

Public Nuisance Law when Politics Fails

DAVID A. DANA*

Public nuisance lawsuits provide a vehicle for litigants to address public problems that legislatures and agencies have sidestepped. The courts have generally rejected such suits, directing litigants back to the very legislatures and agencies that allowed the problems to fester in the first place. This Article proposes a normative framework for judges to evaluate public nuisance claims, balancing democratic legitimacy, technical competency, and the magnitude of the harm. This approach has several important implications, including that courts should stop avoiding reaching the merits of nuisance claims by relying on preemption and abstention doctrines, as they have done with recent claims involving COVID-19, interstate air pollution, and climate change. Another implication is that contrary to leading commentators and some courts, public nuisance liability sometimes should encompass the manufacturing and distribution of products that result in health crises, such as the opioid addiction crisis. Public nuisance law is not a panacea, but it can play a constructive role in dealing with public harm when politics fails.

TABLE OF CONTENTS

I.	INTRODUCTION	62
II.	OVERVIEW OF PUBLIC NUISANCE	69
	A. <i>Three Categories Of Public Nuisance Claims</i>	69
	B. <i>Democratic Legitimacy And Technical Competence</i>	74
III.	JUDICIAL AVOIDANCE IN PUBLIC NUISANCE LITIGATION	76
	A. <i>Asian Carp in the Great Lakes as a Public Nuisance</i>	80
	B. <i>Interstate Air Pollution As A Public Nuisance</i>	84
	C. <i>The Judicial Resources Objection</i>	87
IV.	PUBLIC NUISANCE BALANCING WHEN THERE ARE CLEAR, BUT UNENFORCED, REGULATORY STANDARDS.....	87
	A. <i>Non-Enforcement Reasons and the Mandate/Guidance Distinction</i>	89
	B. <i>The Covid-19 Workplace Litigation</i>	91
V.	PUBLIC NUISANCE BALANCING IN PRODUCTS-BASED LITIGATION	97
	A. <i>The Democratic Legitimacy Objection Based On Products Liability Law</i>	98

* Kirkland & Ellis Professor of Law, Northwestern University Pritzker School of Law. Many thanks to Nora Freeman Engstrom, Heidi Kitrosser, Doug Kysar, and Nadav Shoked for very helpful comments.

B.	<i>The Democratic Legitimacy Objection Based On The Contingency Fee Lawyers' Role</i>	103
C.	<i>A Balancing Approach As Applied To The Opioid And Climate Change Adaptation Litigation</i>	106
VI.	CONCLUSION.....	114

I. INTRODUCTION

Public nuisance is a common law and statutory tort that allows for civil suits to abate interferences with “public right” rights such as the right to clean air and clean water.¹ Recent litigation alleges that defendants interfered with the public right to protection from contagions like COVID-19² and the public right to protection from the effects of climate change, such as increased drought, wildfire, and rising sea level.³ The subjects of public nuisance suits also include the public right not to suffer from widescale health crises created by products such as prescription opioid drugs⁴ and lead paint.⁵ The list of proposed subjects for public nuisance suits goes on and on.⁶

¹ See, e.g., *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189–90 (3d Cir. 2013) (public nuisance alleging public harm in the form of air pollution); see also *infra* Part III.B (discussing public nuisance as air pollution and criticizing the courts’ hesitance to adjudicate these claims on the merits).

² See, e.g., Vin Gurreri, *COVID Suits Test ‘Public Nuisance’ Claim in Workplace Cases*, LAW360 (June 9, 2020), <https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases> [<https://perma.cc/4VYZ-F2PQ>]; see also *infra* Part IV.B (analyzing the COVID-19 litigation involving public nuisance claims).

³ See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (addressing climate change as a nuisance but holding that federal statutory law displaces federal common law); see also *infra* Part V.C (discussing the democratic legitimacy and causation issues in public nuisance cases seeking damages for the costs of climate change adaptation).

⁴ See, e.g., *In re Nat’l Perscription Opiate Lit.*, 477 F. Supp. 3d 613, 623 (N.D. Ohio 2020) (allowing public nuisance claims based on distribution of prescription opioids to proceed); see also *infra* Part V.C (discussing the democratic legitimacy and causation issues in the opioid litigation).

⁵ See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 489, 506 (N.J. 2007) (affirming dismissal of public nuisance claims against lead paint manufacturers); *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 329 (Ct. App. 2006) (holding that lead paint manufacturers could be held liable for creating a public nuisance). For notable public nuisance cases involving other products, see, for example, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389 (2d Cir. 2008) (handguns); *State v. Hess Corp.*, 20 A.3d 212, 214–15 (N.H. 2011) (gasoline additives); and *In re JUUL Labs, Inc., Marketing, Sales Practices, & Products Liability Litigation*, 497 F. Supp. 3d 552, 645 (N.D. Cal. 2020) (vapers).

⁶ See, e.g., Amanda Purcell, Comment, *Using the Public Nuisance Doctrine to Combat Antibiotic Resistance*, 68 AM. U. L. REV. 339, 377–78 (2018) (suggesting public nuisance be used to address antibiotic resistance created by industrialized food production); Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 426 (2011) (suggesting public nuisance be used to address obesity); Justin Pidot, Note, *The Applicability of Nuisance Law to Invasive*

Most of these suits have been brought by public plaintiffs—state attorneys general (on behalf of States), and local governments—although some have been brought by employees against employers or neighbors against neighbors.⁷ The implicit message of all of these suits is that the federal and state legislative and executive branches of government—specifically, Congress, federal agencies, state legislatures, and state agencies—did not do their job: that is, they failed to enact, fund, or enforce regulation to protect the public from harm. But the courts, by and large, have refused to acknowledge the regulatory failures that prompt public nuisance actions. On the contrary, the courts have often dismissed the public nuisance claims, explaining that the problems at issue are suitable for the legislatures and agencies, but not courts, to resolve.⁸ The courts, in other words, often have sent the plaintiffs to seek recourse from the very same legislatures and agencies that had allowed the harm to the public to come into being in the first place.

This judicial posture, if it ever was fully defensible, is less defensible now. The administrative state has never been perfect at protecting the public from harm, but we do appear to be living in a time when notable regulatory failure and inaction is becoming more, not less, common.⁹ For example, we have not seen any major environmental legislation grappling with the climate crisis pass Congress,¹⁰ and Congress and the Executive demurred, avoided, and argued and state governments floundered, as the COVID-19 crisis overwhelmed the nation.¹¹ Chronic underfunding of non-entitlement, non-defense budgets at the

Plants: Can Common Law Liability Inspire Government Action?, 24 VA. ENV'T L.J. 183, 198–218 (2005) (suggesting public nuisance be used to address invasive species).

⁷ See Gurrieri, *supra* note 2.

⁸ See generally Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913 (2008) [hereinafter Gifford, *Impersonating the Legislature*].

⁹ See, e.g., Cary Coglianese, *Preface to REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION*, at vii, vii (Cary Coglianese ed., 2012) (“Has the United States suffered a regulatory breakdown? The answer to this question would appear to be an obvious ‘yes.’”); MICHAEL LEWIS, *THE FIFTH RISK* 21, 26 (2018) (detailing incompetence, neglect and lack of effective leadership in the federal government); Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. DAVIS L. REV. 1075, 1084 (2012) (describing the current era as one of “complex environmental challenges, environmental policy gridlock, and corporate dominance of legislative agendas”).

¹⁰ See, e.g., Amber Phillips, *Congress’s Long History of Doing Nothing on Climate Change, in 6 Acts*, WASH. POST (Dec. 1, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/> [<https://perma.cc/DE3A-FV7P>]; Christopher McGrory Klyza & David Sousa, *Beyond Gridlock: Green Drift in American Environmental Policymaking*, 125 POL. SCI. Q. 443, 443 (2010); Ronald Brownstein, *This Is Why Congress Remains Deadlocked on Climate and Guns*, CNN (Sept. 3, 2019), <https://www.cnn.com/2019/09/03/politics/guns-climate-senate-standoff-smaller-states/index.html> [<https://perma.cc/G7KT-MXWR>].

¹¹ The administrative failures have not been limited to Trump appointees, or even the federal government. See, e.g., George Packer, *We Are Living in a Failed State*, ATLANTIC (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/underlying-conditions>

federal and state level has left even the best-intentioned federal, state, and local agencies with too little money to address the problems they are tasked to solve.¹² A substantial literature addresses the possible causes of contemporary regulatory failure and inaction.¹³

/610261/ [https://perma.cc/ZS5T-392N]; German Lopez, *Everyone Failed on Covid-19*, VOX (Jan. 2, 2021), https://www.vox.com/future-perfect/22176191/covid-19-coronavirus-pandemic-democrats-republicans-trump (on file with the *Ohio State Law Journal*).

¹²In the realm of environmental regulation, see, for example, *During a Time of Cutbacks at EPA, 30 States Also Slashed Funding for State Environmental Agencies*, ENV'T INTEGRITY PROJECT (Dec. 5, 2019), https://environmentalintegrity.org/news/state-funding-for-environmental-programs-slashed/ [https://perma.cc/96EF-QR6N]. The pattern of underfunding is even more dramatic in state and local public health agencies:

Since 2010, spending for state public health departments has dropped by 16% per capita and spending for local health departments has fallen by 18% At least 38,000 state and local public health jobs have disappeared since the 2008 recession, leaving a skeletal workforce in some places.

Lauren Weber, Laura Ungar, Michelle R. Smith, Hannah Recht & Maria Barry-Jester, *Hollowed Out Public Health System Faces More Cuts Amid Virus*, ASSOCIATED PRESS (July 1, 2020), https://apnews.com/article/b4c4bb2731da9611e6da5b6f9a52717a (on file with the *Ohio State Law Journal*); see also *Policy Basics: Non-Defense Discretionary Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 13, 2020), https://www.cbpp.org/research/federal-budget/policy-basics-non-defense-discretionary-programs [https://perma.cc/LVU2-LGGN] (“Since 2010, NDD spending has been declining as a share of the economy, and in 2019 reached a record low of 3.1 percent of gross domestic product (GDP), with official data going back to 1962.”).

¹³These include the rise of a for-profit and generally partisan, “conservative” ecosystem of misinformation that minimizes real problems or contends that proposed regulatory solutions invariably will be wasteful, ineffective, or even corrupt. See, e.g., YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION AND RADICALIZATION IN AMERICAN POLITICS* 3–5 (2018). As has been widely discussed, social media platforms accelerate the spread of misinformation. See, e.g., SIVA VAIDHYANATHAN, *ANTI SOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* 7–11 (2018); CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 4 (2017). Further, the radicalization of one of our major political parties and intensifying partisan polarization undermine legislative and regulatory action, even when, rationally, there should be a broad consensus that some kind of government action is needed. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, at xiv (2012) (“[O]ne of the two major parties . . . has become an insurgent outlier—ideologically extreme; . . . scornful of compromise; . . . and dismissive of the legitimacy of its political opposition.”); Sarah Binder, *How Political Polarization Creates Stalemate and Undermines Lawmaking*, WASH. POST (Jan. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/13/how-political-polarization-creates-stalemate-and-undermines-lawmaking/ [https://perma.cc/GVD4-5UL9] (“Unless one or both parties fear public blame for blocking popular measures, polarization often encourages the parties to hold out for a whole loaf, rather than to settle for half.”). For their part, business elites have become less public-minded and more short-sighted than they were during World War II and the decades immediately following it. JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US*

If one accepts that (at least in the United States) we are in an era of more frequent regulatory failure and inaction, then the question arises: what implications, if any, does that acceptance have for the common law doctrine of public nuisance? Public nuisance is a very old doctrine that litigants have repurposed in an effort to address a wide range of modern problems that could have been or could be addressed by public, that is, non-judicial, regulation.¹⁴ Should courts simply refuse wholesale the invitation to consider whether public nuisance allows courts to provide judicial relief that mimics what a responsible administrative state might have put into place? An extensive body of commentary explicitly commends this view.¹⁵

Or, instead: should the courts be open to, sometimes, regulating (in effect) by means of public nuisance doctrine, notwithstanding all the objections that have been and can be raised toward their doing so? And if public nuisance is at times a defensible response to regulatory inaction and failure, when exactly is it so?

This Article proposes a normative framework—a balancing test—for judges to use in addressing these questions. On one side of the ledger, judges should consider both democratic legitimacy and technical competence objections regarding the use of public nuisance as a response to regulatory inaction and failure. The essence of the democratic legitimacy objection is that judges, even

TO FORGET WHAT MADE AMERICA PROSPER 19, 272 (2016) (“[T]he political coalition in favor of . . . a constructive balance [between effective public authority and dynamic private markets] shattered under the pressure of an increasingly conservative Republican Party and an increasingly insular, parochial, and extreme business leadership Neither contemporary business organizations nor today’s Republican leaders have done much to temper the modern robber barons’ demands, as moderate corporate groups and GOP leaders once did.”).

¹⁴ See, e.g., *State v. Monarch Chems. Inc.*, 443 N.Y.S. 2d 967, 968–69 (Sup. Ct. 1981), *aff’d*, 456 N.Y.S. 2d 867 (App. Div. 1982) (pollution of soil and groundwater); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189–90 (3d Cir. 2013) (air pollution); *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 329 (Ct. App. 2006) (lead paint).

¹⁵ Perhaps the leading, and certainly most influential, article in this regard is Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. TORT. L., no. 2 art. 4, at 1, 1 (2011). Donald Gifford and Victor Schwartz are two other influential, prolific proponents of a constrained conception of public nuisance that would limit the cause of action to cases involving land use and even then generally only ones where there was no federal or state agency that had jurisdiction over the relevant land use issue. See Gifford, *Impersonating the Legislature*, *supra* note 8, at 946–64; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 813–34 (2003) [hereinafter Gifford, *Public Nuisance*]; DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 7 (2010) [hereinafter GIFFORD, *SUING THE TOBACCO*]; Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543 (2006); Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 631 (2010); Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 218 (2014).

when elected (as is true of many state judges), lack as much legitimacy as legislators to create “policy” that is (in a first-best world) properly the domain of the more overtly political branches of government.¹⁶ The essence of the technical competence objection is that judges simply lack the expertise to fashion workable, equitable solutions to the complex problems that are the subject of contemporary public nuisance suits.¹⁷

In almost every situation, these two objections will have some force, but that force will vary considerably by context. On the other side of the ledger, judges should consider the evidence that there has been and will continue to be regulatory inaction and failure alongside the scope of and the severity of the resulting public harm. The clearer the evidence that the public harm is real and great in magnitude and that a meaningful legislative or administrative response has not and will not be forthcoming, the more courts should be willing to fashion a remedy, notwithstanding the democratic legitimacy and technical competence objections.¹⁸

Public nuisance traditionally is limited to “unreasonable” interferences with a public right that cause significant public harm.¹⁹ By definition, an unreasonableness inquiry entails a balancing of contextual factors.²⁰ While the

¹⁶ See Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1838 (2008) (“Policies resulting from litigation may involve less public input and accountability compared to government regulation, serving the private or political interests of the litigants rather than the public interest.”).

¹⁷ Justice Ginsburg articulated this point in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 428 (2011).

The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

Id. (citations omitted) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984)).

¹⁸ The argument that courts should be more assertive and willing to afford relief when faced with harms that are traceable to systematic political failure is well-explored and much-debated in the context of federal constitutional law, especially Equal Protection law. For the classic academic exposition of this argument, see generally JOHN HART ELY, *DEMOCRACY AND TRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹⁹ See RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977).

²⁰ See *id.* (providing that public nuisance requires an unreasonable interference and that the factors in section 826 are relevant to a determination of unreasonableness); *id.* § 826(a) (conduct is unreasonable if the “gravity of the harm outweighs the utility of the actor’s

balancing proposed here may differ from the kind many courts traditionally have undertaken in public nuisance cases, the essence of public nuisance has long been judicial balancing, rather than the application of a clear-cut, acontextual rule.

The balancing approach proposed here, moreover, is normatively superior to the alternatives. Those alternatives are that courts simply ignore the reality and costs of regulatory inaction and failure *or* instead take such failure and inaction as an open, unqualified invitation to enter into arenas that ideally would be the province of the legislatures and executive agencies. Some kind of intermediate posture is needed to take account of the very good reasons for and against judicial regulation via public nuisance.

The balancing approach has several implications for how one assesses what courts have done and should do in public nuisance cases. First, courts should not dismiss public nuisance claims by taking “easy outs”—that is, by invoking doctrines that allow the court to say it lacks jurisdiction to reach, or should abstain from reaching, the merits. Federal and state legislatures, of course, can expressly preempt nuisance actions.²¹ But courts can avoid—and often have avoided—the merits of difficult public nuisance cases using a variety of overlapping doctrines that operate even in the absence of any express preemption; these include political question, implied obstacle preemption, field preemption, displacement, and primary jurisdiction.²² These “easy out” doctrinal means of avoiding the merits preclude any meaningful balancing of factors weighing for and against finding a nuisance; they foster the fiction that the regulatory state is taking account of problems, when (at least in some cases) it clearly is not.²³

conduct”). *But see* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 377–78 (1990) (“If a public right is being substantially violated, the utility of the defendant’s conduct may certainly be a factor to be considered—particularly if the utility redounds to the benefit of the public at large—but it should not be given the weight awarded by the Restatement.”).

²¹ On preemption, see generally David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507 (2008).

²² See *infra* Part III.

²³ Moreover, judicial reliance on these easy outs may contribute to regulatory failure itself by removing a source of pressure for regulatory action. *See, e.g.*, Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 380 (2011) (“In order for such dignified and pedigreed prompts to emerge, courts will have to avoid the temptation to run for political cover, even when faced with monstrously large and complex instances of harm-doing such as contributions to climate change.”); Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015) (“Rather, in the overall context of the modern American legal landscape, tort law may be best understood as playing a critical balancing role in supporting democratic deliberation. Tort suits bring forth new ideas, create new forums for debate, force fact-finding, and increase back and forth dialogue amongst the public and private institutional actors to develop sound law and policy.” (footnote omitted)).

Second, adoption of the balancing approach proposed here suggests that courts should be willing to order injunctive relief as a public nuisance remedy when there are applicable and apparently adequate public regulations, but those regulations are not being enforced by public authorities, despite evident harm to the public. Public nuisance thus can be understood as a common law proxy for statutory citizen suits where (as is often true) those suits are not available or feasible. Suits involving employers' alleged failure to follow COVID-19 regulations and guidance in their own workplaces provide a timely example of this category of public nuisance suits.²⁴

Third, the balancing approach suggests that public nuisance actions based on the sale and distribution of discrete products should not be categorically barred. Commentators have argued that public nuisance claims should be allowed (if ever) only in cases involving land use and that *all* product-based public nuisance cases are democratically illegitimate because they represent end-runs around legislatively created state products liability law. These arguments are unpersuasive on their own terms—and especially so when plaintiffs are seeking to abate the public nuisance action rather than obtain compensation for past harm, and when the defendants themselves have deliberately misled governments and the public about the product's risks.²⁵ More generally, in the balancing approach advocated here, a court should not categorically dismiss all product-based public nuisance complaints, but rather consider the merits of each particular suit.

Two current public nuisance controversies, claims against prescription opioid manufacturers and distributors for fostering the opioid addiction crisis and claims against energy companies for creating the need for costly climate adaptation, illustrate why a categorical approach is inferior to an approach that considers the merits of each product-based nuisance claim on its own terms. As the Article explains, the public nuisance claims regarding opioids are much less problematic on democratic legitimacy grounds than the climate change adaptation claims. Thus, the courts should be more open to the opioid claims than they are to climate-change-adaptation claims.

Part II provides a very brief overview of the history and formal doctrine of public nuisance, and frames the question of how public nuisance, a doctrine that emerged before the regulatory state, should be conceived now, in a time of regulatory inaction and failure. Part III argues that, at a minimum, courts should avoid easy outs like dismissal based on the primary jurisdiction doctrine, and instead should acknowledge the realities of regulatory inaction and failure. Part IV explores the potential for public nuisance to mitigate regulatory failure in the form of non-enforcement of adequate regulatory standards. Part V considers whether public nuisance actions for products-related damages can be defensible

²⁴ See *infra* Part IV.B (describing courts' avoidance of the merits of public nuisance claims in COVID-19 cases).

²⁵ See *infra* Parts V.A–B (explaining that products-based public nuisance cases can derive democratic legitimacy from the status of the plaintiffs as elected statewide officials, and that some of such suits are readily distinguishable from products liability suits).

as responses to regulatory inaction and failure under certain circumstances, taking into account democratic legitimacy, technical competency, and public harm in an overall balance.

Courts have rejected the overwhelming number of public nuisance claims,²⁶ and even if they (explicitly or implicitly) engage in the more open-ended balancing approach advocated in this Article, that still will be true. It is relatively easy for a court that does not want to become mired in a difficult public nuisance controversy to find a doctrinal reason *not* to find an actionable nuisance. But the courts can do better in responding to the reality we live in—a reality in which deferring to some theoretically possible regulatory solution to a problem assumes a better functioning administrative state than we currently enjoy. Public nuisance litigation, in which judges take seriously the merits and balance key considerations, can play a constructive, if limited, role in addressing the failures of the political branches and may even encourage a better, more responsible politics.

II. OVERVIEW OF PUBLIC NUISANCE

A. *Three Categories of Public Nuisance Claims*

Both public and private nuisance are civil actions that sounds in the common law and traces back to English common law. Public and private nuisance share a name (in part), and courts sometimes fail to distinguish between public and private nuisance,²⁷ but analytically, at least, the two tort actions are distinct.²⁸ Private nuisance is defined as an unreasonable interference with another's use and enjoyment of their land.²⁹ Public nuisance is generally defined as an unreasonable interference with a public right.³⁰ Private nuisance is thus always a land-based action, typically pitting neighboring landowners against one another.³¹ Unlike private nuisance, the harm at issue in public nuisance need not involve harm to land,³² but courts in different states disagree on the question of whether public nuisance is limited to instances where the alleged nuisance arose

²⁶ See Schwartz, Goldberg & Schaecher, *supra* note 15, at 631 (noting that most courts have rejected expansive interpretations of public nuisance); Merrill, *supra* note 15, at 54 (noting that “courts have generally been skeptical” of public nuisance claims, and have dismissed them on a wide variety of grounds).

²⁷ See Abrams & Washington, *supra* note 20, at 367 (“Judicial opinions do not always distinguish between public and private nuisance when outlining the elements of a cause of action in ‘nuisance.’ The same can be said of scholarly opinion.”).

²⁸ For a discussion of the doctrinal differences between private and public nuisance, see *id.* at 363–67.

²⁹ See RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1977).

³⁰ See *id.* § 821B.

³¹ *Id.* § 822.

³² See *id.* § 821B cmt. h (“Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land.”).

on land under the defendant's control.³³ Private parties can bring public nuisance actions if they have suffered a "special injury" in addition to the injury to the public;³⁴ government actors also can bring public nuisance actions and, indeed, government actors have been and even today continue to be the principal parties pursuing public nuisance suits in the courts.³⁵

The exact meaning of "public nuisance" is certainly contestable. Some commentators have bemoaned public nuisance as an amorphous, undefined, and perhaps undefinable doctrine.³⁶ But there are various ways to understand public nuisance in concrete terms, one of which is to consider: when have courts actually been willing to find a public nuisance and order relief?

Crudely, one might speak of three categories of public nuisance cases—quasi-crime cases, environmental cases, and product-based cases. Public nuisance originated as a means that (mostly) government officials could enforce via court order prohibitions against (mostly) crimes or quasi-crimes against the public, such as the blocking of public highways or navigable streams.³⁷ This early period included an array of actions to abate public health hazards, such as the maintenance of diseased animals.³⁸ In addition, public nuisance findings sometimes were predicated on the health (more "moral" than physical) risks from brothels and gambling houses.³⁹

Another category of public nuisance cases focused on environmental harms, including air and water pollution and, most recently, greenhouse gas emissions that contribute to climate change. While these kinds of cases are often described as having originated in the 1970s and 1980s,⁴⁰ right before and in the early days

³³ Compare *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (explaining that under Ohio law, public nuisance is not "strictly limited" to "actions connected to real property"), with *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007) (holding that under New Jersey law, "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right").

³⁴ See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 764–75 (2001) (arguing against the special injury requirement for private plaintiff standing).

³⁵ See Merrill, *supra* note 15, at 12–16 (noting the traditional role of public nuisance enforcement by government officials).

³⁶ See Antolini, *supra* note 34, at 769–70 ("Numerous scholars have expressed exasperation in their attempts to describe the boundaries of this 'mongrel' tort.").

³⁷ The leading article tracing the development of this category of public nuisance case—and suggesting public nuisance law not be extended much beyond this category—is William L. Prosser, *Private Action for Public Nuisance*, 52 *VA. L. REV.* 997 (1966).

³⁸ See, e.g., *Durand v. Dyson*, 111 N.E. 143, 145 (Ill. 1915) (keeping diseased animals as public nuisance); *Fevold v. Bd. of Supervisors*, 210 N.W. 139, 140, 147 (Iowa 1926) (same).

³⁹ See, e.g., *Engle v. State*, 90 P.2d 988, 989 (Ariz. 1939) (gaming as public nuisance); *Weis v. Superior Ct. of San Diego*, 30 Cal. App. 730, 731 (Dist. Ct. App. 1916) (indecent exhibition as public nuisance).

See, e.g., Schwartz & Goldberg, *supra* note 15, at 548, 550. Well-known public nuisance cases in this category from the 1970s and 1980s include *State v. Schenectady*

of the development of federal and state environmental regulation, the United States Supreme Court employed public nuisance to abate air pollution crossing from Georgia into Tennessee at the turn of the twentieth century.⁴¹ Harm to natural resources, too, formed the basis of public nuisance holdings.⁴²

The starting date for the third category of public nuisance is arguably the 1990s, when states brought public nuisance suits against leading tobacco companies, which were resolved in a 1998 nationwide settlement.⁴³ Courts in a number (but certainly a minority) of states have found a public nuisance when the nuisance consists of the deceptive marketing of a product that, once used by consumers, created an ongoing public health or environmental harm.⁴⁴ This extension of public nuisance to nuisances created by mass marketed products remains highly controversial among courts and commentators alike,⁴⁵ but that extension is now over twenty years old and is part of the full body of public nuisance case law.

What arguably unites the categories of public nuisance cases is that they all do the work of what a well-functioning administrative state *should* do. At least to modern eyes, the enforcement of prohibitions against crimes or quasi-crimes belongs, in the first best scenario, to duly appointed government officers

Chemicals, Inc., 459 N.Y.S. 2d 971, 976–77 (Sup. Ct. 1983) (applying public nuisance law to the groundwater contamination at Love Canal), and *State v. Monarch Chemicals, Inc.*, 443 N.Y.S. 2d 967 (Sup. Ct. 1981), *aff'd*, 456 N.Y.S. 2d 867 (App. Div. 1982) (finding pollution of soil and groundwater from hazardous waste facility constitutes a public nuisance).

⁴¹ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907) (requiring the defendant to abate its “sulphurous acid gas” pollution).

⁴² See, e.g., *N.J. Dep’t of Env’t Prot. v. Exxon Mobil Corp.*, 183 A.3d 289, 295–304, 339 (N.J. Super. Ct. 2015) (approving a consent decree after decades of litigation in a suit that included public nuisance claims arising out of an oil spill); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020–21 (5th Cir. 1985) (en banc) (addressing whether the plaintiffs had standing to bring a public nuisance claim based on water contamination resulting from a maritime accident).

⁴³ In the 1998 Master Settlement Agreement, the defendant manufacturers agreed to transfer \$246 billion to the states and the states’ attorneys. Although public nuisance was one of the theories underlying the nationwide settlement, the settlement was culminated before any court held that the deceptive marketing of cigarettes constituted a public nuisance. For analyses of the tobacco settlement, see, for example, Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 331 (2001), and David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 474–75 (1999).

⁴⁴ See, e.g., *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142–44 (Ohio 2002) (holding that public nuisance law could support a claim against handgun manufacturers); *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 66, 83–85, 163–65 (Ct. App. 2017) (reversing a judgment in favor of lead paint manufacturers but affirming that public nuisance liability could be predicated on the deceptive marketing of lead paint).

⁴⁵ See *infra* Part V.

exercising their lawful authority.⁴⁶ Preventing and responding to pollution and other environmental threats to the public welfare, too, would seem to best be done by legislatures and agencies. So, too, public health crises from gun violence, ongoing lead paint exposure, and opioid addiction should be something a well-run administrative state can tackle, drawing funding from taxpayers and responsible entities and establishing the necessary programs and implementing the necessary regulations.

Viewed in this light, public nuisance always has been and remains in tension with an ideal of the administrative state. Courts' deployment of public nuisance thus has always implicitly required a conclusion that the administrative state simply was not there to be relied upon. The reasons why reliance was not possible have varied over time: because there simply were few or no police as such, because the state apparatus and needed laws and bureaucracies for environmental and other regulation simply did not exist or were not yet well-developed, or because, as now, a full-fledged administrative state does exist but has been hobbled by the political nihilism, division, and misinformation that characterizes our current era of regulatory failure and inaction.⁴⁷

A leading source of what public nuisance means in practice is Section 821B of the Second Restatement of Torts,⁴⁸ which remains the sole attempt in a Restatement to synthesize and rationalize the full law of public nuisance. While some commentators have criticized Section 821B as seeking to wholly reshape, rather than simply restate,⁴⁹ public nuisance law, it has not been superseded or modified by subsequent ALI efforts.⁵⁰ According to Section 821B, public nuisance makes actionable unreasonable interferences with a right common to the general public, and unreasonableness is defined in terms of (as in nuisance)

⁴⁶ See, e.g., Earl H. De Long & Newman F. Baker, *Powers and Duties of the Prosecuting Attorney: Quasi-Criminal and Civil*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 21, 23–24 (1934).

⁴⁷ See generally Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DÆDALUS 33 (2021) (discussing milestones in the history and present state of the administrative state).

⁴⁸ RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977).

⁴⁹ See Merrill, *supra* note 15, at 26–27 (“With one deft stroke, [the Restatement] transformed public nuisance from a form conduct defined by criminal law into something that sounded like the quintessential tort – albeit a tort having a virtually limitless expanse.”).

⁵⁰ The Restatement (Third) of Torts does not address public nuisance as a general matter, except in a very limited section related to public nuisance actions brought by private plaintiffs for economic loss, and it seems to reaffirm the continuing validity of Section 821B of the Second Restatement. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 8 reporter’s note to cmt. a (AM. L. INST. 2018) (“Restatement Second, Torts §§ 821B and 821C (Am. Law Inst. 1979) define and discuss liability for creating a public nuisance. Those Sections are more general than this one; they are not confined to liability for economic loss, and they contain a more extensive treatment of the standards for determining whether an invasion of a public right is wrongful. The interested reader is referred there for further discussion.”). At the same time, Section 8 of the Third Restatement does express a degree of disapproval regarding products-based public nuisance claims. See *infra* Part V.

a weighing of the gravity of the harm against the utility of the conduct.⁵¹ While any finding of unreasonableness is thus inherently context-specific, three factors are identified as especially relevant:

- (a) Whether the conduct involves a significant interference with the public health, the public safety the public peace, the public comfort or the public convenience, or
- (b) [W]hether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) [W]hether the conduct is of a continuing nature or 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

Factors (b) and (c) suggest that to be held liable in public nuisance, a defendant should have known it was acting “wrongfully.” Under (b), the defendant’s conduct is obviously wrongful because its conduct “is proscribed by statute, ordinance, or administrative regulation.”⁵³ Under (c), the defendant should grasp the wrongfulness of its conduct because “the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and . . . has a significant effect upon the public right.”⁵⁴ Thus, while public and both private nuisance are thought of as strict liability torts,⁵⁵ there is a sense in the case law, as reflected in the Restatement, that public nuisance is about “wrongdoing” even now; in that sense public nuisance remains connected to its criminal and quasi-criminal roots in English law.

A final—but largely uninformative—source of what public nuisance means are state and local statutes defining public nuisances. These statutes are a hodgepodge, ranging from lists of specific, obvious nuisances (like storing gunpowder in a crowded neighborhood⁵⁶) to vague statements of nuisance criteria.⁵⁷ As discussed below, such statutes generally do not purport to be—and have not been judicially construed as—fully codifications of or complete substitutions for the common law of public nuisance.⁵⁸ These statutes, moreover, often date back many decades and are rarely, if ever, updated.⁵⁹

⁵¹ RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1977).

⁵² *Id.* § 821B(2).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See, e.g., Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law*, 16 ENV’T L. REP. NEWS & ANALYSIS 10292, 10294 (1986) (“The imposition of strict liability in public nuisance actions brought by the state is sanctioned by long-standing precedent.”).

⁵⁶ The Illinois public nuisance statute, for example, has not been amended since 1996. 720 ILL. COMP. STAT. ANN. 5/47-5(7) (West 2010).

⁵⁷ See CAL. CIV. CODE §§ 3479, 3480 (West 2016).

⁵⁸ See *infra* note 64.

⁵⁹ A Wisconsin public nuisance statute, for example, was last codified in 1980, and has not been amended since then. *E.g.*, VILLAGE OF ROBERTS, WIS., CODE OF ORDINANCES § 46-

B. Democratic Legitimacy and Technical Competence

Critics of an expansive conception of public nuisance law have argued that judges lack the democratic legitimacy to simply decide there are public harms that require remedying, because such determinations are the province of the political branches and especially the legislatures.⁶⁰ According to this view, judges are acting within the realm of democratic legitimacy when they limit public nuisance to the kinds of cases it historically was most closely associated with—things like blocked highways—and when they very closely adhere to the definitions of public nuisance in state statutes.⁶¹

Viewing democratic legitimacy as an on/off switch, however, is problematic on many scores. In this view, most clearly articulated by Thomas Merrill, there is a hard line demarcating what falls within and without “the delegation” by the state legislatures of the authority of judges to deal with public issues via public nuisance.⁶² But public nuisance is now part of the common law, however one understands its historical origins, and as part of our legal tradition, it is a truism that the role of common law judges is to adapt the common law to changing circumstances.⁶³ The fact that it is the “public” and public rights rather than private parties and private rights that is the focus of public nuisance litigation does not logically remove it from the common law tradition of judicial adaptation and the latitude that tradition bestows on judges.

It is true that many states and localities have adopted public nuisance statutes, but these statutes do not expressly purport to eliminate common law public nuisance and they have almost always been interpreted by courts as *not* superseding or supplanting the common law.⁶⁴ Moreover, even if state public

1 (2022), https://library.municode.com/wi/roberts/codes/code_of_ordinances?nodeId=MUCO_CH46PUNU [<https://perma.cc/SQG8-C8GA>].

⁶⁰ See, e.g., Merrill, *supra* note 15, at 5, 32 (arguing that “public nuisance law suffers from what can be called a delegation deficit” because “[a]ctions have been brought challenging conduct as violating public norms in circumstances where the legislature has not delegated authority to courts to enforce such a norm. And private organizations and individuals have been allowed to bring public nuisance actions in circumstances where the legislature has not provided that they have authority to commence such actions. . . . The chosen instrument of democratic control, throughout our history, has been the legislature. Today, it is widely understood that matters of public right should be resolved by the institution most closely associated with popular control, that is, the legislature.”).

⁶¹ See *id.* at 51 (“Courts should take the position that they have no authority to establish something called public nuisance liability and to define its contours through a process of common law adjudication, absent a delegation from the legislature. Judicial authority to hear public nuisance suits should thus be limited to what has been authorized by statute.”).

⁶² See *id.* at 51–52 (implying that the parameters of delegation are clear and should be strictly honored).

⁶³ See, e.g., *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972) (“The strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.”).

⁶⁴ See 58 AM. JUR. 2D *Nuisance* § 47 (“Statutes defining nuisances generally do not change the common-law definition of the term. Statutes declaring certain things to be

nuisance statutes did supersede the common law, those statutes generally allow for a very expansive public nuisance jurisprudence. Consider, for example, California's public nuisance statutes, which define a nuisance to include "[a]nything which is injurious to health" provided it "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."⁶⁵ Or consider Oklahoma's public nuisance statute, which encompasses any "act or omission" that "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others."⁶⁶

Indeed, because state legislatures have broadly defined public nuisances, it would be contrary to the legislative delegation—it arguably would be *undemocratic*—for courts to rewrite the statutes and proclaim that they only have the authority to declare public nuisances in a very limited set of cases that fit the original quasi-crime conception of nuisance. Democratic legitimacy concerns, of course, can and should weigh in the balance when courts in particular cases determine whether there is a public nuisance. But there simply is no legislative-delegation grounds that courts can rely upon to justify their avoiding direct engagement with the merits of contemporary public nuisance complaints.

The technical competency objection to public nuisance is related to the democratic legitimacy one and also is sometimes depicted as an on/off switch (that is, the court is either competent or not to engage in the public nuisance inquiry and fashion relief). The Restatement hints at this objection but in a very mild form:

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.⁶⁷

There is a logical fallacy, however, in the argument that courts can know that deferring to public regulation as a response to a public harm is a reasonable decision *before* learning about and interrogating the causes of the public harm (or threatened harm). A careful consideration of the claimed harm in a public nuisance suit can provide key evidence as to whether the court is being confronted with a problem that is as severe as it is precisely because of

nuisances that were nuisances at common law are construed to be merely declaratory of the common law. Such statutes do not modify or abrogate the common law of nuisance and do not supersede the common law as to other acts that constitute a public nuisance at common law." (footnotes omitted).

⁶⁵ CAL. CIV. CODE §§ 3479, 3480 (West 2016).

⁶⁶ OKLA. STAT. ANN. tit. 50, § 1 (West 2017).

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (AM. L. INST. 1977).

regulatory failure and inaction rooted in an inability of the administrative state to function to meet its objectives of protecting the public. Even in the latter case, the court must consider whether it has enough technical competence to award meaningful and constructive relief. But the court can never consider those questions if it begins with the assumptions that the administrative state will address the problem at hand or that the court lacks the technical competence to do so.

III. JUDICIAL AVOIDANCE IN PUBLIC NUISANCE LITIGATION

Federal and state courts often avoid an assessment of the actual public harm from the alleged nuisance by dismissing the complaint on the pleadings before evidence of harm is submitted and can be scrutinized.⁶⁸ Because they avoid assessing the actual harm, these courts never reach the point where they can balance the harm against the democratic and technical competence objections to the court fashioning a remedy in the particular case at hand.

One problematic way courts avoid the difficult balancing inherent in public nuisance is by determining, prior to an assessment of actual harm, that the legislature(s) have determined that the issue in question would be better dealt with by the political branches, specifically legislatures and agencies acting on delegated legislated authority.⁶⁹ But only very rarely does a legislature expressly preempt public nuisance claims; one notable exception is the express preemption of agricultural public nuisance claims in state right-to-farm statutes throughout the United States.⁷⁰

Thus, when courts determine that the issue raised by the public nuisance complaint had best be left to the legislatures and agencies, they typically are “discovering” an implicit intent of the legislature to that effect. Moreover, when the courts hold that public nuisance litigation has been implicitly preempted by the legislature, they typically do not rely on anything like specific evidence suggesting implied legislative intent. For example, the district court in *Bell v. Cheswick Generation Station* concluded that the federal Clean Air Act precluded any state common law nuisance suits based on interstate air pollution even though Congress not only had not said that in the statute, but rather had included a clause “saving”—expressly preserving—state law claims.⁷¹ The various implied intent avoidance doctrines have different names and different

⁶⁸ See, e.g., *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 322–23 (W.D. Pa. 2012) (dismissing a nuisance claim on the grounds that it was preempted by federal law), *rev'd*, 734 F.3d 188 (3d Cir. 2013).

⁶⁹ See, e.g., *id.* at 322.

⁷⁰ See, e.g., IOWA CODE §§ 172D.1–172D.4, 352.1–352.12, 657.11, 657.11A (expressly barring private and public nuisance actions related to feedlots, except in limited circumstances of regulatory noncompliance by the feedlots).

⁷¹ *Bell*, 903 F. Supp. 2d at 322–23.

definitions—displacement,⁷² implied preemption, field preemption, obstacle preemption, conflict preemption⁷³—but they all amount to the court avoiding the merits of the public nuisance claim on the supposition that the legislature had somehow communicated an intent to the courts that they should do so, notwithstanding anything like actual proof of intent.⁷⁴

⁷² Displacement acts to bar federal common law claims—including nuisance claims—are a result of Congressional action. “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.” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Displacement thus is based on Congressional action but it is limited in its effects, in that it only bars federal common law actions, not state common law ones. Exactly whether and if so how displacement is analytically different from the form of implied preemption known as field preemption, other than that it is limited in its effects to precluding federal common law actions, is not obvious in the case law. In field preemption, the court finds that the legislature impliedly preempted state common law actions by implying an intent to exercise sole jurisdiction over the regulation of a specific field. For a thoughtful description of courts’ overreliance on field preemption to preempt state common law claims, see generally Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286 (2013).

⁷³ For a discussion of these categories of implied preemption and how divorced they are from actual legislative text and specific evidence of legislative intent, see Dana, *supra* note 21, at 509–10; Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 6–7, 17–19 (2013) (discussing the central role of legislative purpose rather than text in implied preemption decisions); and Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1057 (2013) (arguing that the preemption jurisprudence should adhere more to statutory text).

⁷⁴ The “proof” of legislative intent upon which courts rely is often unpersuasive. For example, in a decision holding that Rhode Island law did not allow for a public nuisance action against lead paint manufacturers, the State Supreme Court noted as support the fact that the legislature had not expressly authorized public nuisance actions when it enacted other measures to address lead paint in residences:

Importantly, the General Assembly has recognized that landlords, who are in control of the lead pigment at the time it becomes hazardous, are responsible for maintaining their premises and ensuring that the premises are lead-safe. Quite tellingly, the General Assembly’s chosen means of remedying childhood lead poisoning in Rhode Island did not include an authorization of an action for public nuisance against the manufacturers of lead pigments, despite the fact that this action seeking to impose liability on various lead pigment manufacturers was well under way at the time the [lead paint legislation] was enacted.

State v. Lead Indus. Ass’n, Inc., 951 A.2d 428, 457–58 (R.I. 2008). However, here legislative *silence* could mean that the legislature approved of the public nuisance suit, as it easily could have said otherwise in its lead paint legislation. Or, more realistically, the silence could mean the absence of any discernible legislative intent one way or the other.

The Second Circuit in *City of New York v. Chevron Corp.* employs intellectual gymnastics to affirm a dismissal that allows the avoidance of the merits of the nuisance claim. First the Second Circuit refuses to recognize the state law nuisance claims as such, recharacterizing them as federal common law claims, because they are too “sprawling” to be encompassed in state law. Then, the Second Circuit holds that federal common law claims

With respect to two avoidance doctrines, the court need not even assert any implied legislative intent to limit or preclude public nuisance cases at all.⁷⁵ The political question doctrine allows a court to choose not to hear a case because it is inherently too political for a court to decide or too difficult for a court to resolve with a suitable remedy.⁷⁶ However, the United States Supreme Court has suggested that the most important factor in deciding whether the political question doctrine applies is whether there is a “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁷⁷ Even though there is no textually demonstrable constitutional commitment of the issue of climate change to the non-judicial branches of government, some courts have unconvincingly maintained that climate change is a political question and have dismissed public nuisance suits based on climate change.⁷⁸

The primary jurisdiction doctrine provides an easier way for a court to avoid the merits of public nuisance claims because it requires only that the court conclude that there is an administrative agency with jurisdiction over the issue at hand that could competently act to address the complained-of public harm.⁷⁹ A court can dismiss a public nuisance complaint or stay the action by invoking

regarding climate change in any manner—and again, the plaintiffs did not bring federal common law claims, it is the Second Circuit that transforms their claims into federal common law claims—are displaced by the Clean Air Act. The court does not even engage with the points that the Clean Air Act expressly preserves (rather than preempts) state law and is silent on the question of the allocation of costs of adaptation. *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95–96, 103 (2d Cir. 2021).

⁷⁵ See, e.g., James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127, 129 (2011).

⁷⁶ See *id.* at 127–28.

⁷⁷ See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing six factors that are relevant in determining whether the political question doctrine applies). The Supreme Court has urged this doctrine to be applied sparingly. See *id.*

⁷⁸ See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 938–39, 51 (2008) (“[T]here is no ‘textual commitment’ of climate issues to the elected branches. Simply, for this prong to apply, the commitment must be ‘textual,’ not inferential. . . . [T]he most salient criticism of using [the initial policy determination] aspect of *Baker* to avoid the ‘global warming thicket’ is that it is patently wrong to conclude that the elected branches have yet to make an *initial* policy determination.”); David A. Dana, *The Mismatch Between Public Nuisance Laws and Global Warming*, 18 SUP. CT. ECON. REV. 9, 18–19 (2010) (“There is not a serious argument that specific constitutional text commits the issue of global warming common law to the exclusive jurisdiction of the Executive or Congress. *Massachusetts v. EPA* stands as dramatic support for the proposition that the courts do indeed have a role vis-à-vis global warming. Moreover, the *Baker* test aside, it is hard to see how global warming is a more ‘political’ issue in the regular sense of the word than others the federal courts have found justiciable.”).

⁷⁹ See Bryson Santaguida, *The Primary Jurisdiction Two Step*, 74 U. CHI. L. REV. 1517, 1517 (2007) (“The doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts but involves issues that fall within the special competence of an administrative agency.”). The doctrine is accepted by most state courts in addition to the federal courts. See, e.g., *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (describing the doctrine under Texas law).

primary jurisdiction without determining that the administrative agency is preparing to, or actually will, address the harm at issue or address it in any meaningful way.⁸⁰

Because intent-based doctrines like implied preemption/displacement and primary jurisdiction allow a court to dismiss public nuisance complaints without much effort, it is understandably tempting for courts to do so, and thereby sidestep the time-consuming and difficult factual and institutional questions raised by public nuisance complaints. But it makes no sense to conclude that Congress or a state legislature impliedly intended only federal or state agencies to address a particular public harm without first examining the history and scope of the public harm itself. If (upon examination) it appears that the harm is enormous and clearly requires a remedy and there nonetheless has been no adequate federal or state regulatory response, it is very difficult to see how a court can defend the inference that Congress or the state legislature must have intended to preempt public nuisance suits.

Similarly, an assessment of the public harm and the response (or lack of response) by the relevant agencies also should inform any decision to dismiss a case on primary jurisdiction grounds. If there is an enormous public harm that the agencies have not grappled with despite pleas that they do so, a court cannot defensibly dismiss the case on the ground that the agencies will suddenly act completely differently than they have to date. To determine if there is enormous harm that agencies have ignored, of course, a court needs to interrogate the public harm, which means moving beyond preliminary pleading and allowing discovery and the consideration of evidence. This is especially true given the current regulatory climate: if the judge assumes a generally well-functioning political system and administrative state, she may reasonably choose to believe any large public harm is or will soon be dealt with, especially if the defendants claim that that is so, but in an era of frequent regulatory inaction and failure, judges should view that assumption as questionable at best.

While addressing the actual scope of the claimed harm is time-consuming, it does not force a court to, at the end of the day, find a public nuisance. But even when a court finds no nuisance after interrogating the public harm, the fact that evidence of substantial harm has been brought to light in a highly visible forum—and the possibility that the courts may act later if that harm remains unaddressed—may prompt better action on the part of the political branches.⁸¹

⁸⁰ One of the factors a court may (but need not) consider in deciding whether to invoke the primary jurisdiction doctrine is whether a proceeding already has been initiated before an administrative agency. *See Santaguida, supra* note 79, at 1523. Dismissal or abstention on primary jurisdiction grounds in some federal circuits is reviewable only for an abuse of discretion. Nicholas A. Lucchetti, *One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review Is Appropriate for It?*, 59 ADMIN. L. REV. 849, 850–52 (2007).

⁸¹ *See Ewing & Kysar, supra* note 23, at 356–57 (characterizing tort litigation as a means to prod and make a plea to the political branches); Hari M. Osofsky & Jacqueline Peel, *Litigation's Regulatory Pathways and the Administrative State: Lessons from U.S. and*

What follows are two examples illustrating these points: North Carolina’s public nuisance suit against out-of-state sources of in-state air pollution, and Michigan’s and other states’ suits against the U.S. Army Corps of Engineers regarding the public nuisance of Asian Carp entering into and disrupting the ecosystem of Lake Michigan.⁸²

A. Asian Carp in the Great Lakes as a Public Nuisance

The Asian Carp is an “invasive species” of fish that has established population in the Mississippi River and connected waterways.⁸³ The Asian Carp are an aggressive fish that (it is believed) could overwhelm other fish species in the Great Lakes and undermine fishery-based tourism and commerce in the Great lakes as well as ecological values.⁸⁴ The Asian Carp have been migrating south (from the Gulf of Mexico) to north and have been identified in the Chicago River and other Chicago waterways.⁸⁵ The Chicago waterways are physically connected to Lake Michigan, and the points of connection are overseen by the United States Army Corps of Engineers.⁸⁶ Fear of the Asian Carp’s migration into Lake Michigan and the other Great Lakes has prompted debate in Congress, some funding appropriation to the Corps by Congress, and undeniable, ongoing efforts on the part of the Corps.⁸⁷

The problem is a difficult one, however, inasmuch as the clearest solution—disconnecting the Chicago waterways from Lake Michigan—is both a massive project and one that could disrupt Illinois’s economy.⁸⁸ Solutions short of physical disconnection are as yet unproven and will require substantial resources to test, implement, and refine in an ongoing, adaptive management

Australian Climate Change Governance, 25 GEO. INT’L ENV’T L. REV. 207, 250 (2013) (suggesting that even when courts cannot grant relief, they “may still acknowledge the seriousness of that need and the desirability of action by more appropriate actors” (internal quotation marks omitted) (quoting Ewing & Kysar, *supra* note 23, at 354)).

⁸² See discussion *infra* Parts III.A–B.

⁸³ Asian Carp in fact refers to several invasive species of carp. See ASIAN CARP REG’L COORDINATING COMM., ASIAN CARP ACTION PLAN FOR FISCAL YEAR 2020, at 9–15 (Feb. 2020), <https://www.asiancarp.us/Documents/2020-Action-Plan.pdf> [<https://perma.cc/4M4B-47N7>].

⁸⁴ Peter J. Alsip et al., *Lake Michigan’s Suitability for Bigheaded Carp: The Importance of Diet Flexibility and Subsurface Habitat*, 64 FRESHWATER BIOLOGY 1921, 1936 (2019) (reporting that the Asian Carp potentially could establish permanent populations throughout the Great Lakes).

⁸⁵ See *Invasive Carp Design Challenge*, NAT’L PARK SERV. (Sept. 10, 2020), <https://www.nps.gov/indu/learn/education/invasive-carp-design-challenge.htm> [<https://perma.cc/22AP-MQUV>].

⁸⁶ *Id.*

⁸⁷ For a summary of the Corps’ efforts, see Charles A. Lyons, *Asian Carp, the Chicago Area Water System, and Aquatic Invasive Species Management in the Great Lakes*, 26 HASTINGS ENV’T L.J. 223, 238–39, 251–52 (2020).

⁸⁸ See *id.* at 253.

regime.⁸⁹ Even now, after the litigation described below and extensive study of the problem, Congress has not yet appropriated the Corps the money, resources and authority it has requested to fully meet this challenge, although there appears to be momentum for it to do so.⁹⁰

In 2010, frustrated by Congress and the Corps' efforts to date, five States—Michigan, Ohio, Wisconsin, Minnesota, and Pennsylvania—sued the Corps of Engineers and the Metropolitan Water Reclamation District, alleging that they have “created and maintained, and continue to operate and control facilities within the Chicago Area Waterway System (CAWS) that link Illinois waters – that are infested with the harmful invasive species bighead carp and silver carp (collectively Asian carp) – to Lake Michigan and other connected waters” and that,

[t]o the extent those facilities are maintained and operated in a manner that allows the migration of Asian carp into the Great Lakes and connected waters, they constitute a public nuisance that threatens grave and irreparable harm to public trust resources as well as riparian and other rights of the citizens of the Plaintiff States.⁹¹

In its complaint and motion for a preliminary injunction, the plaintiffs sought a judgment requiring Defendants to “implement, as soon as possible, permanent measures to physically separate the Asian carp-infested Illinois waters from Lake Michigan” and, in the interim, requiring “Defendants to take immediate and comprehensive action to abate the nuisance and to minimize the risk that Asian carp will migrate from the CAWS into Lake Michigan.”⁹² Plaintiffs acknowledged the Corps was trying to address the situation but alleged that its efforts, absent court intervention, were not and would not be enough to abate the nuisance.⁹³

The district court judge easily could have granted a motion to dismiss the complaint, with a summary explanation that, in this situation, it was clear Congress and federal agencies had occupied the relevant field of regulation, displacing federal common law. After all, with congressional funding, a federal agency (the Corps) had been and was engaged in a multiyear effort to address exactly the problem plaintiffs identified.⁹⁴ From a democratic legitimacy perspective, then, the balance clearly favored dismissal. Moreover, the question of what could stop the Asian Carp, how much that would cost and how the

⁸⁹ See *id.* at 251–52.

⁹⁰ See, e.g., Melissa Nann Burke, *U.S. House Authorizes Project to Help Block Asian Carp from Great Lakes*, DETROIT NEWS (Dec. 8, 2020), <https://www.detroitnews.com/story/news/politics/2020/12/08/house-authorizes-project-block-asian-carp-great-lakes/6498158002/> [<https://perma.cc/78XF-SQFW>].

⁹¹ See Complaint at 1–2, *Michigan v. U.S. Army Corps of Eng'rs*, No. 1:10-cv-04457 (N.D. Ill. Dec. 2, 2010), 2010 WL 2893302, ¶1.

⁹² *Id.* at 2.

⁹³ *Id.* at 11–14, 17, 28.

⁹⁴ See *id.* at 11–12.

necessary measures could be put in place was (and is) a very difficult question that no one can deny required (and requires) rarified technical expertise that judges certainly lack and that federal agencies possess or at least are better positioned to obtain. Thus, from a technical competence perspective the balance also clearly favored dismissal. But had the district court simply dismissed the complaint and denied the request for a preliminary injunction without taking any evidence, the allegation at the heart of the suit—that the Great Lakes faced an imminent, irreparable harm from an irreversible invasion by the Asian Carp—would have gone unexplored. If the judge had not allowed the taking of evidence, the judge could not have meaningfully weighed the magnitude of the threatened harm alongside the democratic legitimacy and technical competence considerations.

The district court did not dismiss the case out of hand, but rather conducted a multiday evidentiary hearing with expert witnesses and accepted “voluminous” written submissions regarding the factual issues as part of the adjudication of the preliminary injunction motion.⁹⁵ The district court made a specific finding that Plaintiffs had failed to establish a “sufficient prospect of irreparable harm absent the requested injunction.”⁹⁶ The Corps had established electronic barriers to prevent Asian Carp from approaching and entering Lake Michigan, although the Corp recognized this as only a temporary measure as it studied and prepared a full response plan.⁹⁷ One of the key assertions by the plaintiff states was that the Asian Carp were able and had survived the crossing of the electronic barrier to an extent that would allow them to establish a breeding population and hence—potentially quickly—overwhelm the Great Lakes ecosystem.⁹⁸ The court focused on what it concluded was insufficient evidence the Carp were on the cusp of establishing a breeding population north of the electronic barrier:

As noted above, the centerpiece of Plaintiffs’ claim of irreparable harm is Dr. Lodge’s testimony based on the positive eDNA results that he reported above the electric barrier, along with the discovery of a single live fish in Lake Calumet and one dead fish found (below the barrier) in the December 2009 rotenone event. Yet the eDNA results and those few fish, amongst the hundreds of thousands of pounds of fish collected, do not establish the requisite likelihood of imminent or irreparable harm. Nor does the state of the eDNA science permit a reasonable inference that live Asian carp are in the canal system above the barrier in numbers that present an imminent threat. Negative eDNA results comprise a super-majority of the results when compared to the number of samples taken. . . . [T]he credible testimony of those witnesses with extensive expertise in Asian carp biology and in assessing populations of Asian carp indicates that if Asian carp are in the CAWS above the barrier, they are

⁹⁵ See *Michigan v. U.S. Army Corps of Eng’rs*, No. 10-CV-4457, 2010 WL 5018559, at *2 (N.D. Ill. Dec. 2, 2010).

⁹⁶ *Id.*

⁹⁷ *Id.* at *4.

⁹⁸ *Id.* at *24.

there only in low numbers—numbers that are effectively being assessed and managed by the aggressive inter-agency effort and that do not present an imminent threat to establish a successful breeding population.⁹⁹

Whether the judge's assessment of the large amount of complicated evidence was correct or not, the key point is that the court took and assessed the evidence and was thus in a position to consider it in the balance, at least for purposes of deciding whether to grant or deny the preliminary injunction.

The court of appeals, moreover, effectively kept the litigation going and thus kept pressure on the Corps to continue its work and to keep the district court and court of appeals informed about that work and why the evidence it continued to gather supported its position that adequate measures were being taken to address the very real threat posed by the Asian Carp to the Great Lakes. After the district court denied the motion for a preliminary injunction, the court of appeals affirmed the denial but engaged in its own review of the evidence presented to the district court and, in effect, stated that a finding of public nuisance and an injunction would be proper *if* the Corps and other government actors did not continue to diligently address the threat posed by the Asian Carp:

The defendants, in collaboration with a great number of agencies and experts from the state and federal governments, have mounted a full-scale effort to stop the carp from reaching the Great Lakes, and this group has promised that additional steps will be taken in the near future. This effort diminishes any role that equitable relief would otherwise play. . . . We stress, however, that if the agencies slip into somnolence or if the record reveals new information at the permanent injunction stage, this conclusion can be revisited. . . .

Our ruling today is tied to our understanding of the current state of play. We recognize that the facts on the ground (or in the water) could change. The agencies currently working hard to solve the carp problem might find themselves unable to continue, for budgetary reasons, because of policy changes in Washington, D.C., or for some other reason. If that happens, it is possible that the balance of equities would shift. Similarly, new evidence might come to light which would require more drastic action, up to and including closing locks on Lake Michigan for a period of time. If either situation comes to pass, then the district court would have the authority to revisit the question whether an exercise of its equitable powers is warranted, taking into account the principles we have discussed in this opinion.¹⁰⁰

On remand, the district court dismissed the complaint for failure to state a claim.¹⁰¹ On appeal from that dismissal, the court of appeals disagreed with the district court's analysis but affirmed the dismissal.¹⁰² Although technically the court of appeals decision was one made on the pleadings, the decision clearly

⁹⁹ *Id.* at *27.

¹⁰⁰ Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 769, 800 (7th Cir. 2011).

¹⁰¹ Michigan v. U.S. Army Corps of Eng'rs, 758 F.3d 892, 907 (7th Cir. 2014).

¹⁰² *Id.* at 895, 907.

reflected a balancing of the potential harm to the public with the democratic legitimacy and technical competence objections that would be inherent in any attempt to grant relief. The court of appeals took judicial notice of “[t]wo intervening events have changed this case since [the court] last saw it”—Congress’s passing in 2012 of the Moving Ahead for Progress in the 21st Century Act, which required the Corps to expedite completion of its Report on Asian Carp action alternatives, and the Corps’ release of the Report in January 2014, just two weeks before the court heard oral argument.¹⁰³

The court of appeals then concluded that “[t]he Corps and the District in particular are engaged in intensive efforts to prevent the carp from reaching the Great Lakes, and there is a great deal of evidence that indicates they have succeeded thus far in doing so,” such that the threatened public harm was not dire.¹⁰⁴ At the same time, an injunction would raise enormous democracy and technocratic competence issues:

An injunction requiring the Corps to exercise its discretion in favor of a certain plan and essentially to lobby Congress to adopt and provide funds for that plan, would be an extraordinary and likely inappropriate use of a federal court’s equitable powers. Drafting and enforcing such an injunction would be impracticable. It also realistically might not provide any relief to the States, because its effectiveness would depend entirely on the independent workings of another branch of the federal government.¹⁰⁵

Thus, on balance, dismissal was proper.¹⁰⁶ But the balancing approach taken by the court of appeals implied that, if the evidence had supported the view that the Corps was ignoring its obligations and the Asian Carp were about to enter Lake Michigan, some public nuisance relief might be proper, notwithstanding all the daunting problems involved in fashioning that relief.¹⁰⁷

B. Interstate Air Pollution as a Public Nuisance

Air pollution is a problem that obviously crosses state boundaries, and one might think that the federal air pollution control regime would be especially attentive to interstate externalities. And in fact, the federal Clean Air Act references interstate pollution and allows a state to petition EPA to address pollution entering the state from other states.¹⁰⁸ But the statutory provisions are not straightforward, and EPA has struggled for decades to devise and implement rules that will protect downwind states from undue pollution from upwind

¹⁰³ *Id.* at 898.

¹⁰⁴ *Id.* at 907.

¹⁰⁵ *Id.* (citations omitted) (first citing RESTATEMENT (SECOND) OF TORTS § 943 cmt. a (AM. L. INST. 1977), and then citing FED. R. CIV. PRO. 65(d)(1)(C)).

¹⁰⁶ *Id.* at 907.

¹⁰⁷ See *Michigan v. U.S. Army Corps of Eng’rs*, 758 F.3d at 906 (reaffirming that “[i]t is the defendants’ apparent diligence . . . that is key to our holding today”).

¹⁰⁸ See 42 U.S.C. § 7426.

states, that will be cost-effective, politically feasible, and withstand judicial review.¹⁰⁹

North Carolina is a downwind state, with respect to the coal-fired plants operated by the Tennessee Valley Authority in Tennessee and Alabama.¹¹⁰ North Carolina contended—and no one seriously disputed, including the federal EPA—that downwind transport of particulate matter and ozone from power plants in Tennessee and Alabama was undermining North Carolina’s ability to meet the federal and its own state statutory pollution limits, and were contributing to public health and welfare harms.¹¹¹ North Carolina sought relief from the federal EPA in an administrative petition, which was denied in 2006.¹¹² North Carolina also challenged EPA’s interstate pollution rulemaking as allowing for excessive transport of pollution into North Carolina; the D.C. Circuit agreed that that was a possibility under the rule but vacated and remanded the rule, leaving the actual effect of the decision in terms of any relief for North Carolina unclear.¹¹³

As an alternative route to addressing the pollution transport problem, North Carolina sued the Tennessee Valley Authority, alleging that emissions from ten coal power plants generated pollution in North Carolina that qualified as a public nuisance.¹¹⁴ Citing the Clean Air Act’s savings clause, the district court refused to dismiss the suit as preempted by federal law and held a twelve day trial, including expert testimony about the operation of the plants at issue, their effects on North Carolina, and the possibility for the implementation of

¹⁰⁹ See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2344 (1996) (“Similarly, the relatively minor provisions directed at controlling interstate externalities have been wholly ineffective, largely as a result of the failure of [EPA] and the federal courts to define a coherent and logical body of law.”). EPA has issued several major rules to try to address interstate pollution—most recently the Cross-State Air Pollution Rule, CSAPR—which the courts have found unlawful in various respects and remanded to the agency. See Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 85 Fed. Reg. 68,964, 68,964 (Oct. 30, 2020) (summarizing the long history of EPA’s rules with respect to interstate pollution, their repeated rejection by the courts, and, most recently, EPA’s proposed rule in October 2020). Downwind States continue to complain that EPA is not sufficiently regulating interstate pollution from upwind States. See, e.g., Complaint at 1–2, *New York v. Wheeler*, No. 1:20-cv-00419 (S.D.N.Y. Jan. 16, 2020) (suit by New York and Connecticut against EPA to compel it to address pollution from Upwind States); *Maryland v. EPA*, 958 F.3d 1185, 1189 (D.C. Cir. 2020) (reversing in part EPA’s denial of Maryland’s petition to EPA regarding interstate pollution and remanding to EPA to provide further explanation of denial).

¹¹⁰ *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 825, 830–31 (W.D.N.C. 2009).

¹¹¹ *Id.*

¹¹² *Id.* at 816; see EPA Air Programs, 40 C.F.R. §§ 51, 52 (2021) (providing rationales for denials of Section 126 petitions).

¹¹³ See *North Carolina v. EPA*, 531 F.3d 896, 901, 905 (D.C. Cir. 2008) (per curiam) (acknowledging the reasons supporting North Carolina’s position but remanding to the agency without specifically accepting North Carolina’s factual claims).

¹¹⁴ *Cooper*, 593 F. Supp. 2d at 815.

pollution control equipment at the plants.¹¹⁵ With respect to four plants, the court then ordered that the plants install the scrubbers they had already been considering by a date certain, in 2011, and also set numerical limits for certain pollutants from the plants.¹¹⁶

Reversing the district court and dismissing the nuisance action, the court of appeals ignored the magnitude of the alleged harm and the apparent inability of North Carolina to be effectively heard by the EPA.¹¹⁷ Waving aside the Clean Air Act's savings clause, the court of appeals read the comprehensive statutory and regulatory framework, including specific provisions regarding interstate pollution, as communicating a clear legislative intent to place air pollution regulation in the realm of expert administrative agencies.¹¹⁸ State public nuisance law thus was impliedly preempted, at least with respect to the kind of alleged nuisance at issue in this case. The court of appeals emphasized the complex balancing required to regulate a phenomenon like air pollution and the risk that disparate nuisance court orders would create inconsistencies, disrupt the regulatory regime, and perhaps even undermine public health.¹¹⁹

If the district court had taken the court of appeals' approach, there never would have been any judicial examination of the harm posed to North Carolina and the options for abating it—the case would have been summarily dismissed at the outset. North Carolina would have had no opportunity to make the case about public harm in a forum other than the EPA, an agency that was caught in the quagmire of interstate pollution politics. Although the court of appeals dismissed the suit based on a sweeping preemption theory, the litigation resulted in a what seems to be a constructive solution: soon after the court of appeals decision and while a certiorari petition was pending, the parties entered into a negotiated settlement.¹²⁰ The settlement required a larger expenditure of money from TVA, was broader in geographical scope, and offered more pollution abatement benefits than had the district court order.¹²¹ It is at least plausible that

¹¹⁵ *Id.* at 816, 818, 821, 825–27, 829.

¹¹⁶ *Id.* at 831–33.

¹¹⁷ North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 312 (4th Cir. 2010).

¹¹⁸ *Id.* at 304 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

¹¹⁹ *See id.* at 296 (“If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.”).

¹²⁰ *See* Laurel Passera, *NC, TVA Settle Clean Air Lawsuit*, INTERSTATE RENEWABLE ENERGY COUNCIL (Apr. 25, 2011), <https://irecusa.org/blog/irec/nc-tva-settle-clean-air-lawsuit/> [<https://perma.cc/YLA7-V28C>].

¹²¹ *See id.* (quoting both the EPA Administrator and a TVA spokesperson as acknowledging that the lawsuit had played a role in making the sweeping agreement possible); Sandy Smith, *EPA Reaches Landmark Clean Air Act Settlement with TVA*, EHS TODAY (Apr. 15, 2011), <https://www.ehstoday.com/standards/epa/article/21904617/epa-reaches-landmark-clean-air-act-settlement-with-tva> [<https://perma.cc/95LZ-VPZU>] (explaining

the airing of the evidence of public harm at trial was essential to bringing North Carolina, the TVA, and EPA to a workable arrangement to address a long-unresolved issue of great public import.

C. *The Judicial Resources Objection*

It could be objected that courts exploring the harm at issue in nuisance complaints is a waste of judicial resources if—as in the Asian Carp litigation—the likelihood the court ultimately will grant relief is low, given weighty democratic legitimacy and technical competence concerns. And courts do need to consider whether expending resources hearing witnesses and such is worth it: where the allegations in the complaint of public harm seem thin or the litigants otherwise appear to lack any credibility, or the legal bar to finding a nuisance (such as express preemption) is undeniable, summary dismissal, on balance, is justified. But where the allegations of massive harm seem plausible, as in the Asian Carp litigation, then the use of judicial resources to explore the allegations' veracity is justified given that there always is the possibility that legislative and agency failure is such that the court will reasonably conclude that it must try to do *something* to abate, prevent, or mitigate the public harm.

IV. PUBLIC NUISANCE BALANCING WHEN THERE ARE CLEAR, BUT UNENFORCED, REGULATORY STANDARDS

The balancing of public harm with democratic legitimacy and technical competence—a balancing this Article argues should be at the core of public nuisance—is easier for a court when the conduct alleged to be a nuisance violates an unenforced regulatory standard or prohibition. Indeed, the Restatement implies as much.¹²²

First, the fact that a legislature or an agency (acting on delegated authority) set a certain standard suggests that there is a degree of democratic legitimacy behind any effort by the court to provide relief based on violations of that standard. The regulatory standard implies that conduct in violation of that standard is unreasonable, at least in the view of the polity. The democratic legitimacy conferred by a statutory or regulatory standard as the basis of a nuisance suit is particularly important because, often, it is private, nonpublic plaintiffs who base their nuisance claims on allegedly unenforced violations of a statute or regulation. Such plaintiffs do not inherently command the degree of

that “[o]nce fully implemented, the pollution controls and other required actions will address 92 percent of TVA’s coal-fired power plant capacity, reducing emissions of nitrogen oxide (NOx) by 69 percent and sulfur dioxide (SO₂) by 67 percent from TVA’s 2008 emissions levels”).

¹²² See RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977) (identifying as a factor in determining unreasonableness “whether the conduct is proscribed by a statute, ordinance or administrative regulation”).

democratic legitimacy recognized for public plaintiffs, especially State Attorneys General acting on behalf of States.¹²³

Second, a regulatory standard also can assuage the court's technical competency concerns because it provides a ready-set line and detailed instructions as to what the court should prohibit and require as part of any injunctive relief. The court need not struggle as to whether it is asking too much or too little or whether it needs more input to craft relief addressed to the relevant harm; the court can instead, in effect, defer to the work of the legislature or regulatory agency.¹²⁴

It is true, of course, that Congress and state legislatures sometimes expressly create citizen suit provisions allowing, under certain circumstances, citizens to sue to compel enforcement of statutes or regulations.¹²⁵ Merrill suggests that Congress and state legislatures have thereby signaled that private enforcement of regulations should be via statutory authorization, if at all, and thus not via public nuisance actions.¹²⁶ But if Congress and state legislatures wanted to preclude public nuisance suits in this sweeping way, they certainly could say so, and they have not.

Moreover, citizen suits and public nuisance actions have different formal requirements and different possibilities for relief. For example, plaintiffs in citizen suits can seek civil penalties and attorneys fees as remedies, neither of which is available in public nuisance suits.¹²⁷ Unlike in nuisance suits, the plaintiffs in citizen suits do not have to prove that the regulatory violation caused substantial or significant public harm; even a permit reporting violation that in and of itself resulted in no obvious public harm can be grounds for a successful

¹²³ One reason a state attorney general may be very unlikely to bring nuisance suits based on unenforced violations of a statute or regulation is that, unlike private actors, the state attorney general has the more direct path available to it of bringing an action to enforce the statute or regulation against the defendant. This option is not always available, however. For example, state attorneys general may lack the power to enforce *federal* statutes or regulations. *See, e.g.,* North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 311–12 (4th Cir. 2010). One way to conceptualize the *North Carolina v. TVA* litigation described above is as an effort by North Carolina to enforce a portion of the Clean Air Act that, in North Carolina's view, was being under-implemented and under-enforced by the federal EPA.

¹²⁴ *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1977) (“If a defendant’s conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.”).

¹²⁵ *See, e.g.,* Merrill, *supra* note 15, at 42 (“Congress . . . has decided to include ‘citizen suit’ authority in most of the major federal environmental law statutes.”).

¹²⁶ *See id.* (“[T]he point is that these judgments are ones that should be made by the legislature. They should not be made by insisting that the common law bequeaths inherent authority on private citizens to bring public nuisance suits.”).

¹²⁷ *See, e.g.,* 42 U.S.C. § 7604 (authorizing the grant of civil penalties and attorneys fees in Clean Air Act citizen suits).

citizen suit.¹²⁸ The fact that Congress and state legislatures sometimes authorize citizen suits may reflect a legislative intent, if it reflects any intent relevant to nuisance law at all, to carve out a particular sphere where private plaintiffs have special, heightened capacity and tools to combat non- or under-enforcement in addition to—on top of—the possibility of using nuisance suits to do so, rather than an intent to limit or preclude public nuisance suits in any way.

A. *Non-Enforcement Reasons and the Mandate/Guidance Distinction*

The absence of enforcement of a regulatory standard in a particular case or set of cases may reflect a definite intent not to enforce on the part of the regulatory agency in charge of enforcement. To the extent that the agency as a part of the executive branch has democratic legitimacy for its decisions and also presumptively has technical expertise, its intentional decisions not to enforce a regulatory standard could weigh against a finding of public nuisance predicated on failure to comply with the standard. But the significance of intentional agency non-enforcement depends, essentially, on the agency's *reasons* for non-enforcement.¹²⁹

Agencies sometimes may choose not to enforce for reasons that suggest that enforcement is not the best means to secure public rights. The agency may determine the violations in a particular case actually do not cause harm, or the agency may reasonably determine that educating or seeking the cooperation of regulated entities is a more reliable long-term path to compliance.¹³⁰ The agency also may determine that compliance has become technically or economically impossible for regulated entities and that an alternative way must be found for the entities in good faith to meet the concerns underlying the regulations.¹³¹

At the same time, there are many untenable reasons for non-enforcement, particularly in our era of regulatory failure and inaction: the starving of agencies of funding because of executive and legislative mismanagement of budgets and

¹²⁸ See, e.g., *id.* § 7604(f)(3) (allowing citizen suits based on violations of “any condition or requirement of a permit” without specifying that harm from the violation must be demonstrated).

¹²⁹ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (“[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”).

¹³⁰ For example, the FAA may not seek punitive measures but use administrative action to ensure future compliance. Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1537 (2018).

¹³¹ See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV’T L.J. 461, 485–86 (2008) (acknowledging instances where agency inaction is tenable). As Lisa Bressman has argued, agency non-enforcement can be based on sound reasons or can be indefensibly arbitrary, and courts are capable of discerning between the two. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1660–61 (2004).

lack of leadership, such that agencies simply lack the resources to enforce, no matter how much agency leadership wants to do so; agency “capture” by or undue influence on the part of regulated entities over agency decision-making; and general inertia characteristic (sometimes) of bureaucracies, such that they are slow to adapt enforcement priorities and programs to meet public needs and threats to public welfare.¹³²

That agency non-enforcement may or may not reflect that there is great unaddressed harm underscores why it is important for judges to assess whether there has been and will be such harm. If there is great unaddressed harm, that suggests that non-enforcement reflects a failure of the regulatory state, which the court should not ratify but rather seek to rectify. And if the agency itself, in its role as a technical expert, stands behind the effectiveness and feasibility of the regulatory standard despite its inability (for whatever reason) to enforce, the court should take comfort from that fact in ordering relief based on the standard.¹³³

The level of specificity in the regulatory prohibition also will affect how the court weighs its own technical competence concerns in reaching a nuisance decision. A prohibition based on a broad-based standard may be extremely difficult for a court to operationalize in an injunction granting relief. By contrast, highly specific, rule-like regulatory prohibitions do not raise these same concerns.

A distinction needs to be drawn, moreover, between regulatory standards adopted by the government as mandates and regulatory standards adopted by the government as guidance or guidelines, rather than mandates.¹³⁴ Guidelines do have some democratic legitimacy as products of agency decision-making, and they can be presumed to reflect and incorporate the agency’s technical

¹³² As Lemos has argued, the role of “capture” or undue influence over agency enforcement decisions should be an even greater concern than it is in the context of agency rulemaking because enforcement decisions are far less transparent and subject to fewer checks on interest group manipulation. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700–03 (2011). Similarly, agencies can engage in politically unaccountable deregulation through sustained non-enforcement, which is facilitated by the judicial doctrines that render agency decisions not to bring enforcement actions close to unreviewable. See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010) (describing possible routes to check this form of unaccountable deregulation).

¹³³ Courts can readily seek out the input of agencies in the context of public nuisance litigation, by asking the plaintiffs to explain what requests they have made to agencies regarding enforcement or by asking defendants to explain what communications and understandings they have had with the relevant agencies regarding their compliance and why they themselves believe they have not been the subject of public enforcement actions.

¹³⁴ Agencies themselves acknowledge that guidance is just that—guidance—but regulated entities often regard it as authoritative and courts have accorded substantial deference to agency guidance as an expression of the agency’s interpretations of its statutory mandates and formal regulations. On the debates over agency guidance generally, see generally Nicholas R. Parillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165 (2019).

expertise. In that sense, when a public nuisance complaint is premised on conduct that contravenes government guidelines, the court's democratic legitimacy and competence concerns should be less than when there are no guidelines. But guidelines arguably should carry less weight for a court than regulatory mandates because an agency typically needs to follow more formalized, transparent, and accountable processes (like notice-and-comment rulemaking) in the case of mandates than in the case of guidelines.

The preceding analysis suggests that the easiest cases for courts to grant public nuisance relief involve highly specific regulatory mandates that remain unenforced despite evidence of substantial actual or threatened harm to the public. Harder cases involve unenforced guidelines, especially open-ended, standard-like guidelines where there is no evidence yet of actual public harm. The following section illustrates the spectrum of cases using recent COVID-19 litigation as examples.

B. *The COVID-19 Workplace Litigation*

Enforcement of COVID regulations or orders within the United States that purport to be binding has been inconsistent.¹³⁵ The Occupational Safety and Health Administration (OSHA) is the federal agency with jurisdiction over workplace safety. During the COVID crisis, at least under the Trump Administration, OSHA has maintained an *extremely* low enforcement profile, despite the avalanche of complaints it has received.¹³⁶ Notably, in the few cases in which it has imposed fines for COVID-related safety violations, the fines have been absurdly low.¹³⁷

¹³⁵ See Lori Rozsa & Karin Brulliard, *On the Covid-19 Beat: Rule Enforcers Seek Cooperation but Come Ready to Fine Scofflaws*, WASH. POST (Dec. 29, 2020), <https://www.washingtonpost.com/health/2020/12/29/covid-mask-enforcement/> [<https://perma.cc/35ZN-9J6L>] (noting that enforcement varies widely).

¹³⁶ See Noam Scheiber, *Biden Tells OSHA to Issue New Covid-19 Guidance to Employers*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/business/economy/biden-osha-coronavirus.html> [<https://perma.cc/B89Y-CQ7C>] (“Critics accused OSHA, which is part of the Labor Department, of weak oversight under former President Donald J. Trump, especially in the last year, when it relaxed record-keeping and reporting requirements related to Covid-19 cases. Under Mr. Trump, the agency also announced that it would mostly refrain from inspecting workplaces outside of a few high-risk industries like health care and emergency response. And critics complained that its appetite for fining employers was limited.”).

¹³⁷ See, e.g., *OSHA Imposes First COVID Worker Safety Penalty to Smithfield Meatpacking Plant*, KAISER HEALTH NEWS (Sept. 11, 2020), <https://khn.org/morning-breakout/osha-imposes-first-covid-worker-safety-penalty-to-smithfield-meatpacking-plant/> [<https://perma.cc/5NRZ-N87Q>] (“The Labor Department cited Smithfield Foods for failing to provide a safe workplace at its Sioux Falls, South Dakota, plant and wants the company to pay a \$13,494 fine. Smithfield says it will contest, while worker groups say the penalty is not sufficient.”); Lillianna Byington, *OSHA Comes Under Fire for ‘Paltry’ Fines and Lax Guidance to Meat Plants*, FOODDIVE (Nov. 17, 2020), <https://www.fooddive.com/news/osha-comes-under-fire-for-paltry-fines-and-lax-guidance-to-meat-plants/589129/> [<https://>

Even with respect to relatively large businesses, states and localities may lack adequate enforcement capacity.¹³⁸ In addition, depending on the location, officials with enforcement authority may have political commitments—as well as beliefs based on misinformation—that lead them to oppose, even openly, the enforcement of mitigation measures.¹³⁹

Faced with threats to workers (and by extension, the community) from allegedly unsafe conditions during the COVID-19 crisis, workers have brought a number of public nuisance suits, seeking, essentially, court orders that the employers comply with either binding government orders or government guidance such as CDC guidance.¹⁴⁰ As suits aiming for public health impact beyond a few workplaces, these suits reflect a sound strategy: the suits target workplaces that entail high transmission risk (meatpacking plants, warehouses, fast food restaurants), and the defendants are large corporations that have the resources to improve compliance and that are likely to re-evaluate their practices at all of their locations once one or more of their locations are deemed public nuisances by a court.¹⁴¹ Thus, in terms of overall impact, such public nuisance cases could have relatively broad impact—but, of course, only if the courts were willing to find a nuisance and order relief. Three cases decided to date—one involving McDonald’s restaurants, one involving an Amazon warehouse, and one involving a Smithfield meatpacking plant—are discussed below.

A balancing of public health risk, democratic legitimacy and technical competency probably supported a finding of public nuisance in all three cases, but because of the differences in background regulatory prohibitions and guidelines or the absence thereof, the McDonald’s case was the easiest case in terms of balancing to find a nuisance. The Amazon and Smithfield cases arguably were more difficult, in terms of what balancing would justify, because the plaintiffs could not rely on highly specific government rules or guidelines in arguing that the defendants’ workplaces were public nuisances. At the same time, the threatened harm and the evidence of regulatory failure in addressing that threat was compelling in the Smithfield case. But in any event, the courts in the Amazon and Smithfield cases did not engage in any real balancing at all, because (harkening back to the discussion above in Part III) they leaned heavily,

perma.cc/5WRM-ABW2] (reporting a former OSHA employee’s view that “these small fines . . . are even less than a slap on the wrist”).

¹³⁸ See, e.g., Rozsa & Brulliard, *supra* note 135 (reporting that in Oregon, the state’s seventy-seven OSHA enforcement officers were faced with “more than 16,000 [complaints] by the first week of December,” or “eight years of work in normal times,” and the “agency has managed to inspect fewer than 2 percent of the associated worksites”).

¹³⁹ See, e.g., Jason Wilson, *US Sheriffs Rebel Against State Mask Orders Even as Covid-19 Spreads*, GUARDIAN (July 31, 2020), <https://www.theguardian.com/us-news/2020/jul/31/us-sheriffs-mask-orders-covid-19-blm> [<https://perma.cc/G9N4-S6A7>] (“Growing resistance is related to far-right movement that claims sheriffs must defy laws they believe are unconstitutional.”).

¹⁴⁰ E.g., Gurrieri, *supra* note 2.

¹⁴¹ *Id.*

and unjustifiably, on the “easy out” of the theoretical possibility of federal regulation and enforcement.

The McDonald’s litigation involved McDonald’s franchise restaurants in the City of Chicago.¹⁴² The plaintiffs, workers at McDonald’s and members of the workers’ households, alleged that the franchises at issue were failing to implement COVID safety measures that McDonald’s as a corporation itself had endorsed and purported to require of franchisees.¹⁴³ The suit was brought while the State of Illinois and City of Chicago had specific orders for safe practices at essential businesses, such as take-out and drive-through restaurants, in place; in addition, the CDC had issued detailed COVID-related guidance for food retail establishments.¹⁴⁴ The Complaint alleged that the franchises in question were simply not following the requirements McDonald’s as a corporation had endorsed and that government mandates required; for example, allegedly, employees at the franchises in question were being instructed that they did not need to socially distance within stores, employees were denied access to hand sanitizer, and employees were never informed when co-workers had likely been infected with COVID.¹⁴⁵ The Complaint explained that the plaintiffs were turning to the courts as a measure of last resort:

Administrative or governmental remedies are inadequate to protect Plaintiffs from significant harm. OSHA, the primary government agency tasked with ensuring workplace safety, has deprioritized inspections and enforcement at non-medical workplaces The CDC . . . does not have independent enforcement authority against businesses that refuse to follow [its] recommendations. And State and local authorities lack the resources, enforcement mechanisms, and authority to effectively compel compliance with safety standards for employees in their workplaces.¹⁴⁶

The plaintiffs sought only injunctive relief, consisting of six basic COVID-safety measures—such as requiring employees and customers to wear masks and providing hand sanitizer to both employees and customers entering the store—that McDonald’s as a corporation, consistent with government guidance and the Illinois state and local order, had said was appropriate.¹⁴⁷ The Cook County court heard testimony about actual practices in the franchises and known or suspected cases of COVID involving employees.¹⁴⁸ In its decision granting injunctive relief, the court emphasized that Illinois had in place both a COVID

¹⁴² *Massey v. McDonald’s Corp.*, No. 20CH4247, 2020 WL 5700874, at *1 (Ill. Cir. Ct. June 24, 2020).

¹⁴³ Complaint at 3, 14–16, *Massey v. McDonald’s Corp.*, No. 20CH4427 (Ill. Cir. Ct. June 24, 2020), 2020 WL 2747338, ¶¶ 4–5, 49–52.

¹⁴⁴ *Id.* at 9–13.

¹⁴⁵ *Id.* at 17–23.

¹⁴⁶ *Id.* at 28.

¹⁴⁷ *Id.* at 14–15, 32–33.

¹⁴⁸ See *Massey v. McDonald’s Corp.*, No. 20CH4247, 2020 WL 5700874, at *5–14 (Ill. Cir. Ct. June 24, 2020).

Executive Order and Illinois Department of Health guidance regarding the implementation of that Order in a restaurant setting; and the Order and implementing guidance clearly required social distancing and mask wearing wherever social distancing was infeasible.¹⁴⁹ As the court explained, although “[d]efendants make clear that they have a mask policy in place for employees . . . credible testimony raises questions of whether employees and managers follow through [on] enforcing the policy.”¹⁵⁰ Although “McDonald’s has the right idea, it is not being put into practice exactly as McDonald’s envisioned, thus endangering public health. The hardship McDonald’s would suffer by strictly enforcing its mask policy and retraining employees on proper social distancing procedures is slight.”¹⁵¹ The court’s order required employee training and conduct consistent with the “Governor’s Order.”¹⁵²

In the Amazon litigation, which involved a massive warehouse in Staten Island, the plaintiffs were workers and family members, and the crux of their complaint was that, despite Amazon’s stated policies, the warehouse was not being operated in a way that allowed for consistent compliance with the New York State order on COVID, specific state guidance regarding the trade sector, and CDC guidance.¹⁵³ Noting that there were many COVID cases among warehouse employees, the Complaint alleged that Amazon’s employment practices had the effect of discouraging workers from taking quarantine leave, and that Amazon maintains work schedules and productivity requirements that make social distancing and sanitizing in effect impossible for workers.¹⁵⁴ The demand for relief included that Amazon “[g]rant an additional 30 minutes of Time Off Task . . . per day without penalty to allow workers sufficient time to wash their hands and sanitize their workstations.”¹⁵⁵ Amazon did take some measures in response to the complaint, which led the plaintiffs to forego seeking emergency relief.¹⁵⁶

Unlike in the McDonald’s litigation, the Amazon complaint did not require the court to simply find that specific provisions of a State Order or CDC guidance were obviously not being followed.¹⁵⁷ Notably, there was no specific

¹⁴⁹ *Id.* at *2–3, *17.

¹⁵⁰ *Id.* at *8.

¹⁵¹ *Id.* at *16.

¹⁵² *Id.* at *17.

¹⁵³ Complaint at 15, 32–34, *Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359 (E.D.N.Y. 2020) (No. 20-cv-02468).

¹⁵⁴ *Id.* at 15–28.

¹⁵⁵ *Id.* at 33.

¹⁵⁶ See Robert Iafolla, *Amazon Workers Drop Bid for Emergency Order on Virus Safety*, BLOOMBERG L. (July 14, 2020), <https://news.bloomberglaw.com/daily-labor-report/amazon-workers-drop-bid-for-emergency-order-on-virus-safety> [<https://perma.cc/ZA4D-SZ4M>] (reporting that the lawsuit had prompted Amazon to inform all employees they would not be penalized for taking time for handwashing).

¹⁵⁷ Compare Complaint at 3, *Massey v. McDonald’s Corp.*, No. 20CH4427, 2020 WL 5700874 (Ill. Cir. Ct. May 19, 2020), with Complaint at 15, 32–34, *Palmer*, 498 F. Supp. 3d 359 (No. 20-cv-02468).

Order or guidance stating how many minutes workers need off from active work in order to be able to maintain proper hygiene during a pandemic. Nor was there anything specific in an Order or guidance that directly answered the question whether Amazon should have provided more air-conditioned bathrooms, so workers did not crowd into the relatively few air-conditioned ones in the warehouse. The district court alluded to this fact in explaining why it was dismissing the case on primary jurisdiction grounds, leaving the matter to OSHA:

Plaintiffs argue that their workplace safety claims simply “require the application of law to disputed facts” and do not implicate OSHA’s expertise and discretion. I disagree. The central issue in this case is whether Amazon’s workplace policies at JFK8 *adequately* protect the safety of its workers during the COVID-19 pandemic.¹⁵⁸

Even if there had been more specific provisions in an order or guidance, however, the district court’s reasoning suggests that it would have denied relief. Like the court of appeals in the North Carolina air pollution case discussed in Part III, the district court in the Amazon litigation did not seem to seriously engage the question whether there was serious public harm that would not be adequately dealt with by the administrative state. Rather, the district court seemed to minimize the especially high risk posed by crowded indoor workplaces.¹⁵⁹

The complaint against Smithfield Klein’s Missouri meatpacking plant highlighted that other plants operated by the company throughout the country already had become infection focal points.¹⁶⁰ The complaint alleged that the company failed to comply with CDC guidance in various ways, including a failure to consistently provide masks.¹⁶¹ After the complaint was filed, Smithfield implemented a number of new policies and procedures,¹⁶² so the principal request for relief that remained was for Smithfield to “make all reasonable changes to its ‘production practices,’ including potentially lowering its line speeds, to place as many workers as possible at least six feet apart.”¹⁶³ The same day as the hearing in the case, “CDC and OSHA issued *Meat and*

¹⁵⁸ *Palmer*, 498 F. Supp. 3d at 369–70. Amici, however, noted that Amazon had extraordinary expertise that “could be redeployed to provide adequate safeguards to limit the spread of the coronavirus.” Amicus Brief of The Open Society Policy Center et al. at 22–23, *Palmer*, 498 F. Supp. 3d 359 (No. 20-cv-2468). In the terms of this Article, the Amici suggested that the limits in the court’s technical competency could be offset by the defendant’s unusual technical competency. *See id.*

¹⁵⁹ *See Palmer*, 498 F. Supp. 3d at 371.

¹⁶⁰ *See* Complaint at 1–2, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228 (W.D. Mo. 2020).

¹⁶¹ *Id.* at 2–3, 21.

¹⁶² *Rural Cmty. Workers All.*, 459 F. Supp. 3d at 1236 (explaining that Smithfield adopted a new leave policy and various plant hygiene policies after the complaint was filed).

¹⁶³ *Id.*

Poultry Processing Workers and Employers – Interim Guidance (‘the Joint Guidance’), which provided supplemental guidance to meat-processing plants concerning Covid-19.”¹⁶⁴ The Joint Guidance, however, was silent on the question whether plants ever should reduce production speed to allow for the CDC-recommended social distancing.¹⁶⁵

The district court dismissed the suit, explaining that OSHA clearly had primary jurisdiction and that the interpretation of what the Joint Guidance actually required and what the remedy for noncompliance should be was better left to OSHA, both because of its superior expertise and because (unlike a court) it could ensure consistency in application of any interpretation of the Joint Guidance.¹⁶⁶ Nonetheless, the court suggested that had there been specificity in the Joint Guidance as to what is an acceptable production line speed, it might have been open to acting, at least if there had been stronger evidence of both inattention or laxity on OSHA’s part (of which there was in fact strong evidence) and a COVID outbreak at the plant.¹⁶⁷ The court credited plaintiffs’ expert’s affidavit that meat-processing plants can allow workers to stand six feet apart only if they reduce production line speed, and that, if they do not space production line workers six feet apart, the plants will “inevitably” have a COVID outbreak.¹⁶⁸ But while agreeing “slowing down line speed may be beneficial for workers and allow more opportunities for social distancing,” the court found most persuasive the fact that the Joint Guidance set no specific limits on line speed.¹⁶⁹

The judge took the wrong lesson from the fact that the public nuisance litigation had quite obviously prompted OSHA to issue guidance. The judge seemed to take that fact as confirmation that this was a matter for the agency, not the court. But the fact that that guidance was vague on a key point—line speed—and vague in a way that potentially allowed for State and CDC social distancing guidelines to be flouted at the plant—should have led the court to realize that OSHA was ducking its responsibility to address straight on contagion risks in the meatpacking plants, despite the overwhelming evidence that such plants pose tremendous risks.¹⁷⁰ If the judge had gone ahead and set even flexible limits on line speed, which required the company to collect data on the fastest line speed that consistently allowed for six-foot distancing and to

¹⁶⁴ *Id.* at 1235.

¹⁶⁵ See generally *Meat and Poultry Processing Workers and Employers*, CDC (June 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [<https://perma.cc/AR89-2DYC>].

¹⁶⁶ *Rural Cmty. Workers All.*, 459 F. Supp. 3d at 1240–41, 1245–46.

¹⁶⁷ See *id.* at 1241.

¹⁶⁸ *Id.* at 1237.

¹⁶⁹ *Id.*

¹⁷⁰ See Scheiber, *supra* note 136 (reporting that “[a] study published in the fall in the Proceedings of the National Academy of Sciences connected between 236,000 and 310,000 Covid-19 cases to livestock processing plants through late July, or between 6 percent and 8 percent of the national total at that point”).

implement that speed, OSHA almost certainly would have been prompted to confront the line-speed issue that it had been studiously avoiding.

Taken as a group, the COVID public nuisance cases underscore the value of specific (if unenforced) regulatory prohibitions or at least guidance for convincing a court to set aside the democratic legitimacy and technical competency questions that otherwise might lead it to decline jurisdiction over a public nuisance case or find no public nuisance. Where there is a political culture and institutions that can produce protective, specific, mandatory regulation, albeit without enforcement, the courts can more readily justify public nuisance relief than they can where the political culture and institutions are such that all the court has to work with is vague guidance or no guidance at all.

V. PUBLIC NUISANCE BALANCING IN PRODUCTS-BASED LITIGATION

Some of the most contentious attempted uses of public nuisance have involved products sold in ordinary commerce that, according to the plaintiffs, caused a broad-based public health crisis. There are many such claims, ranging from cigarettes to lead paint to guns to, more recently, prescription opioids and fossil fuels.¹⁷¹ Some courts have categorically rejected the application of the public nuisance doctrine to *any* products,¹⁷² and business interests¹⁷³ and commentators¹⁷⁴ have likewise strongly advocated this categorical approach.¹⁷⁵

¹⁷¹ See, e.g., Schwartz, Goldberg & Schaecher, *supra* note 15, at 631; Gifford, *Public Nuisance*, *supra* note 15, at 743; Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 705 (2019).

¹⁷² See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) (suggesting that product-based nuisance cases “would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance”).

¹⁷³ See, e.g., Victoria Harker, *Expanding Nuisance Law Unfairly Targets Business*, CHAMBER BUS. NEWS (Jan. 21, 2020), <https://chamberbusinessnews.com/2020/01/21/expanding-nuisance-law-unfairly-targets-businesses/> [<https://perma.cc/NCM6-9UKF>] (criticizing “meritless” cases based on new “twist[s]” on public nuisance).

¹⁷⁴ See, e.g., Gifford, *Public Nuisance*, *supra* note 15, at 746 (arguing that products-based nuisance claims do not reflect a “sufficiently principled and intellectually rigorous” theory); Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 905 (2004) (“Because the reasoning employed in the [public nuisance suits regarding products] can potentially be applied to almost any unhealthy or dangerous product, government entities will be constantly tempted to seek out new parties to sue.” (footnotes omitted)).

¹⁷⁵ The Restatement (Third) of Torts, Section 8 suggests support for this categorical view, although it is difficult to ascertain its meaning. See RESTATEMENT (THIRD) OF TORTS § 8 (AM. L. INST. 2018). On the one hand, Section 8 contains language limiting its scope to private common law actions, but products-based public nuisance actions generally are brought by public officials pursuant at least in part to public nuisance state statutes. See *id.* On the other hand, comment g to Section 8 contains broad language indicating a *categorical* rejection of the application of public nuisance to product-based harms:

The categorical exclusion argument does have purchase in a subset of possible product-based nuisance claims: those where product-based nuisance claims seek compensation for past harm rather than funding for future abatement, and where defendants themselves did not undermine the administrative state and its protective capacities through campaigns of misinformation. But applied wholesale, this categorical exclusion approach ties the hands of the courts with respect to some of the most pressing harms and threatened harms in our current era of regulatory failure and inaction.

The argument for a categorical exclusion of product-based claims rests on two assertions about democratic legitimacy. The first assertion is that all product-based nuisance claims are democratically illegitimate because they represent end-runs around democratically legitimate state products liability law.¹⁷⁶ The second assertion is that products-based nuisance claims are democratically illegitimate because the nominal plaintiffs invariably employ contingency-fee plaintiffs' lawyers who steer and resolve the litigation to serve their own private financial ends.¹⁷⁷ As discussed below, neither of these arguments from democracy are persuasive.

A. The Democratic Legitimacy Objection Based on Products Liability Law

Public nuisance, as a historical matter, did not extend to product-based harms per se, and, rather, concerned harm-creating conducted on specific pieces of land or sites owned or controlled by the defendants; none of the examples of public nuisance in Section 821B of the 1977 Restatement, for example, entail products sold in commerce.¹⁷⁸ At the same time, the foundational principle of public nuisance—that harms to public health and safety are abatable through court order—would seem to apply as much to products once they have left a production facility or other site as before. For example, a comment to

g. Products. 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. . . . [T]he 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. Claims for reimbursement of expenses made necessary by a defendant's products might also be addressed by the law of warranty or restitution. If those bodies of law do not supply adequate remedies or deterrence, the best response is to address the problems at issue through legislation that can account for all the affected interests.

Id. cmt. g.

¹⁷⁶ See e.g., Gifford, *Impersonating the Legislature*, *supra* note 8, at 915.

¹⁷⁷ See Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL'Y 331, 349–51 (2011).

¹⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977).

Section 821 notes that raising diseased animals constitutes a public nuisance, such that the farm or ranch where they are being raised could be closed by court order.¹⁷⁹ But if raising diseased animals is a public nuisance, why is it not also a public nuisance to sell animals to consumers who then become ill as a result of handling or eating the animals and who in turn spread disease, perhaps even resulting in epidemic? And if that is true, should not the sale of (for example) lead paint or guns or prescription opioids that cause illness also be actionable as public nuisance, if we accept the idea that the marketing of such products without proper warnings and regulatory restrictions can and did result in the functional equivalent of epidemics?

The critics of products-based nuisance generally note that public nuisance historically did not extend to products,¹⁸⁰ which is true, but their principal argument sounds in democratic theory—namely, that such an extension violates principles of democratic legitimacy.¹⁸¹ According to a leading academic proponent of this view, Donald Gifford, virtually every state has developed a state law of products liability, instantiated in a state statute or statutes.¹⁸² Because (according to this argument) products liability law is legislatively authorized and hence democratically legitimate, the attempt to use public nuisance in what is the realm properly reserved for products liability law is illegitimate.¹⁸³ Product-based nuisance claims are an improper effort to avoid state tort law, as duly established by the legislature.¹⁸⁴

One problem with this argument is that state products liability law is also very substantially a common law creation of the courts¹⁸⁵; if state courts can shape state products liability law, then why can they not also interpret it to leave space for products-based public nuisance claims?

¹⁷⁹ *Id.* cmt. b.

¹⁸⁰ See *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 449 (R.I. 2008) (concluding that “control of the instrumentality causing the alleged nuisance” is a “time-honored element of public nuisance”); Gifford, *Public Nuisance*, *supra* note 15, at 820 (arguing that the history of public nuisance shows liability is premised “not on the creation of a nuisance but rather on the defendant’s current control of the instrumentality causing the nuisance”).

¹⁸¹ See Gifford, *Impersonating the Legislature*, *supra* note 8, at 915; GIFFORD, *SUING THE TOBACCO*, *supra* note 15, at 9.

¹⁸² See GIFFORD, *SUING THE TOBACCO*, *supra* note 15, at 35; Gifford, *Public Nuisance*, *supra* note 15, at 744.

¹⁸³ See Gifford, *Impersonating the Legislature*, *supra* note 8, at 919, 934–37.

¹⁸⁴ See *id.* at 919 (when “the attorneys general sue to supersede a product-regulatory structure already in place . . . they dramatically change the traditional allocation of powers among the three coordinate branches of state government”); see also Schwartz, Goldberg & Schaecher, *supra* note 15, at 647 (criticizing products liability claims “masquerading under the guise of public nuisance”).

¹⁸⁵ See, e.g., Eric Lindenfeld & Jasper L. Tran, *Prescription Drugs and Design Defect Liability: Blanket Immunity Approach to the Increased Costs and Unavailability of Prescription Medication*, 64 *DRAKE L. REV.* 111, 117 (2016) (“Section 402A of the Second Restatement of Torts codified the modern rule of strict product liability and was eventually adopted by many state courts in the country. It is now the standard.” (footnotes omitted)).

More fundamentally, products-based public nuisance claims are distinguishable from products liability claims in several important respects. First, public nuisance claims are focused on harms to the public—such as over-strapped, under-resourced hospitals and addiction treatment facilities, as well as the destabilization of whole neighborhoods, as in the case of the public nuisance claims regarding prescription opioid products.¹⁸⁶ Product liability claims, by contrast, are focused on the harms specifically borne by discrete individuals, such as individual loss of earning power, medical expenses, and pain and suffering.¹⁸⁷ The line between public and individual harms can blur but it is clear that (for example) opioid addiction has caused widespread public harms as well as, and in addition to, specific harms to many hundreds of thousands of individuals.¹⁸⁸ The relationship between public and private harm is akin to the relationship between epidemiology and individualized medicine, the former focused on the incidence of disease in a community and adverse community wide effects and the latter focused on particular individuals and particular individuals' wellbeing.¹⁸⁹

Second, product-based public nuisance claims differ from standard product liability claims, to the extent that they build on the proposition that the producers of the harmful products were able to inflict harm on the public for profit because they misrepresented what they knew about the risks inherent in their products and thereby undermined the ability of the government—the legislature, agencies—to protect the public, as well as undermining the ability of members of the public to protect themselves.¹⁹⁰ Deliberate misinformation campaigns on the part of producers provide courts with an additional reason why they need not defer to the regulatory state to address the problem at hand, because (if the

¹⁸⁶ See *California v. Purdue Pharma L.P.*, No. SACV 14-1080-JLS, 2014 WL 6065907, at *3 (C.D. Cal. Nov. 12, 2014) (distinguishing between “direct harm to opioid users and indirect harm to communities in the form of increased crime rates, hospital utilization, joblessness, and broken families”).

¹⁸⁷ See DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 5.5 (4th ed. 2014) (describing damages available in products liability actions).

¹⁸⁸ See Haffajee & Abrams, *supra* note 171, at 701–04.

¹⁸⁹ See Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 238–39, 265–66, 270 (2012).

The collectively held public rights recognized in the common law of public nuisance allow for vindication of harms that are suffered by the public as a whole, harms that cannot easily be broken down into an aggregation of private harms. In a public nuisance cause of action the plaintiff may be able to establish that the defendant's actions have contributed to unhealthy living conditions, which have resulted in harms that are quantifiable at the population level by epidemiologists, even if the plaintiff cannot establish that any particular individual is identifiable as the victim of those harms.

Id. at 265–66. Wiley argues “these insights ultimately provide the strongest source of support for understanding an expanding range of health threats as legitimately public in nature and as amenable to structural solutions.” *Id.* at 270.

¹⁹⁰ See, e.g., Schwartz, Goldberg & Schaecher, *supra* note 15, at 631, 639.

allegations are true) it is the defendants' conduct that in part created a situation where there was and is an insufficient regulatory structure in place to address, contain, and resolve that problem. While it may be controversial whether corporate influence obtained over legislatures through massive cash contributions is corruption or just acceptable if not ideal democratic politics, lying and deception about product-related risks is quite another matter, and move product-based public nuisance away from strict liability (the standard for products liability doctrine) into the realm of intentional, "egregious" conduct, even if the deception aspect of the product-based public nuisance claim is conceived as necessary for a showing of causation of the harm rather than as necessary for a showing of the requisite intent to commit harm. As the California Court of Appeals explained in a public nuisance suit regarding lead paint:

Liability is not based merely on production of a product or failure to warn. Instead, liability is premised on defendants' *promotion of lead paint for interior use* with knowledge of the hazard that such use would create. This conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product; indeed, it is quite similar to instructing the purchaser to use the product in a hazardous manner A public nuisance cause of action is [premised] . . . on affirmative conduct that assisted in the creation of a hazardous condition. Here, the alleged basis for defendants' liability for the public nuisance created by lead paint is their 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.¹⁹¹

The strongest point in the critique of product-based public nuisance relates to remedies. Critics sometimes argue that public nuisance claims more closely resemble state products liability claims than anything else to the extent they seek compensation for harm in the form of money damages, which in fact is precisely what products liability claims do.¹⁹² If public nuisance is about threats to the public and the need for courts to abate current and future sources of harm, the critique goes, how can one have public nuisance claims for money for past costs borne by the public if that compensation in no way directly abates the ongoing public nuisance?

This argument has some force. But it is fallacious if employed as an argument against any public nuisance in which monetary relief is sought.

¹⁹¹ *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 328 (Ct. App. 2006); *see also* *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 83–84 (Ct. App. 2017).

¹⁹² *See* Merrill, *supra* note 15, at 17 (“[P]ublic nuisance is not historically associated with a damages remedy. Public nuisance liability traditionally gave rise to criminal sanctions or an order requiring the defendant to abate the condition deemed to be a public nuisance. Throughout the long history of public nuisance law, there is no recorded instance, until very recently, of any public nuisance action initiated by public officials yielding an award of damages.”).

Monetary damages also can be directly related to nuisance abatement, if the court orders that the damages be devoted to that purpose and there is some structure to ensure that this is the case.¹⁹³ And, in fact, restricted funds for nuisance abatement have been employed in public nuisance settlements, including ones for lead paint and opioid prescription drugs.¹⁹⁴

Finally, the nuisance-as-end-run-around-products-liability argument ignores the fact that state legislatures very easily could enact a statute or amend a current statute to specifically exclude from public nuisance all product-based actions.¹⁹⁵ That not a single state legislature has done so, or as far as I know come close to doing so, does not prove that there is a meaningful state legislative intent in support of allowing product-based public nuisance actions. But that fact does beg the question whether there is any reason at all to conclude that there is a state legislative intent to categorically bar product-based public nuisance claims.

In sum, the argument that product-based public nuisance claims are illegitimate end-runs around state products liability law is at its weakest where the claims focus on widespread public harms, plaintiffs allegedly undermined

¹⁹³ See *Atl. Richfield Co.*, 137 Cal. App. 4th at 328 (“A representative public nuisance cause of action seeking *abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use* is not ‘essentially’ a products liability action ‘in the guise of a nuisance action’ Because this type of nuisance action does not seek damages but rather abatement, a plaintiff may obtain relief *before* the hazard causes any physical injury or physical damage to property. . . . A products liability action does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard.”).

¹⁹⁴ See Haffajee & Abrams, *supra* note 171, at 715–16 (reporting on the use of restricted funds for nuisance abatement in opioid settlements); Joshua Schneyer, *California Finally Settles Old Public Nuisance Claim for Lead Paint Remediation*, CLAIMS J. (July 18, 2019), <https://www.claimsjournal.com/news/west/2019/07/18/292032.htm> [<https://perma.cc/UL7N-8HQ8>] (reporting on the use of lead paint settlement funds for abatement). See generally Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029 (2019) (explaining that tobacco settlement funds were used in the short term for tobacco-cessation and prevention, but the absence of firm restrictions in the settlement allowed the later diversion of the funds to unrelated purposes).

¹⁹⁵ Moreover, there are accounts of state legislatures intervening to limit or prevent nuisance liability with respect to a particular product, which in itself, by implication, arguably suggests a legislative intent to allow product-based nuisance liability as a general matter. See, e.g., Daniel McGraw, *Decade-Old Pro-Business Ohio Bill Let Lead-Paint Manufacturers Off the Hook for Paying for Cleanup*, CLEV. SCENE (Jan. 16, 2019), <https://www.clevescene.com/scene-and-heard/archives/2019/01/16/decade-old-pro-business-ohio-bill-let-lead-paint-manufacturers-off-the-hook-for-paying-for-cleanup> [<https://perma.cc/AHU6-X7AU>] (“Around 2006, several Ohio cities . . . filed public nuisance lawsuits against paint manufacturers. But the paint manufacturers decided to move their defense plan out of the courtroom and into the state legislature. In December of 2006, the legislature passed a pro-business bill that restricted the lead paint liability lawsuits [T]he Ohio Supreme Court ruled the pro-business bill just fine in August of 2007.”); Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1275 (2018) (“As we saw in the gun litigation context, if states do not want plaintiff city litigation, they usually have the authority to stop it.”).

regulatory checks on that harm through misinformation or other blameworthy behavior, and the relief sought, even if monetary, is aimed at abating the current, ongoing public nuisance.

B. The Democratic Legitimacy Objection Based on the Contingency Fee Lawyers' Role

Critics of product-based nuisance suits also depict the actions as driven by “greedy trial lawyers” who dominate state attorneys general and drive the ultimate litigation outcomes.¹⁹⁶ Public nuisance suits can be brought by private plaintiffs who allege special injury (in addition to the injury common to the public), but all or virtually all products-based public nuisance suits have been brought by public entities—state attorneys general on behalf of the states, localities, or some mix of state AGs and localities.¹⁹⁷ Before addressing the question of contingency fee lawyers, it is helpful to acknowledge first that the fact that state AGs and localities are plaintiffs in public nuisance suits itself has implications for the democratic legitimacy of public nuisance litigation.

The decision by a state attorney general to sue in public nuisance, in and of itself, confers a degree of democratic legitimacy on the suit. State AGs ability to sue in nuisance is rooted in a very long historical tradition, and also is generally authorized by specific state statute.¹⁹⁸ Almost all state AGs are elected by state voters and accountable to them; the remainder of state AGs are appointed by the State Governor, and accountable to him or her and thus, by extension, to the voters.¹⁹⁹ Accountability of course is imperfect and often more

¹⁹⁶ See Rustad & Koenig, *supra* note 177, at 347–48 (explicating the contingency fee critique of public nuisance litigation); DOUGLAS F. MCMEYER, LISE T. SPACAPAN & ROBERT W. GEORGE, HUSCH BLACKWELL, CONTINGENCY FEE PLAINTIFFS' COUNSEL AND THE PUBLIC GOOD? 1 (2011), https://www.thenalfa.org/files/Husch_Blackwell_Report_on_Contingency_Fee_Lawyers.pdf [<https://perma.cc/9FD2-545E>] (“The recent expansion of an alarming breed of litigation—where state attorneys general hire contingency fee lawyers to represent the interests of the state—means that corporate defendants must worry about a previously inconceivable threat to prosecutorial impartiality: personal financial gain. When contingency fee attorneys are engaged by the state, the self-interest of the contingency fee lawyer, who might make a personal fortune if successful, may cloud the good faith assessment of the public interest that an impartial prosecutor is required to make in the interests of justice.”).

¹⁹⁷ See Gifford, *Impersonating the Legislature*, *supra* note 8, at 913–14, 929–46.

¹⁹⁸ See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 489, 496 n.40 (2012) (“After all, attorneys general plainly are ‘representatives’ of the states’ citizens in a broader sense . . . and all are duty-bound to serve the public interest. . . . There are a number of state statutes authorizing the attorney general to sue as *parens patriae* . . .”).

¹⁹⁹ See Lemos, *supra* note 132, at 722–23 (explaining that even states AG critics “concede that ‘state attorneys general are responsive to political factors in ways that the federal agencies are not.’ Although each state’s experience will be different, all elected attorneys general have incentives to take actions that will respond to the interests of their constituents.” (quoting Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1036 (2001))). See generally Jason Lynch, Note,

theoretical than real, but state AGs decisions to sue and subsequent litigation decisions may well be as transparent to voters as many actions legislators or agencies take.

The status of a locality such as a city as a public nuisance plaintiff is more debatable from a democratic legitimacy perspective. Localities do not speak for the “State” qua state in the way state law expressly authorizes the state AG to do.²⁰⁰ However, as in California, state statutes can authorize localities to sue in public nuisance on behalf of the People of the State.²⁰¹ And the decision by a locality to sue invariably requires the approval of locally elected and locally accountable officials.²⁰² Indeed, actual accountability to voters at the local level by local voters may be a more realistic assumption than the assumption of actual accountability at the state level by state voters.

However, the democratic legitimacy of localities arguably depends on the scope of the alleged nuisance. Where the public nuisance at issue is not limited to the locality’s boundaries and affects all or much of the state, as often is true in product-related cases, the decision of a single municipality to sue in public nuisance without a parallel suit by or formal support of the state AG might suggest to the court that the locality’s decision to sue should carry no more meaning, from the perspective of the democratic legitimacy concern inherent in public nuisance, than a private party with a special injury suing in public nuisance.²⁰³

The argument that the state AG product-based nuisance suits that employ contingency fee lawyers are illegitimate because they are end-runs around the refusal (or anticipated refusal) of legislatures to appropriate more funding for more government lawyers and investigators or hourly-fee-lawyers is unsound.²⁰⁴ The use of contingency fee counsel solves the AGs’ funding problems because it requires no legislative funding or cuts in AGs’ existing

Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation, 101 COLUM. L. REV. 1998 (2001) (defending the multistate litigation role of coalitions of state attorneys general as consistent with constitutional norms).

²⁰⁰ See Luther J. Strange III, *A Prescription for Disaster: How Local Governments’ Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 537, 558–60 (2019).

²⁰¹ See CAL. CIV. PROC. CODE § 731 (West 2015) (“A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists.”).

²⁰² See Swan, *supra* note 195, at 1256–59.

²⁰³ See Strange III, *supra* note 200, at 518–21 (arguing that public nuisance litigation by cities can undermine the coherency and utility of statewide policy initiatives). *But see generally* Swan, *supra* note 195 (making a powerful normative argument for the value of cities as plaintiffs on a range of public law issues).

²⁰⁴ See David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 318–23 (2001) (explaining and critiquing this argument).

programs. But the AGs' use of contingency fees does not render state legislators powerless. Rather, the use of contingency fees simply changes the nature of the action that legislators would need to block public nuisance litigation. Where contingency fees are not an option, the legislature's refusal to grant a litigation funding request by the AG's office might be sufficient to block the litigation. For legislators inclined to support the industry in question but worried about that industry's unpopularity, the failure to fund is an attractive option. The failure to fund generally would not require a vote, so it allows for ducking accountability, and it can always be justified on grounds of fiscal conservatism and frugality. Where an AG can finance litigation through contingency fees, legislators can still stop the litigation, but doing so may require very public, accountable action, such as passage of a bill, and there would be no cover justification of fiscal conservatism. Thus, the relevant question, in terms of "democracy," is which is more "democratic": to allow the legislature to de facto block the AGs' litigation efforts through the opaque budgetary process or to require the legislature to openly and expressly bar the AG from pursuing a public nuisance action.²⁰⁵

With respect to the actual role of contingency fee lawyers in specific cases, there is no real evidence that such lawyers have led state AGs or localities to pursue product-based public nuisance suits that they otherwise did not want to pursue. Moreover, as regards the question of the relationship between State AGs and contingency fee lawyers, states can adopt—and sometimes have adopted—requirements for state AGs' retention of private lawyers.²⁰⁶ Judges can set clear requirements for the communications between contingency fee lawyers and their public clients in an aggregate litigation, and they also can set limits on the kind and amounts of fees private lawyers can receive.²⁰⁷ Courts can and should ensure "a careful balance is struck between employing the talents, skills, experience of private trial lawyers and ensuring that societal interests are advanced."²⁰⁸ While the role of contingency fee lawyers may not always be

²⁰⁵ See *id.* Of course, legislatures also may not want to provide funding for AG litigation because they believe that utilizing contingency fee lawyers is a rational way to share the risk the litigation will be unsuccessful and a means of tapping those lawyers' expertise.

²⁰⁶ See MCMEYER, SPACAPAN & GEORGE, *supra* note 196, at 10–14 (surveying the responses in different states).

²⁰⁷ See, e.g., *id.* at 11.

²⁰⁸ See Rustad & Koenig, *supra* note 177, at 371 ("[T]he judiciary has ample tools to deal with this danger. Judges have the inherent power to reject *parens patriae* settlements that shortchange the public interest. Just as courts may refuse to approve class action settlements, they have the authority to reject *parens patriae* settlements that give trial attorneys grossly disproportionate fees."). Judges, in fact, have been assertive in scrutinizing contingency fees in some high-profile aggregate litigation. See generally Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013) (surveying fee caps in MDL settlements). In the ongoing opioid public nuisance MDL in the Northern District of Ohio, Judge Polster has indicated he will actively review and scrutinize fee requests. See Daniel Fisher, *Judge to Opioid Lawyers: Show Me You're Worth 7% of Multibillion-Dollar Settlement*, LEGAL NEWSLINE (June 5, 2020), <https://www.tortreform.com>

well-managed by individual judges, that does not provide a grounds for barring all kinds of contingency fee representation, any more than it provides a grounds for barring all product-based public nuisance suits.²⁰⁹ And, unlike the clients in most cases with contingency fee representation, state AGs tend to be sophisticated lawyers with professional staffs who are unusually capable of managing the contingency fee lawyers they have retained.

C. A Balancing Approach as Applied to the Opioid and Climate Change Adaptation Litigation

The value of a case-specific balancing approach with respect to product-based nuisance claims, as opposed to a categorical approach, is illustrated by a comparison of the opioid drug and climate adaptation cases. The sprawling opioid litigation across the United States involves a range of state and federal law legal theories, and a range of defendants, including pharmaceutical manufacturers, wholesale distributors, retail distributors, and physician groups.²¹⁰ Plaintiffs include state attorneys general on behalf of states, cities and counties, and tribal governments.²¹¹ To date, there have been several (relatively small, given the billions of dollars at issue) settlements and a \$572 million judgement against one major manufacturer in a suit brought by the Oklahoma State Attorney General.²¹² There is a massive Multi-District Litigation

/news/judge-to-opioid-lawyers-show-me-youre-worth-7-of-multibillion-dollar-settlement/ [https://perma.cc/3A54-F5ZR] (reporting on the judge's demands regarding fee requests, the judge's appointment of a special master to oversee fees, the special master's recommendations that the court exercise caution in approving fees, and state attorneys general's opposition to the contingency fee lawyers' fee requests to date).

²⁰⁹ There is an extensive academic literature critiquing MDL, class actions, and other aggregate litigation and suggesting a variety of reforms, such as publication of proposed aggregate settlements and the empowerment of objectors to proposed settlements. These reforms could be—and perhaps should be—as readily applied to aggregate public nuisance suits as other kinds of aggregate litigation. See generally David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019) (surveying the MDL academic literature and advocating reforms, focused on transparency). See, e.g., Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3186–91 (2013) (exploring foreign models of aggregate litigation and concluding that agency costs are unavoidable but should be minimized while not sacrificing the real benefits of aggregate litigation).

²¹⁰ For descriptions of the ongoing litigation, see Haffajee & Abrams, *supra* note 171, at 715–16; WEN W. SHEN, CONG. RSCH. SERV., LSB10365, OVERVIEW OF THE OPIOID LITIGATION AND RELATED SETTLEMENTS AND SETTLEMENT PROPOSALS 1–5 (Nov. 2019); and Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation> [https://perma.cc/97J6-DTV9].

²¹¹ See Haffajee & Abrams, *supra* note 171, at 715–17.

²¹² See generally *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929 (Dist. Ct. Okla. Aug. 26, 2019); Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572*

(“MDL”) in the Northern District of Ohio, encompassing over 2700 localities’ suits.²¹³ Although the state AGs have sued separately in their own states, the state AGs are coordinating with—and sometimes overriding—the MDL attorneys representing the localities in global settlement talks.²¹⁴ In short, the litigation landscape is complex.

As is the opioid crisis itself: Manufacturers allegedly promoted drugs by understating—and indeed, plainly lying about—the drugs’ addiction risks and overstating their benefits.²¹⁵ Manufacturers allegedly enlisted physicians to overprescribe opioids, essentially bribing them.²¹⁶ Distributors allegedly ignored indications that prescription opioids were being excessively and illegally prescribed, reinforced the manufacturers’ lies, and violated related

Million in Landmark Opioid Trial, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [<https://perma.cc/CFK9-4KEG>]. This judgment, however, was vacated by the Oklahoma Supreme Court, which, in a sweeping opinion that could have been written by the Chamber of Commerce, fully adopted the view that public nuisance never or almost never applies to claims involving the sale of lawful products. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021) (“Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our [c]ourt has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.”). As the dissent pointed out, however, the majority opinion simply ignored the lower court’s findings that the defendant’s misinformation campaign regarding opioid risks, which was central to the trial court’s conclusion that the plaintiffs’ claims did not fall under the category of products liability. *Id.* at 734 (Edmonson, J., dissenting) (“The Court does not address the findings of fact made by the trial court relating to the misrepresentations made by the defendants, and the relationship between these misrepresentations and opioid addiction in Oklahoma. . . . The Court does not discuss the importance of a drug manufacturer deceptively marketing a drug to physicians for the purpose of increased sales, and causing injury to patients and a public health crisis with damage to the public’s purse.”). Although the trial court’s judgment and hence abatement order was vacated, it still can serve as a model for litigation in other States under the public nuisance law of those States.

²¹³The formal description of the Opioid MDL is: “Plaintiffs allege that the manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs--all of which contributed to the current opioid epidemic.” *National Prescription Opiate Litigation*, U.S. DIST. CT. N. DIST. OHIO, <https://www.ohnd.uscourts.gov/mdl-2804> [<https://perma.cc/SJZ7-RX7U>].

²¹⁴For accounts of the active role played by the state attorneys general, see Jan Hoffman, *Opioid Settlement Provokes Clash Between States and Cities*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/health/opioids-settlement.html> [<https://perma.cc/7DK3-Y8EG>]; Jan Hoffman, *Payout from a National Opioids Settlement Won’t Be as Big as Hoped*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/health/national-opioid-settlement.html> [<https://perma.cc/7BTB-VCDH>]; Joseph Flaherty, *Officials in Talks with State’s AG over Opioid Suits*, ARK. DEMOCRAT GAZETTE (Aug. 20, 2020), <https://www.arkansasonline.com/news/2020/aug/20/officials-in-talks-with-states-ag-over-opioid/> [<https://perma.cc/ZD4J-METM>].

²¹⁵See *Purdue Pharma*, 2019 WL 4019929, at *9.

²¹⁶See Dwyer, *supra* note 210.

statutory and regulatory reporting requirements.²¹⁷ As curbs on prescriptions finally came into place, many addicts turned to illegal opioids, increasing the scale and severity of the public health crisis.²¹⁸ The health, social welfare, and economic costs on communities from opioid addiction are huge, by any measure.²¹⁹

The judgment in the Oklahoma case shows the possible public benefits of public nuisance in the opioid context. The trial court order tracked a state agency abatement plan, and as experts have advised, addressed enhancing treatment availability, developing better treatments, and preventing future addiction, including by enhancing the state regulatory treatment apparatus for identifying illegal prescriptions and prosecuting those responsible for them.²²⁰ The abatement plan that ultimately would be part of any MDL settlement reportedly also will focus heavily on expert-recommended abatement measures.²²¹

In the climate adaptation suits, the States of Rhode Island, Minnesota, and Delaware, several California and Colorado localities, the City of Baltimore, and a few other cities and counties have sued major energy companies, arguing that their products, when burnt, produced greenhouse gasses that contributed to climate change, which in turn has and will require the plaintiffs to adapt to such phenomena as sea level rise.²²² According to the plaintiffs, these companies

²¹⁷ See, e.g., *In re Nat'l Prescription Opiate Litig.*, 477 F. Supp. 3d 613, 633 (N.D. Ohio 2020) (describing allegations that pharmacies “willfully and ‘systematically ignored red flags that they were fueling a black market;’ . . . required and rewarded speed and volume by opioid-dispensing employees, while minimizing standards of safety and care; . . . [and] knowingly worked in concert with opioid manufacturers ‘to ensure that false messaging surrounding . . . the true addictive nature of opioids was consistent’”).

²¹⁸ See Steven Rich, Meryl Kornfield, Brittany Renee Mayes & Aaron Williams, *How the Opioid Epidemic Evolved*, WASH. POST (Dec. 23, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/opioid-pills-overdose-analysis/> [<https://perma.cc/CJ7N-W6LC>] (depicting the shift from prescription to illegal opioids).

²¹⁹ See, e.g., *Researchers Estimate Societal Costs of the Opioid Epidemic*, SCI. DAILY (July 30, 2019), <https://www.sciencedaily.com/releases/2019/07/190730092634.htm> [<https://perma.cc/F9C3-W5CL>] (describing studies estimating social costs of the opioid epidemic).

²²⁰ See, e.g., *Purdue Pharma*, 2019 WL 4019929, at *15, *19–20 (awarding funding to the Oklahoma Offices of Medical and Dental Licensure to hire additional investigators and to help retain skilled medical personnel and the Oklahoma Nursing Board to staff addiction treatment and prevention programs).

²²¹ See Jan Hoffman, *\$26 Billion Settlement Offer in Opioid Lawsuits Gains Wide Support*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/health/opioids-settlement-distributors.html> [<https://perma.cc/3QCB-T2BW>] (“Most of the money from the settlement deal is intended to help pay for treatment and prevention programs in communities ravaged by addiction and overdoses.”).

²²² For a database listing the suits with links to the relevant materials, see *Common Law Claim*, U.S. CLIMATE CHANGE LITIG., <http://climatecasechart.com/case-category/common-law-claims/> [<https://perma.cc/TN7Y-J82F>]. The complaints in these lawsuits are substantially similar; the complaint filed by San Mateo County, for example, is almost identical to those filed by the other jurisdictions. See *generally* Complaint, County of San Mateo v. Chevron Corp., No. 171V03222 (Super. Ct. filed July 17, 2017),

have facilitated the burning of fossil fuels that account for something like twenty percent of aggregate emissions,²²³ although that attribution and what it means is debatable.²²⁴ Plaintiffs allege that the companies withheld information about climate change and actively nurtured public doubt about the reality of climate change.²²⁵ As a result, shifts toward renewable sources of energy that otherwise would have happened did not happen, climate change worsened, and the plaintiffs consequently face costs of adaptation now and into the future that otherwise would have been avoided.²²⁶ The plaintiffs seek a range of relief, including recoument of adaptation expenses in the past and funding of adaptation efforts going forward.²²⁷

So far, the federal courts have dismissed these suits on the grounds that the federal Clean Air Act displaces the nuisance claims to the extent that they are understood to sound in the federal common law of nuisance.²²⁸ A number of state court actions based on state public nuisance claims are pending, but defendants are pressing to have them heard in the federal courts, where they believe they will enjoy a friendlier forum.²²⁹ There have been no judgements in the plaintiffs favor or settlements to date.²³⁰

Both the opioid and climate change adaptation crises and cases raise extraordinarily complicated technical expertise and institutional capacity questions, in part because of the sheer number and variety of actors involved in both crises.²³¹ With respect to the democratic legitimacy factor, however, the climate change adaptation suits are more problematic than the opioid suits.

17CIV03222_complaint.pdf [https://perma.cc/RB98-Y5W6]. Sher Edling, LLP is the law firm for the plaintiffs in all these suits to date. For a good analysis of the climate change adaptation litigation, see generally Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49 (2018).

²²³ Complaint, County of San Mateo v. Chevron Corp., *supra* note 222, at 33.

²²⁴ See Lin & Burger, *supra* note 222, at 86 (“Whether courts would find the alleged conduct a substantial factor in causing the nuisance is less certain: while the defendants in the . . . complaint are alleged to be five of the nine ‘largest cumulative producers of fossil fuels worldwide from the mid nineteenth century to present[,]’ they collectively appear responsible for approximately 7.4 percent of cumulative global GHG emissions, according to one methodology of tracing emissions to certain actors.” (footnote omitted)).

²²⁵ See, e.g., Complaint, County of San Mateo v. Chevron Corp., *supra* note 222, at 1.

²²⁶ See, e.g., *id.* at 93.

²²⁷ See, e.g., *id.* at 98.

²²⁸ See *supra* note 71 and accompanying text.

²²⁹ See *supra* note 71 and accompanying text.

²³⁰ See generally *Common Law Claim*, *supra* note 222.

²³¹ See Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. L. 1, 39 (2011) (“[T]he climate change context poses distinct conceptual problems in terms of attribution, given the participation of so many actors. . . .”); Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 406 (2020) (explaining that although “the prescription drug industry, including manufacturers, distributors, and pharmacies, played a significantly culpable role in allowing the crisis to develop into its current magnitude,” it is also clear “that many, many others played supporting roles in this regard, including, but not limited to,

For one thing, the nature and number of public plaintiffs in the sprawling opioid litigation itself supports the democratic legitimacy of the suits. State attorneys general in every state other than Nebraska and thousands of localities have sued to hold the drug manufacturers and distributors liable for funding addiction abatement efforts.²³² When so many government actors—in a range of states with very different political orientations—agree there is a public opioid crisis, that the regulatory state has failed to meet massive public needs, and that the defendant should be held financially responsible for meeting at least some of those unmet needs, the suits themselves can be taken as proof that the plaintiffs are only seeking what a well-functioning democracy should have made happen without resort to the courts. That is, if the federal and state legislatures were doing what they should be doing in a well-functioning democracy, the companies already would be funding the opioid addiction abatement programs and staffing for which the plaintiffs seek funding in their lawsuits.²³³

By contrast, the climate adaptation suits by localities (rather than states, with the notable exceptions of Rhode Island, Minnesota, and Delaware) raise the question whether the suits are in effect asking the court to make determinations on issues that have statewide significance and that therefore, ideally, should have been brought by the state AG or in coordination with the state AG. Although much adaptation necessarily will be tailored to local conditions, state level coordination is desirable, as physical phenomena do not respect the boundaries among localities. Indeed, one locality's adaptation to climate change can worsen the situation of a neighboring locality: for example, sea walls as a response to sea level rise can serve to protect some communities at the cost of greater erosion and water penetration elsewhere.²³⁴

Moreover, the argument that opioid drug manufacturers and distributors engaged in misconduct that in some sense subverted regulation and caused the public harm of mass opioid addiction is much more convincing than the argument that the energy companies subverted regulation and caused the public harm of climate change. As already discussed, a key difference between

individuals, friends; families; governments, both federal and state; licensing boards; and physicians”).

²³² See Berkeley Lovelace Jr., *Nearly Every US State Is Now Suing Oxycontin Maker Purdue Pharma*, CNBC (June 4, 2019), <https://www.cnbc.com/2019/06/04/nearly-every-us-state-is-now-suing-oxycontin-maker-purdue-pharma.html> [<https://perma.cc/Z69U-HYWU>]; Grant Schulte & Geoff Mulvihill, *Nebraska's AG Is Lone Holdout in Pursuing Opioid Cases*, ASSOCIATED PRESS (June 12, 2019), <https://apnews.com/article/prescription-opioids-wv-state-wire-ne-state-wire-us-news-ap-top-news-2ca3e7d1501643b7aea0feeb2bed3929> (on file with the *Ohio State Law Journal*).

²³³ Judge Polster in the MDL litigation made this point powerfully in the first status conference. Transcript of Proceedings at 4–10, *In re Nat'l Prescription Opiate Litig.*, 477 F Supp. 3d 613 (N.D. Ohio 2020) (No. 17-CV-2804).

²³⁴ See Ruo-Qian Wang, Mark T. Stacey, Liv Muir Meltzner Herdman, Patrick L. Barnard & Li Erikson, *The Influence of Sea Level Rise on the Regional Interdependence of Coastal Infrastructure*, 6 EARTHS FUTURE 677, 677 (2018).

products liability actions and product-based public nuisance actions is that the latter, but not the former, is predicated on the fact that defendants' misconduct caused the public harm at issue to go unaddressed and unchecked by regulators and the public alike.²³⁵ This difference is one key way in which public nuisance claims can be defended as something other than an end-run around the state products liability law established by the state legislature.

There does seem to be overwhelming evidence that drug manufacturers intentionally lied about opioid addiction risks and that once those risks became known, regulators, albeit with some delay, acted to curb the use of the drugs, although a full-blown addiction crisis had already become a reality.²³⁶ As the judge in the Oklahoma judgement concluded, based on what appear to have been largely undisputable facts, "Defendants promoted their specific opioids using misleading marketing. . . . Defendants also pervasively promoted the use of opioids generally. . . . Defendants' false, misleading, and dangerous marketing campaigns have caused exponentially increasing rates of addiction."²³⁷ Once litigation forced the disclosure of the truth about opioids, federal and state regulators and the public changed their behavior and attitudes accordingly.²³⁸ The use of prescription opioids has dropped dramatically, and become subject to stringent controls, now that the truth of their potential effects are known.²³⁹ No one advocates for a return to the status quo ante, when such drugs were readily available and few if any prescription controls were in place and actually followed.

But the same cannot be said about fossil fuels and climate change. The climate change adaptation plaintiffs allege that

[r]easonable consumers and policy makers have also been deceived about the depth and breadth of the state of the scientific evidence on anthropogenic climate change, and in particular on the strength of the scientific consensus demonstrating the role of fossil fuels in causing both climate change and a wide range of potentially destructive impacts, including sea level rise.²⁴⁰

²³⁵ See *supra* notes 127–28 and accompanying text.

²³⁶ Rich, Kornfield, Mayes & Williams, *supra* note 218.

²³⁷ State v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4019929, at *12 (Dist. Ct. Okla. Aug. 26, 2019). The New York State AG's complaint contains almost a hundred pages detailing how the drug manufacturers intentionally and energetically misled regulators, physicians, and consumers, falsely representing that other pain relief methods were riskier than opioids, and falsely claiming that opioid dependence and withdrawal could be easily managed and effectively prevented with unproven screening tools and management techniques. See generally Complaint, People v. Purdue Pharma, No. 400016/2018 (N.Y. Sup. Ct. filed Mar. 28, 2019), https://ag.ny.gov/sites/default/files/oag_opioid_lawsuit.pdf [<https://perma.cc/8DZN-WEU6>].

²³⁸ See AM. MED. ASS'N, OPIOID TASK FORCE 2020 PROGRESS REPORT 2 (2020).

²³⁹ *Id.* (reporting a nearly 38% decrease in opioid prescriptions between 2015 and 2019 a nearly 65% increase in the use of state prescription monitoring programs).

²⁴⁰ Complaint, County of San Mateo v. Chevron Corp., *supra* note 222, at 62.

But even assuming all of the alleged deception can be proven, which seems very plausible, it is questionable whether there would have been truly dramatic shifts in policy toward curbing emissions on a global scale had the companies not engaged in deception. The reality is that the harms of anthropogenic climate change have been known for a long time, and nonetheless, and for a range of reasons, the nations of the world simply have not mustered the will to take the sort of dramatic steps needed to shift to decarbonized economy.²⁴¹

That fossil fuels cause climate change and that climate change may well be disastrous for the planet has been known for decades; after all, the Kyoto Protocol, which called for dramatic reforms to curb emissions, is 30 years old.²⁴² And even today, after all that is known about climate change, including the deceptive conduct on the part of energy companies in the past, we still do not see voters in the United States pushing for dramatic curbs on emissions.²⁴³

The Obama Administration was unable to secure passage of even a modest climate bill, and the Trump Administration scorned any efforts to address climate change.²⁴⁴ It is uncertain that the Biden Administration will fare much better on climate than the Obama Administration in Congress, although there surely will be efforts. Climate change has only very recently become a politically palatable phrase in the state that arguably faces the most pressing climate change adaptation needs, Florida.²⁴⁵

Even putting aside the merging of the climate issue with partisanship in the United States, there are many reasons why there remains a lack of political will for true decarbonization even now. These reasons include: the economic importance of fossil fuels for certain regions of the country (e.g. West Virginia, Texas, Pennsylvania),²⁴⁶ the continuing (if substantially diminished) appeal of fossil fuels as familiar, readily available, and highly reliable energy sources, the

²⁴¹ See sources cited *infra* notes 242–51.

²⁴² See *What Is the Kyoto Protocol and Has It Made Any Difference?*, GUARDIAN (Mar. 11, 2011), <https://www.theguardian.com/environment/2011/mar/11/kyoto-protocol#:~:text=The%20Kyoto%20protocol%20was%20the,known%20as%20the%20Earth%20Summit> [<https://perma.cc/YM5Z-CQX6>] (reporting that the “impact of this agreement between nations on reducing greenhouse gas emissions will be modest”).

²⁴³ See Frederick Hewett, *Why Wasn't Climate the Electoral Lever We Thought It Would Be?*, WBUR (Dec. 1, 2020), <https://www.wbur.org/cognoscenti/2020/12/01/climate-change-joe-biden-frederick-hewett> [<https://perma.cc/4M4T-RJH5>] (reporting that only 4% of polled general election voters listed change as their top priority).

²⁴⁴ *Id.*

²⁴⁵ See, e.g., Kimberly Miller, *Climate Change No Longer Dirty Words for Florida's GOP, but How Green Will Trump Go?*, GAINESVILLE SUN (Mar. 1, 2020), <https://www.gainesville.com/story/sports/columns/dooley/2020/03/01/climate-change-no-longer-dirty-words-for-floridas-gop-but-how-green-will-trump-go/1608273007/> [<https://perma.cc/W6UK-BBDF>].

²⁴⁶ Consider, for example, the political pressures Democratic candidates feel not to support a federal ban on fracking. See, e.g., Lisa Friedman & Shane Goldmacher, *In Crucial Pennsylvania, Democrats Worry a Fracking Ban Could Sink Them*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/politics/pennsylvania-democrats-fracking.html> [<https://perma.cc/57HF-LZUD>].

difficulty human beings psychologically have processing an issue like climate change that seem so distant, complex and overwhelming,²⁴⁷ and an ingrained techno-optimism in our culture that leads to the conclusion that somehow technological innovation will obviate the need to worry about climate change.²⁴⁸ Even today, for example, the simplest climate change measure—a very stiff hike in the federal gasoline tax—remains a political non-starter.²⁴⁹

Moreover, even if the energy company defendants had made disclosures that shifted U.S. policy somewhat, it is far from clear that countries like India, China, and Australia would have chosen not to exploit their vast coal deposits because of those disclosures.²⁵⁰ Climate change is an international phenomenon, and necessitates international action. Yet the most recent international climate agreement, the Paris Accords, only entails modest non-binding commitments from most countries, and so far almost every country is on target to fail to meet the deadline for ratcheting up its emissions-reduction commitment.²⁵¹

Enlightened and effective leadership across the political spectrum in the United States and all other major emitters could have—and could still—result in a dramatic reduction in emissions, but the defendants in the climate adaptation suits did not singlehandedly cause the absence of enlightened and effective leadership even in just the United States.

²⁴⁷ See generally Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299 (exploring how biased assimilation, loss aversion, and other psychological processes undermine comprehension of and support for climate change mitigation); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003) (explaining how loss aversion and myopia skew support against immediate sacrifices needed for climate change mitigation).

²⁴⁸ See Jennie C. Stephens & Nils Markusson, *Technological Optimism in Climate Mitigation: The Case of Carbon Capture and Storage*, in THE OXFORD HANDBOOK OF ENERGY AND SECURITY 503, 508–09 (Debra J. Davidson & Matthias Gross eds., 2018) (explaining how techno-optimism works to reduce support for emissions reductions and focuses attention to quick fixes).

²⁴⁹ See Editorial Board, *Gas Tax Hike: Mayor Pete's Best Transportation Idea Is Dismissed Before He's Even Confirmed as Secretary*, BALTIMORE SUN (Jan. 27, 2021), <https://www.baltimoresun.com/opinion/editorial/bs-ed-0128-gas-tax-federal-20210127-h4v4mtmgdvhjpdnthmna6nyo74-story.html> [<https://perma.cc/6AL6-ZBZC>] (reporting that despite his focus on the environment, “President Biden has no appetite for the gas tax increase”).

²⁵⁰ See Andrew Fawthrop, *Profiling the Top Five Countries with the World's Largest Coal Reserves*, NS ENERGY (Oct. 19, 2020), <https://www.nsenergybusiness.com/features/countries-largest-coal-reserves/> (on file with the *Ohio State Law Journal*) (explaining that “Global production [of coal] in 2019 topped 7.9 billion tonnes, with China, India and the US among the world’s top coal-producing countries” and “major economies – notably China and India – still rel[y] heavily on coal-fired power generation”).

²⁵¹ See Fiona Harvey, *World Is in Danger of Missing Paris Climate Target, Summit Is Warned*, GUARDIAN (Dec. 12, 2020), <https://www.theguardian.com/environment/2020/dec/12/world-is-in-danger-of-missing-paris-climate-target-summit-is-warned> [<https://perma.cc/BAN7-NGWA>]; Chloé Farand, *Majority of Countries Miss Paris Agreement Deadline To Increase Climate Ambition*, CLIMATE HOME NEWS (Jan. 4, 2021), <https://www.climatechangenews.com/2021/01/04/majority-countries-miss-paris-agreement-deadline-increase-climate-ambition/> [<https://perma.cc/RZP3-P9JC>].

It is certainly possible that if the energy companies had not withheld information and sowed doubts, we (as a world) would be further along than we are in the shift to low or no carbon sources of energy. Of course, the climate adaptation plaintiffs allege just that: “Defendants’ [a]ctions [p]revented the [d]evelopment of [a]lternatives [t]hat [w]ould [h]ave [e]ased the [t]ransition to a [l]ess [f]ossil [f]uel [d]ependent [e]conomy.”²⁵² But, given all the psychological, economic, cultural, and political impediments to decarbonization, it is unclear that any such “easing” would have resulted in a massive investment in, and shift to, renewable energy sources throughout the industrialized and industrializing world. It is simply unknowable whether, if there had not been corporate deception, aggregate emissions would be substantially lower and the plaintiffs’ climate adaptation needs would be substantially less. By contrast, it is reasonably knowable that if the opioid manufacturers had disclosed their product risks from the start and not enlisted greedy distributors to turn a blind eye and induced physicians to over-prescribe, there would not have been an opioid addiction crisis of anything like the magnitude our nation is now struggling to overcome.

VI. CONCLUSION

For trial court judges who (naturally) want to avoid massive amounts of complicated work on top of their standard workload, as well as the possibility of reversal and criticism by appellate judges, it always will be tempting to determine that it is the federal or state administrative state that should contend with the messy problems at the heart of the public nuisance complaints, and not the court.²⁵³ Nonetheless, if courts can move away from “easy outs” (as described in Part III), take some comfort in the fact that public nuisance claims sometimes only ask that existing unenforced statutory law or regulations be enforced to address palpable harm (as discussed in Part IV), and reject untenable categorical exclusion arguments for products-based public nuisance claims (as

²⁵² Complaint, *County of San Mateo v. Chevron Corp.*, *supra* note 222, at 65.

²⁵³ See generally Stephen J. Choi, Mitu Gulati & Eric A. Posner *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518 (2012) (explaining that the evidence suggests “district judges adjust their opinion-writing practices to minimize their workload while maximizing their reputation and chance for elevation to a higher court,” including by, where possible, maximizing affirmances and minimizing reversals). Moreover, particularly with the increasingly politicized and partisan approach to judicial selection at the federal and (to a lesser degree) the state level, some judges will share the intensely anti-regulatory biases and assumptions that are one of the reasons that we are witnessing regulatory failures and inaction in the first place. Such judges are likely to be very skeptical toward public nuisance claims. See generally Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019) (reporting on the effects of the intensification of political polarization on federal and state judicial selection, judicial decisions, and public perceptions).

argued in Part V), public nuisance law can play a more constructive role in highlighting and addressing public harms than it currently does.²⁵⁴

As the case studies in this Article suggest, even half-measures on the part of courts, even a court simply refusing to immediately dismiss a public nuisance suit, may result in reductions in public harm by prompting harm-reducing actions on the part of defendant corporations (like Amazon and Smithfield Klein in the COVID-19 litigation) and governments (like the federal EPA and TVA in the North Carolina air pollution litigation).²⁵⁵ And a court granting relief in a public nuisance case may provide funding to help build up a depleted regulatory infrastructure, as in the Oklahoma opioid judgment and abatement order, and thus lessen the need for future judicial interventions.²⁵⁶

Public nuisance in an era of “good” politics and political administration—an era with a high functioning administrative state, which responsibly meets public needs—should have a very limited role. But we do not live in such an era, and until we do, the discourse and law of public nuisance should reflect that fact.

²⁵⁴ I do want to acknowledge the possibility, however, that discovery in the climate adaptation litigation, if allowed, could establish that the energy companies’ deception effort was far more extensive and influential than is now commonly recognized. Rather than dismissing the climate suits with strained reasoning regarding “displacement” as the Second Circuit recently did, *supra* note 74 and accompanying text, the courts should allow targeted discovery, so that this possibility can be meaningfully explored.

²⁵⁵ See *supra* Parts III.B, IV.B.

²⁵⁶ See *supra* Part V.C.