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536).

[4] I have developed these themes by drawing on material I published in some earlier essays I wrote for the Hoover Institution's "Defining Ideas" column. *See, e.g.*, Richard A. Epstein, *The Opioid Crisis And a Distorted Legal Response*, HOOVER INST. (Oct. 26, 2020), https://www.hoover.org/research/opioid-crisis-and-distorted-legal-response; Richard A. Epstein, *Taking Opioids To Court*, HOOVER INST. (Apr.15 2019), https://www.hoover.org/research/opioid-crisis-and-distorted-legal-response; Richard A. Epstein, *When Courts Play Public Nuisance*, HOOVER INST. (July 30, 2018), https://www.hoover.org/research/when-courts-play-public-nuisance; Richard A. Epstein, *Is Global Warming A Public Nuisance*, HOOVER INST. (Jan. 15, 2018), https://www.hoover.org/research/global-warming-public-nuisance.

[5] *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

> misdemeanor: and private nuisances; which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.[6]

And among those remedies are those for generally offensive conduct *and* the blocking of ways:

> If have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or plowing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought.[7]

The parallel on the public side is of course the situation in *Anonymous*. Blackstone articulates and defends the two-tier definition of remedies, noting first that for general harms, no private party has a right of action. He then offers a rationalization for the earlier distribution of remedies between public and private rights of action that both tracks *Anonymous* and accurately foretells subsequent developments:

> Therefore no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it; or, he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action of a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and *pater-familias* of the kingdom. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.[8]

This historical approach all rests on an implicit assumption that the definitions of both public and private nuisances are clear and closely related. On this view, the exposition of this branch of law is crisp and there is no lamenting the inherent limitations of the English language. Instead, these formulations force any judge or scholar to develop the systematic account of nuisance by linking public and private nuisance law together. This essay will show that once that connection is severed, the sky is the limit, so that one bad extension of legal doctrine rapidly follows another. It is not only that the law of nuisance becomes an ad hoc mess. It is also that all correlative areas of

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6 WILLIAM BLACKSTONE, *Of Nuisance*, *in* COMMENTARIES ON THE LAWS OF ENGLAND (1765).

7 *Id.*

8 *Id.* (citation omitted).

law such as product liability, misrepresentation, and the economic loss rule[9] are easily circumvented so that essential elements in these torts become lost in the juggernaut now in place to develop the law of public nuisance. In sum, as Joel Brenner has demonstrated, the stable, long-term use of the term nuisance to cover unreasonable interferences with the use and enjoyment of land has been a constant in the discussion.[10]

The free-form analysis of public nuisance today rests on more recent expositions of the topic, all of which take the same form. The late William Prosser demonstrated his expertise in hyperbole when he began his treatise chapter on nuisance with this sentence: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'."[11] The quotation marks around the term nuisance attempt to delegitimate any effort to give it a consistent and coherent meaning.[12] Prosser had previously taken up the same cudgels in his well-known article on public nuisance, where he dismissed the entire notion as though it were a "sort of a legal garbage can."[13] His argument rested in large measure on the observation that the public law of nuisance has also been used to address morals offenses such as prostitution and bawdy houses—which sometimes operate like noisy nuisances and sometimes do not. These cases were not mentioned in either *Anonymous* or Blackstone's *Commentaries*. Today, therefore, the best way to deal with that admitted heterogeneity is to break out the various subsets of nuisance laws, and then in this context at least confine oneself to cases dealing largely with obstruction of public ways on the one hand, or the emission of noise, filth, and smells on public property such as a river or other body of water.

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9 Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DE PAUL L. REV. 431 (2021) (describing the public nuisance doctrine as an "end run" around the economic loss rule which generally provides pure economic loss, apart from any physical injury, is not recoverable under a negligence theory of liability); *see also* Southern Cal. Gas Co. v. Superior Court of Los Angeles County, 441 P.3d 881, 885 (Cal. 2019) (applying the rule to bar recovery to merchants who lost business after a major gas leak caused serious physical injuries to many, including those who evacuated the area).

10 Joel Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974). For one early case that supports this thesis, *see William Aldred's Case*, Coke 57b, 77 Eng. Rep. 316 (1610), which applied the test of substantial interference to a hog sty built in a residential neighbor, rejecting an extrasensitivity defense, following this general rule:

[N]o right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants . . . .

Id.

11 William Prosser, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971).

12 *Id.*

13 William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (citing Commonwealth v. Cassidy, 6 Phila. 82 (Pa. 1865) and Carroll v. New York Pie Baking Co., 213 N.Y. Supp. 553 (N.Y. 1926) ("'Nuisance,' unhappily, has been a sort of legal garbage can. The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie.").

Prosser did just that in his detailed exposition of some of the finer points of public nuisance law, which followed the standard account of actions by a defendant that infringe on a common right, then backhandedly acknowledged the power of standard language by observing that the term is not infinitely pliable. He noted that "even the legislature may not constitutionally declare a thing a nuisance when it does not interfere substantially with public or private interests."[14] That point would be utterly incoherent if the term nuisance were as vague as his general pronouncements claim, but it is on point precisely because the term has powerful descriptive content.[15] Nonetheless, an intellectual version of Gresham's law is at work here, since Prosser's more colorful pronouncements drive the more careful ones out of circulation, at least for the purpose of general analysis. Sadly, loose talk like this leads to the danger that Gaius decried: the free use of language that allows for the thoughtless equation of one idea with another. In the past decade or so, this phenomenon has led to an enormous and unprincipled expansion of the nuisance tort.

Indeed, the point here is part of a larger discussion about language in general, for it is all too easy to assume that the identification of hard cases in any area of law means that the ordinary language of such terms as causation[16] on the one hand or possession on the other[17] are not capable of rational analysis. In fact, careful exposition that starts with ordinary language and then refines it by close analysis can make substantial progress in that direction. The explanation is all too simple. People need to communicate, and they do communicate. They could not communicate if the words by which they express their thoughts could not be known even to themselves, let alone generally. The use of these terms endures over time and across space because they address problems that require response. The durability of these conceptions and their ease of use in ordinary language belie the claim that they are idle tokens that can easily be gotten rid of. The principle of survival of the fittest is as applicable to language as to any other form of exposition.

Prosser goes further off the rails when he insists that, notwithstanding the use of a single term, a public nuisance sometimes does operate as a catch-all that sweeps into its orbit criminal offenses that have "almost nothing in common [with private nuisances], except that each causes annoyance or inconvenience to someone."[18] Why? Because public nuisances are crimes,

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14 PROSSER, *supra* note 11, at 577 n. 66 (citing cases).

15 *See* discussion *infra* note 49 and accompanying text. I make just this point about language in RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 23–24 (1985), dealing with this subject where the paired quotation marks are the way to denaturalize the term. *See also* Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J. LAW & PUB. POL. 583 (2016).

16 *See* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 3 (1959).

17 *See* EPSTEIN, *supra* note 15, at 23–24; MICHAEL J.R. CRAWFORD, AN EXPRESSIVE THEORY OF POSSESSION 2–3 (2019).

18 Prosser, *supra* note 13, at 411.

not torts. At least Prosser insists as much when he begins his 1966 article, *Private Action for Public Nuisance*,[19] with the categorical statement that "[a] public or 'common' nuisance is always a crime."[20] This theme is later echoed by Professor Thomas W. Merrill, who takes the position that a public nuisance is properly understood as a public action and not a tort,[21] "and then fully explains why tort principles do not quite govern these public actions." In his contribution to this volume, Merrill again presses this idea of threatened harm, or what the Romans called *damnum infectum.* But the key passage that he cites from leads to the opposite conclusion. The operative passage, when read in full, states:

> The central claim I wish to make is that public nuisance is distinct from other forms of legal liability in that it commonly seeks to regulate risk—a threat of future harm—as opposed to redressing existing harm. The "essential element" of a public nuisance, as one modern court has recognized, is that "persons have suffered harm or are *threatened with injuries* that they ought not to bear."[22]

It is one thing to italicize the second portion of the sentence to note that threatened harms are subject to government injunctions; it is quite another to downplay the first portion, which acknowledges the tort-like foundation of this branch of public nuisance law. But that is equally true with private injunctions. In this instance the operative distinction between the two forms of nuisance is often based on the simple observation, made by Blackstone, that for nuisances that occur on public roads or rivers it is not easy to identify the threatened individuals. In such cases, public action—as with other breaches of statutory protection—is necessary because no private party has sufficient incentives to block a threatened public harm, it being very unlikely that any particular person will suffer special damages. Funding state action is an efficient way to deal with these situations, and this is often done under the public trust doctrine when no private plaintiffs are available, as in *Burgess v. M/V Tamano*.[23] But that point does not remotely suggest that the public nuisance action cannot be brought for present and certain harms. Nor does it preclude fines by public bodies or private damage actions when both are clearly allowable.

Indeed, *Wood v. Picillo,* the case Merrill cites*,* is diametrically opposed to the Merrill thesis. In the opening paragraph, Judge Weisberger writes:

> Finding that the defendants created a public and private nuisance in maintaining a hazardous waste dump site on their Coventry farm, the trial justice enjoined further

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19 William Prosser, *Private Action for Public Nuisance*, 52 VA. L.R. 997 (1996).

20 *Id.* at 997.

21 Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1 (2011).

22 Thomas W. Merrill, *Public Nuisance as Risk Regulation* 1 (emphasis added) (citing *Wood v. Picillo*, 443 A. 2d 1244, 1247 (R.I. 1982)).

23 370 F. Supp. 247 (D. Me. 1973).

> chemical disposal operations at the defendants' property and ordered the defendants to finance cleanup and removal of the toxic wastes.[24]

At no point does the opinion draw any distinction in the substantive rules that govern the two sides of the case. And at no point is the word "crime" used to describe the public nuisance. The correct understanding of the case thus illustrates that public and private nuisances are complements, making clear that calling public nuisances crimes just gets things backwards. The state does not prosecute these cases because there are crimes; rather, they are crimes because the state prosecutes them. They are made criminal to allow for their prosecution by a public entity.

Public nuisances, even those accidentally created, are called crimes for procedural, not substantive, reasons. To allow the state to be the enforcer of a rule, it is necessary to make the public nuisance a crime. By this, however, it is only meant that the public nuisance is a regulatory offense that could be enforced by some combination of public remedies: damages; clean-up of existing messes; injunctions against future harm; and the like. But it would put an enormous gap in the law to insist that the defendant could only be punished for the criminal offense upon proof of *mens rea*, or some other specific intention to create harmful conditions to others, which is not required at all under the private law of nuisance. It is not as though the complement of public remedies for diffuse, or general, damages and those for special, or particularized, damages limited to designated plaintiffs developed on divergent tracks. To the contrary, both the general and special damages were built into the original formulation of nuisance law; *Anonymous* explicitly allowed for both as part of a unified scheme.

To complete the overall analysis, it is necessary to back up a bit to show how the modern law of nuisance, both public and private, fits into the general scheme of tort liability. The analysis begins with the notion that in ordinary cases private property rights presumptively give the owner or owners rights to exclude others from their land. Those rules extend to such situations as having leaves hang over someone else's property or shooting guns across the lands of others. But those protections are insufficient to secure the "quiet enjoyment" of land, and that gap was filled by the systematic creation of the law of private nuisance.[25] Private nuisances represented unreasonable interference with the quiet enjoyment of private property that fell short of a trespassory invasion,[26] codified, for example, in the Restatement account of

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[24] Wood v. Picillo, 443 A.2d 1244, 1245 (R.I. 1982).

[25] For my early development of this field and the relationship between public and private nuisance, *see* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

[26] As the Supreme Court of North Carolina noted in *Morgan v. High Penn Oil Co.*:

"The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas,* meaning, in essence, that every person should so use his own property as not to injure

the area.[27] The relevant contrast in the decided cases was between trespasses and nuisances, where the former involve situations concerning concentrated direct emissions of noxious substances that were found to be trespasses and thus allowed the plaintiff the benefit of a longer statute of limitations.[28] But in general, the emission of smells, vibrations, and toxic substances from one property to another, typically propelled by wind or water, was the essence of both public and private nuisances. Within the context of public nuisances, two major branches developed. The first involved the pollution of public waters and the second involved the blocking of a public right of way which could be enjoyed by all. These notions were easily extended to cover cases of air pollution without breaking the essential symmetry between public and private nuisances. The private analogs are precise in dealing with both these branches of the law—offensive activities and blocking common rights.

THE REMEDIAL THICKET

That said, one of the distinctive difficulties in nuisance law arises from the variety of situations that are covered by the basic definition. Nuisances could come in all sizes and dimensions. A single person could cause harm to a single person. A single person could damage multiple persons. Multiple persons could damage a single person. Or multiple persons could damage multiple parties. In all of these cases, the intensity of the nuisance could vary from a trifling interference on the one hand to fatal exposures to toxic chemicals on the other. These variations do not involve any changes in the

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that of another. . . . Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance." Morgan v. High Penn Oil Co., *77* S.E. 2d 682, 689 (N.C. 1953) (Erwin, J.) (citations omitted).

27 *See* Restatement (Second) of Torts § 822: General Rule of Nuisance:

The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

(a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and

(b) the invasion is substantial; and(c) the actor's conduct is a legal cause of the invasion; and (d) the invasion is either

(d) the invasion is either

(i) intentional and unreasonable; or

(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

(i) intentional and unreasonable; or

(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

28 *See, e.g.*, Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959).

substantive definition of what counts as a nuisance but rather give rise to a variety of enforcement strategies to enforce rights through either public or private remedies.

Burgess v. M/V Tamano[29] illustrates the basic pattern with its different treatment of three classes of claimants who sought recovery from the release of approximately 100,000 barrels of oil into a bay off the coast of Maine. The three classes of plaintiffs consisted of commercial fishermen, commercial clam diggers, and "owners of motels, trailer parks, camp grounds, restaurants, grocery stores, and similar establishments in [the beach next to the bay], whose businesses are dependent on tourist trade."[30] It seems clear that the first two plaintiff classes were closer to the harms in question, and that the third swept far broader than the first two. The defendant had insisted that all three classes of claims be dismissed because no plaintiff had a "property interest" in the fish and clams that were killed by the oil spill. That same argument could be made, of course, against the owner of private property on which the loss of fish and clams occurred.

The outright dismissal of all claims was rightly denied. Even though none of the plaintiffs had an interest in the fish or clams, the commercial fishermen and clam diggers were entitled under applicable law to acquire ownership in the fish and clams under the usual first possession rule. More precisely, the Court held that the waters where the spill occurred were public trust waters held in common by the state for the benefit of its members. It then followed that the plaintiffs were allowed to sue for "the tortious invasion of public rights which are held by the State of Maine in trust for the common benefit of all people," which in turn was allowed for the reason adumbrated in the *Anonymous* case, namely that the fishermen and diggers had "suffered damage particular to [each]—that is, damage different in kind, rather than simply in degree, from that sustained by the public generally."[31]

The standard position outlined in *Burgess* glosses over any objection that the state as the owner of the waters should be the only plaintiff in the case. And it does so because it understands that public actions are hard to maintain without harnessing relevant information more easily available to private individuals. While it may be somewhat tricky for "direct" victims to prove their claim by determining net profits from their commercial activities (which means subtracting out costs to find net benefits), the alternative is either a public action that is short on information or no action at all. As with all remedial questions, it is best to minimize both kinds of error.

Subject to that constraint, the *Burgess* decision is correct in allowing action by these direct plaintiffs. In contrast, the court rejected the claims by the second tier of persons who profited from the tourist trade. The harms these plaintiffs suffered did not warrant special damages within the confines of the general rule, given that these damages would be more numerous, more

29 370 F. Supp. 247 (D. Me. 1973).
30 *Id.* at 248.
31 *Id.* at 250.

diffuse, and more capable of mitigation by activities of the plaintiffs, who were the only parties in position to act when the risk of harm became imminent. Thus their losses were characterized as "only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches in which they do not have a property interest."[32] Where plaintiffs are this far removed from the initial harm, the administrative costs are large relative to the deterrent effect that could be achieved. Hence the appropriate strategy is to turn to fines payable to the state in order to pick up the slack. The effect on a wrongdoer is the same whether the compensation is paid to an individual victim or to a public fund. The latter is far more efficient from an administrative perspective, so it reduces deadweight losses. The fines in question could be increased, if thought desirable, to keep a constant burden on the defendant, and it is always possible to spend the proceeds of the fine on the remediation and improvement of the public resource in order to minimize the likelihood of an unfortunate reoccurrence. Hence follows the general rule that certain kinds of indirect economic losses fall outside the tort system, and outside the public nuisance area as well.[33]

These powerful limitations have been subject to erosion in recent years, in ways that have taken a useful device that reduces the transaction cost of litigation into a wide expansion of public rights. Some illustrations of the difficulty include the huge direct payments from the BP Deepwater Horizon oil spill, which went far beyond the amounts that I expected in 2010.[34] The scope of the disaster was huge on any reckoning, and full compensation for those killed in the explosion and those who suffered direct injuries of the case under the standard articulated in *Burgess* would have resulted in billions in damages, even if all the common law limitations on liability were fully observed. The position that I attacked at that time called for a special cap on damages, even in strict liability cases involving strangers. In particular, I took issue with a $75 million cap per incident, which in the case of the BP spill would be pennies on the dollar of actual losses caused. But it is one thing to be wary of caps, and quite another to abandon the implicit common law prohibition on recovery by remote plaintiffs, which is what happened in this instance. In general, the wider class of parties has more options to

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[32] *Id.* at 251.

[33] On the economic loss rule generally, *see supra* note 3; *see also* Mario Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281 (1982). For a recent example in connection with a natural gas leak, *see* Southern California Gas Co. v. Superior Court of Los Angeles, 441 P.3d 881 (Cal. 2019) (disallowing recovery for pure economic losses). The same principle applies in other contexts, including rate. *See* S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533–534 (1918) (Holmes, J.) (allowing a shipper to recover an overcharge from a regulated railroad even though it had itself recovered some of the excess costs from its purchasers) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."). The antitrust analog of this rule is Illinois Brick v. Illinois, 431 U.S. 720 (1977), which allows actions by direct purchasers only.

[34] Richard A. Epstein, *BP Doesn't Deserve a Liability Cap*, WALL STREET J. (June 16, 2010), https://www.wsj.com/articles/SB10001424052748704312104575298902528808996.

mitigate, at a time when the administrative costs of suit multiply. Therefore, as the benefits of litigation fall, and its costs rise, the lines cross. It is not possible to make these calculations accurately in individual cases, so that the bright line rule is the best we can imagine. In making these general arguments, my point here is not to defend BP but to note that the placement of these wells is not done by firm choice only. Often the best sites are regarded as too close to the shore, where the risk of landfall is greater, conditional on the size of the spill. Moving outward may reduce the likelihood that a spill of any given size might reach sensitive beaches or other coastal activities. But the offset is that the riskier activities that may be undertaken farther from the shore carry with them a larger chance of a more serious accident. Hence the tradeoffs are not always happy, for regulators' choices can backfire here as in so many other contexts. Thus the dilemma: caps keep the level too low; modern settlements set the total damages too high. The basic economic loss rule formula continues to work, but its application is subject to immense controversy.

One last observation about the two-tiered common law approach to nuisance: it carries with its powerful constitutional limitations that revolve around the Takings Clause. The Fifth Amendment to the United States Constitution reads: "nor shall private property be taken for public use, without just compensation."[35] In this instance, the precise question is whether the statutory authorization of railroad operations through a tunnel insulates a railroad from liability for a private nuisance to a landowner who is not adjacent to the tracks, but whose property suffers major depreciation in damage from excessive concentrations of soot, grime, and other forms of filth. The role of statutory authorization has given rise to a major source of difference among common law judges. In the railroad instance, the background English statutes provided that statutory authorization to construct or use a locomotive that created a public nuisance did not immunize one from liability at common law.[36] There was much disagreement as to the effect of the statute. One position adopted in such cases as *Rex v. Pease*[37] and *Vaughan v. Taff Vale Railway Co.*[38] insisted that the statutory authorization bars all strict liability claims for harms caused. That contention was criticized by Baron Bramwell in *Powell v. Fall,*[39] who maintained instead that compliance with the statute did not excuse the railroad from damages, even if it did prevent the issuance of an injunction.

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35 U.S. CONST. amend. V.

36 24 & 25 Vict. c.70, § 13 ("Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine, which shall be so constructed or used as to cause a public or private nuisance, and every such person so using such engine shall notwithstanding this Act be liable to an indictment or action as the case may be, for such use where, but for the passing of this Act, such indictment or action could be maintained.").

37 168 Eng. Rep. 216 (K.B. 1832).

38 157 Eng. Rep. 1351, 1354 (Ex. 1860).

39 5 Q.B 597 (1880).

The battle here is familiar. *Pease* and *Taff Vale* asked why it was necessary to impose liability if the applicable standard of conduct was set by statute. There is no efficient deterrence in the absence of some negligence. The opposite position is that there is no reason why the defendant should be allowed to prosper at the expense of the plaintiff, so that the matter is one of equity—the party who stands to prosper from its own actions should bear its losses. This debate between negligence and strict liability rages across the entire law of torts. The purported equivalence, however, only works if the statute sets the correct standard for the level of precautions required. In most cases it will either be too high or too low, and the introduction of that element of error—always a second-order consideration—can surely skew the balance in favor of the strict liability rule. If the standard is set too high, firms may prefer not to take full precautions (depending on fines and inspections and the like) but will still have to pay damages. But if the standard is set too low—which interest group politics could easily create—the level of care needed to secure compliance then falls below the social optimum, and unnecessary losses will take place. Hence the preference for the strict liability rule comes from the consideration of a second-order issue—setting the right standard. The strict liability rule proves to be more robust than the negligence rule precisely because it tends toward the optimal level of performance even in the face of government errors in setting the applicable standard of care.

One point that was (apparently) not at stake in the English disputes was diffuse harms of the sort that prompted the development of the law of public nuisance in the first place. But it is clear that some cases involved an admixture of both particular and general losses, so that the mixed solution adopted in the *Anonymous* case and by Blackstone remains relevant. Indeed, just that solution was invoked in a constitutional takings case, *Richards v. Washington Terminal Co.*,[40] which essentially elevated the common law solution to constitutional status, consistent with Prosser's observation that statutes cannot convert something into a nuisance that does not meet the common law definition.[41] In *Richards*, the defendant railroad operated a train through a tunnel, such that the plaintiff's property was "damaged by the volumes of dense black or gray smoke, and also by dust and dirt, cinders and gases," emitted from the train.[42] The operation of the defendant's facilities also caused some general distress in the community, for which a private remedy was not available at common law, and hence not under the constitution. Thus, the Court held that the public nuisance claim was barred as a form of *damnum absque injuria* but that the same was not true of the specific harms to plaintiff's property. In dealing with the English cases, Justice Pitney noted that the "omnipotent" Parliament could authorize a nuisance without offering compensation, even if its actions should only be

40 233 U.S. 546 (1914).

41 *See*, *supra* note 14.

42 *Richards*, 233 U.S. at 552.

interpreted that way if "the language be so clear as to admit of no other meaning."[43] But the American constitutional provisions required the opposite result:

We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.[44]

Hence the payoff: "[T]he legislative authorization conferred exemption only from suit or prosecution for the public nuisance, and did not affect "any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."[45] The articulation of this general rule sets the stage for the particular cases that follow.

ONTO GLOBAL WARMING

The most controversial cases of the current situation concern claims that seek to hold private defendants responsible for harms associated with global warming. These cases do not typically involve government defendants, but the constitutional principles still apply if there is federal or state authorization for the particular activities in question; background harms are outside the scope of private compensation and only subject to a regulatory solution. More severe and localized harms are treated otherwise.

The first round of the public nuisance cases were resolved against the claimants in *American Electric Power Co. v. Connecticut (AEP)*,[46] where the question before the Supreme Court was "whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority),"[47] with an eye to setting emissions levels for each outfit. A unanimous Supreme Court, speaking through Justice Ginsburg, held that to the extent that these claims rested on *federal* common law they were blocked under the authority of *City of Milwaukee v. Illinois & Michigan*,[48] which refused to allow public nuisance suits brought by Illinois under the explicit effluent limitations set out in the 1972 amendments to the Federal Water Pollution Control Act. In that earlier case, Justice Rehnquist wrote, "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity

43 *Id*.
44 *Id.* at 553.
45 *Id*. at 556.
46 564 U.S. 410 (2011).
47 *Id.* at 415.
48 451 U.S. 304 (1981).

jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[49] Note that there were no claims for special damages that might have invoked the rule in the *Richards* case. This authority made it relatively easy for Justice Ginsburg to conclude that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[50]

As a normative matter, a uniform negative answer to that last question rested on the same necessity to coordinate a uniform national policy, perhaps with the implicit understanding that these claims were not subject to any real constitutional override. Hence the qualification from Justice Ginsburg that *AEP* only governed the federal side of matters and could not survive careful institutional or doctrinal analysis. The state law claims for public nuisance raise exactly the same coordination concerns, only more so given that different states may well adopt some different versions of public nuisance laws, or even give different interpretations to identical texts. Since the coordination problems are every bit as acute as in the federal case, preemption of both state and federal claims has to be a given, which indeed it has been. Thus most recently in *City of New York v. Chevron Corp.*,[51] the Second Circuit took just that exact line. First, it assumed that all the allegations in the complaint about the severity of global warming and the threats that it poses are true.[52] It then noted the "interlocking frameworks," both domestic and international, used to deal with the delineation of rights and the enforcement of the rights.[53] The court thus concluded that the government plaintiffs could not "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions."[54] This result falls in line with cases from other jurisdictions,[55] many of which shared the Second Circuit's reluctance to create domestic liability on foreign countries, including those who are treaty parties with the United States.[56] The Second Circuit then cited an opinion by Justice Brandeis, *Hinderlider v. La Plata River & Cherry Creek Ditch Co*.,[57] decided on the same day as *Erie Railroad v. Tompkins,*[58] but almost completely forgotten. Yet *Hinderlider* contains this critical exception to *Erie*: "whether the water of an interstate stream must be apportioned between the two States

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49 *Id.* at 317.

50 *AEP* at 424.

51 993 F.3d 81 (2d. Cir. 2020).

52 *Id.* at 86 n.1.

53 *Id.* at 86.

54 *Id.* at 85.

55 San Mateo County v. Chevron, 294 F. Supp. 3d 934 (N.D. Cal. 2018); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019); Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019)

56 *Chevron*, 993 F.3d at 103.

57 *Id.* at 89 (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)).

58 304 U.S. 64 (1938).

is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."[59] As covered by statutes and court decisions, this exception strongly supports the view that state common law is out from the situation, and for the best of all reasons—namely, in any dispute between two states, each state, whether by common law or by statute, has a strong incentive to rig the rules in ways that will favor its own claim.[60] The so-called "brooding omnipresence" of the common law is not really at stake because the federal government has adopted by implication the neutral set of common law principles that blocks favoritism in either the legislature or the courts.[61] The later Supreme Court decision in *International Paper Co. v. Ouellette*[62] gave a back of the hand dismissal of *Hinderlider*[63] before adopting what I regard as the inferior rule of allowing the liability of point sources to be governed by state laws. Nonetheless, without any clear statutory guidance, the Court in *Ouellette* wrote: Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. . . . [N]othing in the [Clean Water] Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.[64]

There is an important sleight of hand here, for the applicable statutory provision, 33 U.S.C. § 1365, reads, "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ."[65] Note that this provision does not contain any choice of law clause or even limit the range of common law options to state common law rules. And the same is true with respect to the analogous provision under the Clean Air Act.[66] The preference for the source state thus has no clear statutory authorization, which leaves open the question of why *Ouellette* was so dismissive of *Hinderlider*, given the superiority of the federal common law solution as a way to prevent local bias from driving deviations from the best systematic solution.

Nonetheless, *New York v. Chevron* has been subjected to strong criticism. Jonathan Adler has claimed in effect that the reserved powers of a state are large enough to allow it to select and sequence the remedies it wishes

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59 *Hinderlider*, 304 U.S. 92 at 110.

60 For my development of this theme *see* Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. L. REV. 463 (2009).

61 *See, e.g., Southern Pacific Co. v. Jensen,* 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .").

62 479 U.S. 481 (1987).

63 *Id.* at 487.

64 *Id.* at 497 (emphasis in original).

65 33 U.S.C. § 1365(e).

66 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency.").

to impose in climate change cases, just as on any other area of law.[67] He thus argues that it is easier for federal statutes to "displace" federal common law causes of action than it is for them to "preempt" state common law causes of action. It is, of course, beyond dispute that in dealing with matters that take place *solely within their own borders* states are not committed to one legal regimen only. They are entitled to use the full range of approaches, including both damages and fines on the one side and various orders and regulations to govern everything from facility construction to direct regulation of a wide range of activities on the other. From a federalism standpoint, the latter makes it totally permissible for them to require various kinds of filters to reduce the level of toxic emissions and carbon dioxide.

The best explanation for this position, however, is that no other state has an interest in the matter, save the general interest that all states have in other states adopting policies to their liking. But that definition of "interest" is hopelessly broad for dealing with interstate relations. For starters, it would mean that the citizens of New Jersey would have a right to vote in New York state and city elections because of the obvious impact that New York's taxation and regulation policies have on the integrated economy of the two states. But that broad definition does not apply in just one direction, so that New Yorkers could claim that their broad interest allows them to vote in New Jersey elections. And so the snowball continues to roll downhill until everyone in every state has a claim to participate in the electoral affairs of every other state in the Union, and indeed in the activities of our major trading partners overseas whose tariff and trade policies impact us At this point it is a scant concession at best to say that any given state cannot issue direct commands over the activities in other states, if the governments in question are allowed to tax any private firm for activities done anywhere on the face of the globe under a state nuisance law, so long as those actions have some consequences within the state. The very pandemonium that was feared in *AEP* will pass.

The key point here is that the power of a state in a federal system is only to tax and regulate those activities solely within its borders. It cannot be allowed, and should not be allowed, to do so with respect to activities that take place elsewhere with local consequences. On this issue *Ouellette* is of no help, and, ironically, it should be distinguished, so long as it provides that the applicable law is that of the *source* state. And Adler is surely correct to note that the Clean Air Act) (a close relative to the Clean Water Act) does not preempt all private rights of action based upon either the statutory or common law of the source state. But in the case of *Merrick v. Diageo*

67 Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. ECON. & POL'Y 1, 6-7 (2022) (using displacement to refer to the process whereby federal common law claims are blocked by federal statutes).

Americas Supply, Inc.,[68] two points make the decision eminently defensible. First, the level of pollution from the source state was so high that it hardly mattered what the choice of law rule was. It is more important to make sure that, as noted earlier, private actions should be a gimme in cases of breach of statutory obligation. Second, there was only one polluter, so that the identification of the source state was a modest problem. Accordingly, the *Ouellette* rule is eminently administrable (although unwise) when only two states are involved, but it is utterly unworkable when fossil fuel emissions come from too many places to count. Indeed, in *New York v. Chevron*, New York was also a source state, but it was unthinkable that it could apply its laws to operations taken by firms outside New York.[69]

For those multiple source cases, the problem of governance therefore has to be solved in only one of two ways. By the first, states can enter into various forms of pacts with each other to regulate the various joint activities. There was just that sort of arrangement in *Hinderlider* between Colorado and New Mexico, under which officials between the two states agreed that a rotation of water on a ten-day cycle was the most efficient way to split the resource, which limited the scope of the claim that any citizen of Colorado could maintain against its own public official in charge of the allocation. Similarly, Port Authority, which regulates various activities in the tri-state area of New York, New Jersey, and Connecticut, is just such a device. The risk of abusive externalities is now counteracted by collective consent, which allows for coordinated action so long as it does not trench upon the rights of those states that are outside of the group. The second device is of course direct federal regulation, defended in *New York v. Chevron*, where the uniform jurisdiction obviates the need to deal with consent on a piecemeal basis, whether by parties or by project.[70] The bottom line, however, remains that the logic of *AEP* continues to apply across the board.

The weaknesses of the Adler proposal are revealed by looking at its proposed line of litigation now used to get around *AEP*. Representative of this trend is the suit brought by Boulder, Colorado, joined by San Miguel County, against several major oil companies under a quasi-public nuisance theory on the grounds that the fossil fuel defendants had produced, promoted, refined and supplied fossil fuels that downstream purchasers used in a dangerous fashion, for which they should be liable—even though the plaintiffs and countless others had used the same products with the same common knowledge of their potential environmental risks. The theory of these cases is that if the only issues on the table are joint causation,

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68 805 F.3d 685 (6th Cir. 2015). The two other cases the court cites have similar patterns. Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014), was a suit brought by eight class representatives against the operator of a local corn wet milling facility. And in Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013), all members of the plaintiff class were located within a mile of the sole defendant, a coal generating plant less than a mile away.

69 993 F.3d 81, 92–93 (2d. Cir. 2020).

70 *See id.* at 99.

contributory negligence, and assumption of risk, the reduction in damages that these defenses might create still leaves room for a handsome recovery.

Nonetheless, it is well-established law that damages, like injunctions, can be coercive in their own way. In *San Diego Building Trades Council v. Garmon*,[71] the California courts had allowed for damages against the defendant for conduct that could have amounted to an unfair labor practice under the NLRA. Justice Frankfurter, speaking for the Supreme Court, noted that the application of federal law was iffy but then held that this was a matter for the NLRB—not the courts—to determine. In this instance, the NLRB played a similar role to the EPA because Congress entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. Hence:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted . . . . Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, and indeed is designed to be, a potent method of governing conduct and controlling policy.[72]

Undeniably this case was still stronger because the dominance of the EPA was acknowledged while the oversight role of the NLRB was not yet determined. To date, these issues have not been authoritatively resolved, as much of the litigation in these cases so far has involved efforts by the defendant oil companies to remove these cases to federal courts, which generally have proved unavailing.[73]

The preemption should be understood as a blessing in disguise, given the evident substantive difficulties with lawsuits like that in *Boulder* and *New York*, which have generated relatively little enthusiasm, and for good reason.[74] First, these cases fit only awkwardly into standard theory, for sale of a product to others is not itself an emission, release, or discharge covered by the standard rules of nuisance. The extra link in the chain of causation adds a new measure of complexity, for it is far from clear that the purchased oil is used for generating energy, as opposed to, say, for plastics; and if it is used for fuel, how it is used is subject to the exclusive control over the downstream user. Nor is it clear that these limited producers should be held

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71 359 U.S. 236 (1959).

72 *Id.* at 245–47.

73 Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.), Inc., 965 F.3d 792 (10th Cir. 2020).

74 John O'Brien, *Boulder Got Things Rolling, but Momentum for Suing Big Oil Lacking in Colorado*, FORBES (Aug. 6, 2018), https://www.forbes.com/sites/legalnewsline/2018/08/06/boulder-got-things-rolling-but-momentum-for-suing-big-oil-lacking-in-colorado/?sh=54ce3c952487

accountable for the actions of an entire industry on some very dubious theory of joint and several liability, which work poorly when the number of relative parties and their contributions are hard to determine.[75] Another wrinkle is introduced by changes in climate that come from non-fossil fuel sources that are local to Colorado, including large population growth and more vehicular traffic. Local climate changes not attributable to carbon dioxide or other emissions from fossil fuels could be responsible for these effects.

All of these arguments only show, moreover, that if there is to be any attack on global warming it has to be done through a coordinated national program, not by piecemeal state actions. But there is a serious gap in the successful arguments that have been used to dispatch these cases on preemption or similar grounds. Quite simply, they do not establish that global warming is a problem or the particular set of institutional responses if it is. That question in turn requires a precise assessment of whether global warming is a threat, and, if it is, whether it is plausibly attributed to increases in greenhouse gases including carbon dioxide, and if it is, whether the temperature increase is offset by other effects of greenhouse gases, including their ability to promote photosynthesis which in turn increases the level of green covering on earth, thereby reducing the extremes of warm and cold weather. In my view, which I have defended elsewhere, the case for taking strong actions on this front is overstated, and if that is the case, then the argument that there are general damages becomes accordingly weaker.[76] It is obvious that most people take the opposite view, so much so that they regard the entire debate as settled when the duels continue apace in the scientific literature over such matters as sea-level rise, on which there remains a huge dispute.[77] But that is a debate for another time and another place. It is enough for these purposes to realize that the general and special distinction that derives from *Anonymous* remains durable today, at which point the proof of general damages, trivial in the road blocking or dead fish cases, remains contentious even if the analytical framework is not.

At this point, moreover, it is also correct in theory to insist that the same logic of strict liability that was adopted in *Powell v. Fall* carries over to public nuisance cases. Thus, as Jonathan Adler has written, so long as it can be shown that increases in global temperature attributable to activities by developed nations contribute to temperature increases that hurt individuals in poorer countries, liability should attach to those actions—assuming that we can identify the proper defendants—whether or not a set of cost-justified precautions can stop the harm. The law controls against the externalities and

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75 For some of the issues, see RESTATEMENT (SECOND) OF TORTS, § 433A, and RESTATEMENT (THIRD) OF TORTS, § 26, both which look for a "reasonable basis" for the allocation of harm.

76 *See* Richard A. Epstein, *Regulatory Enforcement Under New York's Martin Act: From Financial Fraud to Global Warming*, 14 N.Y.U. J.L. & BUS. 805 (2018).

77 *See, e.g.*, Charles Rotter, *Sea Level Rise Fastest in 2000 Years (Or Not!)*, WATTS UP WITH THAT (June 14, 2021), https://wattsupwiththat.com/2021/06/14/sea-level-rise-fastest-in-2000-years-or-not/.

the firms then decide whether and how to deal with the consequences.[78] But that proposition does not hold if the benefits from climate change—for example, greater green covering on the earth from higher rates of photosynthesis—benefit the persons who might otherwise be harmed by climate change.[79] So at this point it is critical to remember that the willingness to say that all remedial action in this area should be done through direct regulation does not answer the question of whether such direct regulation is justified. Here is not the case to debate the truth of that proposition, but it should be sufficient to say that, notwithstanding the general consensus that ranks global warming—or is the proper term the more elusive "climate change"?—as a substantial risk has been in fact challenged on scientific grounds. The preference for administrative over tort solutions does not explain what kind of global response is wanted or why. The law of public nuisance structures the legal inquiry but does not answer the underlying factual questions.

GUN SALES

Perhaps the first effort to expand the public nuisance doctrine beyond its traditional confines involved efforts to pin tort liability on the manufacturers and distributors of firearms for harms caused by their downstream users, often several parties removed. The argument is that the use of guns, especially in vulnerable communities, constitutes a public nuisance because it is known to a moral certainty that some guns that are sold legally in the ordinary course of business will be used in various kinds of criminal activities, leading to the serious loss to life and to property.[80] The traditional view of this subject took the opposite position and began with parties in possession of guns and then worked its way one step at a time up the chain of distribution. Accordingly, both tort liability and criminal responsibility for unlawful use of firearms is the *sine qua non* of a civilized society. And since the punishment of actual harms is too little and too late, it is also a given that some extensive regulation of the possession and use of guns is a legitimate object of government, which in modern times in in tension with the Second Amendment protection of the right to keep and bear

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78 Jonathan Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 SOC. PHIL. & POL. 296, 311 (2009).

79 *See, e.g.*, Shilong Piao et al., *Characteristics, Drivers and Feedbacks of Global Greening*, EARTH & ENV'T (2019). Its abstract notes, "Vegetation greenness has been increasing globally since at least 1981," and further, "Modelling indicates that greening could mitigate global warming by increasing the carbon sink on land and altering biogeophysical processes, mainly evaporative cooling." *Id.* at 1. These conclusions are of course subject to major qualifications.

80 For a variation of this view, *see* Keith Hylton, *The Economics of Public Nuisance Law and the New Enforcement Actions*, 18 SUP. CT. ECON. REV. 43 (2010). Professor Merrill is on the other side of this debate, calling the use of public nuisance doctrine against guns an instance where the public nuisance doctrine has "gone off the rails." Thomas Merrill, *Is Public Nuisance a Tort?* 4 J. TORT L. 1 (2011).

arms.[81] There is of course a huge dispute over whether these regulations are effective, given the risk that law-abiding individuals will comply with the mandate while criminals will continue to ignore it—hence the reduction in the total number of guns is offset by having a larger fraction of guns in the wrong hands.[82] But that dispute is orthogonal to the issues involved here.

The next question is whether in principle there are sensible ways to extend regulation of guns backwards in time to prior possessors. And on this matter, the correct answer always takes this form: go backwards one step at a time. In most cases, that inquiry asks whether the first possessor gave the gun or other weapon to some person who has inflicted an injury, whether through criminal or innocent activity. The body of law that deals with this issue is the law of negligent entrustment, which applies in its simplest form to a person, often a parent or a retailer, who entrusts a dangerous object, most typically a gun or an automobile, to someone whom he or she has reason to believe is likely to use it.[83] Thus with cars, the typical case involves a parent who entrusts an automobile to a teenager whose speeding causes harm to another individual.[84] It is not in these cases necessary to show that the father had actual knowledge that the harm would ensue—hence the name negligent entrustment. But even here, the scope of the tort is often limited to cases in which it is known that a party is likely to misuse the object for reasons such as a congenital eye defect or a propensity to consume alcohol while drunk.[85] The rules for guns are similarly narrow, so that the kinds of cases that get litigated tend to require special circumstances that are so infrequent that they could not influence crime rates much in either direction.[86] Thus cases against retailers arise in unique circumstances, such as when they know that a straw purchase is used to funnel weapons to ineligible buyers, or from whom illegal

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81 The Second Amendment reads: "A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed." U.S. Cont. amend. II. For its modern exposition, *see generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

82 For that position, *see* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (1998), which has been much debated and subject to intense scrutiny; *see e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003); CHARLES F. WELLFORD, JOHN V. PEPPER & CAROL V. PETRIE, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005).

83 *See* RESTATEMENT (SECOND) OF TORTS § 308 (1965) ("It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."); *see also* RESTATEMENT (SECOND) OF TORTS § 390 (1965) ("One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.").

84 *See*, *e.g.*, Winn v. Haliday, 69 So. 685 (Miss. 1915).

85 Turner v. Lotts, 422 S.E.2d 765 (Va. 1992).

86 For general discussion, *see* Kate E. Britt, *Negligent Entrustment in Gun Industry Litigation: A Primer*, 97 MICH. B. J. 66 (No. 6).

weapons were stolen, or cases where a women pleaded with a defendant not to sell a gun to her daughter, who later used the gun to kill her father.

It seems clear that none of these cases can shake up the gun market, so the standard rules all require background checks of various kinds against potential buyers. But the public nuisance theory comes in at the worst possible place, for now the focus is on the manufacturer, who has legally made and distributed guns and purports to be held liable under laws developed elsewhere for putting these guns into the stream of commerce. As a general matter, asking upstream actors to control the behavior of downstream end users is not sensible. The reason why these cases have not flowered thus far is because the courts have by and large been sensitive to the difficulties of imposing liability on the top of the distribution chain for actions that are better controlled at the bottom. Thus, in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*,[87] the Court agreed with the defendant's contentions:

The manufacturers respond that the County's factual allegations amount to the following attenuated chain of events: (1) the manufacturers produce firearms at their places of business; (2) they sell the firearms to federally licensed distributors; (3) those distributors sell them to federally licensed dealers; (4) some of the firearms are later diverted by unnamed third parties into an illegal gun market, which spills into Camden County; (5) the diverted firearms are obtained by unnamed third parties who are not entitled to own or possess them; (6) these firearms are then used in criminal acts that kill and wound County residents; and (7) this harm causes the County to expend resources to prevent or respond to those crimes. The manufacturers note that in this chain, they are six steps removed from the criminal end-users. Moreover, the fourth link in this chain consists of acts committed by intervening third parties who divert some handguns into an illegal market.[88]

At this point, only three further observations should be made. The first is that the above suit was brought against eighteen named manufacturers, which presaged huge questions of judicial administration. Second, the per curiam opinion then simply wrote, "A public nuisance is 'an unreasonable interference with a right common to the general public,'" citing Restatement (Second) of Torts, § 821B(1).[89] There was of course no common right here, so end of case. But, third, the open question is whether by legislation that particular result could be upset, and in my view it cannot for the reasons mentioned earlier: the confines of a public nuisance are sufficiently clear that the legislature cannot overturn them by insisting that these defendants have created a public nuisance when they have not. It is also the case that with the Second Amendment decisions on the books, there is no simple expedient way to ban all gun sales (in order to stop all possession of guns) by fiat. So long

87 273 F.3d 536 (3rd Cir. 2001).

88 *Id* at 539 (citations omitted).

89 *Id.*

as these constraints hold, the false extension of public nuisance will not take over the law.

LEAD PAINT

The state of play is quite different in the next iteration, where all the guardrails that have held firm in the gun cases have been overrun in the application of public nuisance theories to the sale and distribution of lead paint used on various structures. Here, the banning of these paints is not, contrary to the situation with guns, out of bounds. Its use on interior surfaces or in gasoline is too substantial, despite the availability of adequate substitutes. But the risk of extending public nuisance theory therefore takes retroactive form in dealing with liability today for lead paint that was used years, even decades, before the perils were known

Very briefly, lead paint for exterior and interior use was the gold standard of paint widely used in the United States in the first third of the twentieth century. Lead paint was prized for its ease of application, its durability, and its appearance. But there was a dark side to lead paint, which, quite simply, was that it is capable of causing lead poisoning in young individuals that could lead to intellectual disabilities and other conditions.[90] The early warnings of the risks of lead paint were apparent as early as the late nineteenth century, and new evidence made these concerns stronger throughout the early part of the twentieth century, which in turn provoked a series of restriction culminating in a 1978 ban first on the use of lead paint on interiors, then on exteriors and in gasoline (where it could escape into the atmosphere and contaminate the soil in which children played).[91] The successive set of restrictions roughly mirrored the available knowledge of the severity of the risk associated with its operation.

The obvious question is whether the use of this kind of dangerous substance could generate any remedy to the individuals who were exposed to it. In dealing with this question, the most straightforward applicable body of law is the law of product liability. The argument here is that lead paint is a dangerous substance, which raises the question of whether the production and marketing of the product could be regarded tortious under standard theories of product liability. That question is complicated because the body of product liability law was in its infancy in the years before the Second World War. The ability to hold someone liable in tort for a product that was in common, lawful use was very weak unless the plaintiff could show that the product in question was subject to a manufacturing defect, such that the lead paint when sold deviated in some undisclosed way from how it had been

90 A list of relevant references can be found in People v. ConAgra Grocery Products, Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017).

91 For a general history, *see Lead-Based Paint in the United States*, WIKIPEDIA (last visited June 28, 2021) https://en.wikipedia.org/wiki/Lead-based_paint_in_the_United_States.

advertised. In effect, the early cases of product liability relied on an implicit notion that the appearance of the product created a false impression of its safety on which the individual plaintiff relied to his or her detriment. There was no duty to warn of patent defects or to design around them. This emphasis on latent defects put products liability within a general libertarian framework that required some force or (in this instance) fraud to allow the action to go through. That theory of liability remained in force whether liability was predicated on either negligence or strict liability.[92] Thus the law as of 1950 was summarized by Judge Stanley Fuld as follows in *Campo v. Scofield*:[93]

If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands.[94]

Note that on this view, there is no need to execute a design change to deal with the risk that the product user will balk. So long as the risks are apparent, potential downstream users can make whatever decisions they want about whether and how to use the product. Generic characteristics of lead paint were widely broadcast in the medical literature, so it would be highly unlikely that the defendant would be subject to some duty to warn, or that the plaintiff could escape the application of the assumption of risk defense in cases of this sort.[95] If there were any liability to injured parties, it would

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92 *See* Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

93 95 N.E.2d 802 (N.Y. 1950).

94 *Id.* at 804. The mood changed afterwards. On the transition in design defect liability, Fowler Harper and Fleming James note:

The bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition and since it was so readily avoidable they might find the maker negligent.

FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.5 (1956). That position became the law in New York state in Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976), which emphatically rejected *Campo*. There is no direct connection between Micallef and the public nuisance cases, except that both represent a powerful impulse to go beyond traditional tort cases.

95 For a discussion, *see* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW ch. 2 & 3 (1980). The basic paradigm at the time was that a product liability case required proof that the defect was in the product when made, that there was no modification thereafter, and that the product was put to a normal and proper use. Duty to warn cases were rare. Even after the elimination of the privity requirement set up in Winterbottom v. Wright, 152 Eng. Rep. 4023 (Ex. 1842) and MacPherson v. Buick, 111 N.E. 1050 (N.Y. 1916), actions for product liability were rare events, so much so that during this period, no separate premium was charged for product liability coverage. That changed radically in the mid 1970s when a crisis in affordability and availability led the (then) American Insurance Association to launch a full-scale project to review the state of product liability, resulting in the publication of my products liability book.

likely be fastened on the landlords or sellers of the homes that used lead paint. But I am not aware of any suits of that type because the operative theories of occupier's liability would founder on exactly the same point as before: the duty to warn of dangerous conditions depended on knowledge by the defendant that was not shared by the plaintiff, which could not be made out in cases in which potential perils are public knowledge.

The effort to avoid these limitations with respect to lead paint have come from the use of a public nuisance theory, most notably in a lawsuit brought by California against two major producers of lead paint, ConAgra and Sherwin Williams.[96] That theory should immediately collapse on the simple point that the harm here is not related to any common right, such as is found with any public road, body of water, or air pollution site. Hence the case should, instead, turn on the individual warranties or representations made in these cases to particular parties. But the stated position in those cases took a far more ominous turn. The critical element of reliance on warnings about latent defects has disappeared from view such that the new theory requires only general statements in the area that sported "affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards."[97] There was no requirement here that the defendants had made any false health claims about their paints. It was sufficient that one Sherwin-Williams advertisement from 1904 insisted, "Put *S.W.P.* on your house and you will get satisfaction and save money every time."[98] Similar advertisements noted that Sherwin-Williams paints came in forty-eight shades.[99] The company had also made $5,000 in contributions to the lead paint association between 1937-1941.[100]

It should be crystal clear that these occasional public statements do not meet the requirement of a standard theory of misrepresentation, which requires that a false statement be made to a plaintiff which is relied on it to his detriment. Here there is no need to connect the statements to any people, alive or dead, who might have acted on them. Nor is this outcome saved by any fancy invocation of a fraud on the market theory, which received a qualified endorsement in *Basic, Inc. v. Levenson*[101] that truncated the plaintiff's need to show direct proof of reliance in securities cases brought under Section (b) of the Securities and Exchange Act of 1934[102] as interpreted under the Securities and Exchange Commission's Rule 10b-5.[103] Quite simply, these occasions do not bear the slightest resemblance to an active efficient market that accurately incorporates all relevant information. This is

96 *ConAgra Grocery Products, Co.*, 227 Cal. Rptr. 3d 499.

97 Richard A. Epstein, *When Courts Play Public Nuisance*, HOOVER INST. (July 30, 2018) https://www.hoover.org/research/when-courts-play-public-nuisance

98 *Id.*

99 *Id.*

100 *Id.*

101 485 U.S. 224 (1988).

102 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.*

103 17 C.F.R. § 240.10b-5 (2020).

not a theory of product liability because these statements were never made in connection with the sale of any product to any person at all.

The response was to invoke a novel theory of causation that these statements, which in some way managed to promote the use of these paints, were at least "a very minor force," not just "infinitesimal" or "theoretical."[104] But the court lifted these phrases out of context from a standard product liability case, *Bockrath v. Aldrich Chemical Co*.,[105] which in its first paragraph states that the issue before the court is to "decide how a complaint alleging harmful long-term exposure to multiple toxins must plead causation."[106] It then stated its standard response as follows:

> The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor," but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.[107]

That situation is worlds apart from the plaintiff's novel public nuisance case that alleges no physical connection at all between the defendant's activities and the putative harm suffered but instead rested on the view that these odd statements may have helped increase the sale of these paints while ignoring the usual patterns of interactions between wholesale and retail sales. How this constitutes a public nuisance as opposed to a public statement is left unsaid. But the California court relied on thoroughly erroneous misrepresentation and product liability theories to justify a public compensation program that required ConAgra and Sherwin Williams "to pay $1.15 billion into a fund to be used to abate the public nuisance created by interior residential lead paint" in residential units built before 1951 in ten populous California counties.[108] Of that sum, about $400 million will be used to identify residences that might contain some lead paint. It was undisputed that the sale of lead paint for interior use was both common and legal at that time and was only banned federally for interior surfaces as of 1978. The case therefore raised the standard takings issue as to whether private parties are being asked to fund a public reclamation program that should be on the public budget. In this instance, the resource misallocation was evident because there was never the slightest indication that the affected counties would have kicked in $1.15 billion of their own money for this quixotic project.

The unprecedented decision from the California courts is also wholly at odds with the entire body of the law of misrepresentation. In his famous

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104 Epstein, *supra* note 96; People v. ConAgra Grocery Prods. Co., 17 Cal. App. 5th 51, 102 (quoting Bockrath v. Aldrich Chemical Co., 980 P.2d 398, 403–04 (Cal. 1999)).

105 980 P.2d 398 (Cal. 1999).

106 *Id.* at 402.

107 *Id.* at 403–04.

108 People v. ConAgra Grocery Prod. Co., 17 Cal. App. 5th 51, 65 (2017).

1931 opinion in *Ultramares v. Touche,*[109] Judge Benjamin Cardozo refused to hold accountants liable for negligent misrepresentations to the lenders of their auditing clients in part because of his fear that parties who received little compensation for their work would be held "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[110] The lead paint cases go far beyond those boundaries. The defendants received no money; they committed no negligence; they uttered no falsehood; and no one relied on their supposed falsehoods to their detriment.

This effort to shift public expenses onto private parties once again raises the familiar takings inquiry, which asks whether these matters belong on the state budget or should be forced off to some private firm. The most famous statement on this issue was by Justice Hugo Black in *Armstrong v. United States*,[111] in which the Court ruled "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[112] The People should be told firmly that any clean-up project should be financed, if at all, out of general revenues when the claims of private responsibility are wholly attenuated. The law of public nuisance applies to damage caused to some invasion of a common right, and that element is not satisfied here.

OPIOIDS

The last of the novel public nuisance cases involves the use of opioids, which by any account has reached epidemic levels. The Centers for Disease Control put the estimate of opioid deaths at 450,000 between 1999 and 2018,[113] with thousands more occurring since that date. What makes an effective control of this problem so difficult is the different kinds of opioids that reach the market through different paths. For starters, there are many licensed opioids such as oxycontin, fentanyl and hydrocodone, which are widely used as painkillers, and only in rare cases do they result in any adverse effects if they are used correctly. The difficulties therefore come from those cases in which the opiates are illicitly made or are converted to more lethal dosages by private individuals, typically for recreational use.

As a first approximation, there is little reason to have any liability regime in place for these cases. The individuals who make illicit drugs are responsible for their own deaths or injuries. The individuals who convert the proper opioids through improper techniques should be met by the defense that the conscious product modification, known to be deadly, severs any

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109 174 N.E. 441 (N.Y. 1931).

110 *Id.* at 444.

111 364 U.S. 40 (1960).

112 *Id.* at 49.

113 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Opioids: Data Analysis and Resources* (last accessed on June 28, 2021) https://www.cdc.gov/drugoverdose/data/analysis.html.

causal connection to the original manufacturer who is not responsible for the misdeeds of others.[114]

To this last qualification there is an important possible exception that rests on the theory that the distributers of these drugs flood the markets with excess capacity in an effort to reap extra products, knowing that such potent drugs had to fall into the wrong hands where death or serious injury would ensue. As a matter of basic tort theory, this approach does not impose liability for manufacture but only for distribution and then only on the firms that have engaged in just that form of conduct. For these purposes, I shall be agnostic on this tort theory, which is obviously sensitive to different fact patterns. For starters, it should not apply to any person who died of opioids that were self-generated, and might not apply to individuals who made conscious misuse of the product and thus assumed the risk of loss for engaging in illicit activity.

The relevant question for these purposes, however, is whether there is a second layer of recovery for the state above and beyond that which may be owed to private parties under some product liability theory. In this instance, the all-purpose candidate is none other than the public nuisance doctrine. The most vivid case on this line has been the recent litigation, still ongoing in Oklahoma, where the state attorney general in June 2017 sued three pharmaceutical firms—Purdue, Tiva, and Johnson & Johnson—for causing the crisis in opioid use in the state.[115] The initial case rested on claims of deceptive marketing that related to three separate claims for violation of consumer protection laws, fraud and public nuisance. The state eventually abandoned the first two theories, leaving only the public nuisance claim standing. It then settled out with Purdue for $270 million and with Tiva for $85 million, leaving only the public nuisance claim against Johnson & Johnson.

That case went to trial under the Oklahoma law, which provides in pertinent part that "[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission [… a]nnoys, injures or endangers the comfort, repose, health, or safety of others . . . ."[116] The district court then ruled "[a]s a matter of law" that "Defendants' actions caused harm

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114 Early cases allowed for this defense. *See, e.g.*, Young v. Aeroil Products Co., 248 F.2d 185 (9th Cir. 1957) (refusing to allow recovery when a portable elevator the decedent was riding toppled after it had to be modified by his employer). The company had given an express warranty that the elevator was balanced, the court held that the warranty was unavailing because "[t]he thing being used was not the thing sold." *Id.* at 190. More modern cases are willing to take into account substantial product modifications by allowing for (very modest) reductions in liability in cases of substantial product modifications. *See, e.g.*, Hoover v. New Holland North America, Inc., 11 N.E.3d 693 (N.Y. 2014). My view is that the earlier decisions are correct because otherwise superior manufacturers with durable products are penalized for the mistakes of downstream parties.

115 Oklahoma v. Purdue Pharma L.P. (Okla. Dist. Ct. 2019). By way of disclosure, Mario Loyola and I worked on a brief in the appeal of this in support of Johnson & Johnson, on which I have relied in part here.

116 50 O.S. § 1.

and those harms are the kinds recognized by 50 O.S. § 1, because those actions annoyed, injured, and endangered the comfort, repose, health, and safety of Oklahomans."[117] At that point, the question then turned to the choice of remedy. Consistent with the trope of public nuisance, the state put forward an abatement plan for the state that sought some $17.5 billion in order to develop a twenty-year payment plan for a state that has about four million people or a little over 1% of the national population. The District Court held that estimates for the out years were too speculative and thus made an award for $465 million to cover the first year plan, without going into any specifics as to how that money would be spent. Presumably, liability could be imposed in each of the out years for the expenses incurred within that year. The liability rested on a theory of joint and several liability for the whole, because the only drugs marketed by the J&J subsidiary, Janssen—Duratesic and Nucynta—were niche products that accounted for less than one percent of opioid sales in the state. The drugs, moreover, were not like oxycontin, fentanyl and hydrocodone, which were converted illegally into dangerous drugs. On the remedial side, it would be a simple matter for the court, or better the FDA, to ban or limit the sale of the drug. But it is unmistakable, wholly apart from any public nuisance theory, that the overwhelming fraction of that outsized award was for the abatement of an opioid crisis caused almost exclusively by other firms (under the tricky overpromotion theory) or by the end users themselves.

In order for this theory to get through the front door, moreover, it has to satisfy the requisite of the public nuisance statute in Oklahoma whose references to comfort, repose, health, and safety echo the unreasonable interference with the enjoyment parallel to those covered in the private law of nuisance. Does the decision of any person to overdose on an illegal drug interfere with comfort, repose, health, and safety of others? By holding, without argument, that it does, the Oklahoma trial court read out of the public nuisance law all of the ordinary requirements, namely that there be some blockage of a public road or pollution to some public body of water, or even of air. That narrower definition is, moreover, wholly consistent with Oklahoma law, which follows the traditional restraints on the doctrine and draws a sharp distinction between multiple independent trespasses of private homes and an illegal entry into public lands or waters.

In the *City of McAlester v. Grand Union Tea Co.*,[118] the question before the court was whether the defendant's door-to-door salesmen created a public nuisance when they trespassed on private residences without first receiving invitations from their respective owners. Interestingly, the case also asked whether the state had delegated to its municipalities the power to declare by ordinance whatever conduct it disapproved of. The court held:

117 *Purdue Pharma L.P.*, at ¶ 17.
118 98 P.2d 924 (Okla. 1940).

> The grant of power to a municipality to declare what shall constitute a nuisance and to remove same, . . . does not empower the municipality to declare a thing a nuisance which is clearly not one . . . It is seen that the statute defines a nuisance, a public nuisance and a private nuisance, and provides remedies for each. The Act sought to be prohibited by the ordinance cannot be said to be other than a private nuisance for to constitute a public nuisance the Act must affect "at the same time an entire community or neighborhood, or any considerable number of persons . . . While some annoyance may be said to result from a call of a solicitor, he can only be at one place at one time and such a call cannot reasonably be said to disturb at the same time an entire community or neighborhood or any considerable number of persons.[119]

The clear inference of this case is that a set of sequential trespasses against individuals does not become a public nuisance, even if, perhaps, there were enough common elements in the individual cases to allow consolidation for a class action under Rule 23 of the Federal Rules of Civil Procedure or their state law equivalents. The public nuisance theory is thus worthless in this context because it operates exclusively as a device to circumvent the serious limitations on any serious substantive theory.

POSTSCRIPT: BEYOND PUBLIC NUISANCE

An important lesson about legal language brings us back to the subtitle of this Article. It has often been said that a public nuisance constitutes whatever the legislature says that it is. The implicit assumption behind that powerful declaration is that language is infinitely malleable so that there can be no effective constraints on the way in which government acts.[120] That dangerous form of linguistic relativism corresponds perfectly to "rational basis" review under constitutional norms, which I have long opposed,[121] or to the extreme form of *Chevron* deference as a matter of administrative law. But the moment judges and lawyers start to think in terms of strict or intermediate scrutiny that form of linguistic relativism can longer survive, for the simple reason that if language is infinitely malleable, then no statute can be said to exceed the limits, so that everything can be either legal or illegal at the whim of the legislature, which owes no explanation to anyone else for its decision. Thus the initial quotation from Gaius that takes direct aim at that risk.

The bulk of this paper shows the importance of keeping to traditional approach to constitutional and statutory interpretation. The issue here is of enormous stakes because the same kinds of issues arise time after time in modern constitutional law. Thus, in the law of takings, it is too often held

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119 *Id.* at 926 (alteration in original) (citations omitted). The theme here recalls the earlier discussion of the ability of legislatures or courts to make some conduct into a public nuisance by simple declaration.

120 *See generally,* Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J. LAW & PUB. POL. 583 (2016).

121 *See* Richard A. Epstein, *Rational Basis Review of FDA Regulation: Why the Two Do Not Mix*, 14 GEO. J. L. PUB. POL. 417 (2016); Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931 (2012).

that what counts as a nuisance is in the eyes of a beholder.[122] But the moment the question is whether the nuisance law may impose limitations on freedom of speech, the higher level of scrutiny brings forth a completely different response. Thus in *Erznoznik v. City of Jacksonville*,[123] the Court struck down as a form of illicit viewpoint discrimination a Jacksonville ordinance that decreed that it was a public nuisance for any drive-in movie theater to play films that contained various forms of nudity on any screen that was visible from the public street.[124] Better it is for the offended viewer to "avert his eyes," the court determined (a feat more easily said than done). Labeling the offense a public nuisance therefore did nothing whatsoever to insulate the ordinance from constitutional invalidation on traditional First Amendment grounds, even with respect to conduct that at one time fell comfortably under the "morals" head of the police power.

In many takings cases involving land use regulation, the first move in the effort to sustain the restriction on land use is to denigrate the central role that nuisance law had long played in this area. Thus the early cases made the occurrence of a nuisance as the sine qua non for the application of the police power.[125] It used common law definitions in this area because otherwise the broad definitions of laws intended to protect health and safety could easily be turned into commands for all businesses to supply universal health care to the population at large. By way of just one example, one constant theme urged by the dissenters in *Lucas v. South Carolina Coastal Council*[126] was that the permissible scope of government regulation in no way depended on "whether or not the prohibition was a common-law nuisance."[127] But that observation does not indicate exactly what other limits can be derived from the police power, which amounts to the proposition that it is utterly irrelevant to the regulatory system whether a particular action would generate liability between two private parties.

Just that line of argument was made famously and fatally by Justice Robert Jackson in *United States v. Willow River Power Co.*,[128] a water law case, which emphatically severs the analysis of private rights from the analysis of all relevant issues of public law:

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian

122 *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928). For extensive discussion, *see* WILLIAM FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); Epstein, *supra* note 13, at 112–15 (1985).

123 422 U.S. 205 (1975).

124 JACKSONVILLE, FL., Ordinance, No. 330.313 (1972).

125 *See, e.g.*, Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

126 505 U.S. 1003 (1992).

127 *Id.* at 1060 n.26 (Blackmun, J. dissenting).

128 324 U.S. 499 (1945).

> owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation.[129]

The first sentence is surely correct, for the very existence of an eminent domain power is proof enough that property rights are not absolute. But the next sentence is a complete non sequitur because it makes no effort to figure out what those limitations on property right should be. And by consciously severing any connection between private and public law, he opens the path to the pathology that has taken over the public nuisance cases, namely, that the label can be attached to anything the legislature choose. It is therefore no accident that Justice Brennan in his ill-fated decision in *Penn Central Transportation Co., v. City of New York*[130] relied on just this passage from *Willow River* to support the proposition that "this Court has dismissed 'taking' challenges on the ground that, while the challenged government action cause economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[131] This introduced the notorious and slippery notion of "reasonable expectations," which served as a way to downgrade the protection given to air rights which were fully protected under New York law.

The overall position therefore has come a full circle. The careful common law definitions were not just adopted for aesthetic reasons. They represented the first serious and precise efforts to demarcate the line between law and unlawful conduct and next an effort to distribute the enforcement function between public and private parties. But once those common definitional constraints are lost, the modern law of public nuisance becomes a literal bull in the China shop on both questions of liability and damages. Now anything can become a public nuisance by fiat, so that the restrictions built into every area of tort law—private nuisance, product liability, misrepresentation—can be circumvented at will, resulting in massive verdicts in favor of government entities that are wholly against principle. These results should be undone forthwith, but that will not happen unless the sloppy habits of mind that have generated this massive confusion are exposed and corrected.

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129 *Id.* at 510.

130 428 U.S. 104 (1978).

131 *Id.* at 24–25.

PUBLIC NUISANCE: PUBLIC RIGHTS, PRIVATE RIGHTS, AND THE COMMON GOOD

James L. Huffman

LAW & ECONOMICS CENTER RESEARCH ROUNDTABLE ON PUBLIC NUISANCE LITIGATION

Pollution and other impacts of human activity on the environment can be a nuisance. Sometimes the nuisance is little more than an inconvenience. Other times it can be life-threatening. Most times, the nuisances inherent in human activity fall somewhere in between. The reality and inevitability of nuisances pose two distinct questions in a society founded on democracy and the rule of law: 1) Which must be accepted as necessary burdens of social existence and which must be deterred or forbidden? and 2) Which do individuals and the general public have a right to be free from? From the perspective of constitutional separation of powers theory, answering the first question is the responsibility of legislators and those to whom legislative authority has been delegated. Answering the second is eventually the responsibility of the judiciary.

Before the emergence of the modern regulatory state, the common law courts played a substantial role in answering both questions. In the absence of significant legislative regulation of nuisances and with an eye to customary practices, common law judges enforced standards of conduct that today would be the product of legislation and regulation enacted pursuant to the democratically and constitutionally constrained police powers of the state. As environmentalists and other advocates increasingly look to the courts to impose policies the other branches of government have failed or declined to enact, judges are faced with deciding whether judicial intervention is appropriate or well-advised in the 21st Century.

NUISANCE

As the law is generally described today, private nuisance claims require judges to determine whether a defendant has unreasonably and substantially interfered with a plaintiff's right to the use and enjoyment of his or her land. Claims of public nuisance require judges to determine whether a defendant has unreasonably interfered with rights shared in common by the public. Although public nuisance law now employs the language of rights, the harms for which the common law provided a remedy were discovered not in law but in custom and a judicial assessment of the relative importance of the private activity or condition claimed to be a nuisance and the harm the

activity or condition imposed on the public. Indeed, Blackstone's description of a common or public nuisance made no mention of public rights. "Common nuisances," wrote Blackstone, "are a species of offenses against the public order and economical regimen of the state; being either a doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."[1]

As in Blackstone's day, the typical remedy for a private nuisance is damages with injunctive relief available where the injury is irreparable or ongoing. Consistent with Blackstone's description of public nuisance as offenses against the common good, public nuisances were historically treated as criminal offenses subject only to public prosecution. The penalty was a fine or imprisonment with abatement ordered where the injury to the public was irreparable or ongoing. As public nuisances came to be defined as interferences with public rights, they were less often viewed as criminal offenses and more often subjected to the same remedies as private nuisance.

Blackstone's description of public nuisance, even with the subsequent substitution of public rights for the common good, makes clear that, in the words of J. H. Baker, "there is little or no connection between the two concepts . . . ."[2] Private nuisance falls plausibly within the realm of tort law, although in the internecine competitions of the legal academy, property law scholars have also claimed title. Private nuisance has in common with tort law the remedying of private harms caused by the actions of others and with property law the identification of the sticks included and excluded from the bundle of private property rights. Public nuisance, as Tom Merrill has argued, "is properly regarded as a public action – an action by public authorities to charge criminally or abate . . . a condition that is deemed to be inimical to interests shared by the public as a whole."[3] In other words, public nuisance engages the courts in what would generally be thought of as police power regulation rather than in their more traditional function of interpretation and enforcement of the laws.

ENVIRONMENTAL HARMS

Under the common law received in post-independence America, both private and public nuisance provided remedies for what today are considered environmental harms. Noxious fumes or other harmful emissions from a farm or factory could result in liability to affected neighboring property owners as a private nuisance and in some cases to the general public as a public nuisance. The former were civil wrongs to be remedied by private lawsuits and the latter were, as noted above, criminal wrongs to be prosecuted by the appropriate public officials. Private parties could also bring claims of

1 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 167 (1763).

2 J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 244 (1971).

3 Thomas W. Merrill, *Is Public Nuisance a Tort*, 4 J. TORT L. 1, 5 (2011).

public nuisance if suffering injuries distinct in kind from those claimed to be suffered by the public in general.

With the birth of modern environmentalism in the late 1960s and early 1970s, there was much debate about the continued relevance of common law nuisance as an effective remedy for newly recognized environmental harms.[4] One view was that even if courts could be persuaded to adapt historic nuisance principles to modern environmental harms, the case-by-case method of the common law would be inadequate for remedying immediate and pervasive threats to the environment.[5] The enactment of laws and regulations of general application that could be enforced nationwide, it was argued, promised to be more effective than a myriad of lawsuits to be resolved on varying facts and for harms not previously understood or contemplated. Notwithstanding the expected efficiencies and uniformity of regulation, however, proponents for continued reliance on the common law contended that courts could employ public nuisance "as a gap filler" in statutory and regulatory schemes "to provide a remedy when an administrative agency "allows a serious pollution problem to go unabated" and "where regulatory action can be shown to be inadequate to protect the public interest."[6]

Environmental advocates and sympathetic commentators urging innovation in the traditional law of public nuisance received significant encouragement from revisions to the Restatement of Torts adopted by the American Law Institute in 1972. The Restatement (First) of Torts made reference to public nuisance only by way of explaining that because it is an offense against the state it was not included.[7] Tom Merrill has recounted in some detail the maneuverings that led to the inclusion of public nuisance in the Restatement (Second) of Torts. One contingent, led by John P. Frank of Arizona, objected that a pending proposal "failed to offer sufficient support to the nascent environmental movement." They took particular exception to the description, in William Prosser's draft, of "public nuisance as a 'criminal

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4 *See* 4 J. TORT L. 1 at 29.

5 *Id.* at 33 (quoting Connecticut v. American Electric Power Co., 564 U.S. 410, 428 (2011)).

6 Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 394-96, 398 (1990); s*ee also* Julian C. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1126; James L. Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 CONN. L. REV. 531 (1973); *E. F. Roberts*, *Right to a Decent Environment*; *E=MC2 Environment Equals Man Times Courts Redoubling Their Efforts*, *55* CORNELL L. REV. 674 (1970); Thomas M. Schmitz, *Pollution, Law, Science, and Damage Awards*, 18 CLEV. ST. L. REV. 456 (1969); Peter Schuck, *Air Pollution as a Private Nuisance*, 3 NAT. RESOURCES L J. 475 (1970); *Note, Water Quality Standards in Private Nuisance Actions*, 79 YALE L. J. 102 (1969); *Comment, The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968); *Comment, Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970); *Comment, Air Pollution, Nuisance Law, and Private Litigation*, 1971 UTAH L. REV. 142; *Comment, Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 314 (1967).

7 RESTATEMENT (FIRST) OF TORTS, §821 (AM. L. INST. 1939).

interference' with public rights." An opposing contingent, led by Charles Bane of Illinois, "argued that recent statutory developments designed to protect the environment counseled in favor of 'removing entirely from the concept of nuisance those activities that are subject to regulation.'" After Prosser resigned as reporter his replacement, John C. Wade, substituted "unreasonable" for "criminal" in the definition of public nuisance. Prosser would later write that his definition was rejected because it was thought to be "too restricted and inhibited the incipient development in the field of environmental protection." As Merrill observes, "[w]ith one deft stroke, Wade transformed public nuisance from a form of conduct defined by criminal law into something that sounded like the quintessential tort—albeit a tort having a virtually limitless expanse."[8]

Environmental advocates envisioned that the revised Restatement would inspire sympathetic judges to circumvent the political challenges inherent in legislative and administrative processes or to do what the political branches of government declined to do. By adapting established common law doctrines to the regulation of previously unrecognized or unappreciated environmental harms, courts could independently advance the cause of environmental protection.

Despite reticence by most courts, ambitions for judicial intervention on environmental policy matters have not diminished over the intervening years. Rather with climate change high on the environmentalist agenda, interest in the common law of public nuisance has only increased. Albert Lin describes public nuisance, along with the public trust doctrine, as protections of "collective interests against the excesses of private activity, operating flexibly as common law backstops to political failures."[9] Abrams and Washington write that "public nuisance has the flexibility to provide a remedy when an administrative agency, charged with providing the necessary environmental and health protection pursuant to a comprehensive regulatory scheme, nevertheless allows a serious pollution problem to go unabated."[10] In light of "projections about the timing and severity of key climate change impacts," Katrina Kuh sees public nuisance as a judicial alternative to "[t]he anemic policy response to climate change."[11] By this view, persuading judges to intervene in the name of common law public nuisance provides another "useful weapon in the arsenal against environmental degradation."[12] If judges can be persuaded to intervene where

8 Merrill, *supra* note 3, at 24–26 (*quoting* PRESENTATION OF RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1971) Proc. 287, 291 (remarks of John P. Frank) (Tentative Draft No. 16) and 288-89 (remarks of Charles A. Bane); RESTATEMENT (SECOND) OF TORTS, at 4 (AM. L. INST.1971) (Tentative Draft. No. 17)).

9 Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in A Pod?*, 45 U.C. DAVIS L. REV. 1075, 1078 (2012).

10 Abrams & Washington, *supra* note 6, at 397.

11 Katrina Fisher Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L. Q. 731, 747 (2019).

12 Abrams & Washington, *supra* note 6, at 399.

legislators and administrators have failed or chosen not to act, environmental advocates and like-minded public prosecutors can bring public nuisance lawsuits to remedy all manner of environmental harm including climate change.

At the same time that a few academic lawyers were first advocating for a resurrection of often forgotten common law public nuisance precedent, a similar proposal to revive the then more obscure common law public trust doctrine was launched by Professor Joe Sax. The two efforts shared in common the ambition to circumvent the political obstacles of legislation and regulation by securing what Sax called "effective judicial intervention."[13] Corralling the votes needed for legislative action requires political organization and often leads to unwanted compromise. But it only takes a single sympathetic (and often ambitious) judge to rule that the common law requires what legislators and executive officials have declined to do. This has been the strategy of many environmental organizations, including Our Children's Trust which has filed lawsuits and administrative actions in dozens of jurisdictions in search of judges willing to go where the other branches of government have declined to tread. Even a single such judicial ruling, like that achieved in *Juliana v. United States*,[14] stands as a precedent for other judges to follow and perhaps innovate on their own.[15]

In the case of the public trust doctrine, the goal was to persuade judges that although the historic doctrine precluded only interferences with public rights to navigate and fish in navigable waters, the concept could be extended to claims of public rights in the use and protection of other resources. In the case of nuisance law, the objective was to broaden the scope of activities considered unreasonable and thereby the public rights that might call for judicial intervention. Because nuisance law was much less clearly limited than public trust law, the prospects for judicial intervention to extend the historic doctrine posed fewer precedential obstacles, or what Sax referred to as "historical shackles."[16] Nevertheless, few courts have been willing to extend either doctrine in the ways hoped for by proponents of a revived and extended common law. As of June 4, 2022, the Sabin Center for Climate Change Law at Columbia Law School listed 55 common law cases, 27 of which they cataloged separately as public trust cases. Of the remaining 28 classified as common law cases, 21 alleged public nuisance, 12 private

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13 Joseph L. *Sax*, *The Public Trust* Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970).

14 Rather than claiming public nuisance, the plaintiffs invoked the public trust doctrine as well as constitutional claims. *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016).

15 Professor Mary Wood, whose atmospheric trust theory is an inspiration for the *Juliana* plaintiffs, described a 2011 Pennsylvania Supreme Court plurality opinion overturning the state's pro-fracking regulatory statute based on public trust theory as "a major victory because it gives courts case law to build on." Mary DeMocker, *Natural Law*, OREGON QUARTERLY (May 21, 2022, 10:15 AM), https://around.uoregon.edu/oq/natural-law.

16 Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

nuisance, 16 negligence, 15 trespass, and 11 strict liability.[17] The earliest of these cases was filed in 2004, and the large majority have not been finally resolved, but thus far no court in the Sabin database has found any activities or condition alleged to contribute to climate change to be a public nuisance.

LEGAL PRECEDENT, PUBLIC POLICY AND THE ROLE OF THE JUDGE

Despite valiant efforts by lawyers and academic theorists, environmental law has remained almost exclusively the domain of statute and regulation. As Daniel Farber observed in 2005, "environmental law courses focus almost exclusively on statutory regulation, with the common law receiving much less attention."[18] An obvious reason that environmental law casebooks devote little attention to common law remedies is the reticence of most judges to remove the shackles of common law precedent. Perhaps one reason for the absence of cases is the widely read and often cited case of *Boomer v. Atlantic Cement Company*.[19]

Just as Sax and others were advocating for judicial intervention in the name of the common law, the New York Court of Appeals asserted in *Boomer* that it is neither the role nor within the competence of the courts to resolve private disputes with an eye to the common good, a conclusion reiterated in several subsequent public nuisance cases.[20] The plaintiff in the case claimed that dirt, smoke, and vibration issuing from defendant's cement plant constituted a private nuisance. The trial court agreed and ordered damages but declined to issue an injunction. The Court of Appeals acknowledged that the rule in New York called for injunctive relief where the plaintiff incurred substantial damages. But because a permanent injunction would put the defendant out of business, thus sacrificing an investment of $45 million and eliminating 300 jobs, the court ordered a temporary injunction to be rescinded upon payment of permanent damages. A dissenting judge objected that "the majority is, in effect, licensing a continuing wrong" and authorizing an "inverse condemnation [that] . . . may not be invoked by a private person or corporation for private gain or advantage."[21] But while reaching those seemingly accurate conclusions the dissenting judge observed that the state's recently enacted Air Pollution and Control Act declared it "State policy to require the use of all available and reasonable methods to prevent and control air pollution." The implication

17 U.S. CLIMATE CHANGE LITIGATION, http://climatecasechart.com/climate-change-litigation/us-climate-change-litigation/, (Last visited June 4, 2022).

18 Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 132–33 (2005).

19 Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970).

20 *Id.* at 871. *E.g.,* Native Village of Kivalina v. Exxon Mobil Corporation, 663 F. Supp. 2d. 863, 870 (N.D. Cal. 2009); Conn. v. Am. Elec. Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

21 *Boomer*, 257 N.E.2d at 876 (Jasen, J., dissenting).

was that among those methods should be judicial consideration of the public good in the resolution of private nuisance disputes.[22]

The majority opinion acknowledged this view in posing as the "threshold question . . . whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives."[23] The court recognized "[t]he public concern with air pollution arising from many sources in industry and in transportation . . . [and the] ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it."[24] In answering his threshold question, Judge Bergan insisted that "[i]t is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court."[25] Noting that [e]ffective control of air pollution is a problem presently far from solution" and that "technical research in great depth . . . [and] balanced consideration of the economic impact . . . and . . . of the actual effect on public health" will be required to reach a solution, Judge Bergan observed:

> A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant -- one of many -- in the Hudson River valley.[26]

The *Boomer* decision has been variously criticized as playing fast and loose with New York precedents[27] and, in the view of Douglas Laycock, failing to recognize that what it was actually doing was applying the long-recognized defense of undue hardship.[28] But because the case has for decades appeared in most property and torts casebooks and has been frequently discussed in the law and economics literature, Judge Bergan's comments have discouraged the cause of judicial intervention on matters of environmental policy.

Proponents of "effective judicial intervention" to protect the environment might be quick to note that *Boomer* was a private, not public,

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22 *Boomer*, 257 N.E.2d at 875 (Jasen, J., dissenting).

23 *Id.* at 871.

24 *Id.*

25 *Id.*

26 *Id.* at 871.

27 Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859, 1876 (2018).

28 Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. 1 (2012).

nuisance case. But the *Boomer* court's reluctance to address a complex issue of environmental policy in the context of a private lawsuit should counsel similar reticence in a public nuisance claim, particularly a public nuisance claim brought by a private party. To conclude that a particular condition or conduct constitutes a public nuisance a court must engage in the type of analysis Judge Bergan argues is outside the judicial role and beyond judicial competence. If Bergan is correct, it should lead us to question the very idea of a tort of public nuisance. Whether brought by a public prosecutor or a private party, a public nuisance action requires a court to determine whether private acts or conditions created or allowed to persist on private property are contrary to the common good. Absent a statutory declaration that particular conduct or conditions constitute a nuisance, judges can resolve public nuisance claims only by arriving at their own conclusion of what constitutes the public good.

Notwithstanding the *Boomer* court's prominence in the literature and in the education of first-year law students, environmental interests have continued to invite judicial innovation under the rubric of public nuisance although, as noted above, few courts have accepted the invitation. Dan Farber has suggested that this enduring interest in public nuisance among environmental advocates may reflect that much of the academic attention paid to *Boomer* has focused on the court's preference for damages over injunctive relief rather than the jurisprudential questions raised by Judge Bergan.[29] Another factor, not surprisingly, is that other courts have disagreed with Bergan. A prominent example from the same era, perhaps because retired Supreme Court Associate Justice Clark, sitting by designation, authored the opinion, is the 7th Circuit Court of Appeals case of *Harrison v. Indiana Auto Shredders Co.*[30]

Clark described the case as "representative of the new breed of lawsuit spawned by the growing concern for cleaner air and water . . . [that has] forced the courts into difficult situations where modern hybrids of the traditional concepts of nuisance law and equity must be fashioned."[31] Suggesting that "environmental consciousness may be the saving prescript for our age," he argued that "the right of environmentally-aggrieved parties to obtain redress in the courts serves as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside."[32] However, performing this responsibility to assist with the "solving of environmental problems," Clark acknowledged, "does . . . bring its own hazards."[33] Among the hazards, wrote Clark, are these:

29 Farber, *supra* note 18, at 143.

30 Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1975).

31 *Id.* at 1119.

32 *Id.* at 1120.

33 *Id.*

> Balancing the interests of a modern urban community like Indianapolis may be very difficult. Weighing the desire for economic and industrial strength against the need for clean and livable surroundings is not easily done, especially because of the gradations in quality as well as quantity that are involved. There is the danger that environmental problems will be inadequately treated by the piecemeal methods of litigation. It is possible that courtroom battles may be used to slow down effective policymaking for the environment. Litigation often fails to provide sufficient opportunities for the expert analysis and broad perspective that such policymaking often requires.[34]

However, Clark's catalogue of questions courts are ill-prepared to resolve, similar to those that led Judge Bergan to counsel against judicial intervention in *Boomer*, did not deter him. Declaring that "some forum for aggrieved parties must be made available," Clark argued that "the courts are qualified to perform the task."[35] Courts "are skilled at 'balancing the equities,' and they have the advantage of being "insulated from the lobbying that gives strong advantages to industrial polluters when they face administrative or legislative review of their operations."[36] Furthermore, Clark contended, "[t]he local state or federal court, because of its proximity to the individual problem, is often in a better position to judge the effect of a pollution nuisance upon a locality."[37]

Despite his assertion that intervention is a judicial responsibility, Clark ruled that the district court was "clearly erroneous" in finding the defendant liable in nuisance.[38] *Clark's* point was not that the defendant's activities were not harmful, but rather that the relevant public officials had found the defendant to be in compliance with all applicable regulations. Notwithstanding his insistence that courts are skilled at balancing the equities, there was no hint of such balancing in Clark's opinion. If the plaintiffs had no right founded in nuisance, independent from federal, state and local regulations, why wasn't the case summarily dismissed for failure to state a cause of action? Why allow the courts' time to be consumed in nuisance lawsuits if the common law has been effectively preempted by statute or regulation? What does nuisance law add to the enforcement of statutory and regulatory law beyond effectively granting standing to a private party to raise a question already answered by those responsible to enforce regulations? If the plaintiff property owner had a cause of action it was against the government for inverse condemnation.[39]

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34 *Harrison,* 528 F.2d 1107 at 1120-21.

35 *Id.* at 1121.

36 *Id.*

37 *Id.* at 1120-1121.

38 *Id.* at 1123.

39 In dissenting in *Boomer*, Judge Jasen agreed with reversal of the lower court holding but objected to the assessment of permanent damages in lieu of an injunction. The effect, he argued, was the "licensing [of] a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. . . . This kind of inverse condemnation [citation omitted] may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation

Even if the common law is found to be effectively preempted, it might be argued that labeling judicial enforcement of a statute or regulation as the remedying of a public nuisance could still allow for a judicial 'balancing of the equities.' A question raised by *Boomer*, argues Dan Farber, "is whether balancing the equities is limited to common law cases, or whether that process applies to all environmental injunctions."[40] Noting that "many environmental statutes authorize injunctions as a remedy against violators," Farber asks whether courts can "use their equitable discretion to postpone or exempt polluters from statutory requirements?"[41] The obvious suggestion is that courts be invited to rewrite the law in the name of equity where the court disagrees with the result produced by statute or regulation. As J. R. Spencer has observed of prosecutions for public nuisance in Great Britain, public nuisance can be a vehicle for judicial intervention "where defendant's behavior amounted to a statutory offence, typically punishable with a small penalty, and the prosecutor [with the necessary cooperation of the judge] wanted a bigger stick to beat him with, and . . . where the defendant's behavior was not obviously criminal at all and the prosecutor [again with judicial collaboration] could think of nothing else to charge him with."[42]

Clark's opinion in *Harrison* also reveals that the problems of judicial role and competence are not limited to public nuisance. He mentions public nuisance only in a footnote explaining the historical distinction between private and public nuisance.[43] Otherwise, Clark speaks only of nuisance with a resultant muddling of the significant distinctions of the common law. The plaintiffs were 34 individuals living or working near the defendant's auto shredding business.[44] Not all were property owners, yet all were awarded damages by the trial court.[45] Because private nuisance requires interference with the use and enjoyment of land, the non-property owing plaintiffs' claims would have to have been for distinct-in-kind injuries caused by a public nuisance. Although the Court of Appeals overturned the trial court's damages award, Clark's failure to distinguish between the different plaintiffs suggests that courts should balance the equities of private harm and public burden whether a claim is in private or public nuisance. But in a private nuisance action the balancing of equities weighs private interest against private interest with all interested parties represented. If the court gets it wrong and assigns liability to the higher valued activity the resultant inefficiency can be corrected through a market adjustment (although there

should only be permitted when the public is primarily served in the taking or impairment of property. . . . Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use." 257 N.E.2d 870 at 231.

40 Farber, *supra* note 18, at 132.

41 *Id.*

42 J.R. Spencer, *Public Nuisance: A Critical Examination*, 48 CAMBRIDGE L.J. 77 (1989).

43 Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 n.19 (7th Cir. 1975).

44 *See id.* at 1109, 1114.

45 *See id.* at 1109–10, 114.

will be distributional consequences). In a public nuisance case brought by a private party, most of the public is not represented leaving the court with inadequate information to balance the equities and no prospect for a market correction.

Courts often speak not only of the costs a finding of liability would impose on the defendant or the costs a finding of no liability would impose on the plaintiff, but also of the public utility of the conditions or conduct alleged to constitute a private nuisance. In strictly economic terms, the utility of both plaintiff's and defendant's properties and activities are embedded in the market values of their properties. If the plaintiff's alleged harms are neither abated nor recompensed, the court will have recognized a servitude on plaintiff's property making the property less valuable than without the servitude. If the defendant is enjoined or required to pay damages, the value of his enterprise will be less than it would be had the court recognized a servitude on plaintiff's property. But there are public costs and benefits not reflected in those market valuations including the environmental harms and amenities that have led to our present-day web of environmental laws. Assessing those costs and benefits is no more within the role or competence of a judge in the context of a lawsuit than would be the judge's promulgation of statutory laws and administrative regulations.

THE COMMON LAW METHOD

Notwithstanding concerns like those raised in *Boomer*, proponents of judicial intervention through extensions of common law doctrines like public nuisance and public trust contend that such interventions are well within the traditional role of the common law courts. Because first-year law students have long been taught that the difference between statutory and common law is that the former is made by legislatures and the latter by judges, many lawyers and judges are comfortable with the idea of judge-made law. Despite having studied the separation of powers in their constitutional law course, most American lawyers and judges know little about the very different role of 17th and 18th-century English courts. Blackstone's description of public nuisance as "neglecting to do a thing which the common good requires,"[46] could be read to suggest that he believed common law judges to have lawmaking authority. However, his extensive descriptions of the English judiciary tell a different story.

Blackstone divided the municipal laws of England into "the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law."[47] The *lex non scripta* was unwritten because "the nations among which they prevailed had but little idea of writing."[48] It came to be called the

46 Blackstone, *supra* note 1.
47 *Id.*
48 *Id.* at 63.

common law "more probably, as a law *common* to all the realm."[49] But not all of the common law was common to all the realm. "The second branch of the unwritten laws of England" wrote Blackstone, "are particular customs, or laws which affect only the inhabitants of particular districts."[50]

These particular customs, said Blackstone, were guaranteed by acts of parliament made necessary by the fact that compilations of custom (perhaps resembling the modern Restatements) "collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor"[51] sought to make the law common across the entire realm. Whether motivated by a benevolent desire to facilitate interactions across the realm or monarchical ambition to consolidate power, the establishment of uniform laws applicable to every corner of the realm ran counter to the process by which the foundational customs had come into existence.

Blackstone notes that some of "[our] antient lawyers . . . insist with abundance of warmth, that . . . customs . . . as old as the primitive Britons . . . [have] continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated." But he sides with 17th-century jurist John Selden in concluding that the Romans, Picts, Saxons, Danes, and Normans "insensibly introduced and incorporated many of their own customs with those that were before established."[52] In other words, the customs from which the common law of England derived evolved over time, not only because Romans, Picts, and others brought with them their customs, but also because local customs necessarily adapted to changing circumstances. These "customs or maxims [are] to be known, . . . [and] their validity to be determined . . . by the judges in the several courts of justice. They are the depository of the law . . . ."[53]

Given that common law is founded on customs representing the practices and expectations of the people, and given that customs evolve over time in response to external and internal influences, it would seem that common law must evolve over time. How does this happen if, as Blackstone wrote, "it is an established rule [for judges] to abide by former precedents, where the same points come again in litigation . . ."?[54] Blackstone is clear that:

> it is not in the breast of any subsequent judge to alter or vary from [precedent], according to his private sentiments: he being sworn to determine, not according to his own private

49 Blackstone, *supra* note 1 at 67.
50 *Id.* at 74.
51 *Id.* at 74.
52 *Id.* at 64.
53 *Id.* at 69.
54 Blackstone, *supra* note 1 at 69.

> judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[55]

The only exceptions to this rule of decision, said Blackstone, are "where the former determination is most evidently contrary to reason . . . [or] to the divine law." In such cases "it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm . . . ."[56]

By way of illustrating the exception founded in reason, Blackstone offered this example from Cicero:

> There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything to its preservation.[57]

Blackstone's allowance that judges may decide contrary to precedent where precedent "is most evidently contrary to reason" has led some judges and commentators to contend that it is within the common law judge's authority and responsibility to adapt the law to changing circumstances and public needs – that it is contrary to reason to adhere to outdated rules.[58] But how is the judge to determine that a rule is outdated as a result of changed circumstances and public needs? How is a judge to determine what different rule is better under existing circumstances and in light of current public needs?

The only occasions for judges to make such determinations are in the cases that come before their courts. Blackstone is clear that the judge may not rely upon his "private sentiments." It is also clear that the litigants will contend for a different rule only if it serves their private ends. Therefore, the institutional framework within which the judge functions is not conducive to the formulation of public policy or the enactment of laws designed to implement public policy. Rather the judicial process is designed to find the facts in particular cases, determine the applicable law and apply the law to those facts.

These inherent constraints on the judge as law reformer and lawmaker did not mean that common law is frozen in time. While Blackstone is adamant that judges are "not delegated to pronounce a new law, but to

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55 Blackstone, *supra* note 1 at 69.
56 *Id.* at 70.
57 *Id.*
58 *Id.*

maintain and expound the old one," his description of the source of common law suggests, also, how the law is to change. In dismissing a distinction between "established customs" and "established rules and maxims," Blackstone says the authority of the latter "rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it." The authority of common law rules and of customs derives from their "reception and usage."[59] As old customs are no longer observed and new customs are received and relied upon, the common law judge will adapt the rules accordingly. The law thus evolves not according to the "private sentiments" or public policy prescriptions of judges but in response to the expressed preferences and practices of those who rely on the law in their interactions with others. Thus, the common law judge is engaged in what Professor Douglas Whitman has labeled a "demand-side" rather than a "supply-side" enterprise.[60] The public looks to the judge to say what the law is. The judge looks to statutes and judicial precedent, and ultimately to custom and practice, to discover the law.

The common law process flows in two directions, says Blackstone:

> The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends. These little courts however communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed.[61]

This upward and downward flow between grassroots and the highest courts allowed those with authority and responsibility to declare the law of the realm to learn about the lives and evolving customs of those responsible for obeying the laws.

As historian Stanley Katz observes in his introduction to the University of Chicago Press's reprint of *Commentaries on the Laws of England*, Blackstone gives an obligatory nod to natural law, but he is a positivist in the modern sense.[62] Natural law allows too much room for private sentiments to intrude on judicial interpretation. But the *lex non scripta* poses a challenge for positivists – it is, as the Latin expression states, not written. Blackstone's

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59 Blackstone, *supra* note 1 at 68-69.

60 Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775–76 (2000).

61 Blackstone, *supra* note 1, at 30-31.

62 *Id.* at vi.

solution was to task the judge with strict application of the law as reflected in statute and precedent, except where precedent runs counter to law's reason. An effective withdrawal of consent by the governed (the popular sovereign), as evidenced by contrary practices and customs, requires the judge to abandon the now invalid law in favor of the new rule now consented to.

JUDICIAL LAWMAKING

There are and always have been, as the Realists and their latter-day successors the critical legal studies theorists have shown, supply-side, lawmaking judges who purport to be engaged in the common law process. There are examples in environmental law but first consider two cases often viewed as innovations in the common law.

Every student who paid attention in torts class will know the concurring opinion of California Justice Roger Traynor in *Escola v. Coca Cola Bottling Co. of Fresno.*[63] In upholding a lower court finding of liability in negligence for injuries caused by an exploding bottle manufactured by the defendant, the majority relied on the doctrine of *res ipsa loquitur*.[64] Traynor concurred in the judgment but contended that "the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover . . . , [rather] it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[65] Describing the majority's reliance on negligence as "needlessly circuitous," Traynor wrote: "If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly."[66] That California public policy was to hold manufacturers responsible regardless of negligence he surmised from a California statute imposing criminal liability on manufacturers, packers and vendors of adulterated foods. "While the Legislature imposes criminal liability only with regard to food products and their containers," wrote Traynor, "there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally."[67] In justification of his proposed expansion of strict liability beyond that mandated by legislation, Traynor observed:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are

63 150 P.2d 436 (Cal. 1944).
64 *Id.*
65 *Id.* at 440.
66 *Id.* at 441.
67 150 P.2d 436 (Cal. 1944) at 441.

> ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.[68]

Everything mentioned by Traynor and more was presumably known or knowable to the legislators who chose to regulate foodstuffs only. Yet Traynor saw fit to recommend judicial imposition of strict liability for all products.

In his opinion, Traynor cited another case familiar to first-year law students. In *MacPherson v. Buick Motor Company*, the plaintiff alleged that the manufacturer of an automobile was liable in negligence for injuries suffered from the failure of a wheel. The issue before the New York Court of Appeals, wrote then Judge Benjamin Cardozo, was "whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser."[69] Because the plaintiff had purchased the car from an independent dealer the lower court concluded, in conformance with New York precedent, that the absence of contractual privity insulated the manufacturer from liability.[70] In reviewing precedent from New York and other jurisdictions adhering to the privity rule, Cardozo concluded that the reason for the requirement was that "conduct, though negligent, was not likely to result in injury to any one except the purchaser." Thus, privity was a proxy for the likelihood of injury (and therefore foreseeability), not the reason for the rule. The reason for the rule, "the principle of the distinction" said Cardozo, is "the important thing."[71] Differences among judges in earlier cases, he concluded, are "in the application of the principle [rather] than in the principle itself."[72] After observing that the conditions had changed since the "days of travel by stage coach" and noting that "[t]he dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used," Cardozo wrote that "[t]he principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."[73]

What would Blackstone say of these two prominent American contributions to the evolution of the common law? My guess is that he would endorse *MacPherson* and condemn *Escola*. In *MacPherson* Judge Cardozo abandoned privity of contract as a requirement for negligence in products liability cases because the reason for the rule – the foreseeability of harm –

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68 *Id.* at 443.
69 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916).
70 *Id.* at 1050.
71 *Id.*
72 *Id.* at 1054.
73 *Id.*

was no longer served by the privity requirement.[74] In the words of Irving Lehman, Cardozo's colleague on the New York Court of Appeals for eight years, Cardozo's method "has been accepted and followed wherever English speaking judges administer the law in accordance with common law principles."[75] While the principles underlying the old rule remain unchanged, "the outworn form of the rule which concealed the principles and impeded their application in new conditions was discarded."[76] The privity requirement concealed the reason for the rule. In *Escola*, by contrast, Justice Traynor ignored the principle of the negligence standard – liability-based fault – and substituted a new principle – liability-based on ability to compensate.[77] Cardozo's abandonment of the privity requirement was required by the reason for the rule and thus consistent with reasonable expectations. Traynor's abandonment of negligence in favor of strict liability was founded on a wholly different principle and thus disrupted reasonable expectations.

If the common law originated in and derived its legitimacy from custom as Blackstone concluded, its development over time should be informed by custom. Absent that connection to the practices and preferences of what might be called consumers of the law, what lawmaking judges call the common law is that in name only. Judges may have the raw power to be lawmakers, but the difference between adapting the law to evolving custom and changing the law to counter prevailing practice is transparent. As St. George Tucker observed in one of his lengthy notes supplementing his edition of *Blackstone's Commentaries*: "[A]s all laws are either written; or acquire their force and obligation by long usage and custom, which imply a tacit consent; it follows, that where these evidences are wanting, there can be no obligation in any supposed law."[78] In other words, the legitimacy of written law derives from the legitimacy of the legislator, while the legitimacy of the common law and of judicial modifications of common law rules derive from implicit consent of the people as reflected in custom.

ENVIRONMENTAL LAWMAKING BY JUDGES

The difference between judicial lawmaking in the name of the common law and judicial adaptation of the common law to changed circumstances is illustrated by two developments in American public trust law. Pursuant to the English common law doctrine that in the United States has come to be called the public trust, individual members of the public shared in common a right to engage in commercial navigation and fishing in navigable waters,

74 *MacPherson,* 111 N.E. at 1054.

75 Irving Lehman, *The Influence of Judge Cardozo on the Common Law*, 35 LAW. LIBR. J. 2, 2 (1942).

76 *Id.*

77 150 P.2d 436, 461 (Cal. 1944).

78 Blackstone, *supra* note 1, at 406.

defined as waters affected by the tides. This meant that riparian landowners, other private parties, and the state were forbidden from creating obstructions to navigation and fishing on those waters. The tidality test of English law reflected that the vast majority of navigable waters in Great Britain are affected by the tides, thus relieving the courts from resolving disputes over navigability. Very early in the American states, courts expanded the definition of navigable waters to include non-tidal but navigable-in-fact waters. Their reasoning was that, while in Britain navigable-in-fact waters and waters affected by the tides are largely coterminous, in North America there are thousands of miles of navigable-in-fact waters that are not tidal. Thus, in the United States, the public purpose of the doctrine – the reason for guaranteeing a public right – was defeated by the English definition of navigable waters, while the expectations of riparian landowners (though they might have protested otherwise) could not be said to be unsettled by the new definition of navigable waters. To the contrary, the reasonable expectations of the public and of riparian landowners were consistent with the change in legal definition of navigable waters for public trust purposes.

Much later, over the last four decades or so, a few state courts have modified the English and early American rule in two different ways. They have held that waters affecting navigable-in-fact waters are subject to the public trust,[79] and they have held that other uses including recreational boating, swimming, and wildlife habitat, are within the public right.[80] Though persuasive public policy reasons can be offered in support of these changes, legally based expectations of riparian landowners on non-navigable waters are abjured while the wishes, not the reasonable expectations, of some members of the public are rewarded. It is fair to surmise that Blackstone would have endorsed the first adaptation as a proper application of the common law process. He would have condemned the latter as judicial lawmaking reflecting the "sentiments of the judges."

Like the public rights of navigation and fishing on navigable waters under the public trust doctrine, public rights to unobstructed travel on public highways and waterways under public nuisance law arose from custom. In the absence of legislative regulation of such obstructions, common law courts enforced custom as public rights in the same way that many private rights in common law arose from custom. To an outside observer these public and private rights may have appeared to be judicial inventions, but to those affected the common law courts were only enforcing established customary rights. Although problematical by modern separation of powers standards, the subsequent application of the concept of public nuisance to other harmful or dangerous activities and conditions followed the same pattern – general

79 *E.g.,* National Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983); Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).

80 Kramer v. City of Lake Oswego, 446 P.3d 1, 7 (Or. 2019).

consensus described as public rights enforced by the courts in the absence of legislative regulation.[81]

An early example of judicial lawmaking in the environmental realm is the Oregon Supreme Court's ruling in *State ex rel. Thornton v. Hay*.[82] In 1967 the Oregon Legislature declared it "the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof."[83] Pursuant to that law the plaintiffs were enjoined from constructing fences or other improvements in the dry-sand area of their coastal property. In issuing the injunction, the trial court had ruled that the public had acquired an easement for recreational purposes by implied dedication. On appeal, the State urged a theory of prescription by long use. In an opinion written by then Justice Alfred Goodwin, the Court affirmed the lower court ruling but based its holding on an obscure doctrine – ancient use or custom – for which there was no precedence in Oregon. The Court cited a single New Hampshire case from 1834.[84] Although Goodwin agreed that the public could acquire by prescription and that the elements of prescription were met "in connection with the specific tract of land involved in this case," he concluded that "the most cogent basis for the decision is the English doctrine of custom."[85]

Goodwin's reasons for preferring a doctrine of custom were both practical and ambitious. "Strictly construed," he wrote, "prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation.[86] An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly."[87] Beyond avoiding endless litigation, one reason the entire dry-sand beach ought to be treated uniformly, Goodwin suggested, was because in recent years "the scarcity of oceanfront building sites has attracted substantial private investments in resort facilities . . . [whose] owners like these defendants now desire to reserve for their paying

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81 "Thus public nuisances included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind." RESTATEMENT (SECOND) OF TORTS § 821 B (AM. L. INST. 1965).

82 462 P.2d 671 (Or. 1969).

83 Or. Rev. Stat. § 390.610.

84 462 P.2d at 677 (citing Perley v. Langley, 7 N.H. 233 (N.H. 1834)).

85 *Id.* at 676.

86 *Id.*

87 *Id.*

guests the recreational advantages that accrue to the dry-sand portions of their deeded property."[88] Another reason, he said, was "the unique nature of the lands in question."[89] These sound like legislative considerations that may well have influenced the Legislature in approving the 1967 Beach Law, but whether the injunction issued pursuant to that law infringed vested property rights was the issue before the Court. A judge's opinions about development and how best to use particular lands has nothing to do with settling legal title to those lands.

In concluding that the plaintiffs' ownership of the dry-sand portion of their coastal property did not include a right to exclude the public – that the public held an easement or servitude – Justice Goodwin turned to Blackstone's seven requirements for a custom to be law.[90] Putting aside the questions, scarcely addressed in the opinion, whether the claimed public use had been continued without interruption (requirement 2) and not subjected to contention and dispute (requirement 3), Goodwin's reliance on the seven factors mistook their significance in Blackstone's explication of the unwritten laws (*lex non scripta*) of England. According to Blackstone, unwritten laws included "general customs, or the common law, properly so called,"[91] "particular customs, or laws which affect only the inhabitants of particular districts,"[92] and "peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions."[93] The seven requisites of custom relate only to particular customs. That was the understanding of the court in the single precedent cited by Goodwin[94] and, according to Blackstone, they "must be strictly construed."[95] Nevertheless he concluded that a customary right of public access extended to the entirety of the Oregon coast and likely would have insisted that it extended to Washington and California had he had jurisdiction.

In the penultimate paragraph of his opinion in *Thornton*, Justice Goodwin observed that "[b]ecause so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society."[96] Blackstone's description of statutory law (*leges*

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88 462 P.2d at 674.

89 *Id.* at 676.

90 1) "used so long, that the memory of man runneth not to the contrary;" 2) "*continued*. Any interruption would cause a temporary ceasing: the revival giving it a new beginning;" 3) *peaceable*, and acquiesced in; not subject to contention and dispute;" 4) "*reasonable*; or rather, taken negatively, they must not be unreasonable;" 5) "*certain*;" 6) "established by consent, must be (when established) *compulsory*;" and 7) "customs must be *consistent* with each other." Blackstone, *supra* note 1, at 76-78.

91 *Id.* at 68.

92 *Id.* at 74.

93 *Id.* at 79.

94 After explaining that all rights claimed as custom may also be claimed as prescription, but not vice versa, the New Hampshire court stated: "If these rights are common to any manor, district, hundred, parish, or county, as a local right, they are holden as a custom." *Perley*, 7 N.H. at 235.

95 Blackstone, *supra* note 1, at 78.

96 462 P.2d 671, 678 (Or. 1969).

scriptae) suggests he would have concluded the opposite. He suggests: (1) A general or public act is an universal rule, that regards the whole community; and of these the courts of law are bound to take notice judicially and ex officio; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it; (2) Statutes are also either *declaratory* of the common law, or *remedial* of some defects therein; (3) Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever.[97]

In the construction of remedial statutes, said Blackstone, courts are to consider "the old law, the mischief [sought to be remedied by the statute], and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief . . . . [I]t is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy."[98] In *Thornton,* Justice Goodwin introduced a common law doctrine not previously known to Oregon law and declared the 1967 Beach Law to be a legislative recognition of that subsequently discovered doctrine, thus confiscating private rights previously vested under the common law of property as it had existed since the State's founding.[99] That the Legislature had declared a public right of access to dry-sand portions of private coastal properties and that the vast majority of Oregonians today agree with Goodwin that they should have a right of access to those beaches says nothing of the legitimacy of the court imposing a doctrine not previously known to Oregon law. Many members of the public may have believed they had such a right and many more likely believed they should have such a right, but coastal property owners reasonably believed their title included the right to exclude the public.

Recall Blackstone's example from Cicero of a law "that those who in a storm forsook the ship, should forfeit [the ship] and all property therein . . . to those who staid in it."[100] A man who remained aboard only because he was too sick to abandon ship was denied title because his reason for staying aboard was not relevant to the reason for the rule – namely to be rewarded if one assisted in bringing the ship safely to port. The court, having sympathy for those who suffer seasickness, might have rewarded title to the sick man on the basis that those who have suffered should be compensated. But the reason for the rule was to encourage the saving of the ship, not to compensate those who might have suffered while aboard. In *Thornton*, the reason for the rules of prescriptive title or implied dedication relied upon by the lower

97 Blackstone, *supra* note 1, at 85-86.
98 *Id.* at 87
99 *See* 462 P.2d at 676–78.
100 Blackstone, *supra* note 1, at 68.

courts in *Thornton* is to avoid the abandonment and non-use of valuable resources and to respect reasonable expectations developed over time. The lower court may or may not have been correct to conclude that the public had acquired title to the dry-sand portion of plaintiff's property consistent with the reason for the rules relied upon. But it is clear that public acquisition of a right of access in the thousands of other coastal properties affected by the decision was for reasons unrelated to those underpinning the rules all coastal property owners had reason to rely on. What Justice Goodwin accomplished by substituting a wholly unprecedented rule for wholly different reasons was not unlike Cicero's sick man acquiring title to the ship for the reason that he had suffered.

That the *Thornton* court made no mention of the 5th or 14th amendments to the United States Constitution or of Article I, Section 18 of the Oregon Constitution underscores the power of innovations in the common law as it relates to private property. Although the plaintiffs had claimed a right to exclude the public from the dry-sand portions of their property, the Court saw no need to address whether that right had been taken without just compensation by the injunction issued under the 1967 Beach Law. The question would be raised many years later by Justice Scalia in a dissent to the denial of certiorari in another Oregon case. *Stevens v. City of Cannon Beach* involved a challenge to the denial of a permit to construct a seawall on the dry-sand portion of the plaintiffs' coastal property.[101] The challenge was dismissed on the authority of *Thornton*. Plaintiffs objected that their 5th and 14th amendment rights to due process and just compensation were infringed. Scalia, in a dissent from denial of certiorari, joined by Justice O'Connor, agreed that the Supreme Court could not consider what he believed to be a legitimate takings claim because there was no factual record from the courts below.[102] But he considered that the Court should review the due process claim because it is "a serious one" and review would "hasten the clarification of Oregon substantive law that casts a shadow upon federal constitution rights the length of the State."[103]

Scalia thought a clarification of Oregon substantive law was needed because twenty years after *Thornton* the Oregon Supreme Court had rendered an opinion in which it found that in *Thornton* the Court did not rule that the public right of access to the dry-sand beach applied to every coastal property from Washington to California. Rather, the Court said in *MacDonald v. Halverson* that a careful reading of *Thornton* revealed that "the court was speaking only about those coastal areas that had histories of use like the

101 Stevens v. City of Cannon Beach, 835 P.2d 940 (1992), *aff'd*, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207, 1207 (1994). .

102 510 U.S. at 1207.

103 *Id.*

Cannon Beach area."[104] The second ruling meant that the existence of a customary right of public access to the dry-sand beach required proof of actual public use. What troubled Scalia was that the Oregon Court's reliance on *Thornton* in *Stevens* allowed the State to claim a public right of access to plaintiffs' private property without proving such historic public use, thus denying the plaintiffs an opportunity to counter the State's claim. "To say that this case raises a serious Fifth Amendment takings issue," said Scalia, "is an understatement."[105]

Justice Goodwin's reliance on the mysterious common law doctrine of custom allowed the court to circumvent these constitutional issues for reasons Justice Scalia had indirectly explained two years earlier in *Lucas v. South Carolina Coastal Council*.[106] In holding that Lucas' property had been taken without just compensation, Scalia wrote: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[107] In ruling that the public had customary rights of access to the dry-sand portions of all coastal properties, Goodwin established what Scalia had called a "background principle" that would preclude any claim of an unconstitutional taking. Therein lies the promise and power of innovations in common law doctrines affecting property rights. It was to prevent such abuses of the common law that led Scalia to favor granting certiorari in *Stevens*. "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings (citation omitted), neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas,* for example, would be a nullity if anything that a state court chooses to denominate 'background law' – regardless of whether it is really such – could eliminate property rights."[108] Justice Stewart stated the same admonition a quarter century earlier: "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[109] Judicial innovations in the common law, no less than statutory enactments, can constitute such retroactive assertions that here-to-fore recognized property rights never actually existed.

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104 "The public has no right to recreational use of the narrow beach at Little Whale Cove by virtue of the doctrine of custom, because there is no factual predicate for application of the doctrine." *MacDonald v. Halvorson*, 780 P.2d 714, 723,724 (Ore. 1989).

105 510 U.S. at 1207.

106 505 U.S. 1003 (1992).

107 *Id.* at 2900.

108 *Stevens*, 510 U.S. at 1207.

109 Hughes v. Washington*,* 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

Although the sort of judicial innovation urged in the many public nuisance lawsuits catalogued by the Sabin Center has thus far found little success in American courts, one public trust case stands out as an example of ambitious judicial lawmaking in the context of climate change. *Juliana v. United States*[110] is one of numerous cases brought by Our Children's Trust in their campaign to involve courts in the public response to climate change.[111] Judicial intervention is required, insists University of Oregon professor Mary Wood, because "[t]he international treaty process will probably fail, the legislature will not act, and the president will do too little too late."[112] In other words, the courts must act because the political institutions are failing to address the problem.

Central to the legal theory of the *Juliana* case is what Wood calls the "atmospheric trust" which she asserts is a logical extension of the common law public trust doctrine. In addition to the public trust claim, the *Juliana* plaintiffs assert that their constitutional rights to due process are infringed by the government's failure to take appropriate actions to counter the threats of climate change. In an opinion denying the government's motion to dismiss, district court Judge Aiken rejected the claim that the case presented a nonjusticiable political question and ruled, contrary to recent United States Supreme Court precedent,[113] that the public trust doctrine applies to the federal government and that in alleging injuries relating "to the effects of ocean acidification and rising ocean temperatures" the plaintiffs had "adequately alleged harm to public trust assets."[114]

Having acknowledged early in her opinion that "[t]his is no ordinary lawsuit,"[115] Aiken opines in her conclusion that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law."[116] In support she quotes the author of the *Thornton* opinion, now the long-serving federal judge Alfred Goodwin: "The current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits." "The third branch can, and should, take another long and careful look . . . at deference to the legislative and administrative branches of government."[117] But in the penultimate paragraph of her opinion Aiken insists that she is doing what judges must do. Quoting Chief Justice Marshall's statement in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is," she

110 217 F.Supp.3d. 1224 (Or. 2016).

111 OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/mission-statement (last visited May 21, 2022).

112 DeMocker, *supra* note 15.

113 PPL Montana, LLC v. Montana, 565 U.S. 576 (2012).

114 *Juliana* 217 F. Supp. 3d at 1256.

115 *Id.* at 1234.

116 *Id.* at 1262.

117 *Id.* at 1262 (quoting from Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 786, 788 (2015)).

writes: "Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[118] In this Judge Aiken misunderstands both Marshall's essential point and the meaning of the constitutional separation of powers. Marshall's assertion was not that judges say what the law is in the abstract but rather that, to resolve cases over which they have jurisdiction, courts must say what the applicable laws of the constitution, legislation and regulations mean. That the judiciary is a coequal branch of government means that the judiciary, legislature and executive are equal in having exclusive authority to perform their functions, not that they have equal authority to make public policy and enact laws.

Judicial rulings on the basis of the common law are to be understood not as lawmaking or ad hoc problem solving but rather as required by existing law. Although the company in *MacPherson* may have concluded from the privity requirement that it could be liable only to direct purchasers of its products, Judge Cardozo looked to the principle underlying that requirement and proposed its elimination to assure that manufacturers would continue to be liable for the foreseeable harms that had once been generally limited to cases where privity existed. Foreseeability, not privity of contract, was the principle of common law negligence. Justice Traynor's ruling in *Escola,* on the other hand, made no pretense of conforming the rules governing liability to the long-established principle of fault. Rather, for what he perceived to be reasons of public policy, he introduced a rule of strict liability as the best rule for assuring that injured plaintiffs are compensated without regard to fault. Traynor appealed to a state statute declaring criminal the manufacture and sale of adulterated food as evidence of public policy, but that properly legislative declaration of public policy was clear – it applied only to food, not other products. Cardozo's abandonment of the privity requirement in *MacPherson* was what Blackstone described as remedial. Traynor proposed in his *Escola* concurrence a totally new rule of liability.

PUBLIC NUISANCE, PUBLIC RIGHTS AND THE PUBLIC INTEREST

As noted above, American courts have generally described public nuisance as an interference with public rights not, as did Blackstone, an interference with the common good. This shift gave courts cover from accusations of inappropriate judicial lawmaking, but it erased a distinction that helps to explain the origins of two different nuisance doctrines and why public nuisance should not be considered a tort.

In a democracy, what constitutes the public interest is a political not a legal question. Laws and regulations enacted under the police power to promote the public interest, notwithstanding that they have been democratically determined to be in the public interest, may not violate due process nor take private property without just compensation. Absent a

118 *Juliana,* 217 F. Supp. 3d at 1263 *(*quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

judicial finding of such constitutional impropriety, police power initiatives confer benefits that may be withdrawn and impose burdens for which there is only political recourse.

The pleadings in public nuisance lawsuits generally allege that some private or public act violates public rights. In cases involving a right shared in common by members of the public, the plaintiff will proffer that the offending action or condition has interfered with their exercise of the claimed right. Plaintiffs asserting the so-called public right to navigate on navigable waters or travel on public highways, for example, will offer to prove only that their exercise of the claimed right has been interfered with. Whether or not such obstructions are thought to affect the public interest, one way or another, will be irrelevant. A plaintiff alleging an infringement on an abstract public right such as a right to be free from ubiquitous pollution or climate change, on the other hand, will offer to prove that the alleged infringement is contrary to the public interest. Adjudicating individual rights held in common falls well within the authority and competence of the judiciary. Resolving whether particular actions or conditions are contrary to the public interest has nothing to do with adjudication and everything to do with politics. Understanding the difference between these two claims of public right is central to understanding why judicial interventions in environmental policymaking under cover of public nuisance law are inappropriate.

It is true, as many commentators have observed,[119] that public nuisance in England and early America sometimes amounted to judicial exercise of what in the 19th Century came to be called police powers.[120] To the extent this judicial exercise of police powers involved the enforcement of private rights and public statutes and regulations, a function in which the courts participate not on their own initiative but on the petition of private claimants or the public prosecutor, it was and remains of a judicial nature. But over the 19th and 20th centuries, the police power increasingly came to encompass more than the enforcement of rights. In the 1851 case of *Commonwealth v. Cyrus Alger*, Judge Lemuel Shaw described the police power as "the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either

119 Having reference to the English common law, Denise Antolini describes public nuisance as "a police-power based remedy for interference with the rights of the sovereign." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767 (2001); "At heart, then, public nuisance is not a tort; rather, when asserted by the sovereign, it is essentially an exercise of the police power to protect public health and safety. James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T, Summer 29 (1990); "Public nuisance is no ordinary tort, however, as its invocation--typically by public officials – involves an exercise of the state's police power." Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in A Pod?*; 45 U.C. DAVIS L. REV. 1075, 1077 (2012) "In effect, authority for an action in public nuisance derived from what is now known as the sovereign's police power and not from tort law." Abrams and Washington, *supra* note 6, at 362.

120 For a discussion of the police power *see generally* JAMES HUFFMAN, PRIVATE PROPERTY AND THE CONSTITUTION 7–44 (2013).

with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[121] Shaw's definition made no suggestion that the courts shared the police power authority beyond the enforcement of existing rights and legislatively mandated regulations. Pursuant to the police power the legislature could restrain the use of property "not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit themselves from it; but because it would be a noxious use contrary to the maxim, *sic utere tuo, ut alienum non laedas* [use your own property in such manner as not to injure that of another]." Shaw wrote in the language of nuisance law not to suggest that the courts have authority to independently declare what constitutes nuisance but to assure that the acts of some "shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."[122] In Shaw's understanding, the courts' responsibility is to uphold the rights of other property owners and the community, not to create new rights in the name of promoting the public good.

Where infringements on private or public rights are irreparable or ongoing, courts may enjoin the offending conduct. But that does not mean that courts have authority to independently determine what constitutes rights-infringing conduct. Almost all of the many 19th Century cases in which injunctions were upheld on appeal were challenges not to the court's authority to grant an injunction but rather to the legislature's authority to declare the enjoined activity a nuisance. In the classic case of *Mugler v. Kansas* Justice Harlan, quoting from Justice Story's Commentaries on Equity wrote: "'In case of public nuisances, properly so-called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, Eq. Jur. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law." But Harlan wrote nothing to suggest that the courts have authority to independently determine what constitutes a public nuisance. At issue in the case was a statute enacted by the Kansas Legislature declaring places where intoxicating liquors are manufactured or sold to be common nuisances. The court's responsibility, wrote Harlan, is to "ascertain, in some legal mode, whether, since the statute was passed, the place in question has been, or is being, so used as to make it a common nuisance."[123]

As suggested above, early common law courts sometimes ruled that particular actions or conditions interfered with public rights and were therefore public nuisances. Although their reasoning generally relied on Blackstone's reference to interferences with the common good, the courts

121 Commonwealth v. Alger, 61 Mass. 53, 85 (Mass. 1851).

122 *Id.*

123 Mugler v. Kansas, 123 U.S. 623, 672–73 (1887).

usually described the offense as against public rights. Most of these 19th Century judicial rulings served to confirm long-established custom and were rendered in the absence of legislative or administrative regulation.[124] The courts employed what Whitman has called the demand-side method of confirming custom rather than the supply-side imposing of judicial preferences. Like Judge Shaw in *Alger*, the courts spoke in the language of rights because that is what courts do. Even before the Constitution of the United States and the constitutions of most of the states drew a formal separation of powers, common law courts described both public and private nuisance in the legal language of rights, not the political language of public interest. They did so even while confirming customary rules that were thought to serve the public interest. Once the political branches of government began to assume their rightful role in the exercise of the police power, most courts withdrew from their earlier stretching of the boundaries of the judicial function.

Most of the English and early American cases involved interferences with public highways and waterways and some of those cases made specific reference to interferences with the use of public property.[125] To the extent what came to be called public nuisance encompassed these cases, it made sense to distinguish them from private nuisance cases. The individual's right to use public property is held in common and is therefore non-exclusive, while the interferences subject to liability as private nuisances are invasions of the right to exclude. Putting aside the discretion inherent in determining what constitutes an unreasonable interference, establishing whether the public holds in common a property right allegedly interfered with is within the judicial function and competence. But determining whether a defendant has interfered with an asserted public right having no relationship to public property is a different matter. The difficulty courts and commentators have encountered with public nuisance arises from accepting that public rights

124 "At one time the crime of public nuisance did valiant service in the cause of public health and safety. In the days before there was much legislation on public health matters, public nuisance was the only offence for which it was possible to prosecute those who stank out the neighbourhood with fumes from glass-works, tanneries and smelters, or who kept pigs in the streets, or kept explosives in dangerous places, or spread infectious diseases, or sold unwholesome food and drink, or left the corpses of their relatives unburied, or made the public highway dangerous or impassable, or created any other danger to public safety and health. Over the last hundred years, however, virtually the entire area traditionally the province of public nuisance prosecutions has been comprehensively covered by statute." J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L.J. 55, 76 (1989).

125 Many 19th Century cases involved bridges and other obstructions to navigable waterways. *See, e.g.*, Mayor, etc. of City of Georgetown v. Alexandria Canal Co., 37 U.S. 91 (1838); Com. of Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 520 (1851); and Mississippi & M.R. Co. v. Ward, 67 U.S. 485, 487 (1862). For 20th and 21st Century examples *see*, Vermont v. New York, 417 U.S. 270 (1974) and Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct., 448 Mass. 15, 34 (Mass. 2006) ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury.").

encompass more than rights held in common. When used as a proxy for the common good, the concept of public rights is problematic.

Under a government founded on popular sovereignty, it might be said that the public has a right to self-government. The test for whether that right is being respected is whether individual citizens are allowed to participate in the setting of government policy and the approval of government actions, with the ultimate test being whether or not citizens are allowed to vote. Thus, even if popular sovereignty is described as a public right, it finally comes down to the exercise by citizens of the personal right to vote. The same can be said of every other claim of public right. The abstract claim to public or social justice is tested by whether or not justice is realized by individuals. Claims of public rights to health care, housing, education and clean air all are assessed by the welfare of individuals. The concept of public rights, in other words, functions either to describe rights shared in common by the general public or as a proxy for favored public policies. To paraphrase the Supreme Court's description of the theory of state ownership of wildlife, the concept of public rights is generally but a fiction expressive in legal shorthand of the importance of particular public policy objectives."[126]

As suggested above, the concept of public rights is less dubious when applied to rights shared in common by the public. Most of the early public nuisance cases concerned obstructions to public highways and waterways. In these cases, the rights claims were much like those made under the traditional public trust doctrine. Public highways and navigable waterways are generally claimed to be the property of the government and therefore the property of the public, giving individuals a shared right of access subject to agreed-upon limits. Interferences with these rights shared in common are not unlike the interferences with private property subject to liability under private nuisance. When presented to a court, such claims fall within the authority and competence of the judiciary. But claims of public right to particular public policy objectives or outcomes are better suited to the political branches of government.

Nearly half a century ago, Richard Epstein observed that in the public nuisance highway cases, the interference could "consist in physical harm or solely in the delay and inconvenience in travel." He described the highway "as a place over which all persons have, within the rules of the road, the right to travel without interference or hindrance from others." As a matter of corrective justice, said Epstein, "damages are prima facie appropriate" for both physical harm and inconvenience. But he distinguished general damages – "those suffered by the traveling public generally" – from special damages – "those which are peculiar to one or a small group of individuals" and suggested that the former is the concern of the legislature and not the courts. Where "the harms in question are both widely distributed and of a

126 "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S. 385, 402 (1948).

low level," argued Epstein, public regulation and fines are the better approach.[127]

But the language of public rights rather than public interest or common good invites petitions for judicial intervention when environmental advocates are not satisfied with the actions of those with the constitutional authority to regulate. Appeals to public nuisance as a tool of judicial intervention on matters of environmental policy offer nothing more precise than an alleged public right to be free from environmental harms. Unless we are willing to accept that any or all environmental harms infringe public rights and must therefore be enjoined, resolving public nuisance claims requires courts to determine which harms are to be tolerated and which not. As William Baxter explained many years ago,[128] zero pollution is not an acceptable or viable policy goal, nor is the judiciary a legitimate or competent institution for determining what constitutes optimal pollution. Absent a statutory declaration of forbidden environmental harms, a public right to some maximum level of pollutants or carbon concentrations in the atmosphere is nothing more precise or predictable than whatever a particular judge determines to be unreasonable harm. Perhaps, as with the long-recognized rights of access to public highways and waterways, judicial determinations over time could establish reasonably precise standards for allowable environmental harms, but such standards would require constant revision and be the product of a judicial process ill-designed for establishing environmental policies. Except in the context of what would better be called rights shared in common, the vague and open-ended concept of public nuisance unavoidably requires a balancing of public and private interests, not to mention competing visions of the public interest, rather than the enforcement of established rights. As Judge Bergan argued in *Boomer*, this task is outside the judicial role and beyond judicial competence. It also makes a mockery of the rule of law by making rights contingent on a judge's assessment of the interests of the public as well as those asserting those rights.

A decade ago, Tom Merrill opined "that public nuisance law has gone off the rails, and . . . the ultimate reason for this is that public nuisance is not, and never was a tort." He described public nuisance as "a public action" analogous to the criminal law. Rather than an action to secure private rights as in private nuisance, he observed, public nuisance actions are brought "by public authorities to charge criminally or abate . . . a condition that is deemed to be inimical to interests [not rights] shared by the public as a whole." Understanding that public nuisance is a public action rather than a tort, Merrill concluded, should lead to a recognition that "the proper institution to determine the parameters of public nuisance liability is the legislature – or some institution delegated authority to do by the legislature – not courts

127 Richard Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEG. STUD. 49, 99 (1979).

128 William F. Baxter, *People or Penguins: The Case for Optimal Pollution* (1974).

based on a claim of common law authority."[129] This is exactly the argument made by Judge Bergan in *Boomer*.

Where the legislature has not established the parameters of liability, the judiciary's doing so suffers from what Merrill called a "delegation deficit,"[130] as does the prosecution of public nuisance lawsuits by private parties. As noted above, private prosecution of public nuisance actions was permitted where the private claimant suffered an injury distinct in kind from the alleged harm to the public in general. But this exception to the general rule that public nuisance actions must be prosecuted by authorized public officials made sense only in terms of judicial economy. That the private prosecutor must allege a distinct-in-kind injury makes clear that their claim is really in private nuisance, although with recovery not limited to unreasonable interference with the enjoyment and use of private property. Writing twenty years after *Boomer*, having reminded their readers that *Boomer* was a private, not public, nuisance case, Robert Abrams and Val Washington concluded: "that the private tort of public nuisance is misnamed [because while] . . . a public nuisance exists . . . the interest of the plaintiff is private."[131] They observe that the tort could be renamed but that it might be better "to expand the definition of private nuisance, . . . encompass[ing] both interferences with the use and enjoyment of property and private damages resulting from public nuisances."[132] The adjudication of such private claims, whatever they are called, falls well within the role and competence of the judiciary, but the determination of what actions and conditions are "inimical to interests shared by the public as a whole" remains unsuited for judicial resolution for the reasons set forth in *Boomer* and by Merrill.

CONCLUSION

A distinction between private and public nuisance makes some sense to the extent it recognizes the difference between exclusive private rights and non-exclusive rights shared in common. But inclusion among public nuisances of judicially promulgated rules said to promote the common good is both illogical and, more seriously, an invitation for judicial intervention on matters of public policy properly performed by the political branches of government. In 18th century England, when Blackstone wrote, judicial exercise of what we call the police powers filled a void. In the United States today it engages courts in a function for which they are not competent and usurps the constitutional authorities of the legislative and executive branches of government.

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129 Merrill, *supra* note 3.

130 *Id.*

131 Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 390 (1990).

132 *Id.* at 388–91 (1990).

Although Blackstone described a public nuisance as an interference with the common good, American courts have generally spoken of interferences with public rights. When enforcing rights shared in common, like the rights to navigate on navigable waters and to travel on public highways, the language of rights is appropriate. But when a plaintiff's claim is that a public right has been violated because the alleged infringement is contrary to the public interest, there are no rights at stake – only competing visions of the common good. Choosing among those visions is the work of the legislature, not the courts. Courts have neither the institutional competence nor the constitutional authority to intervene on matters of public policy.

Of course, there is no assurance that legislatures will enact or that administrators will implement wise policies. Indeed, there is ample reason to conclude that rent-seeking and the politics of ideology will overwhelm pursuit of the public good. It is tempting to allow the judiciary some constitutional slack if we believe their being largely independent of politics allows courts to arrive at more reasoned prescriptions. But that is not the constitutional structure we have. Courts have the authority and responsibility to keep the other branches within their constitutional authority and to prohibit their infractions of individual liberties. But courts do not have the authority or competence to propound public policy. James Madison proposed judicial participation in a federal revisionary authority over state laws. The proposal was thrice rejected in the Philadelphia convention on the grounds that it was outside the judicial function to opine on the wisdom or merits of legislation. For better or worse, in a democratic republic, we live with the choices of those we elect to represent us. Looking to the courts, particularly the unelected federal courts, is not an acceptable solution under our national and state constitutions.

Environmental advocates for judicial intervention in the name of public nuisance law seek to advance the same public policies they advocate for in the legislature and before administrative agencies. Often, they look to the courts as a way of circumventing the challenges and compromises inherent to the political branches. Sometimes they look to the courts because they are not satisfied with the results achieved in the political branches or as a means of generating public awareness despite knowing that their legal theories are indefensible. And because environmental regulations often impact private properties, they look to the courts because a judicial declaration of public nuisance instantly becomes a background principle insulating regulation against constitutional due process and takings claims.

In response to concerns about judicial competence and the proper role of the judiciary, proponents of judicial intervention and innovation contend that common law judges have always adapted the law to changing circumstances and evolving public values. But this misrepresents the common law method founded on the recognition and of enforcement of custom. In the far simpler societies of 18th century England and America, it

remained possible for judges to develop a rough sense not only of the needs and ambitions of the parties to a case but also, over time, of public needs and preferences. In today's complex world, within a globally engaged constitutional republic extending over a vast and diverse continent, courts are ill-equipped to mandate public policies by legislating from the bench. They should stick to the important and challenging constitutional function of adjudication.

PUBLIC NUISANCE AS RISK REGULATION

Thomas W. Merrill[*]

INTRODUCTION

Public nuisance has always been defined in terms of the object of protection – the community, the public, or perhaps even the state as a whole. Public nuisance in this regard has been juxtaposed to private nuisance, which protects individual persons and their use and enjoyment of land. Commentary on public nuisance has thus long been concerned with defining (without notable success) what it means to advance a public as opposed to a private right.[1]

In this paper, I offer a different take on the function of public nuisance. The common law is designed to provide redress for actual harm, whether it be the breach of a contractual promise or an injury to a person or property caused by the defendant's tortious act. The requirement of actual harm, in turn, may be related to the standard form of relief at common law, which is money damages. Damages are easier to calculate when actual harms can be identified and measured.[2] The limitation to actual harm, however, leaves a major lacuna in the common law: How can the system protect persons against the risk of future harm? My contention is that a central function of public nuisance was to supply – however imperfectly – a form of regulation of risks that had not yet resulted in actual harm.

I. THE FEATURES OF PUBLIC NUISANCE THAT POINT TO RISK REGULATION

My claim that public nuisance is significantly directed at regulating risk does not mean that this is its only function. Public nuisance has also served as a device for aggregating claims of existing harm to a significant number

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1 For my own efforts to delineate the difference between public and private rights (without notable success) see Thomas W. Merrill, *Private and Public Law* 575-91, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew Gold et al. eds. 2021); Thomas W. Merrill, *Private Property and Public Rights* 75–103, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte and Henry E. Smith, eds. 2011).

2 *Cf.* Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 NOTRE DAME L. REV. 1421 (2021) (arguing for the importance of ability to measure compensation in determining the scope of the Takings Clause).

of persons.[3] In this aggregating respect, public nuisance can be seen as a precursor of the modern class action. But risk regulation is an under-appreciated function of public nuisance. The "essential element" of a public nuisance, as one modern court has recognized, is that "persons have suffered harm or are *threatened with injuries* that they ought not to bear."[4]

That public nuisance is often concerned with risk of future harm distinguishes it from other forms of liability. As a form of risk regulation, the function of public nuisance is to eliminate a condition that imposes the risk of harm, either by deterring the defendant from engaging in the activity that creates the risk or by forcing the defendant to eliminate the risk. This is in sharp contrast to more common forms of legal liability, which are designed to compensate – to provide redress – for harms that have already been inflicted. Tort actions, in particular, invariably require the plaintiff to prove, as part of its action, that the defendant's act has caused the plaintiff *actual harm*, nearly always physical harm to a person or property. Showing that the defendant is engaged in an activity that presents a risk of harm is almost never sufficient.[5]

Consider the paradigmatic public nuisance: blocking a public highway.[6] Some merchants and travelers will be affected immediately; others may be affected in the future if the obstruction is not removed. Even those who never use the highway will face a risk that the blockage will diminish the welfare of the community by disrupting commerce and interfering with intercourse among residents and visitors. So, even if blocking the highway creates an immediate and actual harm to some, it poses a risk to all. The same analysis applies to public nuisances in the form of obstructions to navigable waterways.

A concern with risk can also be discerned in other conditions identified as public nuisances by early sheriff's courts called "leets": "washing hemp or flax in streams or ponds used for watering cattle," letting animals "wander suffering from the scab," victuallers who sell "unwholesome food," and those who catch "immature fish or hunt[] out of season."[7] Later, when public nuisance actions moved to the royal courts, we find further examples of risk

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[3] For example, cases finding a public nuisance based on the presence of "odor and flies" emanating from a cattle feedlot presumably identify a present harm (although the flies might also be a source of future disease). Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P. 2d 700, 705 (Az. 1972).

[4] Wood v. Picillo, 443 A. 2d 1244, 1247 (R.I. 1982) (emphasis added).

[5] There are exceptional cases in which injunctions have been granted based on a substantial risk of future harm, typically in the nature of a nuisance. *See, e.g*., Village of Wilsonville v. SCA Services, Inc., 426 N.E. 2d 824 (Ill. 1981).

[6] Both Bracton and Britton in their Thirteenth Century treatises mention blocking a public right of way as the principal example of a "legal nuisance by reason of the common and public welfare." HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 191, f. 232b (Samuel E. Thorne Ed. 1977); *see also* 2 BRITTON 319-20 (Francis Morgan Nichols trans., 1983). *See generally* J.W. Neyers, *Reconceptualizing the Tort of Public Nuisance*, 76 CAMBRIDGE L. J. 87, 93 (2017) (noting that "obstructing highways (i.e., dedicated roads or navigable waterways) is the core case")).

[7] J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L. J. 55, 60 (1989).

regulation. In *Baines v. Baker*,[8] decided in 1752, an injunction was sought by a neighbor against an "inoculation hospital" that was deliberately exposing persons to smallpox in an effort to immunize them from the disease. The plaintiff was alarmed that the risk of contracting smallpox from the hospital would cause his tenants to quit the property. The chancellor ruled that the action, if it could be brought at all, would have to be maintained by the Attorney General as a public nuisance claim.[9] And in the 1840s and 1850s, multiple actions were brought against municipal corporations that discharged untreated sewage into the nearest river, "turning it into a moving tide of filth which endangered the health of those who lived downstream."[10]

In the United States, we see a similar pattern. Most early public nuisance actions "involved the obstruction of either public highways or navigable waterways."[11] By the 1840s, "industrialization also brought public nuisance claims alleging new types of injuries: water pollution and air pollution resulting from industrial enterprises."[12] In all early public nuisance cases, we see that some people would be immediately harmed, but the entire community faced at least a risk of harm.

The risk-regulating nature of public nuisance is further confirmed by the fact that some forms of activity were regarded as a public nuisance even though they presented *only* a risk of future harm. Particularly striking in this regard are the statutes enacted in the early Nineteenth Century declaring it a public nuisance to store gunpowder in cities.[13] The gunpowder typically posed no present harm. The rationale for these statutes was the risk that the gunpowder would ignite accidentally and burn the whole city down. The measures were purely prophylactic – to head off the risk of a potential catastrophe.

We also see the connection between public nuisance and risk in the prevalence of public nuisance actions against activity said to "offend decency" or undermine "public morals."[14] The early leet courts were concerned not only with obstructed roads and rivers but also with "bawdy houses, disorderly ale-houses, [and] night-walkers."[15] The Americans followed suit. A Tennessee statute of 1915 declared "the sale of intoxicating liquors, the keeping, maintaining or conducting bawdy or assignation houses, and the conducting, operating, keeping, running or maintaining gambling

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8 (1752) 27 Eng. Rep. 105 [AMB 158].

9 *Id.* at 106.

10 Spencer, *supra* note 7, at 71.

11 Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 800 (2003).

12 *Id.* at 802.

13 WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 60–66 (1996).

14 *E.g.*, Okla. Stat. tit. 50, § 1; Ariz. Rev. Stat. § 13-2917; Cal. Penal Code § 370; Ga. Code § 41-1-6; Fla. Stat. § 823.01.

15 Spencer, *supra* note 7, at 60.

houses" to be public nuisances.[16] These sorts of activities do not harm particular individuals in any conventional sense, such as physically harming a person or property or creating an economic loss. The reason they historically appear on the list of public nuisances is that they were thought to threaten the social norms of the community. They posed a risk to the community – one that was collective and moral, as opposed to physical or financial – but a perceived risk all the same.

We can also discern the risk-regulating nature of public nuisance in the very definitions of the action. Public nuisance has always been defined as something that harms "the common and public welfare," in Bracton's terms,[17] or as an interference "with a right common to the general public," to quote the *Restatement*.[18] The proper way to understand this, in my opinion, is that a public nuisance is a "public bad" – the inverse of public good. In other words, it is a risk that is nonexcludable and nonrivalrous and therefore affects all.[19] Admittedly some states define a public nuisance numerically, in terms of its effect on more than a minimal number of people.[20] But the relevant point is that a public nuisance is different from a mass tort that imposes actual injury on a large number of persons, like an airplane crash.[21] Because it is an interference with a right common to the general public, it may harm some individuals more than others, and some not at all – at least not in an immediate sense. What a public nuisance does, insofar as it affects a right common to the general public, is to impose a risk of harm on the general public.

It is also relevant that the remedy for a public nuisance, throughout the great span of history, has been either a criminal sanction or some form of mandatory relief requiring the defendant to correct the offending condition. As Donald Gifford observes, "[t]here is no historical evidence… that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance."[22] This is

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16 State *ex rel.* Mynatt v. King, 191 S.W. 352, 352-53 (Tenn. 1916), quoting 1915 Tenn. Pub. Acts, Chapter 11.

17 HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 191, f. 232b (Samuel E. Thorne Ed. 1977).

18 RESTATEMENT (SECOND) OF TORTS §821(B)(1).

19 Thomas W. Merrill, *Is Public Nuisance a Tort?* 4 J. TORT L, No. 2 1, 8-9 (2011) [hereinafter *Public Nuisance*].

20 *See e.g.*, N.M. Stat. § 30-8-1 ("A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority . . .").

21 *Cf.* FEC v. Atkins, 524 U.S. 11, 24 (1998) (distinguishing an injury that is "abstract" and "widely shared" from a mass tort where "large numbers of individuals share the same common-law injury"). Epstein cites *City of McAlester v. Grand Union Tea Co.* 98 P.2d 924, 926 (Okla. 1940), in which an Oklahoma court held that it was not a public nuisance for a door-to-door salesman to commit multiple trespasses. This is a good example of the distinction because it shows that even when the trespasses affected many homeowners and took place over a period of time, the multiple intrusions did not qualify as a public nuisance because they did not harm a right common to the general public.

22 Gifford, *supra* note 11, at 782; *see* In Re Lead Paint Litg., 191 N.J. 405, 924 A.2d 484 (2007) (observing that the state could not historically sue for damages resulting from public nuisance).

readily explainable if the action was designed in significant part to prevent future harm to an often indeterminate set of persons. The identity of those likely to be injured, and the magnitude of the harm they would likely suffer, would be impossible to determine with anything approaching confidence. If the risk is widespread and significant, the sensible course of action is to deter or eliminate the risk, rather than waiting for harm to materialize and then toting up the losses.

Finally, it is relevant that public nuisance, before the *Restatement (Second) of Torts* sought to make public nuisance a tort, was effectively a strict liability offense.[23] There is no evidence that the action required proof of any fault on the part of the defendant, whether it be intent or negligence. The landowner whose tree blew down in a windstorm and blocked the highway could be charged with a public nuisance, as could a defendant whose boat capsized in a storm and blocked a navigable river. These were acts of God, but they interfered with rights common to the general public. Strict liability has long been associated with activities that pose a high risk of harm to others, whether keeping wild animals or engaging in blasting.[24] Of course, these activities only result in liability if they cause actual harm. In that respect, public nuisance is different. But the strict liability aspect of public nuisance reinforces the understanding that public nuisance is centered on activities or conditions that pose a risk of future harm.[25]

Indeed, it is not clear historically that it was necessary to prove that the defendant *caused* the condition injurious to the general public, except in the sense in which the federal courts speak of "redressability" as an element of Article III standing.[26] What was critical was that the defendant was in a position to eliminate the condition that constituted a public nuisance. If the defendant could cut down the fallen tree or remove the capsized boat – or for that matter, could take the gunpowder out of the city or close the gambling den – then it was appropriate to charge the defendant with maintaining a public nuisance.[27] The whole point of the action was to protect the public from potential harm, not to compensate for past harm. The reason to single out the defendant was because the defendant was in a position to correct the threatening condition.[28]

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23 *See* Spencer *supra* note 7, at 82.

24 RESTATEMENT (SECOND) OF TORTS § 519 (stating that those who engage in abnormally dangerous activities will be held strictly liable for damage they cause).

25 *See* Melker v. New York, 190 N.Y. 481, 490-91, 83 N.E. 565, 568 (1908) ("A nuisance does not rest upon the degree of care used. . . .").

26 *See* Lujan v. Defenders of the Wildlife, 504 U.S. 555, 561 (1992) (explaining how an injury must be redressable by the lawsuit for federal courts to have Article III jurisdiction).

27 *See* Novak *supra* note 13, at 60–66.

28 If the defendant cannot or will not abate the nuisance, some states allow others to do so at the cost to the defendant. Ill. Comp. Stat. 720 ILCS 5/47-25; Conn. Gen. Stat. § 19a-335; § 19a-338-340; Tex. Health & Safety Code § 343.012; Colo. Rev. Stat. 16-13-303; Mo. Rev. Stat.§ 195.130.

William Prosser missed all this when he undertook to add public nuisance to the *Restatement (Second) of Torts* in the 1960s.[29] He added comments to the *Restatement* claiming that public nuisance requires proof of "substantial harm" and that the defendant act either "intentionally and unreasonably," or "negligently" or "recklessly," or in furtherance of an "abnormally dangerous" activity.[30] He cited no authority for these propositions. Instead, faced with a dearth of precedent that characterized public nuisance in terms characteristic of tort law, he simply cut and pasted provisions that the *First Restatement* had adopted for private nuisance, and incorporated them into comments indicating that they were also elements of establishing an action for public nuisance. This was pure revisionism.[31]

Whether or not one agrees that, as conventionally understood, public nuisance was significantly about risk regulation, there can be no doubt that the prominent litigation campaigns launched in recent years against a variety of alleged public nuisances are grounded in a perceived need to regulate forms of risk.

The litigation brought by state attorneys general against the tobacco companies seeking recovery of medical expenses incurred by states because of smoking-related illnesses got the ball rolling.[32] Smoking clearly causes actual harm to many individual smokers and poses a risk of harm to many more. But the state governments did not seek to recover medical expenses based on some right of subrogation for persons actually injured. Instead, they claimed that smoking was associated with a higher rate of state expenditures for health care on an aggregate basis under programs like Medicaid. Thus, the tobacco companies were charged with creating what was both an existing harm and a risk to the public, which in turn had created a present harm to the public fisc. The relief sought – which was unprecedented for a public nuisance action – was monetary compensation for the states in dealing with the fallout from the public harm and risk.[33]

The multiple actions brought against legacy manufacturers who sold lead paint before it was banned in 1978 targeted a more conventional physical risk.[34] The risk here was that some of the paint remained in older buildings, would flake off and that the flakes would be ingested by children living in

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29 RESTATEMENT (SECOND) OF TORTS (1965).

30 *Id.*

31 Merrill, *Public Nuisance, supra* note 19, at 20–29 details the sorry episode.

32 *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 301–05 (2021).

33 The states were never required to prove that smoking had actually caused them to incur higher expenditures. It was doubtful that they could do so on any rigorous basis, given that smoking is also associated with reduced life expectancy, which in turn means lower lifetime medical expenses for many committed smokers. *See* W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, 9 TAX POL'Y & ECON. 51, 92 (1995).

34 *See* DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES (2010); *See also* People v. ConAgra Grocery Products, Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017); In Re Lead Paint Litg., 191 N.J. 405, 924 A.2d 484 (2007).

the buildings creating blood lead poisoning. Again, the actions were predicated on the risk that this had or would happen, unless strenuous efforts were made to assure that all lead paint was removed from residential buildings. Proof that any defendant's paint had caused actual injury to particular children was not offered and was evidently not deemed necessary in a public nuisance action.[35]

The same story applies to the public nuisance suits brought against gun manufacturers.[36] The claim was that the guns were sold in a distribution chain that did not adequately protect against the risk that the guns would come into the hands of criminals or mass killers.[37] No proof was offered that any particular gun had caused any particular harm, and that this was due to the defendants' methods of distribution.[38] The demand was to require a modification of those distribution practices in order to reduce the risk of this happening in the future.[39]

The suits against utilities that burn coal or oil companies that sell petroleum, alleging that they are responsible for emissions of carbon dioxide that contribute to global warming, are also grounded in a concern about risk. There is a broad consensus that human activity – including the combustion of carbon fuels – has led to an increase in average global temperatures and may produce greater and potentially more destabilizing increases as carbons dioxide accumulates in the atmosphere. But the negative welfare effects of these projected temperature increases are nearly all hypothesized to occur in the future, such as the need for coastal cities to build higher seawalls to protect against rising sea levels.[40] These are reasonable concerns, but they are risks all the same. The invocation of public nuisance as a source of authority to address these concerns is a form of risk regulation.

The most recent round of public nuisance suits has targeted drug companies that sell opioids.[41] The claim is that aggressive marketing by these

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35 *See, e.g.*, *ConAgra*, 227 Cal. Rptr. 3d at 108 ("Defendants are liable for promoting lead paint for interior residential use. To the extent that this promotion caused lead paint to be used on residential interiors, the identity of the manufacturer of the lead paint is irrelevant.")

36 *See* Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp. 273 F.3d 536 (3rd Cir. 2001); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002).

37 *See* cases cited i*d.*

38 *Id.*

39 *Id.*

40 U.S. GLOB. CHANGE RSCH. PROGRAM, 1 CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 10 (Donald J. Wuebbles et al. eds., 2017) (predicting sea levels to rise "several inches" in the next 15 years and one to four feet by 2100). *See* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (dismissing a public nuisance suit raising these concerns).

41 *See* Engstrom & Rabin, *supra* note 32, at 316-21; State *ex rel*. Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4019929, at *1-2 (Okla. Dist. Ct. Aug. 26, 2019); Jackie Fortier & Brian Mann, *Johnson & Johnson Ordered to Pay Oklahoma $ 572 Million in Opioid Trial*, NPR (Aug. 26, 2019), https://www.npr.org/sections/health-shots/2019/08/26/754481268/judge-in-opioid-trial-rules-johnson-johnson-must-pay-oklahoma-572-million; Sara Randazzo, *Johnson & Johnson Settles New York*

firms, directed in significant part at physicians, has led to the over-prescription of these drugs.[42] This, in turn, has produced high rates of addiction, which has caused persons to turn to black-market fentanyl and heroin to sustain their addiction, often resulting in debilitating behavior and all-too-often death by overdose. The argument, as in the case of the gun cases, is that the marketing campaign, combined with inadequate controls on the behavior of actors further down the distribution chain, enhanced the risk of opioid addiction.[43] The claim for relief, as in the tobacco cases, is for damages to compensate the states for expenses incurred in dealing with the fallout from opioid addiction.[44]

The policy questions raised by the recent surge of public nuisance litigation are unquestionably serious ones. They all entail questions about how best to regulate widespread risks to public health and welfare. Public nuisance is, at least in significant part, about risk regulation. The question is whether public nuisance should be enlisted as a vehicle for addressing the complex risks motivating the recent litigation campaigns.

II. THE LITIGATION MODEL

Once we see that public nuisance is in significant part about risk regulation, it is important to consider the institutional aspects of public nuisance as it emerged during the formative period of the doctrine – from roughly the Twelfth through the Nineteenth Centuries. It was during this period that public nuisance solidified and took on the institutional features that continue to shape its invocation today. We can call this the litigation model of risk regulation.

A. *The English Background*

At the beginning of this era, when public nuisance was asserted and enforced in local sheriff's courts, public nuisance was simply a version of customary law. Certain activities or conditions were deemed by general consensus to pose an unacceptable risk to the general welfare of the local community. These sentiments were observed and shared by local sheriffs, who indicted those in a position to correct the activity, on pain of

Opioid Case for $230 Million, WSJ (June 26, 2021), https://www.wsj.com/articles/johnson-johnson-settles-new-york-opioid-case-for-230-million-11624716067.

42 Art Van Zee, *The promotion and marketing of oxycontin: commercial triumph, public health tragedy*, 99-2 Am. J. Public Health 221 (2009).

43 *See* articles cited *supra* note 41.

44 *Id.*

"amercement" or even forfeiture if they failed to comply.[45] In this fashion, local community norms that disapproved of blocking public streets, contaminating streams used to water animals, or maintaining a bawdy ale-house, were enforced through the authority of the sheriff.

This mode of risk regulation made sense given that it emerged in an "unpoliced and unregulated society, in which local government was rudimentary or non-existent."[46] At this stage in its evolution, it is probably a mistake to imagine that public nuisance took a form we would recognize as litigation. Direct enforcement of community norms by the local sheriff was the best available mechanism for managing the perceived risks.

The evolution of public nuisance in England over the ensuing years is complex. The best account is provided by John Spencer.[47] As is characteristic of English government more generally, we see a gradual movement over time toward greater control by central institutions.

We have little in the way of direct documentary evidence about what went on in the sheriffs' leets, or for that matter in the local justice of the peace courts that eventually replaced them. By contrast, the common law courts soon attracted aspiring law students who kept notes about decisions, collected in Year Books. The earliest appearance of public nuisance in the Year Books was as a *defense* to an action based on what became private nuisance. The common law courts initially decided that public and private nuisance were mutually exclusive. Hence, "[i]f what the defendant had done affected the plaintiff only, this was a matter for the courts of the common law, but if it affected the whole community it was exclusively a matter for the local criminal courts, and the common law courts had no jurisdiction over it."[48]

The common law courts gained a toehold over public nuisance actions when they decided, following a dictum by Fitzherbert in a decision in 1535,[49] that a plaintiff who alleged "special injury" from a public nuisance could have that claim adjudicated in a common law court. This allowed plaintiffs who alleged actual damages different in kind from the general public to have their case against the defendant heard in a common law court. Although this was not the best reading of the Fitzherbert dictum, the special injury exception was eventually interpreted to mean that the cause of action asserted by the plaintiff in such a case was a species of public nuisance liability, as

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45 William McRae Jr., *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27 (1948).

46 Neyers, *supra* note 6, at 6 (citation omitted).

47 *See generally* Spencer, *supra* note 7.

48 *Id.* at 59.

49 Anon., Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535). The date is sometimes given as 1536. The yearbook entry bears the date "XXVII Henry VIII," which could be anywhere from April 1535 to April 1536. However, these yearbooks were only published through 1535 and the compilation lists the relevant date as 1535. The 1536 date likely comes from an error by Holdsworth, which Prosser repeated. Denise Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury* Rule, 28 Ecology Law Quarterly 755, 796 n.157 (2001).

opposed to an action for negligence or private nuisance or some other established tort.[50]

Starting about the same time, the central government – the Attorney General as the principal legal officer of the realm and the royal courts – asserted control over the action for public nuisance. First the Star Chamber and later the Kings Bench began to hear prosecutions for crimes that the court itself created. These actions were brought by the Attorney General or in the name of the Attorney General. The offenses came to include a variety of things like blasphemy (originally the province of the ecclesiastical courts) and public bathing in the nude.[51] The actions were generally collected by treatise writers under the heading "public mischief," but some writers also described the miscellany of offenses as "public nuisances," thus contributing to the impression that at least the Kings Bench had original jurisdiction over the offenses against common morality that had formerly been prosecuted locally as public nuisances.

Also contributing to the centralizing trend was the struggle between the Stuart Kings and Parliament. James II in particular insisted that he had a dispensing power which would absolve any subject in advance from the duty to comply with an Act of Parliament. Parliament countered that this was subject to a limitation: The King could not use the dispensing power to license the commission of a crime that was *malum in se* or a public nuisance. Thus, Parliament took to inserting clauses into statutes insisting that the forbidden behavior was a public nuisance – in order to insulate it from any assertion of the royal dispensing power.[52] This gave rise, in a backhanded way, to the practice of using legislation to characterize particular activities or conditions as a public nuisance, which eliminated the purely customary foundation of the doctrine.

The next turn of the screw occurred in the late Eighteenth and early Nineteenth Centuries, when the Attorney General or individuals suing as relators in the name of the name of the Attorney General were allowed to seek injunctions in Chancery against a public nuisance. This effectively transformed what had previously been regarded as a local criminal prosecution into a civil action seeking injunctive relief in one of the royal courts (without regard to whether the moving party could show "special injury"). With this development, "the usual method of repressing [public nuisances] ceased to be a public prosecution in the criminal courts and became an injunction issued in the civil courts."[53] In short, the litigation model of public nuisance was complete, characterized by a moving party (the Attorney general or a relator), a defendant, and decision by a judge.

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50 *See* Merrill, *Public Nuisance*, *supra* note 19, at 13–16 (arguing that what Fitzherbert meant was that the possibility of a criminal action in the leet for public nuisance should not preempt a conventional common law action for trespass on the case arising out of the same condition).

51 Spencer, *supra* note 7, at 61.

52 Spencer *supra* note 7, at 63–64.

53 Spencer, *supra* note 7*,* at 66.

Although the English history up to the Nineteenth Century reveals the gradual emergence of the litigation model, it bears emphasis that the relevant actors had no special calling in risk regulation. The list of things that could constitute a public nuisance remained grounded in longstanding customary law, augmented by additional activities identified by Parliament (and possibly by the Kings Bench) as being a public nuisance. The persons entitled to initiate public nuisance suits were no longer limited to local sheriffs or justices of the peace, but had been extended to relators suing in the name of the Attorney General, although these retained at least in form the idea that prosecution of a public nuisance was a governmental function. And the final decision maker in determining whether an activity or condition constituted a public nuisance, and in fixing the appropriate remedy, were generalist judges.

In short, if we view public nuisance as a form of risk regulation, the English litigation model, as it had evolved to the middle of the Nineteen Century, was an amateurish endeavor. But if we recall that the relevant risks were local and easily understood, and that government at both the national and local level was a very skeletal operation, this is hardly surprising. The nature of the risks and the available institutional capacity to address them came together in a way that, if not very sophisticated by modern standards, at least made a certain amount of sense.

B. *The American Version*

The English version of public nuisance "was adopted without significant change in colonial America and subsequently in the new republic during its early years."[54] In broad outline, this meant that the core cases of public nuisance were the obstruction of public roads and navigable waters, actions were brought by public prosecutors seeking correction of these conditions, the available relief was either a monetary fine or an order directing the defendant to abate the offending condition, and the final word on both liability and the form of the relief was delivered by judges. Civil actions seeking damages were permitted only in the case of individuals who could prove special injury from the public nuisance.

The American legal community in the early years of the Republic probably understood the set of ills encompassed by public nuisance to be those set forth in Blackstone's widely-read account. He listed a hodge-podge of activities or conditions:

(1) Obstructing a public way;

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[54] Gifford, *supra* note 11, at 800.

(2) Engaging in conduct that constitutes a private nuisance to multiple persons;

(3) Operating a disorderly establishment, such as a brothel or gambling house;

(4) Running a lottery;

(5) Storing large quantities of explosives, as well as making, selling or setting-off fireworks;

(6) Eavesdropping and publicly quarrelsome behavior.[55]

Blackstone's formidable powers of synthesis were sorely tested in conjuring up a general description of this catalogue of ills, which he characterized as "the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."[56]

It is likely American prosecutors and courts initially assumed that public nuisance could be prosecuted without any legislative authority. If so, this changed over time along with the general repudiation of common law crimes. The U.S. Supreme Court rejected common law crimes in 1812 as a matter of federal law, reasoning that the notion was incompatible with separation of powers and the limited authority of the federal government.[57] The states slowly came to a similar conclusion as a matter of state law, reinforced by concerns about the lack of notice and retroactivity associated with judicially-created criminal law.[58] Public nuisance, understood to be a species of criminal liability, therefore required a statutory basis in the United States.

Eventually, nearly all states obliged by enacting statutes expressly authorizing public nuisance actions. The statutes are generally of two types. One type provides a generic definition of a public nuisance, as something which (in one formulation) "tends to annoy the community, injure the health of the citizens in general, or corrupt the public morals" or (in another) "which injures or endangers the public health, safety or welfare."[59] A second type followed the example set by Parliament in enumerating specific types of activities or conditions as being a public nuisance. Some of the enumerated public nuisances were the traditional ones: obstructing public roadways and navigable waters, or emitting noxious substances, hazardous waste, or other

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55 4 WILLIAM BLACKSTONE COMMENTARIES ON THE LAW OF ENGLAND *166–69 (1769). Note that aggregation of harms to multiple persons (large scale private nuisances) is only one of six categories mentioned by Blackstone.

56 *Id.* at *166.

57 United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).

58 John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 194 n.13 (1985).

59 The first definition is found in Georgia and Florida, see Georgia Comp. Acts § 41-1-6; Fla. Stat. § 823.01; the second in Kansas, see Kan. Stat. Ann. §231-6204.

pollutants that affect the community. More numerous were efforts to codify common morality, such as banning as public nuisances efforts to use, manufacture, or distribute a controlled substance, or to use property for prostitution, pornographic film screenings, and other lewd sexual activities, or to use property for illicit gambling.[60]

This pattern of enactments suggests mixed legislative objectives. The general provisions conferring authority on prosecutors to bring low-level criminal actions against those who threaten "the public health, safety or welfare" could be seen as a codification of the customary law of public nuisance. The assumption behind these acts may have been that prosecutors would continue to bring actions to force responsible actors to remove obstructions to highways and navigable waterways, halt pollution of streams that serve as a source of potable water, and shut down brothels and gambling dens. Alternatively, these provisions could be read as a kind of open-ended delegation of authority to prosecutors and courts to address new sources of risk that might arise in the future. The legislators may have anticipated that new technologies (like steam engines) or new moral imperatives (like the prohibition movement) would arise, and that it was desirable to have a flexible source of government authority to respond to these developments if future legislatures were slow to react.

The enactments that list specific activities or conditions as public nuisances suggest that these statutes also performed a signaling function. If the legislature concluded that specific activity posed a threat to the health, safety or welfare of communities, it could pass a statute declaring the activity in question a public nuisance. This would signal to prosecutors and courts that the legislature expected the activity or condition in question to be prohibited. For example, when the New York legislature was informed that black currents can carry a rust that damages white pine trees, it responded by enacting a measure declaring cultivating or growing black currents to be a public nuisance.[61] Attaching the label "public nuisance" to such an activity, which would ordinarily be regarded as harmless, informed prosecutors that they should take action to charge it criminally, and that courts should respond by imposing fines or issuing orders requiring that the offending activity be abated.

Legislation authorizing regulation of particular risks in the name of public nuisance had an additional advantage: given the antiquity of public nuisance, it served to buttress this form of regulation against constitutional attack. Thus, in *Mugler v. Kansas*,[62] the Court rejected a constitutional challenge to a state statute directing local sheriffs to seize and destroy stocks of intoxicating liquors on the ground that the act could be construed as a

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60 *See, e.g.*, Wis. Stat. § 823.09; Wis. Stat. § 823.113; Wis. Stat. § 823.20; O.C.G.A. § 41-3-1; 50 Okl. Stat. § 21; Conn. Gen. Stat. § 19a-343; Colo. Rev. Stat. §16-13-303; Mo. Rev. Stat. § 195.130; *Id.* § 573.537; Fla. Stat. § 823.05; *id.* § 823.10; *id.* § 823.13.

61 N.Y. Envtl Conserv. Law § 9-1301 (1).

62 123 U.S. 623, 670–74 (1887).

public nuisance measure. And in *Pennsylvania Coal Co. v. Mahon*,[63] Justices Holmes and Brandeis debated whether a Pennsylvania anti-subsidence statute could properly be characterized as a public nuisance regulation. The shared assumption was that if it was, the statute would not require the payment of compensation as a taking.

In terms of procedures, all states authorized public nuisance actions to be brought by public prosecutors seeking criminal penalties, usually modest fines or limited terms of incarceration that would classify the offense as a misdemeanor.[64] Some conferred this authority on local prosecutors, others on the state attorney general, still others on both. Criminal public nuisance statutes often empowered local officials to abate the nuisance at the expense of the defendant after a certain period of time had passed.[65] This made the public nuisance action something like a forfeiture proceeding. With respect to injunction proceedings, the surviving statutes are mixed. Some limit injunction actions to state officers, others permit such actions to be brought by private parties who have suffered special injury, and a few permit such actions to be brought by "any resident."[66] When an injunction action is brought by a private party, some states permit the attorney general to take over the action, as under qui tam statutes.[67]

Notwithstanding the special injury exception and the occasional state statutes authorizing private parties to institute injunction actions, the dominant mode of initiating a public nuisance action has long remained an action by public legal officers. One survey of published opinions from 1890 to 1929 reports that roughly nine public nuisance actions were initiated by public officers for every one brought by a private party.[68]

The American experience with public nuisance differs in certain respects from the English model, primarily in the requirement of a statutory foundation for criminal prosecutions. But the basic institutional setup remains the same. In both systems, the substantive law is based on a foundation of customary law, supplemented by statutory add-ons. In both systems, a public nuisance action is initiated by a public officer or someone authorized to sue in the name of a public officer, with the exception of private actions based on an allegation of special injury. In both systems, the remedy

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63 260 U.S. 393, 413 (1922) (Holmes, J.); *id.*at 421–22 (Brandeis, J., dissenting).

64 *E.g.*, Conn. Gen. Stat. § 19a-335-40; Miss. Code § 45-8-111; Ga. Code § 41-1-6; Cal. Pen. Code § 373a; Kan. Stat. § 21-6204; Utah Code § 76-10-801; Utah Code § 76-10-802-07; Ariz. Rev. Stat. § 13-2917; Minn. Stat. § 609.74-75; Fla. Stat. § 823.01; Ill. Com. Stat. 720 ILCS 5/47-25; Tex. Health & Safety Code § 343.012. In a few states, a person who violates public nuisance law may be guilty of a felony. Mo. Rev. Stat. § 579.105; Mo. Rev. Stat § 195.130; Fla. Stat. § 823.04; Fla. Stat. § 823.10. The possibility of a felony conviction is typically reserved for public nuisances involving controlled substances. Mo. Rev. Stat. § 195.130; id. § 579.105; Fla. Stat. § 823.10.

65 Ill. Comp. Stat. 720 ILCS 5/47-25; Conn. Gen. Stat. § 19a-335; § 19a-338-340; Tex. Health & Safety Code § 343.012; Colo. Rev. Stat. § 16-13-303. Mo. Rev. Stat. § 195.130.

66 Miss. Code 45-8-112.

67 Ga. Code § 41-3-3.

68 Gifford, *supra* note 11, at 805.

is either a modest criminal fine, an abatement order, or a civil injunction, again with the exception of the special injury suit which typically seeks damages. And in both, the determination that a particular activity is a public nuisance, and if so what remedy is appropriate, is given to courts of general jurisdiction.

Did the litigation model make sense as a form of risk regulation? Arguably it did, if we consider the nature of state governments up through the Nineteenth and into the early Twentieth Centuries. Those governments closely conformed to the tripartite model reflected in the U S. Constitution: legislature, executive, and judiciary. Legislatures typically met every-other year for a few months; members often served for only a single term.[69] There was no professional staff to speak of, and bills were commonly drafted and pressed on legislators by lobbyists. The executive was headed by a governor and a few other elected officers, such as an attorney general. But again, these officials had little in the way of a professional staff to assist them. The prosecution of state crimes was generally handled by attorneys elected locally at the county level. The judiciary was also often elected, sometimes in multi-county districts, and served with minimal support staff.

Such a bare-bones government, operating without any permanent staff, could regulate only those risks that could be identified with a high degree of consensus. And the mechanism of regulation had to conform the litigation model, drawing upon the legislature to identify particular risks to target for regulation, using the attorney general or local prosecuting attorneys to investigate potential sources of harm and to institute proceedings, and relying on the courts to render judgments that would be backed by the power of the state. But the litigation model would seem to be woefully inadequate to engage in meaningful regulation of the far-more-complicated risks that would emerge in the Twentieth and into the Twenty-first Centuries.

III. THE ADMINISTRATIVE MODEL

Although public nuisance was an acceptable form of risk regulation up through the middle of the Nineteenth Century – given the nature of risks thought to be amenable to regulation and the limited governmental institutions available to regulate those risks – population growth, urbanization, and a host of new technologies soon revealed its inadequacies. An alternative mode of risk regulation slowly emerged. This can be called the administrative model, the regulatory state, or simply the bureaucracy if one prefers. Over the course of roughly one hundred years, from the 1880s to the 1980s, the administrative model expanded to become the dominant form of risk regulation in both the U.K. and America.

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69 *See, e.g.*, JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 23–36 (2021) (describing the Illinois legislature as it functioned in the late 1860s).

The key innovation here was the creation of a new type of institution with a permanent staff that was delegated broad legal authority to investigate and regulate particular classes of risks – the administrative agency. The various agencies were created and their powers defined by the legislature. The heads of the agencies typically rotated with changes in the dominant political coalition, but much of the staff consisted of professionals protected by civil service laws who could claim a significant degree of expertise, either by specialized training or longstanding experience. Some type of public input was usually allowed before the agencies embarked on significant regulatory initiatives. And the legislature nearly always provided for judicial review of final agency action, typically under some kind of reasonableness standard.

The process by which public nuisance came to be replaced by administrative regimes in England is well described by Spencer:

> At one time the crime of public nuisance did valiant service in the cause of public health and safety. In the days before there was much legislation on public health matters, public nuisance was the only offence for which it was possible to prosecute those who stank out the neighborhood with fumes from glass-works, tanneries and smelters, or who kept pigs in the streets, or kept explosives in dangerous places, or spread infectious diseases, or sold unwholesome food and drink, or left corpses of the relatives unburied, or made the public highway dangerous or impassable, or created any other danger to public safety and health. Over the last hundred years, however, virtually the entire area traditionally the province of public nuisance prosecutions has been comprehensively covered by statute.[70]

Spencer proceeds to list the statutes that now regulate each of the foregoing risks.[71] What he does not note is that the statutes which now regulate the dangers to public health and welfare operate by delegating authority to permanent administrative bodies to investigate potential risks and bring enforcement actions.

In the U.S., the first foray of the federal government into risk regulation occurred in the middle of the Nineteenth Century, with federal legislation establishing a Board of Inspectors to test and inspect steamboat boilers, which had the habit of exploding, often with catastrophic results.[72] Exploding boilers were a new risk created by a new technology. No one suggested that public nuisance provided an adequate model for addressing the problem. Instead, a new entity, which in its structure and powers anticipated the regulatory agencies of the Twentieth Century, was perceived to be the superior solution.

Although much of the federal regulation that followed was concerned with economic relationships, most prominently between railroads and shippers, it was not long before Congress intervened in an area long thought to lie at the core of public nuisance. The Rivers and Harbors Act of 1890

70 Spencer, *supra* note 7, at 76.

71 *Id.*

72 JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 187–208 (2012).

provided that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."[73] The Act further delegated authority to the U.S. Army, acting through its Corps of Engineers, to take legal action against, and if necessary remove, such obstructions to navigable waters. Since the waters over which the United States had jurisdiction were broadly defined (and would become even broader over time), the Act effectively eliminated one important strand of public nuisance regulation and put in its place an administrative unit organized as part of the U.S. Army.

Eventually the administrative model spread to cover other risks previously regulated by public nuisance. The Food and Drug Act[74] and the Meat Inspection Act of 1906[75] were enacted to regulate adulterated or mislabeled food and drug products, another area that had been episodically invoked in the name of public nuisance. As progressively amended over time, the legislation established a significant regulatory agency – the Food and Drug Administration – with extensive powers to prevent a variety of threats to public health from consumable products.

Other risks that had been occasionally addressed by public nuisance, such as air and water pollution, came under comprehensive regulation by the Environmental Protection Agency with the enactment of the Clean Air Act and Clean Water Act in the early 1970s.[76] Pursuant to a slew of major environmental statutes enacted in the decade that followed, the EPA was also given extensive authority over toxic wastes and hazardous waste sites.

Not all administrative regulation is federal of course. Obstruction of highways is today generally handled by state departments of transportation, although the Federal Highway Administration provides input in the form of conditions attached to its significant grants of federal funding for highways. Obstruction of city streets is generally addressed by departments of streets and sanitation, or similar entities. As a result of the creation of these municipal entities, public nuisance enters the picture, if at all, in the form of suits seeking special damages for such obstructions. For example, in *532 Madison Gourmet Foods v. Finlandia Center, Inc*.[77] the New York Court of Appeals considered legal liability for two separate incidents in which collapsed buildings in Manhattan blocked important city streets. The obstructions were removed by contractors hired by city officials. The plaintiffs sought to recover damages because city officials directed the closure of the streets in front of their businesses. The court unanimously rejected the claims of special injury, finding that businesses suffering economic losses were too numerous to make their injury "special."

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73 26 Stat. 426, 454 (1890).

74 34 Stat. 768 (1906).

75 34 Stat. 674-79 (1906).

76 42 U.S.C. §§ 7401–7671q.; 33 U.S.C. §§ 1251-1387.

77 96 N.Y. 2d 280, 750 N.E.2d 1097 (2001).

The primary area of public nuisance which has not been comprehensively supplanted by the modern administrative model concerns activity historically seen as corrupting public morals. The main reason for this, of course, is that the social consensus supporting strict regulation of these activities no longer exists. Even so, as lotteries and gaming have become socially acceptable activities, with many states adopting state-run lotteries and legalizing casinos and sports betting, the regulation of these activities has been committed to the administrative model, in the form of state gaming commissions. And as one state after another moves to legalize recreational marijuana, again we find that the liberalizing states are adopting administrative bodies to license and regulate producers and distributors. The only category on Blackstone's list that has not been given over to the administrative model is eavesdropping and publicly quarrelsome behavior.[78] But one will search in vain for any recent reported decision charging someone who engages in such behavior as having committed a public nuisance.

IV. THE FUTURE OF PUBLIC NUISANCE

Going forward, risk regulation will surely follow some version of the administrative model, not the public nuisance doctrine. For example, although there was significant controversy about emergency orders issued during the Covid pandemic by the Centers for Disease Control and state governors,[79] no one suggested that a better approach would be to rely on lawsuits filed under the public nuisance doctrine. The question then becomes: Does it make sense to keep public nuisance law around, perhaps as a gap-filler in the event that existing statutory and regulatory authority cannot address certain unanticipated forms of public risk as they emerge?

A. *The Current Function of Public Nuisance*

In general, I am skeptical of claims that public nuisance can serve a useful role as a fallback in the event of an emergency not covered by one or more administrative schemes. The current approach, in the event of a crisis, is for the executive to take unilateral action, invoking one or more statutes as a justification.[80] This is what happened after 9/11, during the financial crisis of 2008, and in the Covid epidemic. These forms of emergency response

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78 *See* BLACKSTONE *supra* note 55, at *166–69.

79 Avi Weiss, Note, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 COLUM. L. REV. 1853, 1855 (2021).

80 *See generally* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010) (arguing that the inevitable response to emergencies in the modern world is discretionary executive action).

raise legitimate questions about whether the executive has exceeded the scope of its delegated authority.[81] But the proper response to these concerns is to enact better legislation conferring emergency authority on the executive, perhaps with some kind of fast-track procedure allowing elected legislative bodies to weigh in to ratify or modify the executive response.[82] In any event, public nuisance litigation would be far too slow and uncertain in result to serve as a gap-filler in a true emergency.

Historically, there have been situations where public nuisance has been invoked out of necessity, because there was no other body of law to apply. Transboundary pollution cases are the principal example.[83] But here too, the modern trend is to draw upon federal statutes to resolve such disputes, rather than to rely on general principles of public nuisance. Global environmental problems, like climate change, requires the widespread embrace throughout the world of technological innovations if any effective solution is to be reached.

Nor it is necessary to retain public nuisance in order to provide a vehicle for aggregate litigation. Public nuisance arguably performed this function before the emergence of class actions. Today, class actions can provide a vehicle for large numbers of similarly-situated persons to obtain injunctive relief against existing harms or well-documented risks of future harm. They have often proven to be unworkable as a method of securing damages for large numbers of persons who have suffered similar injuries, given the need for individualized determinations of damages. But if class actions are unworkable as a form of aggregate litigation to recover damages, there is no reason to think that public nuisance would be any more workable. The better way to provide compensation for widespread injuries is to create an administrative compensation scheme, as happened after 9/11.[84]

The most frequently cited justification for the continued deployment of public nuisance is that it can serve as a "catalyst" to stimulate new legislation and administrative regulation. This is the only plausible justification for the one remaining use of public nuisance in contemporary America: as an arrow in the quiver of claims asserted by state and local governments seeking to recover monetary awards from corporate defendants allegedly responsible for various social ills. But here too I think the argument fails.

The most fundamental flaw in the "catalyst" argument is that it rests on a hubristic claim by proponents that they know the future course of political evolution, and therefore litigation is justified as a means of accelerating the

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81 *See* Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S.Ct. 2485 (2021) (enjoining nationwide eviction moratorium as exceeding the statutory authority of the Department of HHS).

82 *See* Weiss, *supra* note 79, at 1889.

83 *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L. J. 931, 937 (1997).

84 Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 108-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101); *see* Virgilio v. City of New York, 407 F.3d 105, 112-113 (2d Cir. 2005) (upholding the administrative process as exclusive).

day when the future arrives. It is understandable that advocacy groups and ambitious attorneys general would advance such arguments in support of their litigating activities. But it is problematic for courts to accept a legal claim – or to perpetuate litigation – on any basis other than what they believe to be the best understanding of the law as it currently stands. To adopt a ruling in the belief that it will serve as a "catalyst" for what the judge thinks is the desirable course of future political change is to stop functioning as a judge and take on what is essentially a political conception of the judicial role.

As an empirical matter, there is reason to doubt that public nuisance litigation will consistently stimulate political change in the direction that its proponents seek, at least as part of a deliberate strategy. The public nuisance suits against the gun industry misfired, as the industry went to Congress and got a statute enacted preempting these efforts.[85] In effect, the litigation served as a catalyst – for a backlash. Public nuisance has also been advocated as a way to spur political action against climate change. The prominent idea here is that judicial regulation of greenhouse gases is such an obviously bad idea that it will induce industry to support administrative regulation as the lesser evil. But so far, the courts have been unwilling to play the role of stalking horse. The Supreme Court in *American Electric Power* held that what it called the "federal common law of public nuisance" had been displaced by the Clean Air Act.[86] The Second Circuit recently reached the same conclusion with respect to state public nuisance.[87]

Nora Engstrom and Robert Radin argue that the tobacco and opioid litigation campaigns have served as a catalyst for needed change.[88] The mechanism, they argue, is the discovery of damaging facts during the litigation (widely publicized by the plaintiffs), which delegitimizes the respective industries in the eyes of the public and creates a climate more favorable to administrative regulation.[89] There is clearly something to this account, at least in the context of the tobacco and opioid litigation, although of course one cannot always expect civil discovery to yield up facts that will sway public opinion.

Moreover, even though the tobacco and opioid litigation helped uncover facts that reinforced public hostility toward the respective industries, the causal connection between the litigation and enhanced administrative regulation is not entirely clear. Congress failed to enact legislation giving FDA jurisdiction to regulate tobacco when settlement of the tobacco litigation was first reached in 1998 and did so only in 2009, more than ten years after a scaled-down settlement that did not provide for FDA authority

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85 Protection of Lawful Commerce in Arms Act, 119 Stat. 2095 (2005), 15 U.S.C. §7901-03.

86 Connecticut v. American Electric Power Co., 131 S.Ct. 2527 (2011).

87 City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (dismissing as preempted a public nuisance suit based on state law).

88 Engstrom & Rabin, *supra* note 32.

89 *Id.*

was concluded.[90] The litigation against the opioid manufacturers has coincided with more vigorous enforcement of preexisting authority by federal agencies and the enactment new legislation by Congress.[91] But whether the litigation was the catalyst for this action is debatable. Arguably rising public dismay about the depth and breadth of opioid crisis has been the driving force behind both the litigation and the invigorated administrative regulation.

Whether or not it is a catalyst for administrative regulation, it seems clear that the model pioneered by Mississippi Attorney General Michael Moore in the tobacco litigation is destined to be with us for the foreseeable future. The model is powered by joint ventures between state attorneys general and members of the personal injury bar, both driven by the prospect of large financial recoveries. The attorneys general hope to achieve huge settlements to supplement their budgets, and the personal injury lawyers to reap large contingency fee awards. Some of these actors may also hope that their efforts will serve as a catalyst for regulatory change. But the dominant motivation is a type of rent-seeking, which explains the ahistorical claim that public nuisance law authorizes large compensatory damages awards. It is also important to note that public nuisance is not the only count charged in these litigation campaigns, and its prominence varies from one context to another. The litigation that has achieved the greatest success so far – the tobacco and opioid litigation campaigns – has emphasized fraud, RICO, and consumer protection counts as much or more than public nuisance. Hence, it is not unlikely that the Michael Moore-inspired litigation strategy will roll on, even if public nuisance eventually fades into oblivion.

B. *The Path Forward*

John Spencer has argued that public nuisance should be abolished, on the ground that the functions it performed historically have been taken over by what I have called the administrative model.[92] Moreover, the standard formulations of the doctrine are so vague that they present an unacceptable lack of fair notice to potential defendants.[93] One can add, in the U.S. context, that some of the state statutes authorizing public nuisance actions may flunk the nondelegation doctrine, which is often applied more rigorously under state constitutional law than it has been as a matter of federal constitutional law.[94] And at the federal level, there is no statute authorizing public nuisance

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90 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776-1852 (2009) (codified as amended in scattered sections of 21 U.S.C.).

91 Engstrom & Rabin, supra note 32, at 351.

92 Spencer, *supra* note 7, at 76–83.

93 *Id.*

94 *But see* Gundy v. United States, 139 S.Ct. 2116, 2148 (2019) (Gorsuch, J. dissenting) (advocating adoption of a more restrictive federal nondelegation doctrine).

actions at all, making any attempt to assert a federal public nuisance claim *ultra vires*.

In principle, Spencer is right: public nuisance has outlived its day and should be laid to rest. Abolition is conceivable in the U.K., with its centralized legislature and the use of Law Revision Commissions to propose eliminating legal doctrines that no longer serve any good purpose. However, outright abolition is probably unrealistic in the U.S., given that public nuisance is subject to the authority of fifty states, whose legislatures generally show little interest in cleansing the books of obsolete statutes.[95] There is also the nontrivial problem that the *Restatement (Second) of Torts* perpetrated the notion that public nuisance is a tort, which implicitly means it is subject to implementation by courts as a matter of common law, whether or not the legislature has authorized such a nebulous action. The *Restatement* thus managed to revive the conception of the judicial role asserted by the Star Chamber, now couched as a power to create judge-made rules of civil rather than criminal liability.

Richard Epstein, writing in this symposium, argues that the solution is to restore public nuisance to its common lineage with private nuisance. But as previously explained, there is little overlap between the doctrines, other than the common use of the word "nuisance." Public nuisance has been described as "the great grab bag, the dust bin, of the law."[96] This is due to its role as a public action designed to address a miscellany of threats to collective welfare, some identified by custom, others by specific legislative direction. Private nuisance has long been understood to be an interference with the use and enjoyment of particular land. Moreover, the strategy would constrain public nuisance only if the standard of care associated with private nuisance is sufficiently constraining. Yet the law of private nuisance, at least as formulated in the First and Second *Restatement of Torts*, would have courts identify a private nuisance based on a judicial balancing of the gravity of the harm as against the utility of the activity giving rise to offense.[97] This is hardly a formula for reigning in the excesses of public nuisance law. Epstein has advocated the restoration of a more articulated version of private nuisance grounded in English common law.[98] But unless that vision gains general acceptance, the current understanding of private nuisance law would provide little constraint on the limits of public nuisance.

Another proposal would have courts limit public nuisance to its original paradigmatic applications involving the blocking of public highways and waterways and reasonable extensions thereof.[99] The idea is that public nuisance should be defined as a denial of access to public facilities that are

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95 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

96 Awad v. McColgan, 98 N.W. 2d 571, 573 (Mich. 1959).

97 RESTATEMENT (SECOND) OF TORTS §826.

98 Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

99 Neyers, *supra* note 6, at 6.

necessary for individuals to interact with each other as participating members of society. Public nuisance, in effect, would converge with a common understanding of the public trust doctrine.[100] The public trust doctrine prevents *legislatures* from denying public access to facilities necessary for the free circulation of goods and persons; public nuisance, on this view, would bar *private action* that has the effect of denying public access to such facilities. This proposal has a certain normative appeal. But it ignores the prominent role that public nuisance has always played, from its very beginning, in enforcing conventional morality. As we have seen, public nuisance as never been limited to preserving access to common modes of public transport. From the very first, it was also directed at "bawdy houses" and "disorderly ale-houses."[101] There is also the oddity that preserving public access to public highways and navigable waterways is today given over to administrative processes, with little evidence that the litigation model plays a significant role in either context.

In previous writing, I have advocated that public nuisance liability should be interpreted in a "non-dynamic" fashion.[102] Assuming that public nuisance statutes remain on the books in every state, they should be interpreted either as referring to the sorts of activity understood to be a public nuisance at the time they were enacted, or they should be limited to the specific conduct they reference as being a public nuisance. These laws should not be read "dynamically" as extending to new forms of conduct alleged to pose a risk to the general public since administrative action or, in a pinch, emergency executive action, is today the generally accepted mode of dealing with such problems. This proposal, like all the others except Spencer's argument for legislative abolition, suffers from the flaw that it would only work if generally accepted by judges as a form of collective self-restraint.[103] There is some hope that judges, acting in fifty different jurisdictions, will exercise self-restraint when called upon to enforce settled law, since this is the very foundation of their authority. There is less hope of self-restraint if judges are told by self-interested actors that the law gives them unfettered discretion, and that they have an opportunity to use this discretion to strike a blow for the public good.

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100 *See* Illinois Central R. Co. v. Illinois, 146 U.S. 387 (1892) (describing the public trust as protecting the right of the public to navigation, commerce, and fishing on navigable waters).

101 Spencer, *supra* note 7, at 60.

102 Merrill, *Public Nuisance*, supra note 19, at 50–53.

103 As Adrian Vermeule has pointed out, it is well-nigh impossible to assume that thousands of judges exercising independent judgment will agree on any given proposal to reform the law. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

CONCLUSION

Although public nuisance is characterized as protecting rights common to the public, it can also be regarded, in functional terms, as a strategy for protecting against the risk of future harm – something the common law courts could not provide through ordinary actions of breach of contract and tort. Public nuisance made sense at a time when the relevant risks were local and largely defined by custom, and government was a skeletal affair. With the emergence of an alternative mode of risk regulation in the form of the administrative model, the role of public nuisance as a type of risk regulation became obsolete. Today, no one would think of responding to a new type of risk by urging the legislature to label the risk a public nuisance and entrust prosecutors and judges to use litigation to eliminate the risk.

The primary remaining function of public nuisance is as a prop in litigation campaigns launched by public officials to shift large amounts of monies from corporate defendants to state treasuries and plaintiff's law firms. The only plausible public-interest justification for dusting off public nuisance for this task is that the litigation may serve as a catalyst for better administrative regulation. But it is inappropriate for a judge to invoke a legal doctrine in order to stimulate political reform the judge regards as desirable. Public nuisance should be limited to existing statutes authorizing such actions, interpreted in a non-dynamic fashion to be limited to their assumed applications at the time they were adopted.

PUBLIC NUISANCE AND A THEORY OF STATE ACTION

Shelley Ross Saxer[*]

INTRODUCTION

Historically, public nuisance law provided government officials with the authority to enjoin or abate unreasonable conduct that interfered with the public's health, safety, and welfare. While a public entity may not obtain monetary damages for the harmful conduct, a private plaintiff who can show that her injury from the public nuisance is different in kind from other members of the public may obtain damages. As a means of holding people accountable for offenses against the community, public nuisance law has expanded over time to address issues like environmental harms, the spread of infectious diseases, protests, gang activity, gun control, opioid abuse, global warming, and other "catch-all" categories.[1]

One doctrine that potentially affects the use of public nuisance law to address community harms is the state action doctrine. The doctrine enhances federalism and individual autonomy by protecting individual liberties against the abuse of government power, but allows private interference with constitutional rights.[2] In the *Civil Rights Cases*, the Supreme Court held that state laws could not discriminate based on race, but private entities could.[3] The first and second sections of the Civil Rights Act of 1875 were unconstitutional because they prohibited racial discrimination by private entities and under the Fourteenth Amendment "[i]t is State action of a particular character that is prohibited." Private invasion of individual rights is not the subject matter of the amendment.[4]

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[1] Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 818 (2010).

[2] *See* Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L. J. 171, 205 (2004) (noting that "[t]he second and third reasons courts have commonly given to justify the distinction between public and private—separation of powers and federalism—are institutional mechanisms for advancing the democratic ideal of limiting the reach of the judiciary so as to reserve space for political activity").

[3] The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[4] *Id.*

In accordance with the state action doctrine, courts have generally not allowed individuals to claim protection against private action that violates their constitutionally protected individual liberties. Common law claims brought under tort, contract, or property law are not generally subject to constitutional restriction unless the private action is attributed to the state under a recognized exception such as the entanglement or public function exceptions.[5] In some circumstances, the Court has applied an expansive interpretation of state action by holding that a court's own determination in private suits is adequate to find a state action. For example, the Court in *Shelley v. Kraemer*[6] held that the lower court's action of enforcing a racially restrictive private covenant constituted state action subject to constitutional scrutiny.

One purpose of this article is to reconcile why the Court has allowed speech tort defendants to use the First Amendment as a shield against private tort claims but has refused to allow defendants in contract and property lawsuits to use constitutional defenses against arbitration agreements, private covenants, trespass, and nuisance actions under the guise of the state action doctrine. This article rejects some of the confusing idiosyncrasies employed by the Court, but not the state action exceptions discussed in Part II.B., to distinguish which actions are subject to the state action doctrine. Instead, the article proposes a framework to help litigants and courts decide when to consider constitutional constraints in suits between private actors applying state law. The proposed framework does not differentiate between the court applying state common law or state legislation and, instead, views the court as a neutral arbiter in adjudicating private disputes based on state law.

Part I reviews the general contours of public nuisance from its early beginnings, when nuisance was a tool to address criminal and social harms such as storing explosives, obstructing public ways, dealing with diseased animals, and operating houses of prostitution, to some of its more current uses as a means of addressing climate change, gun violence, and opioid abuse. Part II focuses on the state action doctrine and describes its purpose, application, and its exceptions when private action is subject to constitutional limitations. This Part also proposes that a theory of state action based on its use as a sword or as a shield could bring clarity to the doctrine.[7] Obviously, I am not the first to propose a theory to address the "conceptual disaster" of

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[5] Jon L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1239–40 (2014).

[6] Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial action enforcing private racially restrictive covenant constitutes state action in violation of the Fourteenth Amendment even though such private agreements standing alone do not violate constitutional rights).

[7] Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2254 (2014) ("The state action doctrine has become complex and confusing because the courts and commentators have lost sight of the fact that in every state action case the core issue is whether the 'state rule of law'—in New York Times Co. v. Sullivan, the state rule of law defining the contours of the right to reputation—is consistent with the Constitution.").

the state action doctrine.[8] It is imperative to bring clarity to the state action doctrine as we confront issues such as restraining the speech of private media platforms[9] or deputizing private parties in Texas "to cloak its attack on constitutionally protected rights behind a nominally private cause of action."[10] Clarifying the state action doctrine will also help in confronting the spectre of judicial takings from *Stop the Beach Renourishment*.[11]

Part III explores judicial approaches to nuisance claims to determine the extent to which these state law actions have been subject to constitutional restrictions. Part IV examines how a reimagined state action framework, based on its use as a sword or as a shield, explains its use in some of the major decisions involving tort, contract, and property law, and suggests what changes will be needed in existing state action doctrine jurisprudence to normalize its application across multiple fields.

I. PUBLIC NUISANCE AND CONSTITUTIONAL LIBERTIES

A public nuisance is "an unreasonable interference with a right common to the general public," such as public health, safety, welfare, or morals.[12] A public nuisance does not necessarily involve land, unlike a private nuisance, which does require "a substantial and unreasonable interference with the use and enjoyment of the land of another."[13] Ironically, discussions about the early history of public nuisances suggest that the purpose of its original creation was to deal with interests in land.[14] The Restatement (Second) of Torts makes it clear that an activity can be treated as both a public and a private nuisance, such as "when a bawdy house that interferes with the public morals and constitutes a crime also interferes with the use and enjoyment of land next door."[15] Zoning has mostly supplanted common law nuisance as the means to control land use and regulate moral nuisances, but nuisance law

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8 *See, e.g.*, Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 968 (2017) (proposing a Core Right Theory to "provide guideposts that explain the courts' willingness to place constitutional constraints on private law in some cases but not others").

9 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).

10 Complaint at 11, United States of America v. Texas, (W.D. Tex. 2021) (No. 1:21-cv-796). Note the possibility that other states "could use a similar tactic to ban or impermissibly limit another constitutional right, like a right grounded in the Second Amendment." United States v. Texas, 2021 WL 4593319 *52 (W.D. Tex. 2021).

11 *See* Nestor M. Davidson, *Judicial Takings and State Action: Rereading* Shelley *After* Stop the Beach Renourishment, 6 DUKE J. OF CONST. L. & PUB. POL'Y 75 (2011).

12 John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 273 (2001) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979) and citing § 821B(2)(a)).

13 RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1979).

14 Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., 1, 21 (stating that "[p]ublic nuisance liability nearly always attaches to owners of land"); John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience,* 52 S.C. L. REV. 287*,* 292 (2001).

15 RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (AM. L. INST. 1979).

still "serves as a back-up" to zoning "to provide direct legal remedies to injured landowners."[16]

Throughout the early 20th century, public nuisance law expanded to cover perceived social harms not satisfactorily addressed through legislative action at the local, state, or federal level. Such an expansion was the result of

> new situations [] constantly being brought within the scope of equity's restraining powers, and generally they are called public nuisances. This formal denomination patently comes as a kind of afterthought; it is obvious that the only real problem seriously considered either by court or legislature is the efficacy and social desirability of the quick remedy. Sometimes the new situations are factually comparable to old ones, which have been called public nuisances for a long time because equity had given specific relief against them for a long time. Sometimes the new situations are factually quite different from any of the old ones, yet they may be called public nuisances nevertheless because they are handled in the courts in the same way that the older public nuisances are handled.[17]

The legislature can declare as unlawful an action that is wrongful to the public, and it has the power to call it a public nuisance.[18] "As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions are enacted by the legislature."[19] The legislature creates new statutory nuisances enabling the state to proceed against an offender, and permitting a private individual to bring an action if they have suffered a private injury from the public nuisance.[20] For example, in the 1931 landmark case of *Near v. Minnesota*, the Court held that a state statute was unconstitutional as a prior restraint under the First Amendment as applied to the states through the Fourteenth Amendment.[21] Under the guise of preventing a public nuisance, the statute allowed public officials and private citizens to seek injunctive relief against "producing, publishing or circulating . . . 'a malicious, scandalous and defamatory newspaper.'"[22] "Everything old is new again"[23] as courts, litigants, and scholars deal with public nuisance claims against lead paint manufacturers, fossil fuel companies, opioid producers, and the gun industry.[24]

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16 Nagle, *supra* note 12, at 307 (citing RICHARD A. EPSTEIN, TORTS 357 (1999)).

17 Robert A. Leflar, *Equitable Prevention of Public Wrongs*, 14 TEX. L. REV. 427, 440 (1936).

18 Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 327 (1914).

19 *Id.* (listing as examples "regulations of highway traffic, — the position of vehicles on the highway, the speed at which they may run, the conduct of railways at crossings; or building laws passed to lessen fire risks; or restrictions on the use of dangerous articles, such as the carrying of firearms by children, or the sale of poisons unlabeled, or handling explosives without specified precautions").

20 *Id.* at 326–28.

21 Near v. Minnesota, 283 U.S. 697, 723 (1931).

22 *Id.* at 702.

23 PETER ALLEN & CAROLE BARYER SAGER, *Everything Old Is New Again*, *on* CONTINENTAL AMERICAN (A&M Records 1974).

24 *See* Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489, 491 (2020) (discussing judicial and scholarly reactions to "public nuisance actions aimed at broad social problems").

A. Public Nuisance as a Crime

Traditional common law viewed public nuisances as crimes,[25] and state and local statutes have incorporated certain types of criminal conduct into legislative authority to proscribe such activities.[26] Private plaintiffs may not bring a criminal prosecution, but they may supplement government enforcement against illegal activities, if the activities also constitute a private nuisance or if the plaintiff experiences a special injury that is different from the harm to other members of the public.[27] Some have argued that recognizing private "standing" does not serve to supplement public official enforcement in order to vindicate public rights, but instead recognizes that the public nuisance action does not preempt the private plaintiff's tort cause of action for an injury to a private right.[28]

Public nuisance, unlike private nuisance, does not necessarily implicate the use of land and can instead be an unreasonable interference with public health, safety, morals, or welfare.[29] The early moral nuisance cases supported both public and private nuisance claims and controlled "houses of prostitution, saloons, and gambling parlors."[30] Is public nuisance always a crime, or is it properly understood as tort, property, or all three depending upon the targeted conduct? Professor Thomas Merrill contends, "before the publication of the Restatement (Second) of Torts, public nuisance, even when brought as a civil action, was universally understood to be based on the defendant's maintenance of a condition that was also a crime."[31] Hence, public nuisance is a public action, not a tort.[32] This conclusion finds support in five features showing that public nuisance is dissimilar to tort law and is instead, public action:

> (1) Public nuisance law protects public rights, not private rights. (2) Public nuisance liability was historically said to lie only for activity indictable as a crime. (3) Public nuisance is predominantly enforced by public officials, not private claimants. (4) Public nuisance has traditionally focused on the existence of a condition, not the defendant's

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25 Merrill, *supra* note 14, at 11 (noting that public nuisance has traditionally only been a crime and that "civil liability for public nuisance lies only for conduct that is also a crime"); *see also* John G. Culhane & Jean M. Eggen, *Defining a Proper Role for Public Nuisance Law in Municiple Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S. C. L. REV. 287, 294 (2001) (noting that modernly, claims "may be brought under general criminal nuisance statutes, by authority of statutes criminalizing what had been common-law nuisances, or as civil actions").

26 Nagle, *supra* note 12, at 307.

27 *Id.* at 307–08.

28 Merrill, *supra* note 14, at 14 (using a hypothetical where the defendant digs a trench that obstructs a highway, constituting a public nuisance, but the ditch also causes injury to a horse and rider, allowing a private suit for personal injury).

29 Nagle, *supra* note 12, at 273.

30 *Id.* at 276–77 (discussing moral nuisances based on morally objectionable activity as well as other harmful consequences).

31 Merrill, *supra* note 14, at 5.

32 *Id.* at 12.

> conduct. (5) Public nuisance liability typically does not result in an award of damages, and never did so in actions brought by public authorities.[33]

Viewing public nuisance as a crime would make it state action subject to constitutional limitations on any civil liberties implicated. It would also preclude suits brought by private individuals, even if they had a special injury, since private actors cannot prosecute crimes. In *Spur Industries, Inc. v. Del E. Webb Development Co*., the court formulated a novel remedy when it enjoined the operation of Spur's cattle feedlot as both a public and a private nuisance, but required the developer, Del Webb, to indemnify Spur for the reasonable cost of moving or shutting down.[34] A private individual, Webb, brought the public nuisance claim based on an Arizona statute declaring conditions dangerous to public health to be a public nuisance.[35] The condition relied upon in finding a public nuisance was "1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons."[36] Under this statute, "an otherwise lawful (and necessary) business may be declared a public nuisance."[37] There is no doubt that the cattle feedlot constituted a public nuisance, harming the health of the citizens of Sun City. However, this otherwise lawful operation was not a prosecutable crime.

B. Public Nuisance and Social Harms

Public nuisance claims have filled in gaps left by the "perceived failures of legislatures and regulatory agencies" to address social harm through tort litigation.[38] Professor Donald Gifford defines public interest tort litigation as having one of the following four characteristics:

> 1. Public interest tort litigation seeks to tackle large social problems instead of seeking to resolve disputes between individual parties (or involving carefully defined and circumscribed groups of plaintiffs or defendants, or both). In this manner, it is similar to any other public interest litigation, but unlike most tort litigation.
>
> 2. Public interest tort litigation is a *collective* action, most often filed on behalf of a collective plaintiff seeking to address harms sustained in the first instance by thousands or millions of individuals. Collective actions may be filed by states as *parens patriae*,

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33 Merrill, *supra* note 14, at 19.

34 Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 186 (1972).

35 *Id.* at 183–84 (citing A.R.S. § 36-601 regarding public nuisances dangerous to public health).

36 *Id.* at 184.

37 *Id.*

38 Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 204 (2010) (arguing that this public law model of tort litigation is "faux legislation" by the courts and that judges should use judicial restraint in addressing climate change claims).

> municipal governments, or class action representatives. The substantive claim—most often public nuisance—conceives of the harm as a *collective* harm.
>
> 3. Unlike earlier genres of public interest litigation, this new form of litigation purports to derive its authority not from the Constitution or federal statutes, but from judge-made or common law, most often from the most vaguely defined tort, public nuisance.
>
> 4. The objective of public interest tort litigation is either to circumvent the regulatory structures already established by the political branches or to impose new regulation where legislative efforts have stalled or otherwise failed.[39]

Public nuisance served as a gap filler to address the increasingly damaging environmental harm from industrial pollution. The explosion of federal pollution legislation in the 1970s gradually preempted tort litigation and more effectively addressed this social harm. Recent public nuisance cases addressing social harms include lawsuits brought against asbestos manufacturers, lead paint manufacturers to abate or pay the cost of abating the hazards caused by lead paint in homes and buildings, and Monsanto for contamination from products containing polychlorinated biphenyls (PCBs). Litigation against tobacco-product manufacturers, gun manufacturers to hold them liable for gun violence, opioid producers to recover response costs to the opioid crisis, and major contributors to climate change has also relied on public nuisance law.[40]

II. STATE ACTION

A. *The Purpose and Application of the State Action Doctrine*

The state action doctrine shields private actions from claims of constitutional violations on the basis that individual liberties receive protection from government actions, not those of fellow citizens. "The Constitution applies only to governmental conduct, usually referred to as 'state action.' The behavior of private citizens and corporations is not controlled by the Constitution."[41] Detractors of the doctrine have argued that it is an incoherent doctrine because of "the difficulty of defining the difference between state action and private action *and* because the distinction is not a sufficient or coherent way to determine when constitutional norms should or should not apply."[42]

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39 *62 S.C. L. Rev. 201,* at 219.

40 *See* Lin, *supra* note 24, at 495–501 (briefly surveying public interest public nuisance cases, other than those involving public harms based on climate change).

41 Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985).

42 Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action and Private Property*, 5 TEX. A&M L. REV. 439, 445–46 (2018) (arguing "that the state is *always* involved when it recognizes, promotes, or enforces a common law rule that regulates relationships").

The state action doctrine came into being shortly after the ratification of the Fourteenth Amendment in 1868. Its ignominious beginning flowed from the horrific Colfax massacre in Louisiana involving a Southern mob of over 100 armed, white supremacists who massacred 150 African Americans and lynched two African American men, Levi Nelson and Alexander Tillman, who had tried to vote in a local election.[43] The resulting 1875 Supreme Court decision in *United States v. Cruikshank*,[44] has been castigated for "ensur[ing] that the most basic constitutional rights of Black citizens would be denied well into the 20th century" and leading directly to the race riots in East St. Louis in 1917 and in Omaha, Chicago and other cities two years later; to the abhorrent crimes committed in the 1921 Tulsa race massacre; to the criminal brutality unleashed on African-Americans in Selma and Birmingham, Ala., in the 1960s; to the present-day instances of police and white nationalist violence in Ferguson, Mo., Charlottesville, Va., and now Kenosha, Wis.; to the shameful, plain-sight attempts to suppress the Black vote in the 2020 elections.[45]

The *Cruikshank* Court reviewed a federal jury's guilty verdicts against three members of a lynch mob tried for violations of federal law under Congress' act of 1870, including violating the victims' "right and privilege peaceably to assemble together."[46] Federal prosecutors charged the defendants with conspiracy, but not murder since murder was a state, not a federal, offense and Louisiana officials chose not to prosecute.[47] The defense successfully argued that the Fourteenth Amendment allows only Congress to act against state government civil rights violations and not against a citizen's violation of another's civil rights.[48] The United States Supreme Court interpreted Section 1 of the Fourteenth Amendment as limiting the scope of its constitutional protections to state action[49] and the convictions of the three white defendants were rescinded.[50]

The Court continued to apply the state action doctrine in subsequent decisions to deny a Black defendant's appeal from a conviction by an all-

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43 William Briggs & Jon Krakauer, Opinion, *The Massacre That Emboldened White Supremacists*, N.Y. TIMES (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/opinion/black-lives-civil-rights.html.

44 United States v. Cruikshank, 92 U.S. 542 (1875).

45 Briggs & Krakauer, *supra* note 43.

46 *United States v. Cruikshank: Southern Racism Makes a Comeback*, JRANK.org https://law.jrank.org/pages/24268/United-States-v-Cruikshank-Southern-Racism-Makes-Comeback.html (last visited June 9, 2022).

47 *Id.*

48 *Id.*

49 Saidel-Goley & Singer, *supra* note 42, at 448 (identifying the "key constitutional text underlying the state action doctrine" as Section 1, which stated "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

50 Briggs & Krakauer, *supra* note 43.

white jury based on equal protection[51] and to find that Congress exceeded its authority when enacting the Civil Rights Act of 1875.[52] As Professor Joseph Singer points out, the collateral damage of the doctrine to African Americans has been substantial, causing Professor Charles Black to observe, '"Separate but equal' and 'no state action' – these fraternal twins have been the Medusan caryatids upholding racial injustice."[53] It is impossible to close your eyes to the doctrine's history in protecting private discrimination against constitutional scrutiny.[54]

B. *State Action Exceptions*

Over time, the Court developed different ways to deal with the difficulties and complexities of applying the state action doctrine by developing three tests to determine whether private actors could be subject to constitutional limitations as a state actor. Some define these tests as follows:

> (1) the public function test, which asks whether the private entity performed a function traditionally and exclusively performed by government; (2) the compulsion test, which asks whether the state significantly encouraged or exercised coercive power over the private entity's actions; and (3) the joint participation test, which asks whether the role of private actors was "pervasively entwined" with public institutions and officials. [55]

This article accepts that these state action exceptions remain in force, such that the theory proposed here only operates when there is not a state actor or a private actor does not fall within one of the exceptions. Described as the "most famous entanglement case, and perhaps the most famous state action case," some have viewed *Shelley v. Kraemer*[56] as applying the joint participation test stated above.[57] "[T]he Court held that judicial enforcement of private racially restrictive covenants constituted state action in violation

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51 Virginia v. Rives, 100 U.S. 313, 322–23 (1879).

52 Civil Rights Cases, 109 U.S. 3, 25 (1883).

53 Saidel-Goley & Singer, *supra* note 42, at 450.

54 *See id.* at 452 (examining all of the ways in which "the Court's invention of the state action doctrine played a fundamental role in the maintenance of private racial discrimination, undermining the rights and liberties of millions of African Americans for almost a century between the enactment of the Civil Rights Act of 1875 and the Civil Rights Act of 1964"); *see also* John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 576–77 (2005) (noting that the state action doctrine has had "harmful effects on the politically powerless" and recognizing its past and recent history "as a primary defense for private racist acts").

55 *See* Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1943 (2019) (citing Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52–58 (1999); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–302 (2001)).

56 334 U.S. 1 (1948).

57 *See* Saidel-Goley & Singer, *supra* note 42, at 465.

of the Equal Protection Clause."[58] It is not clear that the *Shelley* decision fell within one of the recognized exceptions making private action into state action. If viewed instead as finding state action based on the judiciary's enforcement of a private claim, *Shelley* put the viability of the state action doctrine in doubt as to when private state law actions in tort, contract, and property would be subject to constitutional scrutiny.[59] In addition, it cleared the way for potentially finding a "judicial taking" when a court decides a case involving a change to common law that results in a diminution of private property values.[60]

C. *Speech Torts and State Action*

The First Amendment cases involving civil liability do not appear to fall neatly into any of the three tests, discussed above, to determine whether a private actor should be subject to constitutional limitations as a state actor. Instead, scholars have identified five approaches to resolve how to apply the First Amendment in civil liability cases:

> (1) the generally applicable law approach, where the First Amendment does not require scrutiny for civil liability imposed by laws of general applicability; (2) the consensual waiver approach, where instances in which people consent to relinquishing their right to free speech define the areas where the First Amendment does not require scrutiny; (3) the nature of the injury approach, where cases involving damages for reputational harm trigger full First Amendment protection; (4) the public concern approach, in which the First Amendment provides full protection when the information is of public concern; and (5) the First Amendment balancing approach, where all civil liability implicating free speech would trigger full First Amendment protection and all cases would be subjected to First Amendment scrutiny.[61]

New York Times Co. v. Sullivan[62] established the foundation for First Amendment protection against tort claims based on harmful speech, such as defamation, invasion of privacy, intentional infliction of emotional distress, the right of publicity, and negligence.[63] In *Sullivan*, a public official brought

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58 *Id.*

59 *See, e.g.*, Lawrence A. Alexander, *"Under Color of Law"? Rogue Officials and the Real State Action Problem* (draft on file with author), pg. 3 (noting that *Shelley v. Kraemer* "epitomizes the bogus state action issue" as it is instead a substantive constitutional issue "when the state permits private parties to do what the state, acting in its proprietary role, could not do).

60 *See* Davidson, *supra* note 11, at 75.

61 Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liberty*, 109 COLUM. L. REV. 1650, 1655 (2009) (emphasis omitted) (contending "that each of these approaches is flawed and that none of them provides a satisfying explanation for when civil liability should implicate the First Amendment" and proposing instead "that the First Amendment should apply to civil liability when government power shapes the content of public discourse, but not when government power merely serves as a backstop to private ordering").

62 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

63 *See* Solove & Richards, *supra* note 61, at 1651–52.

a libel action against those who criticized his official conduct.[64] The Court held that the defendants, individuals who purchased an allegedly libelous advertisement and the New York Times as the publisher, could use the First Amendment as a valid defense to this civil lawsuit between private parties because the state court applied a state law, which imposes "invalid restrictions on [] constitutional freedoms of speech and press."[65] The Court stated that "[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised."[66]

Finding that "the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials"[67] was subject to First Amendment scrutiny, the *Sullivan* Court held that the Constitution protected an advertisement "as an expression of grievance and protest on one of the major public issues of our time."[68] The federal rule established in *Sullivan* "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[69]

Following the *Sullivan* decision, speech-tort jurisprudence sought to balance the opposing interests of the First Amendment's protection of speech and the state's imposition of tort liability.[70] In *Curtis Publishing Co. v. Butts*, the Court extended *Sullivan*'s prohibition against a public official recovering for a speech tort into constitutional protection for libel claims raised by public figures.[71] Eventually, the Court in *Gertz v. Robert Welch*[72] extended at least some constitutional protection against libel claims raised by private figures. This further weakened any connection to government abuse concerns and the state action doctrine.[73] Yet, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., the Court limited constitutional constraints on defamation cases that involve private figures suing for allegedly defamatory statements of private concern.[74] The Court later applied the defamation framework to other speech-tort cases, including false light invasion of privacy and intentional

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64 *Sullivan*, 376 U.S. at 256.

65 *Id.* at 265.

66 *Id.* (explaining further that "[i]t matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute.").

67 *Id.* at 268.

68 *Id.* at 271.

69 *Id.* at 279–80.

70 David Han, *Managing Constitutional Boundaries in Speech-Tort Jurisprudence*, 69 DEPAUL L. REV. 495, 504 (2020).

71 Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967).

72 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41, 343 (1974).

73 *See* Han, *supra* note 70, at 503 (contending that after *Sullivan*, "the Court's rhetoric focused on the risk of undue chilling effects on public discourse rather than the risk of government abuse.").

74 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985); *see also* Han, *supra* note 70, at 513–14.

infliction of emotional distress.[75] Meanwhile, lower courts applied the framework to the "right of publicity and intentional interference with contractual relations and prospective economic relations."[76]

It has been difficult to understand how courts, including the U.S. Supreme Court, have applied the state action doctrine (or not) to civil liability cases.[77] For example, in *Cardtoons v. Major League Baseball Players Association*, the Tenth Circuit held that a company's production of parody trading cards featuring active major league baseball players infringed the players' right of publicity.[78] However, in balancing Cardtoons's speech rights against the players' property rights, the court held that "the justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property."[79] Thus, when a court balances the players' rights of publicity against the parody cards, which serve as "an important form of entertainment and social commentary," the cards "deserve First Amendment protection."[80] Unlike some First Amendment cases involving speech tort liability, the *Cardtoons* court explicitly established that state action was present in the case because Oklahoma, similar to California, codified the right of publicity and statutorily authorized a civil suit for infringement of that right:

> Because the parody trading cards infringe upon MLBPA's property rights, we must consider whether Cardtoons has a countervailing First Amendment right to publish the cards. The First Amendment only protects speech from regulation by the government. Although this is a civil action between private parties, it involves application of a state statute that Cardtoons claims imposes restrictions on its right of free expression. Application of that statute thus satisfies the state action requirement of Cardtoons' First Amendment claim.[81]

In another private tort suit for civil liability involving speech, the Court in *Snyder v. Phelps* set aside a jury verdict imposing tort liability for the intentional infliction of emotional distress against the founder of the

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75 Han, *supra* note 70, at 514 (first citing Time, Inc. v. Hill, 385 U.S. 374, 390–91 (1967); and then citing Hustler v. Falwell, 485 U.S. 46, 56 (1988)).

76 *Id.* at 514 & nn. 100–01 (citation omitted); *see* Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., 175 F.3d 848, 856–58 (10th Cir. 1999); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185–86 (9th Cir. 2001); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990).

77 *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L. J. 1109, 1113 (2013) (arguing "that the conception of private law as government regulation in *Snyder* arises from a combination of (1) the doctrinal tools that judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism, specifically in obscuring the plaintiff's agency and the state interest in redress, and in privileging a particular view of compensation").

78 Cardtoons v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

79 *Id.* at 976.

80 *Id.*

81 *Id.* at 968.

Westboro Baptist Church.[82] The jury found in favor of a fallen soldier's father for emotional distress and for intrusion upon seclusion caused by the church's protests at his son's funeral.[83] However, the Court determined that Westboro's "speech was entitled to 'special protection' under the First Amendment" because it "was at a public place on a matter of public concern."[84] Nowhere in the Court's opinion did it mention the state action doctrine. Instead, the Court stated that the Free Speech Clause of the First Amendment "can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[85] Justice Robert's opinion ignored the doctrinal distinction between whether the plaintiff or defendant in a speech tort case is a public or private figure when addressing conflicts between the First Amendment and tort liability.[86]

The *Snyder* Court used the traditional First Amendment approach applied to direct government regulation and analyzed the tort claim as "no different than direct government regulation."[87] In contrast, the trial court in *Snyder* responded to Westboro's claim of absolute First Amendment protection and noted, "the First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals."[88] Review of the trial court decision by the Fourth Circuit resulted in a reversal with the firm statement that "[i]t is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment."[89]

While some have argued for the demise of the state-action doctrine,[90] others posit "more attention ought to be paid to the genuinely private aspect of private-law actions" so that courts balance private interests and

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82 Snyder v. Phelps, 562 U.S. 443, 459 (2011).

83 *Id.* The church protesters carried signs stating "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* at 448.

84 *Id.* at 458.

85 *Id.* at 451 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (finding that public figure may not "recover damages for emotional harm caused by the publication of an ad parody offensive to him.")).

86 *See* Oman & Solomon, *supra* note 77, at 1147–48 (explaining that "it matters whether plaintiffs like Snyder are 'public figures' or not. . . . But Justice Roberts's opinion ignores entirely this issue, despite the fact that it was the ground on which the district court ruled that the verdict should stand.").

87 Han, *supra* note 70, at 516.

88 Snyder v. Phelps, 533 F. Supp. 2d 567, 570 (D. Md. 2008) (citing Gertz v. Robert Welch Inc., 418 U.S. 323, 342–43 (1974) for the holding "that First Amendment protection of particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury"), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011).

89 Snyder v. Phelps, 580 F.3d 206, 217 (4th Cir. 2009) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 264–65 (1964)).

90 *See generally* Chemerinsky, *supra* note 41 at 556 (arguing for the elimination of the state action doctrine and stating "[t]his is certainly not the first article to propose the elimination of the state action doctrine.").

constitutional values based on "the degree and kind of state involvement" implicated.[91] In addition, the identity of the plaintiff as a private or public figure should help determine the level of First Amendment protection provided to the speaker.[92] State courts have subsequently interpreted *Snyder* as "categorically prohibiting tort liability when the allegedly tortious act in question is speech on a matter of public concern."[93]

Typically, private parties bring tort suits, and the government is not involved. Thus, to find the state action necessary to justify constitutional scrutiny, some courts have theorized that applying a state rule of law constitutes state action.[94] The Court used this theory of state action for *Shelley*,[95] *Sullivan*,[96] and *Cohen*[97] to justify First and Fourteenth Amendment scrutiny of a private covenant violation, a speech tort, and a contract claim. However, in each of these cases, the state was providing recourse for private injury through private law, not directly enforcing government action.[98] Courts should be viewed as an "impartial arbiter of the dispute, working within a doctrinal context" instead of as a governmental actor suspected of abusing constitutional liberties.[99] While there may be the potential for government abuse in tort cases by courts developing the common law, such potential abuse is not equivalent to direct state action given the "courts' very different institutional roles as compared to the political branches."[100]

D. *Contract Claims and State Action*

Civil liability with speech implications is also present in contract and property law, such as homeowner association and private media restrictions on speech.[101] However, some scholars have observed that the rules for

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91 Oman & Solomon, *supra* note 77, at 1165 (emphasis omitted) (suggesting that "[i]f the state involvement consists of making available a common-law action and enforcing a jury verdict, then the constitutional concerns should be less significant than those raised in litigation involving a state statute, agency action, or direct action by government officials.").

92 *Id.* at 1166.

93 Han, *supra* note 70, at 517–18 (citing Jeffrey Steven Gordon, *Silencing State Courts*, 27 WM. & MARY BILL RTS. J. 1, 32–45 (2018)).

94 *Id.* at 510–11 (citing *Sullivan*, 376 U.S. at 265).

95 Shelley v. Kraemer, 334 U.S. 1, 18, 19, 20-21 (1948) (holding that state enforcement of a private covenent was a state action).

96 New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that a private party, the New York Times, was entitled to protection under the Fourteenth Amendment for a speech tort).

97 Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (contending that the state-law doctrine of promissory estoppel may be applied to First Amendment claims through the Fourteenth Amendment).

98 *See supra* notes 95–97 and accompanying text*; see generally* Han, *supra* note 70, at 510–11 ("[T]he requisite state action comes only in the form of the court's application of a state rule of law, rather than from a direct act of enforcement by the government upon an individual") (citations omitted).

99 Han, *supra* note 70, at 521.

100 *Id.* at 522.

101 Solove & Richards, *supra* note 61, at 1652.

applying the First Amendment to civil liability implicating free speech are contradictory.[102] While *Sullivan* applied First Amendment protection to a tort claim against a newspaper involving speech, the Court in *Cohen v. Cowles Media Co.*,[103] gave no First Amendment protection to a newspaper against a contract claim involving newsworthy speech.[104] The *Cohen* Court found that state action was present in the enforcement of the agreement, but it determined that the contract claim against the press did not merit a constitutional defense.[105]

Indeed, the *Cohen* Court first addressed "whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered."[106] Relying on the rationale of *Sullivan* and subsequent cases, the Court concluded (and the dissent agreed)[107] that state action is involved because "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[108] Nevertheless, the Court determined that the situation in *Cohen*, involving a plaintiff's promissory estoppel claim for damages against a newspaper for breaching a promise of confidentiality in exchange for newsworthy information, did not warrant First Amendment protection.[109] It held that the Minnesota doctrine of promissory estoppel is a law of general applicability enforceable against the press, which holds no special immunity, and the level of scrutiny is the same as would be applied against other entities.[110]

The *Cohen* Court found state action in the Minnesota courts' enforcement of legal obligations under a state-law theory of promissory estoppel. However, a Washington state court in *State v. Noah* distinguished *Cohen* as a situation where "the state created the duty before it enforced that duty."[111] *Noah* involved a defamation suit between private individuals where the parties knowingly and voluntarily entered into a private settlement agreement.[112] One of the parties, initially sued for defamation, renounced the agreement claiming that it was unconstitutional because "a person cannot contract away their First Amendment rights."[113] The *Noah* court determined

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102 *Id.*

103 *Cohen*, 501 U.S. at 670.

104 Solove & Richards, *supra* note 61, at 1653.

105 *Cohen*, 501 U.S. at 668, 670.

106 *Id.* at 668.

107 *Id.* at 672 (Blackmun, J., dissenting) ("I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner's promissory estoppel claim constitutes state action under the Fourteenth Amendment.").

108 *Id*. at 668 (majority opinion).

109 *Id*. at 665.

110 *Id*. at 670.

111 State v. Noah, 9 P.3d 858, 871 (2000).

112 *Id.* at 864.

113 *Id.* at 869.

that "[u]nlike *Cohen*, judicial enforcement of the settlement agreement does not require application of a state common law doctrine to create the duty enforced."[114] The court held that a First Amendment violation requires state action and that "[s]tate enforcement of a contract between two private parties is not state action, even where one party's free speech rights are restricted by that agreement."[115] The *Noah* court also distinguished the state action in *Shelley v. Kraemer* as "more than mere judicial enforcement" of an agreement between two private parties.[116] Because the racially restrictive covenants "did not merely involve two private parties: its exclusionary function against all African-Americans required state action."[117]

Arbitration agreements are private contracts, and their enforcement may not trigger constitutional protection under the Fourteenth Amendment.[118] Many scholars adhere to the view that the state action doctrine is "a conceptual disaster area,"[119] but some have argued that "conduct by private arbitrators during private arbitration proceedings" may constitute state action under the "public function" exception as binding conflict resolution controlled by the state.[120] Nevertheless, courts have uniformly rejected the view that private arbitration constitutes state action and, consequently, the Fourteenth Amendment's guarantee of procedural due process does not protect parties in arbitration from questionable arbitration procedures and arbitrator misconduct.[121] For example, in *Davis v. Prudential Securities, Inc*., the Eleventh Circuit reviewed a challenge to an arbitration award and agreed "with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases."[122]

Employees of religious institutions have filed breach of contract claims for termination without good cause. For example, in *DeBruin v. St. Patrick Congregation*, the plaintiff, hired by a Catholic church as the Director of Faith Formation, alleged that the church breached her employment contract by terminating her employment "without good and sufficient cause as that term is defined by the Contract of Employment."[123] The Wisconsin Supreme Court reasoned that, similar to the *Shelley v. Kraemer* decision, which

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114 *Id.* at 871.

115 *Id.*

116 *Noah,* 9 P.3d at 870.

117 *Id.*

118 *See* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L. J. 2994, 3035–37. (2015).

119 *Id.* at 3036 (quoting Charles L. Black, Jr., *The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

120 *Id.* at 3036–37.

121 *Id.* at 3037–38 (citing CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 18 (3d ed. 2013)). *See, e.g*., Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (citing Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995)) ("courts have consistently held that private arbitration lacks any element of state action").

122 Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191 (11th Cir. 1995).

123 DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 883 (2012).

required state action by the Court to enforce a discriminatory private covenant, DeBruin's employment claim would require "state courts to engage in activity that the Constitution prohibits."[124] The Wisconsin court reviewed DeBruin's complaint and observed, "[DeBruin] seeks court participation in enforcing a private contract against St. Patrick, as Kraemer did against Shelley."[125] The court concluded that DeBruin's complaint failed to state a claim because "the State is effectively enjoined by the First Amendment from interference with such ecclesiastical decisions."[126] The *DeBruin* court relied extensively on the *Shelley* decision to find unconstitutional state action if a court enforces a private contract between a ministerial employee and a religious institution.[127]

Private restrictive covenants are also private contracts that may "run with the land" as a property interest, but only the enforcement of racially restrictive covenants has constituted state action under the *Shelley v. Kraemer* view that court enforcement of a private covenant is state action that violates equal protection rights under the Fourteenth Amendment.[128] Private restrictive covenants that do not discriminate based on race are not subject to constitutional scrutiny unless viewed as a contract made in violation of public policy.[129]

There are many examples of homeowners trying unsuccessfully to defend themselves against the enforcement of homeowner association rules (private covenants) by asserting constitutional liberties.[130] In *Linn Valley Lakes Property Owners Ass'n v. Brockway*, a homeowner association sought an injunction against the property owners requiring them to remove a "for sale" sign from their property because it violated one of developer's

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124 *Id.* at 885–86.

125 *Id.* at 887.

126 *Id.* at 890.

127 *See id.* at 885, 887. *See also* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 188–89 (2012) (without referring once to *Shelley*, the Court held that under the "ministerial exception," grounded in the First Amendment, employment discrimination laws do not apply to employment disputes between a religious institution and its ministers).

128 *See supra* note 38 and accompanying text.

129 *See, e.g.*, State v. Noah, 9 P.3d 858, 871 (2000) (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) for the rule that "[c]ontract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms," but noting that the law favors settlement of litigation disputes); Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1075 (2007) (restrictive covenants that violate public policy, such as those that unreasonably limit speech and association rights, may be void as unenforceable).

130 *See, e.g.*, Jacobs, *supra* note 8, at 995–96 (noting that although the issue of HOA rules prohibiting the possession of firearms has not yet been litigated, an attempt to enforce such a restriction could be subject to a Second Amendment defense). *See also*, Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 626 (2019) (predicting that "[t]he right to keep and bear arms is likely to operate much as freedom of speech and other fundamental rights do—as a strong trump in some cases, but a right that is subject to certain limits in the name of other rights or public interests.").

Declaration of Covenants and Restrictions that forbid signs from being "placed or maintained on any Lot."[131] The property owners relied on *Shelley v. Kraemer* and asserted that the enforcement of the restrictive covenant would constitute state action in violation of their constitutional rights of free speech.[132] The Kansas Supreme Court distinguished the facts from those in *Shelley* and held that "a private agreement restricting signs in a residential neighborhood, and enforcement thereof does not constitute improper state action."[133]

Still, some states have adopted more expansive protection of constitutional rights than those recognized by the Federal Constitution. As discussed below,[134] the U.S. Supreme Court in *PruneYard Shopping Ctr. v. Robins* allowed California to expand First Amendment protection under its state constitution to those expressing speech rights on private property open to the public.[135] Likewise, New Jersey protects an individual's freedom of speech, not only against state action, but also in situations where a private entity has unreasonably or oppressively restricted free speech.[136] In *Mazadabrook Commons Homeowners Ass'n v. Kahn*, New Jersey extended First Amendment protection under its state constitution to a homeowner who violated a homeowner association rule by posting two political signs at his home in support of his candidacy for city council.[137] After examining the three factors developed in *State v. Schmid* to determine whether the state constitution would protect private speech against private restriction, the court in *Kahn* found that "the Association's sign policy, which prevented Khan from posting a political sign on his home, violates the State Constitution's guarantee of free speech."[138] The *Kahn* court relied, in part, on the Court's decision in *City of Ladue v. Gilleo*, which invalidated a *municipal* sign restriction because it limited residential signs, which "'have long been an

131 Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948, 949 (Kan. 1992).

132 *Id.* at 951.

133 *Id.*; *see also* Midlake on Big Boulder Lake, Condominium Ass'n v. Cappuccio, 673 A.2d 340, 342(Pa. Super. Ct. 1996) (holding that *Shelley v. Kraemer* is not applicable to enforcing a restrictive covenant in a contract between private parties unless there is racial discrimination involved and thus a condominium restriction against signs on property is not state action subject to free speech protection) (quoting Wilco Elec. Sys., Inc. v. Davis, 543 A.2d 1202, 1205 (Pa. Super Ct. 1988).

134 *See* discussion *infra* Section D.

135 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)).

136 *See* State v. Schmid, 423 A.2d 615, 630 (N.J. 1980)(in determining whether the state constitution protects free speech rights on private property, the court must balance the "legitimate interest in private property with individual freedoms of speech and assembly" by examining "(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.").

137 Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 510 (N.J. 2012).

138 *Id.* at 520.

important and distinct medium of expression"—"a venerable means of communication that is both unique and important.'"[139]

E. *Property Rules and State Action*

It appears that the Supreme Court has "rarely" applied First and Fourteenth Amendment restrictions to private actions involving property law.[140] These rare examples include *Marsh v. Alabama*, where the Court subjected a company town to First Amendment limitations based on the town's assumption of a public function when company agents attempted to exclude religious canvassers from public areas,[141] and *Shelley v. Kraemer*, discussed above. The *Shelley* decision has subsequently been limited to its facts, as has the *Marsh* decision.[142] So why are certain forms of civil liability, such as tort law, subject to First Amendment scrutiny while other forms, such as contract and property law, are not?[143] Adding confusion to the situation is the fact that the lines are blurry between tort, contract, and property law.[144] Given that the Court in *Snyder v. Phelps* set forth "a broad rule that tort liability cannot be imposed with respect to speech on a matter of public concern,"[145] is the difference that it is a tort involving expression versus a contract or property claim involving expression?[146] On the other hand, could it be that private defendants may use the constitution as a shield against private actors bringing common law claims,[147] but not as a sword by private plaintiffs alleging constitutional violations against private actors?[148]

Trespass and nuisance are property-based torts and may provide guidance as to how courts should apply the state action doctrine. Courts have applied property rules to protect a private owner's right to exclude others and restrict the exercise of alleged constitutional rights by non-owners. Before returning to a discussion of nuisance cases in Part III, this section will explore

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139 *Id.* at 518 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994)).

140 Solove & Richards, *supra* note 61, at 1663.

141 Marsh v. Alabama, 326 U.S. 501, 506 (1946).

142 Solove & Richards, *supra* note 61, at 1664; *see also* Moss v. Univ. of Notre Dame Du Lac, 2016 WL 5394493, at *4–5 (N.D. Ind. 2016) (refusing to dismiss claim alleging violation of the First and Fourteenth Amendments from denial of a promotion and a demotion on the basis of race based on lack of state action if plaintiff can show that Notre Dame, a private university, is a company town similar to the facts in *Marsh v. Alabama*).

143 Solove & Richards, *supra* note 61, at 1665.

144 *Id.*

145 Han, *supra* note 70, at 536 (suggesting that the Court should take "a more open-ended and contextualized analysis" to speech torts that could conclude that even though the speech is on a matter of public concern "the risks of government abuse and impermissible chilling effects in the case do not outweigh the state's interests in imposing tort liability").

146 *See* David Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755 (2004).

147 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

148 *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.").

how courts have applied the state action doctrine to protect private property ownership against trespass.

The trespass cases discussed in this Section fall into two different categories. The first category is where private property owners exclude private individuals from entry onto their property to exercise speech protected by the First Amendment. As discussed below, the U.S. Supreme Court allows a First Amendment defense against trespass only where the private property is serving as a company town. Otherwise, private individuals may not defend against trespass charges based on the First Amendment, even when the private property, such as a shopping center, is generally open to the public. However, California has interpreted its own constitution to allow trespassers to use First Amendment defenses to avoid liability for trespass, finding state action in the property owners opening property for public use.

The second trespass category is where the state, by regulation or other action, requires a private property owner to allow access to private individuals for more than an occasional trespass. The Court has found that such state-required access constitutes a *per se* physical taking requiring just compensation under the Fifth or Fourteenth Amendment. The state action in providing access to private property allows the private property owner to assert a constitutional defense against a trespasser's claim of unfair labor practice and allege an inverse condemnation claim against the state action requiring such access.

The first category of trespass cases begins with *Marsh v. Alabama*, where a shipbuilding corporation owned the town of Chickasaw.[149] However, the town was "accessible to and freely used by the public in general and there is nothing to distinguish [it] from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[150] Upon entry to the town, security warned a Jehovah's Witness that she could not distribute religious writings and arrested her for criminal trespass when she refused to leave the sidewalk.[151] The Court noted that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[152] It held that the State's action in imposing criminal punishment for distributing religious literature limitation in a company-owned town was in violation of the First and Fourteenth Amendments.[153] By opening up its property for the general public use, the

149 Marsh v. Alabama, 326 U.S. 501, 502 (1946).

150 *Id.* at 503.

151 *Id.* at 503–04 (she was convicted after defending against the claim based on her right to freedom of press and religion and appealed to the Supreme Court after the Alabama Court of Appeals affirmed her conviction and the State Supreme Court denied certiorari).

152 *Id.* at 506.

153 *Id.* at 508–09.

private entity could not restrict the First Amendment rights of those who used the property.

Subsequently, the Court in *Lloyd Corp. v. Tanner* and *Hudgens v. N.L.R.B*. abrogated *Marsh* and confined *Marsh*'s holding to situations such as a company town where the private entity acts as a municipality within the full scope of the police power. In *Lloyd*, a retail shopping mall in Portland, Oregon had a strictly enforced policy against distributing handbills in the mall to protect its shoppers from annoyance and litter.[154] Individuals protesting the draft and the Vietnam War distributed handbills in the mall until security guards told them to either stop distributing the handbills or face arrest for trespassing.[155] Subsequently, protestors filed suit seeking declaratory and injunctive relief and the Ninth Circuit Court of Appeals affirmed the trial court's decision that "Lloyd's 'rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights.'"[156] On review, the Supreme Court determined that Lloyd did not dedicate its Fifth and Fourteenth Amendment rights as a private shopping center to allow First Amendment rights for all people, and reversed and remanded the case to the Court of Appeals to vacate the injunction.[157]

In *Hudgens*, warehouse employees protested against a retail store located in a retail mall and the shopping center manager threatened them with arrest for trespassing.[158] The union filed an unfair labor practice charge against the owner of the shopping center, and the case ultimately ended up in the Supreme Court after the Fifth Circuit remanded it to the National Labor Relations Board following the Court's decision in the *Lloyd* case.[159] The *Hudgens* Court found that, similar to the *Lloyd* decision where individuals distributing handbills concerning Vietnam did not have a First Amendment right to enter the shopping center, neither did the picketers in *Hudgens* have the right to enter the Hudgens mall to advertise their strike against a shoe retail store.[160] Thus, the combined holdings of *Lloyd* and *Hudgens* established that the First Amendment does not protect individual speech rights against exclusion by private shopping centers, even though the centers were open to the public.

Some courts have similarly resisted a Second Amendment defense against a private property trespass claim by relying on the property owner's right to exclude trespassers.[161] For example, in *GeorgiaCarry.Org, Inc. v. Georgia*, plaintiffs challenged the Georgia "Carry Law" that restricted gun owners from carrying a handgun in eight specific locations, including houses

154 *Lloyd Corp.*, 407 U.S. at 555–56 (1972).
155 *Id.* at 556.
156 *Id.* at 556–57.
157 *Id.* at 570.
158 *Hudgens*, 424 U.S. at 509 (1976).
159 *Id.* at 509–510.
160 *Id.* at 520–21.
161 *See* Jacobs, *supra* note 8, at 994–95.

of worship, as violating both their First Amendment free exercise rights and their Second Amendment right to bear arms.[162] First, the Eleventh Circuit concluded that plaintiffs did not state a Free Exercise claim because the factual allegations were not sufficient to allege "that the Carry Law imposes a constitutionally impermissible burden on one of Plaintiffs' sincerely held religious beliefs" – their personal preference to carry a gun to act in self-defense is a secular purpose.[163] Second, the conflict between private property rights and the Second Amendment is resolved in favor of the property owner, who has the right to determine whether to allow guns on its premises.[164]

California courts treated First Amendment rights to private property space more expansively than did the U.S. Supreme Court, which eventually upheld California's right to expand First Amendment rights under its state law.[165] Beginning with *Robins v. PruneYard Shopping Center* in 1979, the California Supreme Court relied on its state constitution to support a broad interpretation of the need to protect speech on private property.[166] The *Robins* court required a shopping mall to allow expressive activity on its property so long as it was speech activity protected by state law.[167] While the California Supreme Court did not address the state action doctrine in *Robins*, in *Golden Gateway Center v. Golden Gateway Tenants Ass'n*, the court held that California free speech protection requires state action and allowing the public free and open access to the private property is the state action that meets the requirement.[168] In *Fashion Valley Mall, LLC v. NLRB*, the California Supreme Court again upheld the right to engage in expressive activity on private property and prevented a shopping center from requiring a permit to allow people to boycott in front of one of the mall's stores.[169]

The second category of trespass cases involves state regulation that requires a private property owner to grant access. In another case from California, *Cedar Point Nursery v. Hassid* came before the U.S. Supreme Court in 2021 to determine whether a California regulation requiring agricultural employers to allow union organizers to access their private

162 GeorgiaCarry.org, Inc. v. Georgia, 687 F.3d 1244, 1248–49 (11th Cir. 2012).

163 *Id*. at 1258-59.

164 *Id*. at 1266. *But see*, Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1202, 1211 (10th Cir.) (Oklahoma law "hold[ing] employers criminally liable for prohibiting employees from storing firearms in locked vehicles on company property" was not a violation of Plaintiffs' due process right to exclude others from private property as it was rationally related to increasing safety and expanding the right to bear arms) (*citing PruneYard*, 447 U.S. at 81 for the proposition "that the state may exercise its police power to adopt individual liberties more expansive than those conferred by the Federal Constitution").

165 *State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1305–06 (2010). California's broad interpretation was upheld by the U.S. Supreme Court in PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

166 *Id.*; Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979).

167 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

168 Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 29 P.3d 797, 810 (Cal. 2001).

169 Fashion Valley Mall, LLC v. Nat'l Lab. Rels. Bd., 172 P.3d 742, 749, 754 (Cal. 2007); *see State Action and the Public/Private Distinction*, *supra* note 164, at 1306–09 (illustrating how some other states have also recognized limited expressive rights in private shopping malls).

property "constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments."[170] The Court relied on previous decisions where private property owners alleged *per se* takings based on the physical occupation of their property.[171] While "[t]he Board and the dissent argue[d] that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory [under *Penn Central*] rather than *per se* takings,"[172] even the dissent noted that the *Loretto* Court viewed "the 'invasion' in *PruneYard* as 'temporary and limited in nature.'"[173]

The *Cedar Point* Court distinguished between a trespass and a taking based on the difference between "a mere occasional trespass" and the consideration of factors such as "the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue."[174] In this case, the employer was able to defend itself against an unfair labor practice based on its Fifth Amendment right to just compensation for a physical invasion of its private property by a state regulation requiring access by union organizers. This state-imposed access constituted more than a trespass because of the duration and character of the access. Unlike the *PruneYard* decision, where the shopping mall allowed the public on its property, the growers in *Cedar Point* did not allow the public on its property.

The *Cedar Point* Court's reliance on *Kaiser Aetna v. United States* was particularly persuasive as the *Kaiser Aetna* Court held that the appropriation of an easement to allow public access to a private marina because it had connected to navigable water was determined to be a taking.[175] The dissent, in contrast, argued that the access regulation should be analyzed under *Penn Central* instead of *Loretto*, because *Kaiser Aetna* "applied a *Penn Central*, not a *per se*, analysis."[176] Please note, the *per se* analysis was adopted by *Loretto* almost three years after *Kaiser Aetna* was decided; thus, *Kaiser Aetna* could not have relied upon *Loretto*'s *per se* takings analysis. Instead, *Kaiser Aetna* relied on the physical invasion cases of *United States v. Causby*[177] and *Portsmouth Co. v. United States*,[178] the same cases relied upon by the *Cedar Point* majority, and not the *Penn Central* analysis as the dissent asserted.

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170 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

171 *Id.* at 2072–74 (discussing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); United States v. Causby, 328 U.S. 256 (1946); Horne v. Dep't of Agric., 576 U.S. 350 (2015); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).

172 *Id.* at 2076 (disagreeing that the *PruneYard* facts are similar to the growers' properties because PruneYard "was open to the public, welcoming some 25,000 patrons a day").

173 *Id.* at 2084 (Breyer, J., dissenting) (citing *Loretto*, 458 U.S. at 434).

174 *Id.* at 2078–79 (discussing Arkansas Game and Fish Comm'n v. United States, 568 U.S. 23 (2012), which involved a temporary government-induced flooding).

175 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (citing *Kaiser Aetna*, 444 U.S 164 (1979)).

176 141 S. Ct. at 2086 (Breyer, J., dissenting).

177 U.S. v. Causby, 328 U.S. 256 (1946).

178 Portsmouth Harbor Land & Hotel Co. v. U.S., 260 U.S. 327 (1922).

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[179]

These two categories of trespass cases involving constitutional rights illustrate how the Court does not allow a private actor to assert a First Amendment or other constitutional defenses against a common law trespass claim by a private landowner.[180] However, when state regulation requires a private entity to open its property to private actors, the private entity may defend its property rights under the Fifth Amendment, if the access required is substantial and more than a mere trespass. Thus far, we have seen that while a private actor may use the First Amendment as a shield to defend against speech torts, the same shield is not available to a private actor seeking to use their constitutional rights as a shield against a trespass tort.

Private litigants have attempted to use the First Amendment as a sword against private media entities to claim that the private media is restricting and censoring private speech. Courts have held that private media entities are not subject to First Amendment restrictions as they are not state actors.[181] Relying on property access concepts, rather than speech torts, the Court has allowed private entities operating public access channels to exercise discretion in deciding who has access to their property and what they may say. In *Manhattan Community Access Corporation v. Halleck*,[182] the Court relied on *Hudgens*, which said "to hold that private property owners providing a forum for speech are constrained by the First Amendment would be 'to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.'"[183] Instead, private property owners and lessees should have the right to exercise control over the speakers and speech that occurs on their property without constitutional constraint.[184] The *Halleck* Court determined that receiving a government license, contract, or monopoly "does not convert a private entity into a state actor–unless the private entity is performing a traditional, exclusive public function."[185] It concluded that Manhattan Neighborhood Network (MNN), designated by New York City to operate public access

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179 *Kaiser Aetna*, 444 U.S. at 180.

180 California courts have allowed a First Amendment defense against trespass claims finding state action in the owner's act of opening the property to the public. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001).

181 *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (holding that "state action doctrine precludes constitutional scrutiny of YouTube's content moderation" and dismissing PragerU's First Amendment claim).

182 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

183 *Id.* at 1931 (quoting Hudgens v. NLRB, 424 U.S. 507, 517 (1975)).

184 *Id.* at 1930–31.

185 *Id.* at 1931.

channels, is a private actor and is not constrained by First Amendment rights in deciding who speaks and what they say on its public access channels.[186]

The *Halleck* dissent argued that MNN should be subject to First Amendment restrictions because the City delegated to MNN the administration of a public forum and MNN discriminated against speech based on viewpoint.[187] However, the majority rejected this attempt to invoke the state action exception based on the public function test, which asks whether the private entity performed a function traditionally and exclusively performed by government.[188] Instead, the Court found that New York City has no property interest in the public access channels that it could delegate and thus, MNN cannot be a state actor under the public function exception.[189] Because MNN is not a state actor, the producers of public access programming cannot use the First Amendment as a sword to gain access to MNN's private media platform.[190] This setting differs from the situation where a private defendant asserts a violation of constitutional rights as a shield against a private plaintiff's cause of action.[191]

III. PROTECTING CONSTITUTIONAL LIBERTIES FROM NUISANCE CLAIMS

In addition to exploring state action in relation to property claims, one of the purposes of this Article is to determine the extent to which courts have used the state action doctrine in public nuisance cases to subject statutory or common law tort claims to constitutional scrutiny. Both public and private nuisance have historically relied on property law. Therefore, the blurred line between tort law, with First Amendment limitations, and property law, where courts have not generally applied the First Amendment to civil actions enforcing property rules, may prove to be problematic when deciding whether First Amendment scrutiny or other constitutional limitations apply to civil liability under nuisance law.

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186 *Id.* at 1931, 1933.

187 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting).

188 *Id.* at 1934 (majority opinion).

189 *Id.* at 1933.

190 *Id.*; *see also* Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (holding that "state action doctrine precludes constitutional scrutiny of YouTube's content moderation" and dismissing PragerU's First Amendment claim).

191 *See, e.g.*, CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (defendants could not raise a First Amendment defense against a trespass action by CompuServe to restrict access to its private computer systems from unsolicited commercial e-mail send by defendants) (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972)). Based on the theory put forth by this article, Cyber Promotions should be able to raise a First Amendment defense as a shield against a trespass action that affects speech.

A. *Nuisance Claims and State Action*

State or local regulations may declare that particular conditions constitute "per se" public nuisances and thus decidedly place them within the state-action classification. Public nuisance actions brought under common law tort by public officials are also state action.[192] However, in a case in which a public nuisance claim is brought by a private individual who has an injury that is different in kind from other community members, such claims should not necessarily evoke the state action doctrine.[193]

Public officials in *People ex rel Gallo v. Acuna*, brought a nuisance claim against gang members for nuisances they created by making the community "a staging area for gang-related violence."[194] The California Supreme Court affirmed that public nuisances interfering with the community's public values "are enjoinable as civil wrongs *or* prosecutable as criminal misdemeanors. . . ."[195] In evaluating the defendants' constitutional defenses, the court first held that the First Amendment did not protect gang activities based on freedom of association.[196] It then refused to recognize defendants' "overbreadth" claim as to the protected speech or communicative conduct by others who might suffer an abridgement of their rights.[197] Finally, the court concluded that the injunctions were not unconstitutionally vague under the Fifth Amendment[198] and that the conduct enjoined "consists of threats of violence and violent acts themselves" and is therefore not protected by the First Amendment.[199]

The First Amendment and other constitutional liberties may restrain criminal trespass and public nuisance enforcement by public officials, but extending this restraint to private trespass and private nuisance seems problematic under the state action doctrine, even though courts have broadly extended First Amendment restraint to speech and privacy tort actions.[200] In the Article, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom*, I argued that zoning ordinances impacting First Amendment rights, such as free exercise of religion, constitute a prior

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192 *See* Merrill, *supra* note 14, at 5 (asserting that "[p]ublic nuisance is properly regarded as a public action—an action by public authorities to charge criminally or abate (that is, to order an end to) a condition that is deemed to be inimical to interests shared by the public as a whole").

193 *Id.* (concluding that even public nuisance claims brought by private individuals should be treated as public action, not tort).

194 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997).

195 *Id*. at 607.

196 *Id*. at 609.

197 *Id*. at 611.

198 *People* ex rel. *Gallo*, 929 P.2d 596 at 615.

199 People ex rel. Gallo v. Acuna, 929 P.2d 596, 616 (Cal. 1997).

200 *Compare* Solove & Richards, *supra* note 61, at 1665 (noting that First Amendment constraints have not generally been applied to property torts) *with* Saidel-Goley & Singer, *supra* note 42, at 488 (arguing that allocating property rights will always constitute state action).

restraint.[201] To avoid the problem of prior restraint and provide a less restrictive means of controlling religious land use, I proposed that nuisance law could stop conduct that might interfere with the use and enjoyment of the neighbors.[202] In analyzing whether the conduct was unreasonable, I suggested the court place a heavy thumb on the religious use side of the scale when balancing the gravity of the harm to the residential landowner against the utility of the conduct of the religious institution, such as feeding the homeless.[203] At the time I proposed this approach, I wondered whether the *Shelley v. Kraemer* interpretation of state action would apply to a private nuisance lawsuit and subsequently explored the issue in a later article.[204]

In her Article, *Property and Projection*,[205] Professor Molly Brady examines a new form of protest by means of projecting light messages onto buildings. While these projections, "also known as projection bombing or guerrilla projections,"[206] have primarily targeted the sides of commercial buildings with political messages, it is possible that light projections could point to residences or homes and display advertisements or other unwanted messages.[207] There are various theories used to support property owners' efforts to prevent these targeted projections, such as trespass, nuisance, and ordinances on light pollution or graffiti, but there is "a glaring lag in the property torts" using nuisance law as a remedy.[208] In analyzing how private nuisance and the First Amendment should interact, the "initial puzzle [is] . . . where the state action occurs."[209]Some of the light projection cases involving nuisance claims have weighed First Amendment rights in determining whether the interference from the projection is substantial and when balancing the gravity of the harm against the utility of the conduct to determine unreasonableness.[210] Should we put a heavy thumb on the side of conduct implicating the First Amendment, such as free speech or free exercise, when determining whether the conduct is unreasonable? Alternatively, should "a property owner who suffers dignitary, privacy, and appropriative harms [be] prevented from asserting those harms as a basis for

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201 Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507 (1996).

202 *Id.* at 512 (suggesting using nuisance instead of zoning to regulate religious land uses and avoid the problem of prior restraint).

203 *Id.*

204 Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?* 47 U. KAN. L. REV. 61 (1998).

205 Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143 (2020).

206 *Id.* at 1145.

207 *Id.* at 1145–47.

208 Brady, *supra* note 205, at 1146–48.

209 *Id.* at 1202.

210 *Id*. at 1204.

a nuisance claim [?]"[211] The court would doubly penalize the plaintiff by "consider[ing] the speech values twice: first, in the utility calculus affecting the decision whether the conduct is tortious in the first instance, and then again, in considering whether the First Amendment should be a defense to the tort."[212]

Nuisance law may also intersect with the Second Amendment when a public official brings a nuisance claim against a gun range.[213] When a private plaintiff brings a nuisance action, the gun range may not be able to assert a defense under the Second Amendment because state action is lacking. Just as a court must consider First Amendment rights in determining the unreasonableness of speech or religious exercise under the Restatement Second (Torts) balancing test, a court could consider Second Amendment rights when determining the unreasonableness of a gun range.[214] Alternatively, under the reimagined state action theory, since the gun range might seek to use the Second Amendment as a shield, it should have the opportunity to assert a constitutional defense.

It is unnecessary to examine the unreasonableness of a defendant's conduct to decide whether there is a nuisance when state or local government has declared that a particular activity constitutes a public nuisance. Thus, the court need not take into account any constitutional considerations regarding the utility and social value of the targeted conduct in determining unreasonableness and, instead, the defendant in a public nuisance case will be able to defend against liability by reference to its constitutional rights.[215] The remainder of Part III explores public and private nuisance claims brought by private entities to determine when such claims are subject to constitutional limitations or are sheltered from constitutional scrutiny.

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211 *Id.* at 1214. I have argued that courts should take the First Amendment into account in determining unreasonableness, while Professor Brady argues the First Amendment should be considered in one place, as a potential defense to a nuisance claim, just as in other tort contexts. Nevertheless, Brady advocates in favor of applying the typical rule that "property rights define communicative entitlements, and individuals do not have rights to speak on or from private property that they do not own." *Id.*

212 *Id.*

213 Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 990 (2017) (citing Ezell v. City of Chicago, 651 F.3d 684, 708–09 (7th Cir. 2011) (City of Chicago in banning firing ranges "must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights")).

214 *Id.* at 990–91 (proposing Second Amendment rights be considered in evaluating the social value of gun range and its suitability to the character of the locality based on the availability of other gun ranges in the area).

215 *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting that liberty of the press requires immunity "from previous restraint of the publication of censure of public officers and charges of official misconduct" under the guise of public nuisance).

B. *Public and Private Nuisance Claims Brought by Private Parties*

There are not extensive examples of public or private nuisance claims brought by private parties that involve constitutional rights, but my research into nuisance cases with constitutional implications is not exhaustive and may not have captured all the reported cases. Nonetheless, this Section focuses on nuisance cases where parties have asserted constitutional claims or defenses. Some cases involve the right of privacy when anti-abortion protestors and clinics obstruct public spaces, allegedly creating public nuisances.

For example, in *Kuhns v. City of Allentown*, anti-abortion protesters sufficiently alleged a public nuisance based on clinic obstruction of a public street to shield patients from protesters.[216] The protestors alleged that the clinic violated their civil rights by imposing an impermissible content-based restriction on speech, a specific injury giving plaintiffs the right to bring the public nuisance action.[217] The *Kuhns* court held that the plaintiff protesters sufficiently alleged a conspiracy with public officials to establish that the private actor defendants operated under the color of law.[218] The court concluded that plaintiffs sufficiently pled claims under § 1983 for violation of free speech and religion under the First Amendment, as well as a private claim for public nuisance.[219] In *Planned Parenthood League of Mass., Inc. (PPLM) v. Bell*, an anti-abortion protester was the defendant charged with creating an actionable public nuisance by making uninvited and harassing contact with an abortion clinic's patients.[220] The court found that PPLM alleged a special injury to its patients allowing it to sue for a public nuisance, and "factual characteristics of Bell's activity place it outside the realm of constitutionally protected speech."[221]

An abortion clinic sued abortion protesters in *Lovejoy Specialty Hospital, Inc. v. The Advocates for Life, Inc.* for trespass and private nuisance resulting in property damage, lost business, and physical altercations.[222] The court affirmed the plaintiff's award of compensatory and punitive damages, even though some expressive activity accompanied the trespass and nuisance. The court agreed that even if "some of defendants' conduct was expressive, that conduct is not necessarily protected."[223] It concluded, "[w]here expressive and non-expressive elements are combined in the same course of conduct, the conduct can be regulated if a sufficiently important governmental interest justifies an incidental limitation on First Amendment

216 Kuhns v. City of Allentown, 636 F. Supp. 2d 418, 438 (E.D. Pa. 2009).
217 *Id.* at 434.
218 *Id.* at 431–32.
219 *Id.* at 438.
220 Planned Parenthood League of Mass., Inc. (PPLM) v. Bell, 424 Mass. 573, 575 (1997).
221 *Id.* at 578–80.
222 Lovejoy Specialty Hospital, Inc. v. The Advocates for Life, Inc., 121 Or. App. 160 (1993).
223 *Id.* at 164.

freedoms. The governmental interest must be unrelated to the suppression of free expression."[224]Similarly, in *Saint John's Church in the Wilderness v. Scott*, demonstrators against abortion and homosexuality near a Church during services created a private nuisance.[225] In assessing whether the demonstrators were entitled to defend against the private nuisance action based on their constitutional free speech rights, the court concluded "that entering the Church's property and obstructing access to the Church are not inherently expressive acts" protected by the First Amendment.[226] However, the court then considered whether the restrictions on picketing and noise restricted defendants' free speech rights and concluded that it was unable "to determine whether the restrictions burden more speech than necessary to protect the relevant government interests."[227]

Religious demonstrations and religious exercise have also been subject to private nuisance challenges. In *Liberty Place Retail Assocs. v. Israelite School of Universal Practical Knowledge*, members of a religious sect held public sidewalk demonstrations outside a shopping center.[228] The court rejected the shopping center's trespass claim, and held that the center failed to prove that the demonstrations constituted a public nuisance.[229] Thus, the court did not address the issue as to whether "the First Amendment provides a defense to these claims."[230] The court in *Devaney v. Kilmartin* dismissed a pro se complaint against a Town for common law private nuisance because there was no allegation that the Town was responsible for the noise created by the bell ringing of two local churches.[231] The court found that the plaintiff's Establishment Clause claim was "fatally deficient" because it did not prove that the secular bell exemptions to the noise ordinance constituted an impermissible establishment of religion.[232] In addition, the court recommended, "that all of the constitutionally grounded claims against the Churches and the Bishop be dismissed" because such action is not "state action."[233] As private actors, the church defendants cannot be liable for unconstitutional action such as nuisance.[234]

Finally, private plaintiffs have brought public nuisance actions against gun manufacturers, distributors, and dealers based on the intentional distribution of firearms that has unreasonably interfered with public safety,

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224 *Id.* at 166.

225 Saint John's Church in the Wilderness v. Scott, 194 P.3d 475, 479 (Colo. App. 2008).

226 *Id.* at 481.

227 *Id.* at 482 (remanding for further findings).

228 Liberty Place Retail Assocs. v. Israelite School of Universal Practical Knowledge, 102 A.3d 501, 502 (Pa. Super. Ct. 2014).

229 *Id.* at 510.

230 *Id.*

231 Devaney v. Kilmartin, 88 F. Supp. 3d 34, 45 (D.R.I. 2015).

232 *Id.* at 56.

233 *Id.* at 46.

234 *Id.*

health, and welfare.[235] For example, in *Ileto v. Glock Inc*., surviving victims and a surviving relative of a shooting victim that began at the Jewish Community Center in Granada Hills, California in 1999 sued firearm defendants for public nuisance and negligence claims.[236] The Ninth Circuit concluded that the private plaintiffs had standing and alleged sufficient facts to bring a public nuisance cause of action.[237] However, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA) in 2005, which required the court to dismiss the victims' claims in *Ileto* against federally licensed manufacturers and sellers of firearms, but not those claims brought against an unlicensed foreign manufacturer of firearms, China North Industries Corp.[238]

As these nuisance cases illustrate, when plaintiffs claim that a private actor has violated their constitutional rights in creating a nuisance, the state action doctrine will protect them from liability as a private actor,[239] unless considered a state actor under an exception to the doctrine.[240] In contrast, defendants in a nuisance action may be able to offer constitutional defenses for their actions, even though they may not ultimately prevail under these constitutional defenses.[241]

IV. REIMAGINING STATE ACTION

Combine the "conceptual disaster area"[242] of the state action doctrine with the "impenetrable jungle"[243] of nuisance law and you have an opportunity to come up with a theory that cannot possibly make matters worse "so it really doesn't matter."[244] Notwithstanding this challenge, I propose a reimagined state action framework that should apply in state law

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235 *See* Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1192 (2005).

236 Ileto v. Glock Inc., 349 F.3d 1191, 1194 (9th Cir. 2003) (en banc hearing denied Ileto v. Glock Inc., 370 F.3d 860 (9th Cir. 2004)).

237 *Id*. at 1215; *see also* Johnson v. Bull's Eye Shooter Supply, 2003 WL 21639244 *4 (denying defendant firearm distributer's motion to dismiss plaintiffs' public nuisance claim); City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237, 242–43 (E.D.N.Y. 2008) (holding that settlements of public nuisance claims by New York State and City against gun retailers were reasonable and enforceable under the Protection of Lawful Commerce in Arms Act).

238 Ileto v. Glock Inc., 565 F.3d 1126, 1129–30 (9th Cir. 2009).

239 *See Devaney*, 88 F. Supp. 3d at 34.

240 *See Kuhns*, 636 F. Supp. 2d at 431.

241 *See PPLM*, 424 Mass. at 573; *Lovejoy*, 121 Or. App. At 160; *Saint John's Church in the Wilderness*, 194 P.3d at 475.

242 Charles L. Black, Jr., *Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967).

243 WILLIAM PROSSER, PROSSER ON TORTS 615, 616 (5th ed. 1984).

244 W.S. Gilbert & Arthur Sullivan, *My Eyes are Fully Open*, English National Opera (last visited May 16, 2022), https://www.eno.org/discover-opera/explore-more/gilbert-and-sullivans-best-loved-songs/.

actions involving private litigants. First, when a private plaintiff alleges that a private actor violates constitutional rights, the state action doctrine should preclude the plaintiff's use of the constitution as a sword against a private defendant, unless the defendant's conduct is attributable to the state. Second, when a private plaintiff brings a state law claim against a private defendant, the state action doctrine will not prevent the private defendant from using the constitution as a shield. By using this framework, it should no longer be necessary to ascribe state action to the court's action in enforcing private rights to satisfy the state action requirement in a lawsuit between private actors.[245]

A. *State Action Bars the Constitutional Sword Against Private Actors.*

The state action doctrine originated in situations where a plaintiff (or in the *Cruikshank* case, a federal prosecutor) claimed that a private actor or actors violated constitutional rights.[246] In *Cruikshank*, the state action doctrine barred the federal government from punishing private actors for violating the constitutional rights of others.[247] In *Rives*, the Court applied the state action doctrine to prevent the appeal of a conviction based on the defendant's claim that an all-white jury violated his rights under the Equal Protection Clause.[248] Finally, in the *Civil Rights cases*, the Court disallowed private plaintiffs from claiming that private actors violated their equal protection rights by discriminating against them based on race in providing public accommodations.[249]

A more recent decision in which private individuals unsuccessfully asserted their constitutional rights as a sword against a private entity is *Rendell-Baker v. Kohn*.[250] In *Rendell-Baker*, discharged employees filed a section 1983 action against a private school alleging First, Fifth, and

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245 *See, e.g.*, Cohen v. Cowles Media, 501 U.S. 663, 668 (1991) (addressing "whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered"). The *Cohen* court relied on the rationale of *Sullivan* and subsequent cases to conclude that state action is involved because "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Id.* The dissent agreed that the action constituted state action. *Id.* at 672 (Blackmun, J., dissenting) ("I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner's promissory estoppel claim constitutes state action under the Fourteenth Amendment."). *See also* Shelley v. Kraemer, 334 U.S. 1 (1948), DeBruin v. St. Patrick, 816 N.W.2d 878 (2012), and Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010) (stating that the court action itself constitutes state action).

246 See United States v. Cruikshank, 92 U.S. 542, 547 (1875), Virginia v. Rives, 100 U.S. 313 (1879), and the Civil Rights Cases 109 U.S. 3 (1883).

247 *Cruikshank*, 92 U.S. at 547.

248 *Rives*, 100 U.S. at 313.

249 *Civil Rights Cases*, 109 U.S. at 3.

250 Rendell-Baker v. Kohn, 102 S. Ct. 2764, 2765 (1982).

Fourteenth Amendments violations.[251] The Court affirmed the First Circuit's determination that although "the school's funding, regulation, and function show that it has a close relationship with the State," the private school was not acting under color of state law when it discharged employees.[252] After reviewing the factors that could make a private entity a state actor, the Court concluded that the action of the private school was not state action subject to constitutional considerations.[253]

The Court in *Halleck* disallowed a First Amendment claim filed by private plaintiffs producing public access programming against a private media platform for excluding them from participation based on their views.[254] While the dissent argued that the private media platform was a state actor because it performed a public function, the majority found that New York City did not have a property interest in public access channels that it could delegate to a private actor.[255] Similarly, in *Prager University (PragerU) v. Google*, the Ninth Circuit found that YouTube is a private forum, not subject to judicial scrutiny under the First Amendment, and relied on the *Halleck* decision to affirm the dismissal of PragerU's complaint alleging that YouTube violated its First Amendment rights.[256] Again, the PragerU court found that YouTube is not a state actor because it did not perform a public function.[257]

B. *State Action Allows the Constitutional Shield Against Private Actors.*

Beginning with *New York Times v. Sullivan*, private defendants in speech tort actions have been able to use their First Amendment rights as a shield against private plaintiffs.[258] As detailed in Part II, Section C, tort law developed to the point where the Court in *Snyder v. Phelps*, without ever referencing the state action doctrine, avowed that the Free Speech Clause of the First Amendment "can serve as a defense in state tort suits, including suits

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251 *Id.* at 2769.

252 *Id.* at 2769–70 (noting that the color of law issue under Section 1983 is the same question as to whether state action exists to justify constitutional scrutiny of the claim asserted) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

253 *Id.* at 2770–72 (analyzing the three factors used by the Court in Blum v. Yaretsky, 457 U.S. 991, 1005 (1982)—1) dependence on the State for funds; 2) extensive regulation by the State; and 3) performance of a public function—to determine whether "certain nursing homes were state actors for the purpose of determining whether decisions regarding transfers of patients could be fairly attributed to the State").

254 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

255 *Id.* at 1934 (Sotomayor, J., dissenting).

256 Prager University (PragerU) v. Google, 951 F.3d 991, 995 (9th Cir. 2020).

257 *Id.* at 998.

258 *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 282–283 (1964).

for intentional infliction of emotional distress."[259] While at first the *Cohen v. Cowles Media* decision may look incongruous with the other Free Speech press cases, the Court did recognize that state action was present in the enforcement of the agreement, but it determined that the contract claim against the press did not merit a constitutional defense.[260]

Courts enforcing other contract claims between private parties have not found state action to allow constitutional defenses. As discussed in Part II, Section C, courts have denied private parties the right to assert constitutional defenses as a shield against the enforcement of contract settlement claims,[261] arbitration agreements,[262] employment contract claims against religious institutions,[263] and private restrictive covenants, other than in *Shelley v. Kraemer*.[264] My reimagination of the state action doctrine would require courts to allow constitutional defenses in contract enforcement litigation, except, perhaps in the religious institution employment context, which seems to have a framework outside of the state action doctrine as illustrated in *Hosanna Tabor*. Accordingly, arbitration agreement enforcement would allow constitutional defenses, as would private restrictive covenant enforcement. New Jersey already allows private landowners in covenant enforcement actions by HOAs to use the state constitution as a shield. Instead of viewing *Shelley v. Kraemer* as an outlier, applicable only to racially restrictive covenants, or as support for a rule that court action is state action, all restrictive covenants would be subject to constitutional restrictions.[265] Such a reimagination would also reduce the need to rely on public policy restrictions against covenants that violate constitutional rights.

Private defendants facing property claims of trespass and nuisance have also confronted state action barriers when asserting their constitutional rights as a shield against private actors. Part II, Section D, reviews the development of trespass litigation involving constitutional liberties beginning with *Marsh v. Alabama*, which allowed trespassers in a company town to defend against claims by using their First Amendment rights as a shield.[266] Like *Shelley*, *Marsh* was an outlier, subsequently restricted to its facts. Later, a U.S.

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259 Snyder v. Phelps, 562 U.S. 443, 451 (2011) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988) (finding that public figure may not "recover damages for emotional harm caused by the publication of an ad parody offensive to him").

260 Cohen v. Cowles Media, 501 U.S. 663, 668, 670 (1991); *see* Solove & Richards, *supra* note 61, at 1662–63 (explaining different scholars' opinions about the impact of *Cohen*).

261 *See* State v. Noah, 103 Wash. App. 29, 50 (2000).

262 *See* Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191 (11th Cir. 1995).

263 *See* Debruin v. St. Patrick, 343 Wis. 2d 83, 92–93 (2012).

264 Shelley v. Kraemer, 334 U.S. 1 (1948); *see* Solove & Richards, *supra* note 61, at 1700–01 (contending that *Shelley* is an outlier from restrictive covenant cases).

265 This reimagination is in direct conflict with my previous writings that attempted to resolve the state action dilemma by viewing *Shelley* as an outlier, no longer necessary to protect against racial discrimination. *See* Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?* 47 U. KAN. L. REV. 61 (1998).

266 Marsh v. Alabama, 326 U.S. 501, 507–08 (1946).

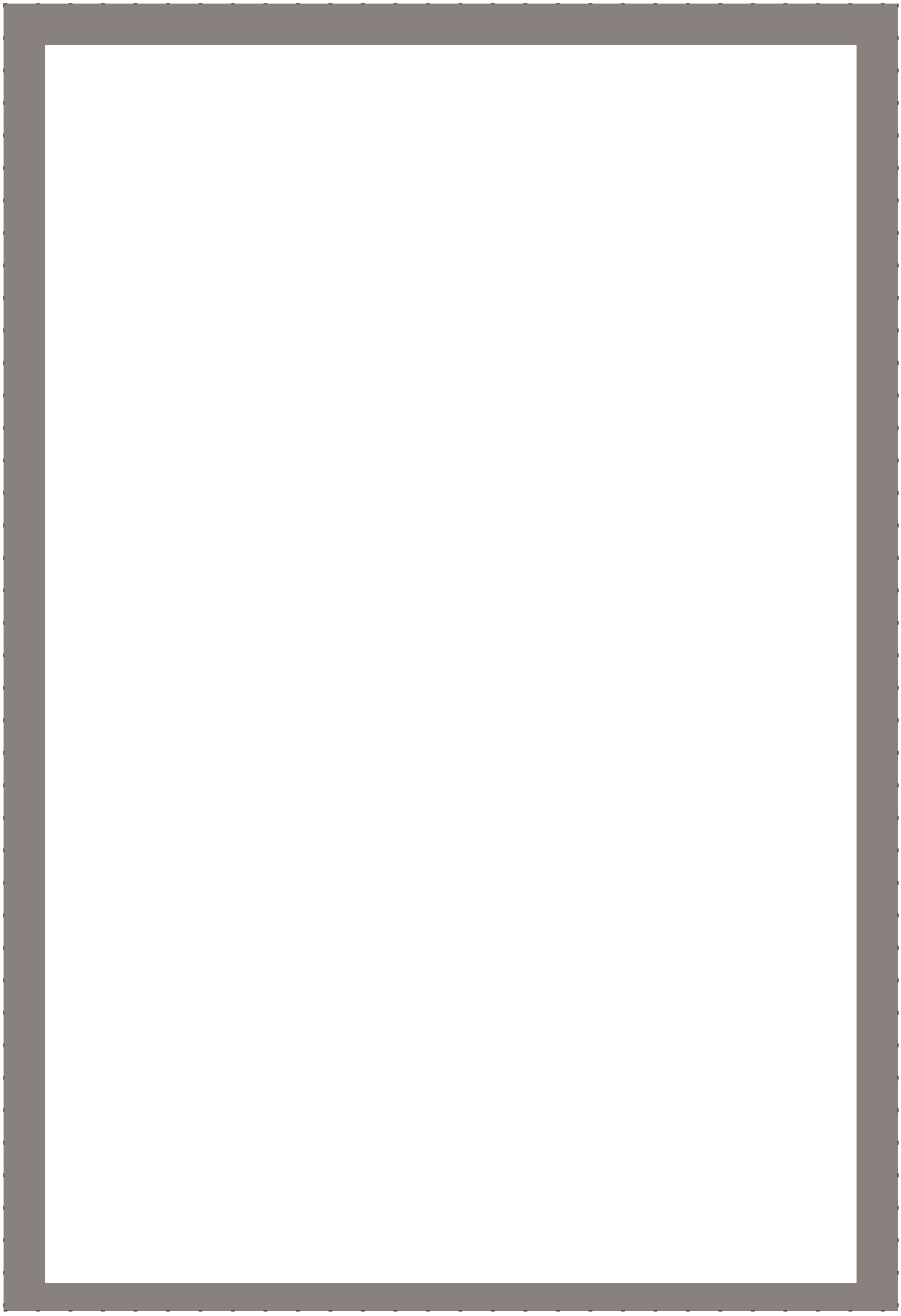
Supreme Court decision barred private defendants from using the Constitution to defend themselves against trespass claims brought by private shopping centers, otherwise open to the public. In *PruneYard Shopping Center v. Robins*, the Court upheld California's expansion of state constitutional defenses against trespass claims involving private litigants.[267] The California Supreme Court found the state action necessary for constitutional defenses in the fact that a private shopping center opened its doors to the public.[268] Federal courts should return to a standard that allows private defendants in trespass suits to use constitutional rights as a shield.

Finally, private defendants should be able to use constitutional principles to defend against nuisance claims brought by private actors. Part III examined several nuisance actions implicating constitutional rights. These cases illustrate that when plaintiffs claim that a private actor has violated their constitutional rights in creating a nuisance, the state action doctrine will protect the private actor from liability. Alternatively, defendants in a nuisance action may constitutionally defend their conduct, even though they may not ultimately prevail. The constitutional protection of their conduct should serve as a defense, not just as a factor in determining the unreasonableness of their conduct that constitutes a nuisance.

CONCLUSION

New York Times v. Sullivan was originally an outlier in state action jurisprudence.[269] However, federal courts extended *Sullivan* to allow, without question, First Amendment defenses to speech tort liability.[270] The federal courts did not similarly extend *Shelley* to allow constitutional defenses to contract enforcement and they did not extend *Marsh* to allow constitutional defenses to trespass. While there is not a similar outlier in nuisance litigation, state and federal courts should continue allowing constitutional defenses against nuisance claims. Reimagining state action to bar the constitutional sword against private actors, while allowing the constitutional shield against state law claims between private actors, will help bring clarity to this "conceptual disaster area."

267 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).
268 *See* Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742, 749, 754 (Cal. 2007).
269 Solove & Richards, *supra* note 61, at 1656–57.
270 *See generally* Han, *supra* note 70.



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