

## **Uncommon Law: Ruminations on Public Nuisance**

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***“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”***

**Oliver Wendell Holmes<sup>1</sup>**

I. PREFACE

The ancient common tort of public nuisance is one of the most highly visible issues in modern tort jurisprudence. Its growth is particularly notable in climate change and environmental litigation, where it seems to be the “tort of choice” for plaintiffs seeking breathtakingly broad relief from global warming and trans-border pollution.<sup>2</sup> Traditionally limited to local concerns, the tort now aspires to global dimensions, and its expanding scope seems increasingly likely to attract review by the United States Supreme Court.<sup>3</sup> If its advocates succeed, the

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<sup>1</sup> S. Pac. Co. v. Jensen, 244 U.S. 205, 201 (1917) (Holmes, J., dissenting); *see also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (Yale Univ. Press 1921) (stating that courts make law only within the “gaps” and “open spaces of the law”).

<sup>2</sup> *See generally* Richard O. Faulk & John S. Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 TOXICS L. REPT. (BNA) 1231 (Oct. 22, 2009) (analyzing recent public nuisance decisions regarding climate change). *See also* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003) (providing historical perspectives regarding public nuisance).

<sup>3</sup> The Second Circuit recently denied rehearing en banc in a case allowing public nuisance claims to proceed based upon defendants’ greenhouse gas contributions to global warming under federal common law, and the defendants filed a petition for certiorari to the Supreme Court on Aug. 2, 2010. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009). A Fifth Circuit panel rendered a similar decision allowing claims to proceed under Mississippi law, but the ruling was vacated and the appeal dismissed when the court granted rehearing en banc and subsequently discovered it lacked the necessary quorum to hear the case. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh’g granted*, 598 F.3d 208 (2010), *appeal dismissed*, 607 F.3d 1049 (2010). Under Fifth Circuit law, a vacated panel decision has no value as precedent, but the court noted that the plaintiffs may still seek certiorari. *See Comer*, 607 F.3d at 1053-55. Another global warming case, which was recently dismissed, is now pending in the Ninth Circuit. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

“monster that will devour in one gulp the entire law of torts”<sup>4</sup> may be afforded a prime seat at the banquet.

This enthusiasm should be tempered, however, by caution – caution advised by wise common law jurists who warned against abrupt shifts in societal norms through judicial action alone. Although the “common law” may have originated within the judiciary, citizens have increasingly imposed legislative and regulatory policies to guide and regulate its discretion. These began as early as the Magna Carta, proceeded through the industrial revolution, and matured into today’s complex legislative and regulatory environment.<sup>5</sup> In today’s legal landscape, where conduct and business activities are thoroughly regulated by statutes and administrative rules, there are comparatively few areas where a common law court is free to act without legislative influence.<sup>6</sup>

Moreover, even when the political branches have not acted in an area, common law courts are not necessarily free to fill the void. As we will see below, some controversies – even when framed as “ordinary” public nuisance lawsuits – involve issues where courts lack the tools and resources to reach results that are principled, rational, and based on reasoned distinctions. When such non-justiciable political questions are raised, courts wisely defer to the political branches of government, which are far better equipped than the judiciary to amass and evaluate vast amounts of data bearing upon complex and dynamic issues. Thus, irrespective of whether the executive or legislative branches have spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary’s own limitations – can motivate judicial restraint. Although the ancients concluded that “nature abhors a

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<sup>4</sup> See *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (holding that, if public nuisance law expanded beyond its traditional boundaries, it “would become a monster that would devour in one gulp the entire law of tort.”) (quoting *Camden County Bd. of Chosen Freeholders v. Beretta, USA Corp.*, 273 F.3d 536, 540 (3rd Cir. 2001)).

<sup>5</sup> See generally Faulk & Gray, *Alchemy in the Courtroom?*, *supra* note 2, at 951-60.

<sup>6</sup> See Arthur T. Von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 660 (1997) (“Codification and case law embody two contrasting, yet complimentary, principles of justice. . . . In every legal system, regardless of where it falls on the spectrum between a pure system of codified law and a pure system of case law, the principles of these two approaches are in tension.”).

vacuum,”<sup>7</sup> there are circumstances in the law where uncharted voids should be eschewed.

## II. THE INTERSECTION BETWEEN STATUTORY AND COMMON LAW

Over the last century, common law and statutory codification systems began to converge. To some extent, codified systems departed from their rigidity and became more fact-specific in their approaches, and common law systems increasingly stressed the advantages and importance of “structure, coherence, and predictability” in judicial administration.<sup>8</sup> As early as 1908, Roscoe Pound was convinced that judges should take a more responsive attitude toward legislation.<sup>9</sup> Pound demonstrated that antiquated ideas, such as the principle that “statutes in derogation of the common law are to be strictly construed,” were inappropriate; instead, he advised that courts should refer to the principles set forth by legislators when applying the common law.<sup>10</sup> As he stated:

Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter – probably more so as our legislation improves.<sup>11</sup>

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<sup>7</sup> This supposition is often attributed to Aristotle. *See generally* PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 551-52 (10th ed. 2008). The belief persisted for centuries until certain fallacies were demonstrated by the experiments of Galileo and Torricelli. *Id.* at 552. Nevertheless, the saying perhaps offers wisdom for public nuisance cases. As Thoreau observed, “Nature abhors a vacuum, and if I can only walk with sufficient carelessness, I am sure to be filled.” HENRY DAVID THOREAU, EARLY SPRING IN MASSACHUSETTS 34-35 (Boston Houghton 1892). In the absence of guiding principles, errors are as likely to fill the jurisprudential mind as wisdom.

<sup>8</sup> Von Mehren, *supra* note 6, at 667.

<sup>9</sup> Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908) (noting with disdain, even at that early date, the “indifference, if not contempt, with which [legislation] is being regarded by courts and lawyers.”).

<sup>10</sup> *Id.* at 401-02, 406-07.

<sup>11</sup> *Id.* at 406-07.

Justice Harlan Stone demonstrated the continuity of this view in 1936 when he concluded: “I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and source of law, and as a premise for legal reasoning.”<sup>12</sup>

Historically, legislative and regulatory enactments informed and guided the judiciary in the context of property rights, especially those involving expectations that landlords should be responsible for maintaining property in a healthy condition. For example, Justice Cardozo stressed the importance of legislative policies, such as housing codes. Although the common law imposed no duty to repair and required tenants to pay rent even when housing was unsuitable, the widespread adoption of housing codes led courts to discard those principles.<sup>13</sup> In one of the first cases to do so, Judge Cardozo held that the code “changed the measure of [the landlord’s] burden,” and used the statute to guide his decision regarding whether to reform a common law doctrine.<sup>14</sup> Other common law developments regarding the duties owed by landlords to tenants adopted the same approach. For example, in allowing tenants to sue landlords for injuries caused by defective premises, Judge Bazelon recognized that legislatively established duties reflect contemporary community values and that “the law of torts can only be out of joint with community standards if it ignores the existence of such duties.”<sup>15</sup>

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<sup>12</sup> Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13-14 (1936) (“Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent.”).

<sup>13</sup> See, e.g., *Altz v. Leiberson*, 134 N.E. 703, 703 (N.Y. 1922).

<sup>14</sup> *Id.*

<sup>15</sup> *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 946 (D.C. Cir. 1960); see also *Pines v. Persson*, 111 N.W.2d 409, 412-13 (Wis. 1961) (“The legislature has made a policy judgment – that it is socially (and politically) desirable to impose these duties on a property owner – which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.”); *Boston Hous. Auth. v. Hemmingway*, 293 N.E.2d 831, 840 (Mass. 1973) (“Thus, we are confronted with a situation where the legislation’s establishment of policy carries significance beyond the particular scope of each of the statutes involved.”).

Today, scholars recognize that societies and economies are so “complex and interrelated” that jurists need to draw upon the universe of common law and statutory codifications to administer justice effectively.<sup>16</sup> As a result, in modern America the common law does not operate in a vacuum, but rather exists within a dynamic and interactive democracy that informs, guides, and, at times, constrains its creativity.

When there are legislative and regulatory policies that define and deal with an issue, those policies must be considered before determining who, if anyone, is responsible for creating and, ultimately, for abating a public nuisance in the owner’s premises.<sup>17</sup> Such a decision is fundamentally one of public policy, and in the judicial sphere, it can only be explained if it can be plausibly derived from policies that originate outside the courtroom. As Justice Linde explained in his critical article: “[T]he explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive public policy from a recital of facts.”<sup>18</sup> According to Justice Linde:

Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability

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<sup>16</sup> See Von Mehren *supra* note 6, at 670 (“The experience of the twentieth century makes clear that, as societies and economies become increasingly complex and interrelated, legal orders need to draw on both the civil law and the common law traditions in thinking about law and its administration. . . . The twenty-first century will doubtless witness a continuation of this tendency.”); see also Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J. L. & HUMAN. 149, 163 (2007) (Modern civil law theorists “have assumed an increasingly flexible attitude toward traditional civil law principles . . .”).

<sup>17</sup> See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614 (Cal. 1997) (discussing legislative efforts to address gang activity); *State v. Lead Indus. Assoc., Inc.*, 951 A.2d 428, 438-39 (R.I. 2008) (discussing the legislative response to childhood lead poisoning); *In re Lead Paint Litigation*, 924 A.2d 484, 491-94 (N.J. 2007) (reviewing legislative efforts to address childhood lead poisoning).

<sup>18</sup> Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994).

within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.<sup>19</sup>

Consistent with this observation, common law courts must fully and fairly consider the complete “matrix” of the jurisdiction’s statutes, regulations, and common law principles before rendering their judgments. In such a complex and interactive environment, courts cannot appropriately rest their decisions solely on common law grounds. Courts are not free to disregard legislative choices and create their own common law remedies merely because the legislature does not expressly forbid public nuisance liability in a particular context.

Using this perspective, the Supreme Court of New Jersey declined to engage in common law creativity in its public nuisance decision regarding lead paint.<sup>20</sup> The court rejected the notion that the state’s legislature, which had enacted a comprehensive scheme to address environmental lead hazards, intended to permit “plaintiffs to supplant an ordinary product liability claim with a separate [public-nuisance] cause of action as to which there [were] apparently no bounds.”<sup>21</sup> The court recognized that it was “only in light of [the existing] statutory framework that the arguments of the parties concerning the viability of a cause of action sounding in public nuisance [could] be evaluated.”<sup>22</sup> After reviewing the existing statutory framework, the court concluded that the New Jersey Legislature, unlike the plaintiffs, had used the term “public nuisance” in a manner consistent with the term’s historical underpinnings,<sup>23</sup> and “maintain[ed] a focus on the owner of premises as the actor responsible for the public nuisance itself.”<sup>24</sup> Since the products containing lead were only dangerous when they deteriorated after the property owners failed to maintain their premises, the manufacturers of lead paint products were not responsible for creating a public nuisance. In

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<sup>19</sup> *Id.* at 855.

<sup>20</sup> *See In re Lead Paint Litigation*, 924 A.2d at 505.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 494.

<sup>23</sup> *Id.* at 505.

<sup>24</sup> *Id.* at 500.

another landmark case involving the same parties, the Rhode Island Supreme Court reached a similar conclusion.<sup>25</sup>

Although similar lead paint litigation is pending in California,<sup>26</sup> that state's legal history is markedly hostile to common law innovation in the public nuisance arena. While the state maintains its original "general" public nuisance statute, the California Supreme Court plainly disfavors using that measure as a "catch all" basis for increasingly inventive claims. Noting the amorphous, vague, and uncertain nature of the term "nuisance," the court noted in *People v. Lim* that "it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity" because what society deems to be a nuisance may change over time.<sup>27</sup> Therefore, the court concluded that "[i]n a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."<sup>28</sup> This is particularly true where the activity can be remedied by applying criminal law unless the legislature

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<sup>25</sup> *State v. Lead Indus. Assoc., Inc.*, 951 A.2d 428 (R.I. 2008). For a complete history of the litigation that resulted in the landmark Rhode Island decision, see Faulk & Gray, *Alchemy in the Courtroom?*, *supra* note 2, at 981-1005, and Thomas Bender, Richard Faulk & John Gray, *The Mouse Roars! Rhode Island High Court Rejects Expansion of Public Nuisance*, Washington Legal Foundation (July 2008), available at [http://works.bepress.com/richard\\_faulk/15](http://works.bepress.com/richard_faulk/15).

<sup>26</sup> *See Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 333 (Cal. Ct. App. 2006) (remanding case after initial dismissal on the pleadings). Later in the same proceeding, the California Supreme Court held that public entities were not barred from employing private contingent fee counsel so long as the retainer agreement listed matters the private counsel must present to government attorneys for review. *See County of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010),

<sup>27</sup> *People v. Lim*, 118 P.2d 472, 475 (Cal. 1945). In *Lim*, the prosecutor asked the court to enjoin the defendant's gambling operations and alleged that the court was empowered to look outside of California's nuisance statutes to the common law for its jurisdiction, where gambling was historically considered a public nuisance because it encouraged "idle and dissolute habits". *Id.* at 473-74.

<sup>28</sup> *Id.* at 476 ("Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another."); *see also* *Schur v. City of Santa Monica*, 300 P.2d 831, 835 (Cal. 1956) ("[U]nless the conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime . . .").



specifically provides for an equitable remedy.<sup>29</sup> The principles espoused in *Lim* are not antiquated or outdated. Indeed, they were affirmed by the California Supreme Court in the last major public nuisance opinion it issued in 1997,<sup>30</sup> where the court expressly recognized the statutory supremacy that has permeated California jurisprudence since it was admitted to the Union in 1850.<sup>31</sup>

Under these authorities, once the legislature decides the condition or activity is a nuisance, a court cannot usurp the legislative power by determining that a violation is insignificant.<sup>32</sup> Instead, courts are bound to only determine “whether a statutory violation in fact exists, and whether the statute is constitutionally valid.”<sup>33</sup> They may not expand the scope of the tort beyond the limits prescribed by the statute, and they are not permitted to decide for themselves that a condition outside the statute’s intent constitutes a public nuisance.<sup>34</sup> When the legislative and executive branches act to codify or modify common law rules by defining expectations, the judiciary cannot ignore the impact of these statutes and regulations merely because the plaintiff’s cause of action originated at common law.

Even the *absence* of statutes in a particular area, however, does not necessarily condone judicial adventures.<sup>35</sup> As the Rhode Island Supreme Court recently cautioned:

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<sup>29</sup> *Lim*, 118 P.2d at 476. The court stated that it is not impermissible to enjoin criminal activity when a clear case is present. But it was concerned about bypassing a criminal trial, thereby depriving the defendant of the protection of the higher standard of proof and leaving open the possibility that the defendant remain criminally liable for the same activity. *Id.* at 476-77.

<sup>30</sup> See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997) (“This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a ‘public nuisance.’”); see also *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600, 613 (Cal. 1976) (Tobriner, J., dissenting).

<sup>31</sup> See *Acuna*, 929 P.2d at 606 (discussing the role of the legislature to “declare a given act or condition a public nuisance” and the judiciary’s need to defer to the legislature’s supremacy to declare the law).

<sup>32</sup> *City of Bakersfield v. Miller*, 410 P.2d 393, 397-98 (Cal. 1966).

<sup>33</sup> *Id.* at 398.

<sup>34</sup> *Lim*, 118 P.2d at 476.

<sup>35</sup> See *Kalian v. People Acting Through Cmty. Effort, Inc.*, 408 A.2d 608, 609 (R.I. 1979) (construing statutory silence on the existence of a claim as deliberate exclusion of

It is not for this Court to assume a legislative function when the General Assembly chooses to remain silent . . . . To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government.<sup>36</sup>

Instead of viewing legislative silence as a “liberating” factor, courts must evaluate claims within the context of priorities previously declared by the people’s elected representatives, consider the extent to which those policies would be impacted by its decision, and then make a “principled response” by deciding whether the requested remedy is truly within the competence of the judiciary.<sup>37</sup>

### III. RELATIONSHIP TO THE “POLITICAL QUESTION” DOCTRINE

This concept is remarkably similar to portions of the political question doctrine declared by the United States Supreme Court in *Baker v. Carr*<sup>38</sup> and its progeny,<sup>39</sup> where the Court held that courts should not

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the claim); *see also* United States v. Philip Morris USA Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) (“Congress’ care in formulating . . . a carefully crafted and detailed enforcement scheme [was] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”) (internal quotations omitted) (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)).

<sup>36</sup> *DeSantis v. Prella*, 891 A.2d 873, 881 (R.I. 2006) (declining to extend statute-of-limitations period by judicial rule when General Assembly had opportunity to change period but refrained); *see also* *Bandoni v. State*, 715 A.2d 580, 596 (R.I. 1998) (“[T]he function of adjusting remedies to rights is a legislative responsibility rather than a judicial task . . . .”) (citing *Henry v. Cherry & Webb*, 73 A. 97, 107 (R.I. 1909)).

<sup>37</sup> *See* Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 859 (2000) (“If a statute was enacted to protect a class of persons from a specified risk, courts should not assume from legislative silence that the legislature meant to reject private liability any more than courts should imply a legislative intent to create liability. Such a protective statute calls for formulation of a principled response, taking into account the respective roles and competencies of the court and the legislature.”).

<sup>38</sup> 369 U.S. 186 (1962).

entertain disputes when they lack “judicially discoverable and manageable standards for resolving it.”<sup>40</sup> As Justice Scalia stated for the plurality in *Vieth v. Jubelirer*, “[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”<sup>41</sup> The crux of the political question inquiry “is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is ‘principled, rational, and based upon reasoned distinctions.’”<sup>42</sup>

There is plainly an overlap between these jurisprudential principles, and each should inform courts when advocates invite creative excursions. In either context, respect for the legislative and executive spheres is critical. In public nuisance cases based on global climate change, where no standards presently exist to measure responsibility, political question arguments require a comparative evaluation of the resources needed to craft appropriate rules.<sup>43</sup> In other “complex and dynamic” issues, the United States Supreme Court has recognized that, as an institution, “the [legislature] is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon” complex and dynamic issues.<sup>44</sup> A sampling of decisions from various state courts yields similar appraisals.<sup>45</sup>

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<sup>39</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>40</sup> *Baker*, 369 U.S. at 217. This requirement is the second of several tests listed in *Baker v. Carr*, and is one of the most critical. See *Vieth*, 541 U.S. at 278 (“These tests are probably listed in descending order of both importance and certainty.”).

<sup>41</sup> *Vieth*, 541 U.S. at 278.

<sup>42</sup> *Id.*

<sup>43</sup> “Political question” considerations are primary concerns in the pending public nuisance cases involving global climate change. See generally Faulk & Gray, *supra* note 2.

<sup>44</sup> *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 665-666 (1994) (Kennedy, J., plurality) (citing *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).

<sup>45</sup> See, e.g., *Ferreira v. Strack*, 652 A.2d 965, 968 (R.I. 1995) (declining to judicially create tort liability for social hosts: “The imposition of liability . . . has such serious implications that any action taken should be taken by the Legislature after careful

Unlike courts, the legislative and executive branches can consider all pertinent issues in their entirety, rather than being limited to the issues raised by the parties involved in litigation. As a result, their “policy choices are likely to strike a fairer and more effective balance between competing interests [because] they are based on a broad perspective and ample information.”<sup>46</sup> Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have “evergreen” opportunities to revisit statutes and rules to create better tailored provisions.<sup>47</sup>

Political branches are also better equipped to deal with broad issues because they represent a quorum of the people, unlike trial and appellate courts. While the “process of enacting a statute” is “perhaps not always perfect, [it] includes deliberation and an opportunity for compromise and amendment and usually committee studies and hearing.”<sup>48</sup> Before any law is enacted, it must garner the support of a majority of the people through their elected representatives. Once enacted, the legislation is subject to a gubernatorial veto and must judicially pass any constitutional or interpretational challenges, if challenged. These are the built-in “checks and balances” that make our system of government work so effectively. When courts bypass these political safeguards to implement their own common law solutions, the

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investigation, scrutiny, and debate. It is abundantly clear that greater legislative resources and the opportunity for broad public input would more readily enable the Legislature to fashion an appropriate remedy to deal with the scope and severity of this problem.”); *see also* *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002); *Browner v. Browner*, 327 S.W.2d 808, 812-13 (Mo. 1959) (en banc) (“Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones.”).

<sup>46</sup> *See* Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1271 (2000).

<sup>47</sup> *See* *Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J. concurring); *see also* *Bandoni v. State*, 715 A.2d 580, 585 (R.I. 1998) (“In the event the Legislature should choose to [modify the statute], there is no question that it has the capacity to do so at any time. But it is not the function of this Court to act as a super legislative body and rewrite or amend statutes already enacted by the General Assembly.”) (internal citations omitted).

<sup>48</sup> *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995).

judiciary – the least political branch of government – declares policy unilaterally and the will of the people is expressed not through their elected representatives, but through a plebiscite of jurors and a hierarchy of judges. Juries play an enormously important role in our system of government, but they are not a substitute for decision-making by democratically-elected representatives.

In public nuisance contexts, such considerations should predictably result in judicial deference – not “common law” policy-making. Such questioning will typically expose “the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency. . . .”<sup>49</sup>

In public nuisance cases involving global climate change, for example, the primacy of political solutions is compelled by the universal scope of the controversies,<sup>50</sup> the depth of the inquiries needed to develop fair standards for their resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty – if not impossibility – of fair adjudication. Indeed, as Professor Tribe recently wrote, “[W]hatever one’s position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.”<sup>51</sup>

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<sup>49</sup> See Linde, *supra* note 18, at 853.

<sup>50</sup> The majority of the greenhouse gas emissions alleged to be creating this public nuisance occur outside the United States. See KEVIN A. BAUMERT ET AL., NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY, WORLD RESOURCES INSTITUTE 12 (2005), available at [http://pdf.wri.org/navigating\\_numbers.pdf](http://pdf.wri.org/navigating_numbers.pdf) (listing greenhouse gas emissions by country).

<sup>51</sup> See Laurence H. Tribe, et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES, Jan. 2010, at 23, available at [http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe\\_WP.pdf](http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf).

With all due respect to the judges who decided *Connecticut v. American Electric Power*,<sup>52</sup> climate change cases are not “ordinary tort suits” which can be litigated under an existing legal framework.<sup>53</sup> Instead, they frame wholly new claims by which plaintiffs seek to hold a comparatively tiny group of defendants liable for a global phenomenon caused universally by countless natural and anthropogenic sources. It is not enough that courts have experience resolving public nuisance liability and environmental damage cases.<sup>54</sup> The judiciary has *no* experience dealing with public nuisance litigation created by a *global* phenomenon resulting from the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts. The judiciary’s past experience provides no guidance for determining what standards and rules should be applied to fairly and justly resolve such controversies in a principled, rational, and reasoned manner.

Public nuisance cases, even those involving interstate issues, have always been contained within well-defined geographic borders. They are localized and linked to impairment of property, or to injuries resulting from such effects.<sup>55</sup> Significantly, all of the precedents upon which the Second Circuit relied were within that tradition.<sup>56</sup> Each case, and others dealing with the same issue, concerned a localized controversy traceable to specific actions by identifiable defendants,<sup>57</sup> such as the discharge of

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<sup>52</sup> *Connecticut v. Am. Elec. Power, Inc.*, 582 F.3d 309 (2d Cir. 2009).

<sup>53</sup> *See id.* at 330-331 (finding a public nuisance suit based on global climate change to be “an ordinary tort suit,” where there was “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”) (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007)).

<sup>54</sup> *See* Laurence H. Tribe, et al., *supra* note 51, at 13-14 (“[T]he political question doctrine is about more than wordplay. . . . [T]he Second Circuit – essentially confusing a label with an argument – concluded that it was an ‘ordinary tort suit’ and therefore justiciable.”).

<sup>55</sup> *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 830-33 (2003).

<sup>56</sup> *See, e.g., Am. Elec. Power Co.*, 582 F.3d at 326-29.

<sup>57</sup> *See* *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) (“The common thread running through each of those cases is that they involved a discrete number of ‘polluters’ that were identified as causing a specific injury to a specific area.”) (quoting *Am. Elec. Power Co.*, 582 F.3d at 329).

sewage or chemicals into waterways;<sup>58</sup> emission of noxious fumes from copper foundries that destroyed forests, orchards, and crops;<sup>59</sup> dumping garbage into the ocean that fouled beaches;<sup>60</sup> irrigation projects that contributed to flooding;<sup>61</sup> construction bridges that interfered with navigation;<sup>62</sup> and pollution of lakes by vessels transporting oil.<sup>63</sup> Although the panel decision by the Second Circuit cited authorities that noted that nuisance actions were “the common law backbone of modern environmental law,”<sup>64</sup> it failed to recognize that each of those cases involved acts that occurred within a circumscribed “zone of discharge,” affected defined geographic locations, and encompassed situations where the full range of defendants was either known or could be identified.<sup>65</sup> Unlike global climate change, the alleged nuisance in each case was entirely man-made, created over a relatively short period of time, and the relief being sought was injunctive abatement, not monetary damages.<sup>66</sup>

Global climate change, by contrast, is boundless and, according to many scientists, caused by a universal and unlimited range of actors and events that began at the start of the Industrial Revolution.<sup>67</sup> Nothing in the law of public nuisance allows plaintiffs to single out these few defendants and hold them monetarily liable for creating a condition that spans the

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<sup>58</sup> See, e.g., *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois (Missouri II)*, 200 U.S. 496 (1906); *Missouri v. Illinois (Missouri I)*, 180 U.S. 208 (1901).

<sup>59</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916).

<sup>60</sup> *New Jersey v. City of New York*, 283 U.S. 473, 476 (1931).

<sup>61</sup> *North Dakota v. Minnesota*, 263 U.S. 365, 371 (1923).

<sup>62</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 526 (1851).

<sup>63</sup> *United States v. Bushey & Sons*, 363 F. Supp. 110, 120-21 (D. Vt. 1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973).

<sup>64</sup> See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 328 (2d Cir. 2009).

<sup>65</sup> Cf. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 881 (N.D. Cal. 2009) (stressing that conduct creating the public nuisance must occur within a specified “zone of discharge” to satisfy standing requirements).

<sup>66</sup> See *supra* notes 55-63. See generally Faulk & Gray, *Alchemy in the Courtroom?*, *supra* note 2, at 949-50, 955-57.

<sup>67</sup> See generally Richard O. Faulk & John S. Gray, *A Lawyer’s Look at the Science of Global Climate Change*, 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) (providing scientific references regarding the climate change phenomenon).

globe and jointly took the entire industrialized world – in combination with natural forces – more than 150 years to create.<sup>68</sup> Currently, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution.<sup>69</sup> Nor can the role of titanic natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad confounding forces that impact the relative degree of liability attributable to these or any defendants – such as forests and seas, which absorb emissions.<sup>70</sup> Simply stated, the immeasurable scope of the controversy matters. Using public nuisance to redress global climate change far exceeds the tort's common law boundaries, – and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice.<sup>71</sup>

Despite the Second Circuit's decision that its ruling was consistent with the Restatement (Second) of Torts,<sup>72</sup> it failed to heed Dean Prosser's stern warning in his comments to § 821B: “[I]f a defendant's conduct . . .

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<sup>68</sup> See generally John S. Gray & Richard O. Faulk, “Negligence in the Air?” *Should “Alternative Liability” Theories Apply in Lead Paint Litigation?* 25 PACE ENV'T L. REV. 147 (2008) (discussing the problems associated with apportioning liability in public nuisance cases when the plaintiffs cannot or do not sue all possible defendants, cannot prove or trace causation as to any particular defendant, and the alleged harm was created over a long period of time).

<sup>69</sup> For example, Mississippi law allegedly governed the (now vacated) Fifth Circuit panel decision. In a Mississippi civil action based on fault, however, each tortfeasor is liable only for damages allocated to him in direct proportion to his percentage of fault. MISS. CODE ANN. § 85-5-7 (West 2007). Fault must be assigned to absent tortfeasors who contributed to the injury even if they are insolvent, no longer in existence, unreachable by the court's jurisdiction or immune from liability. *Id.*; see also *Blailock v. Hubbs*, 919 So. 2d 126, 131 (Miss. 2005).

<sup>70</sup> See generally Faulk & Gray, *A Lawyer's Look at the Science of Global Climate Change*, *supra* note 67, at 12-14 (providing discussion and references regarding absorption roles of forests and oceans).

<sup>71</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (“‘The judicial Power’ created by Article III, § 1, of the Constitution is not whatever judges choose to do....”). Indeed, the Supreme Court has already warned that it has “neither the expertise nor the authority” to evaluate the many policy judgments involved in climate change issues. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007).

<sup>72</sup> See *Connecticut v. Am. Elec. Power*, 582 F.3d 309, 328 (2d Cir. 2009).



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.”<sup>73</sup> Dean Prosser’s wise advice, as well as history’s experience with public nuisance as a tort circumscribed by geographic limits and caused by identifiable actors, demonstrate that it is impossible to render a judgment in climate change cases that is “principled, rational, and based upon reasoned distinctions.”<sup>74</sup> Consistent with *Baker v. Carr*, this problem does not involve the manageability of climate change litigation. Instead, it concerns the impossibility of creating and applying a rule of liability fairly and rationally to reach a principled decision.

Dean Prosser’s concerns were reinforced recently by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the “lawlessness” of expansive tort liability.<sup>75</sup> According to Professor Henderson, these new tort theories are not lawless simply because they are non-traditional, court-made, or because the financial stakes are high. Instead, “the lawlessness of these aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages.”<sup>76</sup> Such paths lead inevitably to limitless and universal liability. If the court allows such controversies to proceed, it will be “empower[ing] judges and [juries] to exercise discretionary regulatory power at the macro-economic level . . . that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort

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<sup>73</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. e. (1979). Because of its vagueness and mutability outside of defined boundaries, public nuisance has even been characterized as a “chameleon word.” J.R. Spencer, *Public Nuisance: A Critical Examination*, 48 CAMBRIDGE L. J. 55, 56 (1989).

<sup>74</sup> *Vieth*, 541 U.S. at 278.

<sup>75</sup> See James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). Despite Professor Henderson’s status and writings, neither plaintiffs nor their *amici* have referenced his concerns or distinguished his reasoning from the present “aggregative” controversy.

<sup>76</sup> *Id.* at 338.

litigation, courts (including juries) exceed the legitimate limits of both their authority and their competence.”<sup>77</sup>

Dean Prosser’s wise advice, as well as Professor Henderson’s concerns about “lawlessness,” are substantiated by the history of public nuisance – a history in which where courts have refused to expand liability because of concerns over “standardless” liability. In the early 20<sup>th</sup> century, litigants argued that public nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment.<sup>78</sup> Proponents of this expansion argued that the “end justified the means” by highlighting the tort’s remarkable effectiveness and claiming “that [otherwise] there is no adequate remedy provided at law.”<sup>79</sup>

Legal commentators and authorities, however, objected when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.<sup>80</sup> They warned that this “solution” was planting the seeds of abuse that would ultimately weaken the judicial system.<sup>81</sup> Finally, when public nuisance was used as a precursor to CERCLA<sup>82</sup> to address environmental contamination in the Love Canal controversy, a decade of nuisance

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<sup>77</sup> *Id.* Although the Fifth Circuit in *Comer* stressed that tort cases rarely involve political questions, aggregative torts, such as public nuisance, raise unique “lawlessness” concerns that transcend routine tort cases and cross the political question threshold. *See Comer v. Murphy Oil USA*, 585 F.3d 855, 873-74 (5th Cir. 2009); *see also Henderson, supra* note 75, at 338-39.

<sup>78</sup> *See People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that courts justified “public nuisance” abatement because “public and social interests, as well as the rights of property, are entitled to the protection of equity.”).

<sup>79</sup> *See Edwin S. Mack, Revival of Criminal Equity* 16 HARV. L. REV. 389, 400-03 (1903). These same arguments are again resurfacing as governmental authorities employ public nuisance litigation to address complex problems such urban violence and public health issues. *See also Faulk & Gray, Alchemy in the Courtroom?*, *supra* note 2, at 974-75.

<sup>80</sup> Mack noted that the expanding boundaries of public nuisance law making courts of equity of that time period careless of their traditional jurisdictional limits. Mack, *supra* note 79, at 397.

<sup>81</sup> *Id.* at 400-03.

<sup>82</sup> Comprehensive Environmental Response, Compensation, & Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

litigation failed to produce a solution.<sup>83</sup> Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state's supreme court ultimately deferred to the legislature's "statutory supremacy" to define and set standards for determining liability.<sup>84</sup> Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability.<sup>85</sup>

There is plainly an overlap between this jurisprudential principle and the political question doctrine. Although these concepts are inextricably linked, their conjunction has been inexplicably overlooked. Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles, courts also resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres, and the constitutional limits on judicial power is critical. History's experience with public nuisance as a tort traditionally circumscribed by geographic limits and caused by identifiable actors, coupled with the pronounced concerns of wise legal scholars and courts regarding the dangers of entertaining controversies without guiding adjudicative principles, demonstrates the present impossibility of rendering judgments in climate change cases that are "principled, rational, and based upon reasoned distinctions."<sup>86</sup>

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<sup>83</sup> See ECKARDT C. BECK, EPA, THE LOVE CANAL TRAGEDY, EPA JOURNAL (Jan. 1979), available at <http://www.epa.gov/history/topics/lovecanal/01.htm> ("no secure mechanisms [were] in effect for determining such liability."). See generally Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE REPORT. (BNA) 474, 475-76 (Sept. 24, 2007).

<sup>84</sup> See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997) ("This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance.'").

<sup>85</sup> *Id.*; see also *People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity.").

<sup>86</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

Contrary to the Second Circuit's concerns, the issue is not whether federal common law regarding public nuisance has been "displaced" by Congress or the EPA.<sup>87</sup> Legislative and regulatory silence is not dispositive of whether courts are competent to decide climate change controversies. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws."<sup>88</sup> Moreover, the Supreme Court has condemned reliance on congressional silence as "a poor beacon to follow."<sup>89</sup> More pointedly – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – Justice Frankfurter warned that "*we walk on quicksand* when we try to find in the absence of . . . legislation a controlling legal principle."<sup>90</sup>

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global climate change, where there are no "controlling legal principles" to frame the controversy, fully investigate the issues, adjudicate liability, or allocate responsibility. In such cases, courts must decide whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. This question goes to the very heart of the political question doctrine.<sup>91</sup> Unless this inquiry is answered

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<sup>87</sup> See *Connecticut v. Am. Elec. Power*, 582 F.3d 309, 374-381 (discussing whether the federal common law remedy of public nuisance must be applied by the courts unless "displaced" by Congressional or regulatory measures).

<sup>88</sup> Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 516 (1982) (quoting Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of Am. Law Schools 1938)).

<sup>89</sup> *Zuber v. Allen*, 396 U.S. 168, 185 (1969); see also *Cleveland v. United States*, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring) (noting that "[t]here [are] vast differences between legislating by doing nothing and legislating by positive enactment . . .").

<sup>90</sup> *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (emphasis added).

<sup>91</sup> The Supreme Court clearly recognizes that such scenarios exist. See *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question

correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of “standardless” liability.

#### IV. CONCLUSION

If, as Justice Holmes counsels, the development of the common law should be “molar and molecular,”<sup>92</sup> the wholesale transmutation of public nuisance concepts to authorize, for example, a massive judicially-created environmental bureaucracy – answerable only to a single judge – requires more rumination and digestion than the judiciary alone can prudently provide. Enthusiasts who advocate public nuisance litigation as a universal panacea should pay careful attention to the rumination analogy. Despite the tort’s ravenous reputation as a potential “monster” capable of devouring time-honored legal precedents in a single gulp, that appetite is constrained by the common law’s tendencies to move in a “molar and molecular” fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Faced with allegations of planetary liability, wise jurists may decide that they lack the resources and tools to comprehensively investigate, thoroughly evaluate, and fairly resolve public nuisance claims based upon global climate change. After considering their unique role in our tripartite system of government, judges may decide that complex environmental bureaucracies can only be reliably developed and justly administered outside their limited realm. They may conclude that judicial intrusion into such matters usurps the legislature’s and the executive’s prerogatives, especially when they are urged to base sweeping liability determinations on narrow, case by case standards limited by a record generated solely by litigants, and by budgets constrained by judicial

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is entrusted to one of the political branches *or involves no judicially enforceable rights.*”) (emphasis added).

<sup>92</sup> See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”); see also CARDOZO, *supra* note 1, at 113 (stating that courts make law only within the “gaps” and “open spaces of the law”). Neither Holmes nor Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.

appropriations. Under such circumstances, the limits of judicial competency suggest that forbearance, rather than adventure, may be the most "principled response."