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Public nuisance, write attorneys Charles H. Moellenberg Jr. (chmoellenberg@jonesday.com), Kevin P. Holewinski (kpholewinski@jonesday.com), and Ryan D. Dahl (rddahl@jonesday.com) ''has become the tort du jour.'' Government entities, asserting they are protecting public health and safety, are suing product manufacturers over tobacco, firearms, lead paint, and climate change, the authors observe.

But are the courts the right place to resolve these issues? No, the authors say. ''Complex scientific and technical issues, which also raise profound and far-reaching public policy concerns, are most appropriately debated and resolved through the legislative and regulatory processes, not in the courtroom,'' the authors argue. Judges and juries do not have the expertise needed to understand the issues or fashion remedies.

No Gap Left: Getting Public Nuisance Out Of Environmental Regulation and Public Policy

By Charles H. Moellenberg, Jr.,
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INTRODUCTION

Once the sole prerogative of the king to resolve offenses against the sovereign, and relegated for centuries to the dusty back pages of common law tort books, public nuisance has become the tort ''du jour.'' As public policymakers failed, in some advocates' eyes, to act decisively to correct perceived public health problems from tobacco, firearms, lead paint, and climate change, among other social ills, imaginative public health advocates teamed with well-financed armies of contingency fee attorneys to tout their causes as public nuisances requiring judicial intervention.

The judiciary has been called upon historically to address social grievances and inequities when government, particularly at the state and local levels, has failed to act. Protecting existing constitutional and civil rights in schools, housing, and prisons are well-known examples. Admittedly, in those types of litigation against public bodies, the courts must address not only thorny legal issues, but a host of complex economic, public policy, and scientific questions as well.

However, today's public nuisance claims are not brought to protect citizens against the institutions of

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government. Just the reverse: Powerful government officials, bearing the procedural protections afforded to the government and the moral imprimatur of acting in the public interest, in league with wealthy lawyers and zealous advocates, are asserting public nuisance claims against targeted citizens—certain product manufacturers—that make lawful, useful products and employ thousands of people in communities throughout the U.S. It is a scheme for wealth transfer outside the usual system of taxation and fees, and for government coercion outside the traditional process of legislation and regulation.

In light of prior judicial intervention into the public policy arena, one might ask whether there should be any concerned eyebrows raised over the recent invocation of public nuisance law to attack manufacturers that are allegedly responsible, in whole or in part, for the health and environmental ''crises'' caused by their lawful products or business operations. The short answer is ''yes.'' The reasons for concern arise from traditional notions of judicial competency, the appropriate role of the judiciary in our democracy, the distortion of public nuisance law principles, and, most importantly, the self-evident conflicts between our comprehensive, detailed environmental laws and the amorphous public nuisance rules that give little guidance to courts and juries and that permit, unless checked, sweeping claims for relief.

The thesis of this article is straightforward: Complex scientific and technical issues, which also raise profound and far-reaching public policy concerns, are most appropriately debated and resolved through the legislative and regulatory processes, not in the courtroom. Not only are there inefficiencies and unintended consequences from using public nuisance as a ''judicial gap-filling tool,'' there are actually few gaps left to fill. Public nuisance doctrine should not be allowed to operate as the equivalent of a roving, un-enacted Superfund law to resolve hotly disputed, perhaps even intractable, environmental and public policy issues of our time.

To the extent that national or even regional problems need to be addressed, governmental agencies with expertise, acting pursuant to legislative programs and following public processes in which all interested parties have an opportunity to participate, provide the most rational, efficient, and comprehensive system to address environmental problems – not to mention the most democratic means to ameliorate, if not solve, the perceived ill. The agencies possess more resources and, by definition, have more in-depth knowledge than judges and juries who lack the necessary training, expertise, and public accountability for those issues. If the existing, comprehensive legislative schemes, which result from our democratic process, do not address the alleged harm, the answer lies not in the courtroom, but rather in the legislative chambers and regulatory hearing rooms where any necessary and appropriate amendments to these schemes can be sought. If regulatory agencies are loathe to act or believe they lack authority to act, the courts may address those threshold jurisdictional questions and require the regulatory agency to take action. *See*, *e.g.*, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (concluding that carbon dioxide is an ''air pollutant'' under the Clean Air Act and EPA must determine whether new motor vehicle greenhouse gases are reasonably anticipated to endanger the public health or welfare, or to provide a reasonable basis for not making such a judgment).

Insofar as courts are called on to address environmental matters covered by or within the fair contemplation of regulations, courts should decline the invitation to work with the blunt instrument of public nuisance. Instead, courts should follow established law, which advises against the use of public nuisance law where a statutory or regulatory framework already exists.

I. PUBLIC NUISANCE HISTORY

The history and theory of public nuisance has been well explicated in recent articles.[1] In old England, public nuisance developed as a right of the sovereign to prevent continuing offenses against the Crown, such as polluting public lands or blocking public waterways. As the Rhode Island Attorney General stated in arguing against a motion to dismiss his public nuisance lawsuit against several former lead pigment manufacturers, public nuisance is ''always, always, always, always a crime.''[2] Today, ''public nuisance actions'' are often authorized by statute and regulations, and they permit public officials to use the courts to abate or prosecute the alleged nuisance in order to protect the public interest.[3]

A century ago environmental statutes and regulations did not exist. Suppose that in 1900, a toxic cloud emanated from a factory, crossed state lines, polluted the countryside and destroyed crops. The state suffering from the pollution wanted to stop the pollution. To what statutes or regulations could the State Attorney General turn at that time? None. The lone federal environmental statute, the Rivers and Harbors Act of 1899,[4] governed only the navigable, interstate waterways. Public nuisance law filled the need for an avenue of redress as no comprehensive federal or state environmental programs provided the means to abate the alleged harm.

Public nuisance law has also traditionally dealt with accommodating competing uses of property. Again, at the dawn of the twentieth century, zoning and land use laws and regulations were seldom seen. Yet, as towns grew, industrial uses competed with farmers, and pig farms competed with residential areas, to name a few. Again, public nuisance stepped in to fill a void, to sort out discrete instances of unreasonable interferences with another's property rights by smells, noises, and other local intrusions on property. Over time, but before the advent of what has become our ''cooperative federalism'' approach to environmental regulation by federal and state governments, private parties have used public nuisance law to address a potpourri of local environmental issues, such as contamination from tanning operations, parks in disrepair, noisy campers, shopping centers, helicopters, polluting vehicles, noxious dis-

[1] Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 Temp. L. Rev. 825 (2004); Richard O. Faulk & John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel,* 21 Toxics Law Reporter 48 (December 14, 2006); Donald G. Gifford, *Public Nuisance as a Mass Product Liability Tort*, 71 U. CIN. L. REV. 741, 817 (2003); Victor E. Schwartz and Phil Goldberg, *The Law of Rational Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. 541 (Spring 2006).

[2] Hearing, State of Rhode Island v. Lead Indus. Ass'n, C.A. No. 99-5226, p. 134, 1: 16-18 (Oct. 12, 2000)

[3] *See e.g.,* Ohio Admin. Code §§ 3701 *et seq*, Ohio Rev. Code. §§ 715.261, 3707.01, and 3742 *et seq*.

[4] 33 U.S.C. § 412, *et seq*.

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charges from factories, airports, sumps, and interference with views and sunlight.[5] Public nuisance also had its history of resolving smaller criminal or statutory offenses. It is no wonder, then, that Dean William Prosser called public nuisance a ''legal garbage can,''[6] others a ''mongrel tort,''[7] even others a ''chameleon word.''[8] As Dean Prosser noted, nuisance actions have addressed such varied issues as ''obstructed highways, lotteries, unlicensed stage-plays, common colds, and a host of other rag ends of the law.''[9] Not surprisingly, law school texts and professors spent little time discussing this amorphous, seemingly unimportant tort, which stepped in to serve a public regulatory role when laws and regulations were absent or inapplicable.

II. LOVE CANAL—BRINGING ENVIRONMENTAL REGULATION TO THE FOREFRONT

In the past, public nuisance allowed the courts to fill a regulatory void to protect the environment and the citizenry from pollution. However, comprehensive environmental laws and regulations eventually filled that void. As public anxiety and scientific evidence over the health effects of industrial pollution grew in the 1960s, the current era of extensive government regulation of the environment, as well as the workplace, product safety, and consumer protection, was born. The Clean Air Act preceded by four years the first Earth Day in 1970. Citizens learned new sets of acronyms in the early 1970s, when Congress created EPA, OSHA, and CPSC. Civil rights coalesced with environmental, worker, and consumer safety to change the way of prior generations' thinking.

The Love Canal site became the poster child for environmental regulation in the 1970s. In 1953, municipal authorities covered the former chemical landfill and transferred the property to Niagara Falls, New York. Developers and the city that built homes, roads, and a school on the site cut into the landfill's containment. Escaping contaminants caused environmental and health alarms.[10]

In December 1979, the United States filed suit against the former operator of the Love Canal dumpsite and its parent company.[11] The suit alleged that the Niagara sites were an ''imminent and substantial endangerment to health and the environment'' and that the defendants violated the Resource Conservation and Recovery Act, the Clean Water Act, the Safe Drinking Water Act, the Refuse Act, and the common law of nuisance.[12] After ten years of litigation, it became clear that ''no secure mechanisms [were] in effect for determining such liability.''[13] Ten years of nuisance litigation gave no solution. Congress responded to the complexities of Love Canal, a property that changed many hands over the course of nearly half a century, by passing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or ''Superfund'').[14]

CERCLA provides broad regulation facilitating cleanup of hazardous substances with a level of detail and compromises that the common law cannot match. CERCLA provides for EPA remediation authority as well as private party contribution claims.[15] CERCLA not only empowers EPA to employ the administrative actions necessary to protect the environment (such as investigations, assessments, and detailed remedial studies), but also allows for citizen suits to enforce its provisions and permits natural resource trustees to bring actions for damages to natural resources.[16] CERCLA set up a comprehensive program administered by persons with scientific and technical expertise to handle designated sites with a specific set of rules aimed at particular companies and persons identified as actually contributing to the hazardous contamination at a site. Judicial review was limited to the end of the process, so as not to interfere with the hazard assessment and remediation *See, e.g.*, 42 U.S. § 9613(h).

CERCLA imposed retroactive liability on industries, but narrowly avoided constitutional problems by linking prior conduct to the liability and spreading the liability among many potentially responsible parties from owners to operators to generators to transporters.[17] While liability to the Government was not only strict but joint and several, CERCLA was amended to make explicit that a party had a right to contribution so as to ensure that liability was shared by all responsible. Contribution liability, therefore, was ultimately apportioned among the responsible parties and limited to each party's allocated share.[18] Interested members of the community could participate in hearings on the risk and proposed remedies. CERCLA provides a powerful, all-inclusive solution to large-scale environmental problems at particular locations.

Other statutes and regulations also allow EPA and other agencies to address complex environmental problems. For example, the Resource Conservation and Recovery Act (RCRA) was designed to provide ''cradle-to-

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[5] William H. Rodgers, Jr., Environmental Law: Air and Water, § 21, at 29-30 (1986).

[6] William L. Prosser, Handbook of the Law of Torts § 71, at 549 (1st ed. 1941).

[7] F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480 (1949).

[8] J.R. Spencer, *Public Nuisance - A Critical Examination*, 48(1) Cambridge L.J. 55, 56 (1989).

[9] William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 998 (1966).

[10] Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal, Jan. 1979. Available at, http://www.epa.gov/history/topics/lovecanal/0l.htm.

[11] EPA, Press Release: *U.S. Sues Hooker Chemical at Niagara Falls, New York*. Dec. 20, 1979. Available at http://www.epa.gov/history/topics/lovecanal/02.htm.

[12] *Id.*

[13] Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal, Jan. 1979. Available at, http://www.epa.gov/ history/topics/lovecanal/01.htm

[14] Thomas F. P. Sullivan, *Environmental Law Handbook*, at 225 (13th ed. 1995).

[15] Sullivan, *supra* note 24, at 226.

[16] Sullivan, *supra* note 24, at 225-26, 242.

[17] *See: United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997); *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663 (N.D. Ohio 1992); *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988); *United States v. Bliss*, 14 Chem. Waste Litig. Rep. 551, 551-52 (E.D. Mo. 1987); *United States v. Tyson*, Civ. No. 84-2663, 1986 U.S. Dist. LEXIS 21325 (E.D. Pa. Aug. 21, 1986); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985) (''Courts which have addressed these arguments have held that retroactive application of § 107(a) to pre-CERCLA conduct does not offend due process.''); *Jones v. Inmon Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984); *see also: United States v. Atlas Minerals & Chemicals*, 797 F. Supp. 411, 419 (E.D. Pa. 1992).

[18] *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991).

grave'' controls over those responsible for the generation, transportation, treatment, storage, and disposal of hazardous waste.[19] As with CERCLA, RCRA allows EPA to bring enforcement actions and permits citizen suits aimed at either violators or the EPA Administrator for failure to perform a nondiscretionary duty.[20] Other federal statutory schemes, including the Clean Air and Clean Water Acts, the Toxic Substances Control Act, the Safe Drinking Water Act, the Nuclear Waste Policy Act, the Asbestos Hazard Emergency Response Act, the Lead Contamination Control Act, and continuing amendments to each of these schemes, provide a complete set of rules for regulating and resolving environmental questions in those areas. Equally important, each vests vast power within federal agencies with the requisite scientific and technical expertise to administer and enforce the programs. Furthermore, state statutes will very often duplicate and even enhance federal law, filling in potential gaps in the federal schemes with intensive regulations that have a more local focus. This notion of ''cooperative federalism'' is one of the linchpins of the development and evolution of federal environmental law.

Some might argue that the legislators and regulators have not included all of the companies and persons who should be held responsible for the alleged environmental contamination. Did not manufacturers create and set in motion the chemicals and products that have now allegedly caused the pollution and environmental hazard; arguably so, but Congress and state legislators have drawn the lines for responsibility based on public policy. It is not for the courts to redraw those lines.[21]

III. JUDICIAL PRECEDENT AND COMMENTARY SUPPORT JUDICIAL DEFERENCE TO ENVIRONMENTAL REGULATION

Now that environmental laws and regulations encompass the field, how should courts react to environmental public nuisance claims? Public nuisance has always been a ''mongrel'' because it has served to fill the gaps left in various laws and regulations when it is necessary to balance individual activities against the public interest. Long-established law and commentary holds that highly regulated activities and subject matter are not the stuff of public nuisance actions. However, one principle has consistently held true for public nuisance:

> [I]f there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations.
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> ***
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> The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, *may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately*.

Restatement (Second) of Torts § 821B, Comment f, at 91-92 (1979) (emphasis added). The Restatement comment reflects traditional judicial philosophy on the proper role of the courts and the limitations on their competence to resolve complicated scientific and public policy issues.

Many courts have followed the Restatement's mandate to leave regulation to the regulators. In *New Mexico v. General Electr. Co.*, the Tenth Circuit recently affirmed summary judgment for corporate defendants in a common law action brought by the New Mexico Attorney General in an effort to supplement existing environmental statutes and remedies.[22]

The Attorney General sought damages under tort law (including public nuisance) from companies for extensive groundwater contamination.[23] Because the nuisance action unnecessarily supplanted the state and federal agencies' long-standing remediation efforts and expertise, the federal district court granted summary judgment for the defendants, and the Tenth Circuit affirmed.[24]

From the outset, U.S. EPA and the New Mexico Environmental Department (NMED) worked in tandem performing necessary investigations and studies to assess and remediate the groundwater contamination. In fact, the Tenth Circuit could find nothing in the record indicating that the state agency opposed any aspect of the ongoing cleanup. ''Rather, the [U.S.] EPA . . . worked with and addressed the concerns of NMED at every stage.''[25] When the state through its Attorney General brought a nuisance action seeking damages, the state did not follow the procedures to seek damages under CERCLA but instead brought suit in state district court seeking essentially the same damages under common law theories of trespass, public nuisance, and negligence.[26] The court held that CERCLA preempted the state law claims, rejecting them outright.[27]

The federal appellate court deferred to CERCLA's principal aim to effectuate the cleanup of hazardous waste sites and to impose cleanup costs on responsible parties.[28] The court observed that CERCLA provides a ''comprehensive damage scheme which addresses damage assessment for natural resource injury, damage recovery for such injury, and use of such recovery.''[29] Congress, according to the court, ''intended to provide a vehicle for cleaning up and preserving the environment from the evils of improperly disposed of hazardous substances rather than a new font of law on which private parties could base claims for personal and property injuries.''[30] The court then stepped aside in favor of the agencies' superior ability to address a complex environmental problem: ''CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or

[19] Sullivan, *supra* note 24, at 44.
[20] Sullivan, *supra* note 24, at 71-72.
[21] In fact, the legal doctrines of duty, remoteness, and actual and proximate causation would likely draw these lines in the same place but for those instances where a manufacturer actually generated or transported a waste, as contemplated by CERCLA.

[22] 467 F.3d 1223 (10th Cir. 2006).
[23] *Id.* at 1226.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1235.
[27] *Id.*
[28] *Id.* at 1244.
[29] *Id.*
[30] *Id.* (citing *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1286 (D. Del. 1987)).

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acquisition of the equivalent of a contaminated natural resource . . . the remedy the state seeks to obtain through such causes of action—an unrestricted award of money damages—cannot withstand CERCLA's comprehensive NRD scheme.''[31] Indeed, ''[a]ny relief provided the state would substitute a federal court's judgment for the authorized judgment of both the EPA and NMED . . . that the cleanup is not only comprehensive but flexible and dynamic, readily adjusting as new data is received.'' *Id.* at 1250. In short, the Tenth Circuit refused to allow the Attorney General to use public nuisance law to substitute for the comprehensive programs, well-defined rules, well-informed expertise and experience of federal and state environmental regulators.

Other courts have applied similar reasoning to achieve the same results. In *South Camden Citizens in Action v. N.J. Dep't of Envt'l. Prot.*,[32] a group of minority citizens sued the operator of a cement grinding plant for operating a public nuisance in their neighborhood.[33] The federal district court found that the plant was ''fully regulated'' by applicable state and federal laws, including the Clean Air Act.[34] Plant activities were ''affirmatively sanctioned by the [New Jersey Department of Environmental Protection] by way of air permits.''[35] In the court's view, another black-letter principle of law stated in the Restatement precluded nuisance liability against the plant operator: ''conduct that is fully authorized by statute, ordinance, or administrative regulation does not subject the actor to tort liability.[36]

In *State ex rel. Norvell v. Ariz. Pub. Serv. Co.*,[37] the Attorney General of New Mexico brought a nuisance action for mercury emissions against a power plant regulated by the New Mexico Environmental Improvement Agency.[38] The New Mexico Supreme Court dismissed the suit: ''[b]y nothing before us is it made to appear that the trial court could solve the mercury problem [at the plant] either more quickly or better than the Agency. All of the plaintiffs' claims involve areas in which the Agency is active. Based upon the information available to us, we are concerned lest the intervention of the trial court would add little to, or even hamper, the solution of the overall problem.''[39] The court cited to a number of cases supporting judicial deference:

> While the state and federal governments may not be moving as swiftly as plaintiff would like in this area, the fact remains that legislative and administrative guidelines and programs have been initiated. It would be improper for this Court to exercise its equitable jurisdiction to interfere with the comprehensive programs designed to solve a complex social, economic and technological problem. Quite simply, we choose not to pollute the scene with still more studies and standards.[40]

The court continued:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[41]

In July 2004, eight states—Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin—and the City of New York filed a public nuisance action in federal court in New York against the five largest electric utilities in the United States.[42] On the same day, three private land trusts—Open Space Institute Inc., Open Space Conservancy , Inc., and Audubon Society of New Hampshire—filed a parallel suit making virtually identical allegations.[43] In their complaints, plaintiffs asserted claims under federal common law, or alternatively statutory nuisance law, to abate the ''public nuisance'' of ''global warming.'' They asked the court to cap defendants' alleged emissions of carbon dioxide from their plants and then reduce those emissions by some unspecified percentage each year for at least a decade.

Plaintiffs' assertion of ''federal common law of public nuisance,'' and their attempt to assert tort claims based on the worldwide phenomenon of global warming, raised a number of legal issues, including whether the allowance of any federal common law cause of action to abate global climate change would be inconsistent with basic separation-of-powers principles, whether any cause of action that might have encompassed those claims has been displaced, whether plaintiffs lacked standing, and whether the alternative state law-based public nuisance claims are preempted. When the case was argued in the federal district court, Judge Loretta A. Preska also raised, and defendants endorsed, the conclusion that plaintiffs' claims presented nonjusticiable political questions.[44] Judge Preska dismissed the actions on that ground.[45] Relying on statements of both Congress and the Executive branch over the years

[31] *Id.* (citations omitted).
[32] 254 F. Supp.2d 486 (D.N.J. 2003).
[33] *Id.* at 489.
[34] *South Camden,* 254 F. Supp.2d, at 507.
[35] *Id*.
[36] *Id*. at 91.
[37] 510 P.2d 98 (N.M. 1973).
[38] *Id.* at 98.
[39] *Id.* at 105.
[40] *Id.* at 105 (citing *City of Chicago v. General Motors Corp.*, 332 F. Supp. 285, 291 (N.D. Ill. 1971)).
[41] *Id.* at 103-04 (citing *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).
[42] *See Connecticut v. American Electric Power Co.,* No. 1:04-cv-05669-LAP (S.D.N.Y.).
[43] *See Open Space Institute, Inc. v. American Electric Power Co.*, No. 1:04-cv-05670-LAP (S.D.N.Y.).
[44] 406 F. Supp.2d 265 (S.D.N.Y. 2005), *(appeal pending)*, No. 05-5104-cv (2d. Cir. 2005).
[45] The Connecticut litigation is not the only nuisance action filed over global warming or climate change. There have been at least three other cases filed. In one, *Comer v. Nationwide Mutual Insurance*, a class of plaintiffs has asserted state nuisance and other tort claims against oil companies, coal companies and others for damages allegedly sustained as a result of Hurricane Katrina and allege that defendants' emissions caused global warming and contributed to Hurricane Katrina. *Comer v. Nationwide Mutual Insurance,* 2006 WL 1066645 (S.D. Miss. Feb 23, 2006). The district court dismissed the claims as non-justiciable. In another, *California v. General Motors*, California sued six automakers for contributing to global warming. In that suit, the state seeks damages, including compensation for the State's expenditures in responding to global warming. A motion to dismiss this case is pending. *California*

on the issue of global climate change in general and the federal government's specific refusal to impose limits on carbon dioxide emissions of the kind sought by the plaintiffs, the court held that the initial policy determination as to how to address global climate change was vested in the political branches and not the courts.

As a final example of judicial deference, the New Jersey Supreme Court upheld the dismissal of public nuisance suits brought by 26 municipalities against former lead pigment manufacturers seeking to recover costs of lead paint inspections and remediation, health care costs for residents, and public education programs, as well as to order the handful of former manufacturers sued to abate all lead paint present in the State. The New Jersey Supreme Court concluded that the cities did not fit within the ''well-recognized parameters of [the] tort'' of public nuisance, but ''to find otherwise would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims . . . .''[46] After discussing the extensive federal and state legislation and regulations in place to prevent health risks to children from old lead paint, the Supreme Court said, ''[i]t is only in light of this statutory framework that the arguments of the parties concerning the viability of a cause of action sounding in public nuisance can be evaluated.''[47] The Supreme Court then constrained public nuisance to its historic boundaries to prevent that tort from interfering with legislative action:

> Our Legislature, in recognizing the scope and seriousness of the adverse health effects caused by exposure to and ingestion of deteriorated lead paint, acted swiftly to address that public health crisis. Its careful and comprehensive scheme did so in conformity with traditional concepts of common law public nuisance. Nothing in its pronouncements suggests it intended to vest public entities with a general tort-based remedy or that it meant to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme.[48]

These courts, ranging from last month to half a century ago, refused to entertain public nuisance claims where regulation exists and refused to ''substitute a . . . court's judgment for the authorized judgment''[49] of the regulators. Indeed, as the U.S. Supreme Court indicated in *Far East Conference*,[50] judicial tampering through the vehicle of public nuisance can become more of a nuisance than the very problems courts seek to address.

IV. A COMPARISON OF PUBLIC NUISANCE TO STATUTORY AND REGULATORY PROGRAMS AND REMEDIES

When environmental regulatory programs overlap with potential liability and remedies under common law public nuisance, prevailing judicial precedent encourages the courts to step aside in favor of the regulators. But, why should courts stand down when critical issues of public health and welfare seem to be at stake? A number of compelling, jurisprudential, and practical reasons support that deferential philosophy.

A. Judicial deference avoids conflicts between the branches of government.

Public nuisance law when used to remedy environmental problems may conflict with established legislative schemes and sound public policy. As the Tenth Circuit recently noted in striking a tort claim for money damages in deference to a comprehensive environmental regulatory approach, ''an unrestricted award of money damages does not restore or replace contaminated natural resources.''[51] The objective of environmental statutes and regulations is to protect and restore the environment, consistent with other public policy goals.

For example, in Rhode Island, the State Attorney General brought a public nuisance suit against a few of the many former lead pigment manufacturers rather than enforcing existing federal and state statutes and regulations that place the responsibility on property owners to prevent or abate lead paint hazards accessible to children. The Attorney General alleged and argued that all lead paint in or on homes in Rhode Island must be abated. In contrast, federal and state environmental and housing rules proclaim that intact lead paint is typically not a hazard and does not need to be abated. The legislators and regulators have chosen a lead-safe policy and determined that property owners should be responsible. This policy recognizes not only the goal of protecting children, but protects against unnecessary, costly, and dangerous abatement of intact lead paint, balances costs against benefits for all concerned, rations public and private resources toward the high-risk hazards, and takes into account the need to maintain a supply of affordable housing for low-income people. The Attorney General argued that all lead paint everywhere is a nuisance, even where it is not an immediate hazard, and opted to hold former raw material producers responsible rather than the landlords who control the conditions of the properties today. While the Attorney General may argue that he is filling a regulatory void, the conflict in health, housing, and economic policy is real, as the New Jersey Supreme Court has recently observed. The Rhode Island trial court, however, has brushed that conflict aside.

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v. General Motors, No. 3:06-cv-05755 MJJ (N.D. Cal. 2007). Finally, in *Korinsky v. EPA*, a New York resident sued New York City, the State of New York and EPA alleging that their greenhouse gas emissions contributed to global warming. That case was dismissed on standing grounds, *Korinsky v. EPA*, 2005 U.S. Dist. LEXIS 21778 at *8 (S.D.N.Y. September 29, 2005).

[46] *In re Lead Paint Litigation*, 2007 WL 1721956 (N.J. June 15, 2007) at **1.

[47] *Id.* at **8.

[48] *Id.* at **19.

[49] *New Mexico*, 467 F.3d at 1249.

[50] 342 U.S. at 574-75.

[51] *New Mexico*, 467 F.3d at 1247.

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In the Rhode Island lead paint case, the trial court is searching for a special master or panel of special masters with the expertise to advise it on crafting a remedy, because the court admittedly lacks the expertise to determine the appropriate abatement remedy.

The Rhode Island Attorney General sued in October 1999. After years of motions and discovery, one mistrial, more motions, discovery, and another trial, the Attorney General won a jury verdict, which is now on appeal. But what has the Attorney General accomplished in nearly eight years of litigation? No damages have been awarded, because the state failed to prove its damages. No prospective remedies are in place. No experts have assessed the scope or gravity of the nuisance. There have been no cost estimates, no property visits, and no thorough analysis of the problem. Instead, the trial court is now searching for a special master or panel of special masters with the expertise to advise it on crafting a remedy, because the court admittedly lacks the expertise to determine the appropriate abatement remedy. That lack of judicial expertise and experience in crafting a public health program is the very reason for courts to defer.

With the prospect of appeals ahead and more arduous judicial proceedings, a remedy is not at hand for this ''public nuisance.'' And, the trial court is asking basic questions, such as:

> If we had to have a complete abatement, what does that mean? Does it mean 100,000 homes have to be cleaned up? . . . Hundred and fifty thousand? Is there some point where the public nuisance disappears, or is that . . . something that must be within the unique scope of the equity powers of the court to determine?[52]

In other words, how does the court know when to stop? The last two years of state health data show that, in fact, the incidence of children with elevated blood lead levels is at an all-time low, as is the average blood lead level in the state, and the state has already met its stated target for what it has defined as ''eliminating'' childhood lead poisoning in the state. Neglected housing, lead in soil, lead in water, and other lead sources still present a risk in certain neighborhoods, but the current data, which the state did not show the jury at trial, do not suggest a statewide public nuisance from the mere presence of lead paint.

What more could have been accomplished in the last eight years? The Attorney General could have vigorously enforced lead safety laws against the recalcitrant landlords. Rather than casting about for persons with expertise and experience, the state regulators in health and housing have the capability, as the data show, to do the job. They have a set of rules already passed by the Rhode Island General Assembly and implemented through more detailed regulations. The legislature has the ability to raise money to pay for more intensive programs and enforcement if deemed necessary. Instead, the Attorney General may use the trial court to set up court-administered inspectors, risk assessors, and abaters operating under different authority and possibly conflicting rules.

B. Federal and state environmental rules allow for uniformity and consistency, which also provides some level of certainty and predictability to companies in conducting their businesses.

Our Constitution commands that citizens are entitled to know and have ''fair notice'' of the rules judging their conduct.[53] In addition, public policy achieves optimum results through consistent application of those rules. Further, companies can function more efficiently when they are able to predict and account for the costs of doing business, including costs of regulation and liability. All argue in favor of a system based on known, consistently applied federal and state environmental rules, rather than *ad hoc* outcomes resulting from public nuisance lawsuits under divergent state tort law. For example, firearms regulations can take steps to keep firearms out of the hands of criminals and others who are likely to misuse them. Those regulations are in effect and can be immediately implemented. Reform through regulation can proceed promptly once consensus is reached after hearing from all interested parties.

Likewise, as appropriate, environmental regulations can efficiently set limits for sulfur dioxide, carbon dioxide, and other emissions that might have an impact on the environment. Programs can enforce the regulations and use economic incentives to encourage desired behavior. In contrast, public nuisance litigation against firearms manufacturers and those allegedly responsible for global warming has accomplished nothing to date because courts have recognized these types of claims raise non-justiciable questions that are best addressed, if at all, by another branch of our government.[54]

Inconsistency and unpredictability are inherent in any type of litigation, but especially the vague area of public nuisance. A jury in Rhode Island assessing whether a few former lead pigment manufacturers are responsible for a public nuisance, defined as the cumulative presence of lead pigments in paint in or on buildings throughout the state, first deadlocked. A second jury initially reported a deadlock, then eventually reached a verdict finding three of four companies responsible for a public nuisance, where no finding of culpable conduct was required. In Milwaukee, the city sued only one of those former lead pigment manufacturers, and a jury found that it was not responsible for creating a public nuisance through its prior sale and

[52] Hearing, *State of Rhode Island v. Lead Indus. Ass'n*, C.A. No. 99-5226, p. 8:5-15, (Feb. 7, 2006).

[53] *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (''Living under a rule of law entails various suppositions, one [of which is] that '(all persons) are entitled to be informed as to what the State commands or forbids.' '' (citing *Lanzeta v. New Jersey*, 306 U.S. 451, 453 (1939)).

[54] *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (affirming dismissal of public nuisance case brought against gun manufacturers); *Connecticut v. American Electric Power Co.,* No. 1:04-cv-05669 LAP (S.D.N.Y.); *Open Space Institute, Inc. v. American Electric Power Co.*, No. 1:04-cv-05670 LAP (S.D.N.Y.).

marketing of lead pigments there. Four state supreme courts have refused to allow public nuisance lawsuits to proceed against former lead pigment manufacturers,[55] while two intermediate appellate courts and one trial court in other states have allowed the public nuisance claims to proceed.[56] That is hardly the sort of consistency on which a coherent and successful public policy should be based.

One must also wonder about the unintended consequences resulting from the public nuisance trials in Milwaukee and Rhode Island, for example. The Milwaukee jury found that a public nuisance existed in some housing from deteriorated lead paint, but the defendant company was not responsible. The city now has a finding of public nuisance on its hands. Is it estopped from contesting that finding in future litigation against it, if it fails to enforce the law or to remedy the nuisance conditions? How does the finding of public nuisance affect its bond disclosures and ratings? By filing suit, has the State waived any government immunity from claims?

In Rhode Island, is the Attorney General and State Health Department bound to abate all lead paint in housing everywhere, since in their view it has been declared a public nuisance, including public housing? Is every Rhode Island owner of a property with lead paint now complicit in maintaining that public nuisance? What does that finding do to property values and insurance? Can tenants withhold rent until all lead paint is abated? Are lenders now potentially liable in future property transactions? Can and will property owners now sit back and do nothing to prevent or abate lead paint hazards on their properties, while waiting for the court to fashion and implement a remedy, and consequently cause more lead hazards to children? When enforcement of the existing laws and regulations is critical to preventing and removing health hazards, will enforcement decline while governments wait for the results of a public nuisance lawsuit?[57]

C. Legislation and regulation fosters democratic accountability, unlike litigation.

Proposed laws and regulations are debated in public, and all interested or affected persons have the right to be heard. Proposed regulations are published with notice for comments, and hundreds of comments are often received. Elected officials communicate with their constituents to learn their desires and are ultimately accountable in the voting booth. Regulators answer to those elected officials. While democracy sometimes moves at a slow pace, all views are heard, and officials strive to find an acceptable consensus. Competing policy goals are put in balance, special interests of all kinds are heard and sometimes accommodated, and the costs and benefits of a proposed program are carefully evaluated. Program funding is typically spread equitably across either all taxpayers or certain groups of persons.

Litigation is inherently undemocratic. Decisions are made behind closed doors and shielded from public view and comment in the name of jury privacy, attorney-client communications and attorney work product. The choice of contingency fee counsel to represent public bodies and the amount of their fees often evades public scrutiny, normal legislative review, and public comment.[58] Contingency fee counsel have wide latitude in the conduct of the litigation and have a sizeable personal financial interest at stake, not purely the public interest. Settlements are brokered in privacy. Most affected persons are not before the court. The costs and burden of litigation are imposed on the few unfortunate targets, chosen by contingency fee attorneys for their deep pockets, rather than spread widely and fairly.[59] Public nuisance liability standards, often imposing joint and several liability, give incentives for plaintiffs to sue only large, wealthy targets. Apportionment of liability becomes very difficult because plaintiffs and courts in a public nuisance action have few mechanisms, and even less incentive, to bring in all responsible parties.

The contingency fee attorneys retained by the Rhode Island Attorney General identified six former lead pigment manufacturers, and no one else, to pursue for an alleged statewide nuisance resulting from elevated blood lead levels in children. It was apparently of no moment to the Attorney General that the General Assembly had already pinpointed landlords, property managers, and others as stewards over potentially offending properties, and had also noted many other sources of lead within the state accessible to children.[60] The global warming litigation is no exception. Government authorities and citizens groups sued five electric utilities while ignoring other potentially responsible parties whose total contribution to the alleged global warming problem far exceeded the utilities' collective share.

Environmental statutes such as CERCLA give incentives for cooperation among ''potentially responsible parties'' (PRPs). Where many entities contribute to a single large-scale problem, PRP groups form, centralizing processes for information gathering, analysis, and allocation of responsibility. Public nuisance provides no

[55] Opinion, *City of St. Louis v. Benjamin Moore & Co., et al.*, No. SC88230 (June 12, 2007); *In re Lead Paint Litigation*, 2007 WL 1721956 (N.J. June 15, 2007); *Jackson v. Glidden Co.*No. 87779, 2007-Ohio-277, 2007 WL 184662, *rev. denied*, 114 Ohio St. 3d 1426, 868 N.E. 2d 680, 2007-Ohio-2904 (Ohio 2007); *City of Chicago v. American Cyanamid Co., et al.*, 355 Ill.App.3d 209, 823 N.E.2d 126, *appeal denied,* 215 Ill.2d 594, 833 N.E.2d 1 (2005).

[56] Opinion, *County of Santa Clara v. Atlantic Richfield Co., et al.*, No. CV788657 (Cal. App. March 3, 2006); *City of Milwaukee v. NL Industries, Inc.*, 278 Wis. 2d 313, 691 N.W.2d 888 (Wis. Ct. App. 2005), *review denied,* 285 Wis. 2d 631, 703 N.W. 380 (Wis. Aug. 1, 2005); Final Judgment, *State of Rhode Island v. Lead Indus. Ass'n*, C.A. No. 99-5526 (March 16, 2007).

[57] One unintended consequence of the Attorney General's public nuisance action is the government's decision to cut funding for its lead programs. Ray Henry, *Rhode Island Budget Problems Dominate Legislative Year*, The Boston Globe (June 22, 2007) (''Democrats overturned some of Carcieri's cuts to social welfare spending, for example, his proposal that the state not fund lead paint cleanup programs and phase out financial support for teenagers in state foster care after they turn 18.'').

[58] *See e.g.,* City of East Cleveland, Ordinance No. 67-06 (Sept. 5, 2006), heard on an ''emergency'' basis dispensing with normal procedures.

[59] Memorandum of Decision, *Whitehouse v. Lead Indus. Ass'n*, C.A. No. 99-5226 (March 15, 2002); Decision, *Whitehouse v. Lead Indus. Ass'n*, C.A. No. 99-5226 (July 3, 2002).

[60] R.I. GEN. LAWS §§ 6-36-12, 10-1-1, 23-24.6-1 *et seq.*, 27-18.4-2, 40-6-9, 40-8.2-6, 42-9-2, 42-9-5, 45-24.3-5, -1046-12.3-5; 1844 R.I. Pub. Laws 71-74.

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such mechanism. The large number of contributors that go unaddressed in public nuisance litigation is detrimental to positive remediation efforts. Minor contributors have little incentive to reduce their environmental impact, while large-scale participants, which are left holding a potentially business-paralyzing bill for money damages or abatement, must fight the litigation vigorously.

D. Courts and juries lack scientific and technical expertise, unlike specialized regulatory agencies.

Public nuisance, at its core, allows judges and juries with little, if virtually any, expertise to make sweeping decisions related to complex environmental problems, which possess overwhelming scientific complexities that experts, whether at EPA or elsewhere, would have considerable difficulty solving. Juries sit for only a few days or weeks listening to truncated information about problems that may require, as do many environmental issues, months or years for an environmental agency to adequately assess. Without adequate information and without a complete and in-depth understanding of the underlying issues that large-scale environmental problems present, juries are susceptible to catch phrases such as: ''if you make a mess, you have to clean it up'' or ''the companies should pay their fair share'' when making decisions. Such sound bites may make headlines and may even persuade jurors, but they come up empty when authorities have to address the real issues involved in efficiently and effectively resolving complex environmental problems.

Environmental statutory schemes, however, flow from legislative analysis and administrative regulations that provide guideposts to follow, predictable procedures for implicated parties, and comprehensive remedies that aim for total resolution, rather than imposing broad liability on a single ''contributor'' to a public nuisance. Expertise and experience is brought to bear through agency staff, scientific advisory panels, government funded research, and a multitude of public commentators, written comments, articles, and those who testify or otherwise communicate with their public representatives.

E. Litigation involves extra expense and diverts attention of public officials.

Litigation is expensive for all involved. It is especially costly for government bodies that retain outside counsel on a contingency fee. While government officials might believe that litigation financed by contingency fee counsel is cost-free, it is hardly that. Litigation consumes much time of government personnel. They have to gather records, submit to depositions, prepare their attorneys, and testify at trial. Time and attention is diverted from developing and implementing public programs.

More importantly, the contingency fee attorneys are not working for free. If successful in a public nuisance lawsuit, they will take out of any award a substantial percentage plus all of the litigation expenses for experts, transcripts, travel, and the like. Those funds go to the lawyers, not the public policy program.[61] Less funds are left available for the public programs than funds raised through other public means, whether taxes, fees, or licenses, for example. Less can be accomplished. And, as seen in the protracted litigation involving firearms and lead paint, litigation can take much longer to accomplish less than legislation and regulation. Because litigation must proceed case by case, often individual by individual plaintiff, it also can devour far more time and resources than a regulatory solution. Is it better to have a piecemeal solution with a multitude of cases clogging already congested courts, or a single, comprehensive legislative solution?

F. Funding for legislative and regulatory programs will go to their designated programs, whereas public nuisance awards are treated as general revenues.

This point is self-evident. Funds appropriated for government programs must be used for their designated purposes. Government audits ensure the proper use of public funds. In contrast, funds obtained from public nuisance litigation are put into the general revenues and can be used for any purpose. Everyone is well aware of tobacco litigation settlement funds supposedly earmarked for smoking cessation and other related health programs instead being used to build roads and close budget gaps.[62]

G. With legislation and regulation, responsibility is equitably shared; with public nuisance, liability is imposed on the selected few.

Because of the political process, the costs of legislation and regulation tend to be shared among many. That is certainly true for CERCLA liability, which usually brings many potentially responsible parties to the table. Each is liable for a share, determined by its contribution to the contamination.

With public nuisance, the plaintiff picks the persons to sue. The plaintiff has every incentive to sue a few deep pockets rather than a multitude of smaller ones. For example, in the lead pigment litigation, the plaintiffs have tended to sue a few former manufacturers of lead pigments that are out-of-state, wealthy companies. Although statutes and regulations put the obligation on property owners to prevent and abate lead paint hazards, it is not financially lucrative to sue hundreds of neglectful landlords on a property by property basis. Nor have the plaintiffs sued the hundreds of former lead paint manufacturers, distributors and retailers, the professional architects who specified the lead paint, or the professional painters and contractors who chose to use it, much less the myriad other lead sources. The same phenomenon is seen in the public nuisance lawsuits over global warming, in which the plaintiffs have pre-

[61] This leaves aside the controversy over how fee counsel have been chosen and the exorbitant amounts to those counsel. *County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct., Santa Monica Cty., Apr. 4, 2007), at 3 (''[A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, . . . and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel.'')

[62] John O'Brien, *Tobacco Settlement Money Going to Fix Rhode Island's Budget*, LegalNewsline, June 27, 2007, http://www.legalnewsline.com/news/197312-tobacco-settlement-money-going-to-fix-rhode-islands-budget.

dictably chosen to sue a few large energy companies, or a few large auto manufacturers, rather than include the many other sources of carbon dioxide emissions.

H. Under legislation and regulation, the rules are prescribed and the obligation is direct. Public nuisance rules are vague, and causation is often attenuated.

It is rare to see legislation or regulations attacked for excessive vagueness. They set definitions, provide explicit rules in writing, establish procedures, and designate responsible persons. Persons obligated to act under the legislative and regulatory rules have some direct connection to a particular site that presents environmental contamination. Unless that direct link is proven, through eyewitnesses, invoices, bills of lading, or other records, the defendant is not responsible. The site can be visited, inspected, and tested.

Public nuisance law has strayed from its moorings. Historically, public nuisance was tied to a particular location. The defendant could visit, inspect and test the site; juries were taken to the site to view it.[63] The defendant's conduct had to be tied directly to the alleged, offending nuisance. The conduct was typically ongoing at the time, so it and its consequences could be seen. This direct causal connection between one person's conduct and another person's injury is the hallmark—the sine qua non—of any tort claim. It demarks the proper role of courts to resolve particular disputes among individuals, not to create social programs. Courts are traditionally asked to decide whether a particular activity or event injured the plaintiff. Courts require proof of specific causation.

Not so with the new brand of public tort, public nuisance lawsuits. With the tobacco public nuisance litigation, no product was inspected, no injured person was examined, and no public costs were tied to an injury caused by the defendant's product. The same is true with the public nuisance lawsuits aimed at the former lead pigment manufacturers. No property is inspected, no product is seen at any location, and no person injured by a defendant's product is ever identified or examined.

The new public nuisance litigation is based on statistics and principles of general, not specific, causation.[64] Can and does tobacco harm health? If so, how much has the government entity spent on programs relating to illness caused by tobacco use? Population data, population statistics, and epidemiology pervade the courtroom, but not actual individuals with injuries and direct causal connections to specific harm or expenditures. The new public nuisance plaintiffs argue that proof of specific causation is not needed. The question is no longer whether tobacco or lead paint injured a particular person or presents an immediate health risk to a particular person or at a specific property. The question becomes whether tobacco or lead paint can harm children.

The battle in the public nuisance courtroom resembles a public policy debate, not the traditional role of courts to mete out individualized justice. The vague rules for public nuisance liability lend themselves to such a debate. Has there been an interference with a public right, defined as some interference with public health, welfare or safety? Product sales or marketing in the community take the place of specific identification of the defendant's product damaging a property or injuring a particular person. In the Rhode Island lead pigment litigation, the trial court did not require any proof of culpable misconduct or any finding that a defendant's product is actually present in the state today, essentially imposing absolute liability for assumed product presence.

Public nuisance litigation, if set loose from traditional tort requirements, transforms fundamentally the court's function from arbiter of individual disputes to that of public policy maker. It allows a single judge or jury to set public policy for an entire state or the nation based on a set of rules that is confusing and vague at best, and that can vary from state to state. Certainly the public nuisance rules have nowhere near the specificity and detail of environmental laws and regulations. The unpredictability and inconsistency of courtroom decisions and verdicts is the inevitable result.

V. WHAT IS LEFT FOR PUBLIC NUISANCE LAW IN REGULATED ARENAS?

The California Supreme Court says it well:[65] ''The ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature.''[66] That supreme court earlier explained the limited, proper role of the judiciary:

> Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.[67]

Following that logic, one may fairly ask what is the remaining, appropriate role for common law public nuisance to play, if any, in addressing environmental contamination or other heavily regulated spheres.

To the extent that there is any gap left by environmental regulations and statutory nuisance—and we imagine in the context of ''the parade of imaginary horribles'' that lawyers are trained in, there could be—those situations are more likely than not to raise nonjusticiable questions that are best resolved through our democratic form of government by another branch rather than the courts. Should courts determine the risks to the environment, if any, from nanotechnology and set the policy rules? Should the courts determine

[63] William Blackstone, 3 Commentaries on the Laws of England 221; Alexander M. Burrill, 1 A New Law Dictionary and Glossary 107 (1850); Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 Cambridge L. J. 144, 145 (1978); Anthony Fitz-Herbert, Natura Brevium 426 (7th ed.1730).

[64] A manufacturer's liability for products past the point of sale has historically been limited to product liability and negligence claims, often expressly because courts have found that imposing liability on manufacturers for the use or condition of products subsequent to sale creates a vast and unprecedented burden. *See Board of Education v. United States Gypsum Company*, 580 F. Supp. 284, 294 (E.D. Tenn. 1983).

[65] *People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090 (1997).

[66] *Acuna*, 14 Ca1. 4th 1090, at 1107.

[67] *City of Bakersfield v. Miller*, 410 P.2d 393, 398 (Ca. 1966).

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the desirable amount of wetlands protection? Those and other situations most likely will involve complex, interrelated and far-reaching policy questions that, under our democratic process, are constitutionally assigned to Congress or state legislatures, not the courts, which lack the expertise and any meaningful and clear legal standards for resolving them.[68]

Ask a few basic questions and the answer seems to be obvious:

- Is it better for complex scientific questions to be resolved by persons with technical expertise who can devote months of considered research and analysis, ask probing questions of many experts in the field, engage in extended debate, and receive public comments from all interested persons, *or* by an untrained judge and jury who hear carefully scripted, truncated presentations by a few ''experts'' chosen to fit each party's self-interest?
- Is it better to resolve liability issues affecting potentially thousands of persons through a multitude of individual lawsuits and contribution claims or through a comprehensive regulatory program?
- Is it desirable to have a judge with no specialized education or expertise in science or the environment set societal policy through the exercise of equitable remedies?
- Which process is more likely to achieve a balanced, socially and economically optimal result – the ''all or nothing'' process of litigation between particular persons, or the legislative and regulatory process which invites everyone's views and seeks to accommodate them?

Thus, in the hypothetical public policy gap situation, it is our view that the courts should typically hold such public nuisance claims to be non-justiciable. Otherwise, the very decision to permit such suits presents a major policy choice: It would confer on private litigants the authority to choose which industries and environmental issues should be regulated to forestall the alleged harms they wish to address, but that should not be the function of our courts.

Fashioning any equitable relief plaintiffs seek would inevitably entail other policy choices: In an already highly regulated world, should an injunction force defendants to change their business operations and if so, in what way, and who should absorb the costs? The automakers sued by the state of California over global warming certainly would suggest it should not be them. Further, there are unknowable downstream economic consequences that courts are not equipped to assess, much less adjudicate. In short, these are not decisions that courts, armed only with ''vague and indeterminate nuisance concepts and maxims of equity jurisprudence,''[69] are competent to make.[70] Nor are federal courts constitutionally authorized to make such decisions. These policy choices require ''the balancing of competing values and interests, which in our democratic system is the business of elected representatives.''[71]

CONCLUSION

Environmental statutes and regulations allow for a comprehensive analysis of an environmental problem before declaring that a site or facility is dangerous. Agency experts and private consultants can take the time to address, on a property by property basis, the varying degrees of hazard and the most efficient manner of cleanup. Legislatures and agencies can also effectively resolve, after hearing from all interested persons and a multitude of persons with expertise and experience in a variety of disciplines, issues of public policy affecting societal health, safety and welfare. A judge and jury may well have opinions on those public policy issues, but cannot address those large-scale problems with any similar sense of competency or all-inclusive procedures.

The broad landscape of environmental statutes and regulations provides procedural and substantive predictability that ad hoc public nuisance actions cannot provide. Courts should avoid employing the erratic, inefficient and incomplete remedies wrought by public nuisance and defer instead to Congress and state legislatures' more sure mechanism for the remediation of environmental and other public policy problems.

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[68] This point is hardly novel. The courts, for example, will evaluate legislative schemes to consider whether they expressly or impliedly preempt judicial action. *See Sprietsma v. Mercury Marine, a Division of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).. Elaborate rules of standing, justiciability, and abstention also permit the courts to defer to other branches of government. The problem is for the courts to avoid the enticement that public nuisance law presents to overstep appropriate judicial boundaries.

[69] *City of Milwaukee v. Ill. and Mich.*, 451 U.S. at 304, 317 (1981).

[70] *Id.* at 325 (pollution is ''particularly unsuited to the approach inevitable under a regime of federal common law''); *West Virginia*, 341 U.S. at 27 (noting ''inherent limitations upon [the courts'] ability to deal with multifarious local problems'').

[71] *Texas Indus., Inc.*, 451 U.S. at 647 (internal quotation marks omitted); *see also O'Melveny & Myers v. F.D.I.C.*, 512 U.S., 79 – 89 (1994); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (''[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches' '') (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)); *New York v. FERC*, 535 U.S. 1, 24 (2002) (energy policy is ''properly addressed to the [FERC] or to the Congress, not to th[e] Court[s]'').

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