



## From *Euclid* to the Development of Federal Environmental Law

*The U.S. District Court for the Northern District of Ohio  
and the Regulation of Physical Space*

Keith H. Hirokawa

**I**N 1969, THE federal district court for the Northern District of Ohio occupied a position of potentially profound influence, for the Cuyahoga River was burning. Although the blaze on the river would illuminate the Ohio sky for only twenty-four minutes<sup>1</sup>—not even long enough for the local papers to snap a single photograph—the flames would be reflected on the hearts and homes of an entire embattled nation for decades through the flurry of federal environmental laws that followed. The Cuyahoga River became the symbol of a past that the nation would resolve to remedy.

The U.S. District Court for the Northern District of Ohio was not called upon to adjudicate the liabilities resulting from this pivotal event. But in the years preceding the Cuyahoga fire, the district court was asked to navigate conflicting jurisprudential approaches to the use of land, air, and water. This chapter explores a handful of these cases, bringing them to light in order to illustrate the nation's struggle over suspicious conceptions of economic advantage and fairness, flexible distinctions of private and public property, and evolving ideas of nature and health. The chapter begins with the 1924 decision in *Ambler Realty Corporation v. Village of Euclid*, which remains the most famous chal-

lenge to the constitutionality of zoning regulations. It then turns to the 1930 decision in *Swetland v. Curtiss Airports Corporation*, where the district court addressed the inevitable limitations in property rights above land following the advancement of powered human flight. Finally, it considers an opinion released on the eve of the Cuyahoga River fire, when the court was asked to choose between saving a town and protecting railroad operations in *Biechelle v. Norfolk & Western Railway Company*. Although the district court's decisions in these controversies do not bear the indelible character that we often attribute to law (the *Euclid* and *Swetland* opinions were overturned, and the decision in *Biechelle* might be considered unfortunate), the federal district courts for the Northern District of Ohio contributed to a legal framework in which the fire could occur and, perhaps more significantly, in which the fire could be perceived as an important event.

### Nature and Nuisance in the Northern District of Ohio

It is often said that the exercise of property rights by any one owner must be limited in order to provide such property rights to many. In this regard, nuisance law has been an essential platform for determining when a person's actions fall outside the protective shelter of property rights. Typically expressed as an unreasonable interference with another individual's property interests or with the needs of the general public welfare—*sic utere tuo ut alienum non laedus* (“One should use his own property in such a manner as not to injure that of another”)<sup>2</sup>—nuisance acts serve as a limitation on the freedom to control captured water, air, and land. Although the advent of administrative agencies has been the impetus for developing a deeper understanding of how and when land uses cause impacts to others and the environment, nuisance doctrine continues to serve as the foremost catalog of limitations on property rights.<sup>3</sup>

For the purposes of this chapter, nuisance law is historically relevant because Ohio was particularly industrious in developing its natural resources long before local, state, or federal governments were actively regulating natural resource production. Ohio's access to commerce via waterways and railroads, as well as its forests and mineral and oil deposits, have allowed the state to host a competitive marketplace. The state claims the first discovery of oil from a drilled well, in 1814, and it was one of the nation's most productive coal-mining states during the Industrial Revolution.<sup>4</sup> With an active industry, of course, came the

inevitability that nuisance law—especially in conflicts over domestic and industrial pollution, vast landscape transformations, and controversies among competing property claims—would help characterize the geopolitical circumstances of the region. Three preliminary points are salient to understanding the influence of nuisance law on the controversies that loomed in the Northern District.

First, nuisance law requires courts to define the scope of property rights, and as such, nuisance is governed by state law. Ohio's development of nuisance law illustrates the manner in which law balances the economic and industrial needs of the time. For instance, although courts in Ohio employed nuisance to limit activities that directly interfered with the enjoyment of property by others (such as noise, smoke, and odors),<sup>5</sup> the courts were reluctant to enjoin normal railroad operations due to the immense public interest involved in freight transportation.<sup>6</sup> Nuisance was also invoked to regulate the means of social change. Because nuisance is a tidy tool for keeping public ways clear of obstruction, it was invoked to curtail the aggressive behaviors of labor advocates during strikes.<sup>7</sup> The flexibility inherent in the law of nuisance led to property dispute resolutions that reflected the "felt necessities of the time."<sup>8</sup>

Second, in Ohio as elsewhere, state and local governments have traditionally relied on nuisance as a justification for the governmental regulation of land use impacts. Because legislative prohibitions of nuisances are justified under the police power for the protection of the public health, safety, and welfare, courts were initially deferential to the local determination of public welfare needs, a rule that was punctuated in 1887 in *Mugler v. Kansas*.<sup>9</sup> Rejecting a challenge to the prohibition on liquor manufacture despite the devastating economic effect on the plaintiff's facility, the *Mugler* Court stressed that because property owners were not entitled to cause nuisances, prohibiting owners from causing nuisances did not impair property rights.<sup>10</sup>

Third, as state and local governments adapted the police power to an expanding array of public objectives, courts were called upon to tether the use of nuisance to a justification for regulating property use. In 1922, the U.S. Supreme Court changed the landscape by holding that a coal-mining regulation violated the property protections of the takings clause. In *Pennsylvania Coal Company v. Mahon*, Justice Oliver Wendell Holmes Jr. echoed the *Mugler* decision by noting that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," yet he cautioned that a regulation of property use might so fundamentally alter the benefits of ownership as to act as a physical

invasion.<sup>11</sup> Simply because the regulatory goal served a public purpose, Holmes reasoned, did not justify allotting the burden of the public welfare to a few. Although “property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>12</sup>

## Land: Pigs in the Parlor of the Village of Euclid

The *Pennsylvania Coal* decision was cause for concern in local governments. In the time between the *Mugler* Court’s reluctance to recognize the property effects of land use regulations and Justice Holmes’s “too far” calculus in *Pennsylvania Coal*, so many local governments had adopted zoning regulations that the Court’s resolution of the legitimacy of zoning was unavoidable. Zoning, a new concept at the dawn of twentieth century, was largely a consequence of the failure of nuisance to control the negative effects of urbanization: urban blight seemed immune to nuisance for a variety of reasons, not the least of which was the inability of plaintiffs to identify a suitable defendant. Zoning embodied the idea that the form of a city could be intentional, rather than subjected to the private, unrestricted, and often chaotic process of land use as an incident of property rights.

New York is typically credited for adopting the first comprehensive zoning ordinance, in 1916. Ohio adopted enabling legislation in 1920 that authorized local governments to enact zoning ordinances.<sup>13</sup> In 1922, an advisory commission appointed by Herbert Hoover, the secretary of commerce at that time, produced the Standard Zoning Enabling Act (SZEAA), a model act that was widely followed in the early zoning jurisdictions.<sup>14</sup> By 1926, hundreds of municipal governments had implemented comprehensive zoning schemes. However, of all the dates on which zoning regulations were enacted in this period, the most important was November 13, 1922, the date on which the village of Euclid, Ohio, concluded its six-month investigation of zoning laws and adopted its own zoning ordinance.<sup>15</sup>

The zoning scheme in Euclid was specifically intended to halt an industrial development trend spreading into the village from the city of Cleveland. In the preamble to the ordinance, the public needs for building regulations were specified: that as a “residential suburb” of Cleveland, the village was largely residential or restricted to residential uses; that the village had made available sufficient land for manufacturing, industrial, and commercial purposes; that

the public water and sewer systems lacked capacity to accommodate “more congested use”; and that the regulations were necessary to preserve the character of the village for the public “health, safety, convenience, comfort, prosperity, and general welfare.”<sup>16</sup> To accomplish this feat, the village established use, height, and building area regulations to apply throughout its jurisdiction. Those who objected to the regulations were especially opposed to the use restrictions. Use districts identified the most appropriate locations for industrial, commercial, and multifamily and single-family residential development, and the districts were intended to exclude all land uses that were considered incompatible with the primary use. Industry, therefore, would not be located next to affluent, single-family neighborhoods.

Ambler Realty, which held acreage in the village for its investment possibilities, objected strongly. When it decided to bring the first federal court challenge to comprehensive zoning against the village of Euclid, several cases were pending or had been decided in various state courts. The decisions (and the causes raised to the courts) showed no common thread from which an understanding of the zoning application of the police power could be stitched.<sup>17</sup> Yet there was enough concern raised by the challenge for the village to amend its zoning ordinance by adding several permitted uses to several districts and altering the zoning map to make Ambler Realty’s speculative holdings more adaptable to commercial and industrial development.<sup>18</sup> The offer did not appease Ambler Realty, and the matter proceeded to trial before District Court Judge David C. Westenhaver of the Northern District of Ohio.

At the outset of the decision, Judge Westenhaver acknowledged the importance of the dispute. The court presaged, “This case is obviously destined to go higher.”<sup>19</sup> But the magnitude of the case was undermined by Judge Westenhaver’s impression of the evidence submitted at trial. “Much of the evidence is immaterial; still more of it is without substantial weight,” he opined, speaking specifically about the volume of evidence regarding the lack of capacity in the village’s water and sewer supply to the stated purpose of preventing potential congestion from unrestricted development. Westenhaver agreed that such problems were of public concern, but he held to the belief that such concerns involved the village’s failure or refusal to perform its duty to provide public services and should not fall onto the shoulders of vacant property owners.

The village claimed that the police power authorized local governments to avoid urban evils through prevention. Judge Westenhaver dismissed the village’s reasoning as mere rhetorical device. To him, the deference requested by the

village to its political machine was the injury, as it would eventually subject private property “to temporary and passing phases of public opinion” in a way that cut at the heart of the notion of property itself.<sup>20</sup> Property value, asserted the judge, was only a consequence of property use; there could be no property without the right to control and use.<sup>21</sup> He ruled that whatever the village’s purpose might be, zoning’s restrictive effect on an owner’s land use choices resulted in a transfer of property rights from a private to a public owner, a trick that could be accomplished only when the owner was compensated.

The U.S. Supreme Court was not so suspicious of zoning. In an opinion authored by Justice George Sutherland, zoning found its justification in the police power. In the first place, wrote Sutherland, where the legislative scheme was “fairly debatable,” it was not for the court to interfere and scrutinize the judgment of the community.<sup>22</sup> As to the substance of zoning, the Court found that the public welfare would be served by separating incompatible land uses and identifying areas in which an industrial, commercial, or other more intensive use would be “like a pig in the parlor instead of the barnyard.”<sup>23</sup> Residential neighborhoods, which were most sensitive, could be protected by restricting the location of incompatible land uses without running afoul of property. Nuisance, which may have been a poor tool for avoiding the evils of urbanization, would be the platform on which municipalities would create order in the city and design urban life. Yet with the expansion of nuisance in the form of zoning, the Northern District Court’s effort to protect private property and the preferences of owners was futile.

What remained troubling (and continues to taint zoning to this day) was the type of order envisioned in the zoning scheme. Beyond the property conflicts at issue in *Euclid*, the divide between Westenhaver’s and Sutherland’s understandings of the zoning power raised concerns about the social effects of separating land uses. Judge Westenhaver feared the manner in which zoning promised greater property protections for the affluent. Noting that the U.S. Supreme Court had rejected an effort to establish race districts in the city of Louisville,<sup>24</sup> Judge Westenhaver cast zoning as an indirect means of legalized segregation. From the bench, zoning reflected on the welfare of the few and not the public: “The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.”<sup>25</sup> Whether Westenhaver’s concern was inescapable remained a matter of some debate, but the weight of experience seemed to suggest zoning

was a means to ensure that “rich people can see other rich people on the far side of their large suburban lots, and the poor live snugly next door to the poor.”<sup>26</sup> Nevertheless, Justice Sutherland addressed this concern, focusing not on the potential abuse of zoning but on the proper use of this power. The police power, Sutherland argued, enabled governments to adapt to social and economic changes to preserve the public welfare.<sup>27</sup>

## Air: Property into the Heavens

Nuisance law played a more doctrinal role in determining the propriety of other land uses, and as a second instance of the Northern District Court’s jurisprudential influence, this chapter considers the advent of human flight. In *Swetland v. Curtiss Airports Corporation*,<sup>28</sup> the federal district court enjoined the operation of an airport to protect adjacent properties from dust, dropped circulars, and low flights during takeoffs and landings. However, to reach this result, the district court tangled with one of the common law’s most elusive doctrinal canons—*ad coelum*—and, in the process, attempted to resolve the conflict to protect property despite the inevitable future of human flight.

The idea of ownership of airspace—*cuius est solum, eius est usque ad coelum et ad inferos* (“for whoever owns the soil, it is theirs up to Heaven and down to Hell”)—has ancient origins.<sup>29</sup> William Blackstone opined: “Land in its legal signification has an indefinite extent, upwards as well as downwards; whoever owns the land possess all the space upwards to an indefinite extent; such is the maxim of the law.”<sup>30</sup> Coined before any feasible expectation of human flight, the canon developed over centuries of controversies that involved intruding tree limbs, overhanging scaffolding, and unwanted projectiles entering the space above neighboring properties.<sup>31</sup> Arguably, however, the resilience of *ad coelum* was illusory. The doctrine applied reasonably well to tree limbs and bullets: the role of *ad coelum* in such disputes was not particularly problematic. But then, on the morning of December 17, 1903, amid a world of skepticism about the possibility, the Wright brothers of Dayton, Ohio, accomplished a herculean feat and guaranteed a collision between innovation and the *ad coelum* doctrine. The brothers launched a human into the air, sustained by a machine, for a distance of 120 feet.<sup>32</sup> Their marvelous invention would soon change methods of warfare, travel, and communication, and it ultimately would make the world seem much smaller.

The primary question raised by the airplane was one of unoccupied space: how far into the heavens did the property boundary reach? The importance of this question cannot be overstated. By 1930, humans had flown across the globe and navigated the airspace over both poles. Aviation securities were traded on the New York Stock Exchange. People and mail traveled the air. Innovation and interest in flight had not yet peaked, and the aviation industry found itself prepared to outlast the stock market crash of 1929.<sup>33</sup> Yet there was no clear indication that pilots were entitled to fly over private property.

Two doctrines—nuisance and trespass—might have settled the matter. The difference between the two approaches revolved around burden of proof. Trespass, as an exclusionary doctrine, protected boundaries: an injury was proven where an intrusion was shown. In contrast, nuisance required a plaintiff to show injury from some other, nonboundary incident of property, resulting in an interference with the enjoyment of property.<sup>34</sup> A resolution of *ad coelum* would require the court to take a position on boundaries. If property boundaries actually reached into the heavens above, any passing projectile might pierce the boundary and be considered a trespass, and as such, a finding that overhead flights could constitute a trespass would hobble flight. Each flight could subject the pilot to hundreds, if not thousands, of trespass actions.

To the extent that the intrusion of airspace resulted in touching the land or improvements, the injury might be presumed a trespass.<sup>35</sup> A similar argument might be made for low airspace intrusions, particularly at heights where the landowner might be expected to use the space.<sup>36</sup> Yet even the lowest elevations of most flights (at launching and landing, for instance) would occur at heights reachable only by unusually tall structures, and it might not be reasonable to think that every owner had plans to erect another Eiffel Tower. *Ad coelum* was soon tested in Ohio. When subsidiaries of the Curtiss-Wright Corporation opened an airport and flight school in a rural residential area, the Northern District was given the opportunity to shape the direction and content of property rights in airspace.<sup>37</sup>

The Wright brothers were Ohio boys, and Ohio claimed flight as their invention: the federal district court for the Northern District of Ohio could have proven an expedient venue for the evolution of airspace rights. As such, when Judge George Phillip Hahn was asked to enjoin the airport in 1930, the court's resolution bore the undertones of industry and invention. *Swetland v. Curtiss Airports Corporation* concerned the impacts of an airport and flying school on land adjacent to existing residential uses. The airport was designed to direct

flights over the residences, often below 500 feet.<sup>38</sup> Even at such heights, airplanes were alleged to cause trespass and nuisance injuries. Judge Hahn wasted no time in recognizing the parochial importance of the issue in the case: “Because of the inventions and activities of the Wright Brothers, at Dayton, Ohio, Ohio regards itself as the mother state of aviation.”<sup>39</sup> In addition, because aviation at that time remained largely experimental, Judge Hahn was not hesitant to secure the future of flight, asserting that “it is indispensable to the safety of the nation that airports and flying schools such as contemplated by the defendants be encouraged in every reasonable respect.”<sup>40</sup>

The federal involvement in flight was an influential moment for Judge Hahn. Congress had defined “navigable airspace” and declared that such space “shall be subject to a public right of freedom of interstate and foreign air navigation.”<sup>41</sup> The federal regulations also established elevations below which “aircraft shall not be flown”: a safe distance or 1,000 feet above congested areas and “elsewhere at a height less than 500 feet, except where indispensable to an industrial flying operation.”<sup>42</sup> Judge Hahn deferred to the expertise of the secretary of commerce in the area of aeronautics and identified the altitude of 500 feet as the upper limit of the effective possession of property, opining that the rights of the property owners above that elevation were impractical. The court concluded that the federal laws constitutionally curbed nuisance and trespass actions against reasonable flights and that *ad coelum* had no precedent extending property rights to “air space normally traversed by the aviator.”<sup>43</sup>

Although Judge Hahn rejected the application of *ad coelum* into the heavens, he fractured his skepticism on the more challenging factual issue in the case—what rights did property owners have against lower flight elevations, such as during takeoffs and landings? Such impacts could be considered significant and pervasive, and as such, he said, “until the progress of aerial navigation has reached a point of development where airplanes can readily reach an altitude of 500 feet before crossing the property of an adjoining owner, or such crossing involves an unreasonable interference with property rights or with effective possession,” courts could require larger airports to facilitate flying at such heights.<sup>44</sup> Specifically, Judge Hahn found that *ad coelum* could apply to flights at heights lower than 500 feet, and he portrayed such injury as optionally actionable in nuisance or trespass.

Judge Hahn’s appeal to boundaries and trespass was overturned by the Sixth Circuit Court of Appeals. The Sixth Circuit agreed that an airport could not be

established “where its normal operation will deprive a plaintiff of the use and enjoyment of [another’s] property.”<sup>45</sup> Moreover, the Sixth Circuit agreed that a landowner “has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface,” which might include a reasonable expectation of occupancy in the space in the “lower stratum.”<sup>46</sup> However, in the “upper stratum,” the landowner was not entitled to exclude or prevent use by others, except where such use interfered with his or her enjoyment of the surface. The appellate court held that the appropriate remedy for the latter was in nuisance and “not trespass.” As the landowner had no right of exclusivity in the upper stratum, overhead flights did not impair a property right.<sup>47</sup>

Eventually, the U.S. Supreme Court would acquiesce in a limited applicability of *ad coelum* to flight by restricting the importance of boundaries at heights above where one could reasonably expect to use space. As noted by the Court, given the importance of flight, *ad coelum* “has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.”<sup>48</sup> Nuisance, not trespass, would provide the basis for navigating between competing land uses and setting the limitations of property rights in air. *Swetland* and the controversies that followed represent a second instance in which law whittled away at the boundaries of property over the objections of the Northern District courts.

## Water: Keeping Our Feet out of the Fire

Like the controversies over zoning and airspace, geopolitical circumstances served as significant factors in the ability of the Northern District of Ohio to exert influence over the direction of pollution control laws. In 1969, District Court Judge Don Young faced growing tensions between industry and public health as he sifted through the trial records from a class action suit brought by residents of Sandusky against the Norfolk & Western Railway Company.<sup>49</sup> Sounding in nuisance, *Biechelle v. Norfolk & Western Railway Co.* concerned the health and environmental impacts of uncontained, airborne coal dust from the railroad’s storage of fine industrial coals. The “black, greasy, dirt, which was difficult to wash or clean off” silted the waters of Lake Erie and “ruined the paint on [the plaintiffs’] homes, drifted inside and damaged rugs, draperies and other furnishings”

in the town of Sandusky.<sup>50</sup> The plaintiffs offered evidence regarding their deteriorating health during windier seasons or more active markets, which led to the “inescapable” conclusion of the seriousness of plaintiffs’ injuries.

The railroad offered evidence relating the degree of care taken in its operations. As argued by the railroad, the dust did not take flight *as a result* of the railroad’s actions, and indeed, the railroad had taken every necessary and otherwise standard precaution. The railroad argued that its containment efforts should absolve it of any possible liability. The district court was unmoved: “Assuming this to be true, which plaintiffs strenuously deny, this argument may be answered by reference to an old case, citation unknown, dealing with the action of a man whose house was being shaken to pieces by blasting in a neighbor’s quarry. The court held that it was no comfort to the plaintiff to know that his house was being demolished by the defendant in the most careful manner possible.”<sup>51</sup> The court was clearly impressed with the defendant’s effort to take advantage of precedential imprecision in distinguishing nuisance from negligence.<sup>52</sup> However, because the general public should not be required to suffer for the profits of the few, the law of nuisance would deliver industry into a new age: “We are, happily, departing from the era in which it was considered proper for any commercial enterprise, in the name of those profits which are not a dirty word in Ohio, to pollute the atmosphere, earth, and water beyond the endurance of the general public.”<sup>53</sup> Whether Judge Young intended this statement as a warning to industry or as a personal commitment, his message was clear: the public had tolerated the indiscriminate mistreatment of the commons, but commercial enterprise had abused the privilege. As such, Judge Young chose to harken in the new era by shifting the burden of pollution onto commerce.

Young’s disposition was far from radical. By 1969, citizens had witnessed as many environmental disasters (as that term might have been understood in 1969) as they had seen failures by the state and federal legislatures to control pollution. No state or federal agency exerted control over the location, design, or operation of solid waste facilities; the disposal of hazardous wastes; or waste disposal enforcement. Local agencies struggled to manage waste disposal and regulate air quality as part of their health programs.<sup>54</sup> Water remained as much a resource for drinking as for waste disposal. Nuisance had been unable to cast these circumstances as injuries in a manner that the court could redress. Yet at that time, the public demands for a clean and healthy environment were no longer met with contempt or reticence or even mere tolerance. Environmental quality was becoming a common call, reflecting on the reach of the message.

The final dilemma facing Judge Young was how to fashion a remedy to relieve the plaintiffs of their injuries. He recognized that a nuisance suit involved two competing property rights, not just a single offending use: “Just as the defendant has no right to destroy the property of the plaintiffs by its operations,” he reasoned, “it is questionable whether plaintiffs have a right to relief which would destroy the legitimate activities of defendant.”<sup>55</sup> Because of Young’s sympathetic perspective on nuisance as a competition among rights, rather than as a mere infringement of an injured party, the array of options read like a bad dream: “It is possible that this Court has the burden of deciding whether the plaintiffs must continue to suffer in defendant’s filth, or become citizens of a ghost town on an abandoned railway line and a silted-up harbor.”<sup>56</sup>

Ultimately, Judge Young was guided by prudence, recognizing that “the present difficulty is certain, but the future disasters are uncertain.”<sup>57</sup> Because the plaintiffs could choose to avoid further injury by relocating, staying clear of the silted waters, or simply ducking through the dust clouds, the court bet on the plaintiffs to lessen future injuries. Judge Young ordered the defendant “to continue the various methods of dust control it has been employing,” based on the belief that “it should be possible to work out economically feasible methods of controlling the emission of coal dust without inhibiting the operations of defendant’s facilities, and even permitting defendant to expand the operations should it desire to do so.”<sup>58</sup> The judge described his reasoning in a manner that, in retrospect, projects a tragic irony. “It may well be,” he said, “that the citizens of Sandusky can jump out of the frying pan and still avoid falling into the fire.”<sup>59</sup> Three days later, on June 22, 1969, the Cuyahoga River was ablaze. Although the citizens of Sandusky may have been clear of the flames, the nation would not recover so quickly.

The federal courts of the Northern District of Ohio were not called upon to adjudicate the rights or liabilities from the 1969 fire. Nevertheless, the Northern District played a pivotal role in the controversy by essentially compelling the conclusion that the pollution problem could be solved only by appeal to the legislative branch, rather than the judiciary. Indeed, given Judge Young’s resolution of *Biechelle*, it could easily be concluded that the judicial branch was willing but ill equipped to employ common-law nuisance remedies to transform pollution practices. Other limitations in Ohio’s nuisance law suggest the judiciary’s deficiency was more pronounced in the Northern District of Ohio, where many of the problems exemplified by the Cuyahoga River fire were not even actionable under the state’s nuisance doctrine.

The first hurdle to consider was the preclusive effect that long-standing pollution practices had on private nuisance claims. For instance, in 1860, the city of Cleveland began to discharge raw sewage into a tributary stream known as Kingsbury Run. Approximately forty years later, the city's discharges had increased dramatically and combined with a variety of other domestic and industrial discharges to eventually overwhelm the stream. The stream was no longer able to absorb or carry the waste away. On appeal from an award of damages, the Ohio Supreme Court reversed, finding that "Kingsbury run is not within the rules of law for the protection of streams devoted to their primary uses."<sup>60</sup> By its continuous and public use of the run for over twenty-one years, the city had acquired prescriptive rights to the continuing discharge of waste against any competing riparian rights to the contrary, and the stream would be considered devoted to this use.<sup>61</sup> In addition to the typically onerous challenges faced by private nuisance plaintiffs, prescription was a gargantuan hurdle: prescription would block private nuisance claims, and given how common it was at the time to use streams, rivers, and lakes for sewage disposal, prescription was a blow to the Cuyahoga.<sup>62</sup>

Second, although the defense of prescription had little effect on the protection of the public welfare through public nuisance litigation, Ohio law raised other obstructions to public nuisance claims in environmental matters. In the 1940s and 1950s, the state and its municipalities began to assert some semblance of control over pollution. In 1951, the state adopted its first comprehensive water pollution statute.<sup>63</sup> The so-called Deddens Act provided that "no person shall cause pollution . . . of any waters of the state, or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state."<sup>64</sup> The Water Pollution Control Board was given vast authority to gather evidence, issue enforcement orders, and grant permits. The general recollection, however, is that although Ohio's water quality law appeared far-reaching, it was inadequately (if ever) enforced by the state. As recounted by Jonathon Adler, the permits issued by the board did not indicate that the board was particularly visionary in its role. Permit conditions and discharge limits were not stringent, and the board adopted "a relatively hands off approach" to enforcement of permit limits.<sup>65</sup> The problem was that the statute also prevented cities and citizens from protecting themselves in the courts. Even though the legislature declared pollution into Ohio's waters to be a public nuisance, the law did not apply "in cases where the water pollution control board has issued a valid and unexpired permit."<sup>66</sup> Arguably, Ohio's first compre-

hensive pollution control laws merely legalized pollution and protected pollution practices from judicial scrutiny.

In addition, dedicating flowing waters to the benefit of industrial uses was not only practical (where else would wastes go?), it was also legitimized in the court's approval of zoning. In some cases, local governments would use the zoning power to attack the manner in which land uses impacted environmental quality, such as in the adoption of zoning regulations to control urban sediment transportation, to set minimum lot sizes for the purposes of aquifer protection, and to establish environmental quality districts that prevented erosion and landslides.<sup>67</sup> However, the Supreme Court's decision in *Euclid* also authorized local governments to regulate the impacts of land uses by locating offensive uses where the impacts could be minimized. More specifically, *Euclid* authorized local governments to concentrate the major sources of industrial pollution to the most appropriate areas of a city as a way of *avoiding* the creation of nuisances. In Cleveland and Akron, the most appropriate areas were on the Cuyahoga River.<sup>68</sup> The river served as a waste depository for these developing cities.

Just what sparked the 1969 Cuyahoga fire remains a matter of speculation, and given the limited damage it caused, many continue to wonder why we even remember this fire.<sup>69</sup> Most likely, its lasting significance stems from the monumental effort that ensued in the administrative and legislative bodies of the state of Ohio and the federal government.<sup>70</sup> Five months later, Senator Walter Hickel brought four steel companies—U.S. Steel, Republic Steel, Jones and Laughlin Steel, and Interlake Steel—to answer for pollution in the Cuyahoga River and Lake Erie.<sup>71</sup> Ten months after the fire, the Ohio Water Pollution Control Board imposed a building moratorium in the Cleveland area pending the development of a plan to control the regional sewer system.<sup>72</sup> The state of Ohio soon adopted its own host of environmental laws. The federal government also began its occupation of what has become a comprehensive field of environmental law by adopting regulatory programs governing air, water, and land pollution. Congress would even establish the Cuyahoga Valley National Park “for the purpose of preserving and protecting for public use and enjoyment, the historic, scenic, natural, and recreational values of the Cuyahoga River.”<sup>73</sup>

The legacy of the Northern District of Ohio on the development of environmental law certainly includes the 1969 fire on the Cuyahoga River. But the flurry of environmental laws emerging from the embers of the fire had obvious implications for environments suffering historical practices of unscrupulous pollution. The courts of the Northern District of Ohio preside over many such

areas and have been instrumental in facilitating the transition to modern environmental law due in part to the intensity of industrial operations pervading the region. Early in this transition, the Northern District courts were heavily tasked with enjoining industrial pollution activities and enforcing civil penalties under federal water pollution statute.<sup>74</sup> The mere presence of the court may have influenced the speedy resolution of regulatory enforcement actions, such as the enforcement action filed by the Department of Justice against U.S. Steel that immediately resulted in a settlement for a civil penalty of \$6.45 million and a commitment to spend approximately \$60 million to clean up air pollution from its mill in Lorain, Ohio.<sup>75</sup> Because of EPA's dissatisfaction with regulatory efforts of the state of Ohio,<sup>76</sup> the Northern District was also asked to enforce the rigid "new stationary source" emission standards under the Clean Air Act against the city of Painesville, despite a determination by Ohio EPA that the city's coal-burning facility could not be regulated as a new source.<sup>77</sup> The Northern District courts thereafter maintained their prominent role in developing environmental law over the course of several decades by ruling that a scienter is not required for an assessment of an administrative penalty for violation of environmental laws,<sup>78</sup> by offering loose constructions of statutory provisions intended to preclude duplicative enforcement of environmental laws,<sup>79</sup> by preserving the fullest range of cost recovery options for the United States in hazardous waste cleanup actions,<sup>80</sup> and by protecting the investigative function of the EPA.<sup>81</sup> As such, the story of the Northern District of Ohio confirms that, although "there is no question that modern environmental law finds its roots in common law nuisance,"<sup>82</sup> modern environmental law resulted from the legislative empowerment of courts to participate in the transformation of pollution practices, freed from the confines of the law of nuisance.

## Conclusion

Over time, social and economic changes demanded that law concede significant claims of ownership in physical space. Property owners had been increasingly left to rely on the law of nuisance. Ultimately, however, nuisance failed to ensure those rights that were challenged by new circumstances and technologies. As portrayed in this chapter, the Northern District Court was situated—but perhaps unable—to influence the substance and direction of such rights and responsibilities in the use of land, air, and water resources.

By 1969, the Cuyahoga River had burned on at least nine separate occasions.<sup>83</sup> *Time* magazine ran an article on August 1, 1969, identifying the Cuyahoga as “among the worst” of all of the severely polluted rivers of the nation. The description of the Cuyahoga in the article was laden with shock and horror: “No Visible Life. Some River! Chocolate-brown, oily, bubbling with subsurface gases, it oozes rather than flows. ‘Anyone who falls into the Cuyahoga does not drown,’ Cleveland’s citizens joke grimly, ‘he decays.’ The Federal Water Pollution Control Administration dryly notes: ‘The lower Cuyahoga has no visible life, not even low forms such as leeches and sludge worms that usually thrive on wastes.’ It is also—literally—a fire hazard.”<sup>84</sup>

A combustible Cuyahoga would be only the first of many projects that lay ahead for the Northern District and the nation. Today, however, the circumstances causing the Cuyahoga River to ooze rather than flow have largely been resolved. The unabated disposal of waste into land, water, and air has been tempered by a mix of heavy-handed federalism and collaborative governance. Importantly, the array of pollution legislation enacted after the 1969 Cuyahoga River fire conceded the limitations of nuisance as a tool for achieving environmental quality, a result compelled in light of the evolution of nuisance and rights to physical space in the federal district for the Northern District of Ohio.<sup>85</sup>

## Notes

Keith Hirokawa is an associate professor of law, Albany Law School. The author wishes to thank Luke Sledge and Andrew Wilson for their insightful research.<sup>1</sup> “Oil Slick Fire Damages 2 River Spans,” *Cleveland Plain Dealer*, June 23, 1969, C11, as cited in Jonathon H. Adler, “Fables of the Cuyahoga: Reconstructing a History of Environmental Protection,” *Fordham Environmental Law Journal* 14 (Fall 2002): 89, 95.

2. *Black’s Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990), 1380.

3. *State v. Schweda*, 736 N.W.2d 49, 56 (Wisc. 2007).

4. Ohio Oil and Gas Association, “Our Industry,” available at <http://www.ooga.org/history/our-industry>; Ohio Air Quality Development Authority, “The Ohio Coal Story,” available at [http://www.ohioairquality.org/acdo/ohio\\_coal\\_story.asp](http://www.ohioairquality.org/acdo/ohio_coal_story.asp).

5. See, e.g., *Kepler v. Industrial Disposal Co.*, 85 N.E.2d 308 (Ohio App. 1948) (emissions from burning waste); *Weber v. Butler County Bd. of Health*, 74 N.E.2d 331 (Ohio 1947) (garbage accumulation and piggery odors).

6. Ohio courts adopted both the rule that railroad companies were legally entitled to operate their engines and the common knowledge that rail engines caused injuries from their noise, odors, and smoke. See, e.g., *City of Hamilton v. Hausenbein*, 139 N.E.2d 459, 461 (Ohio App. 1956) (reversing conviction of train engineer under ordinance prohibiting “loud and great annoying noise” in residential areas, on grounds that “the normal necessary noises incident to the operation of a railroad [cannot] be said legally to unreasonably disturb

any one”). See also *Metzger v. Pennsylvania, O & D R. Co.*, 66 N.E.2d 203, 206 (Ohio 1946) (finding that the emission of black smoke from rail engines is not a nuisance); *City of Niles v. Drummond*, 232 N.E.2d 830 (Ohio App. 1967) (finding that local ordinance prohibiting running and idling of railroad engines for longer than ten minutes was arbitrary and capricious and an unreasonable exercise of the police power).

7. A court, sympathetic to labor, enjoined the leaders of a strike from obstructing replacement laborers from reaching the plaintiff’s mill, noting: “Even ‘scabs’ and those who employ ‘scabs’ in a time of strike have rights which the strikers are bound by the law to respect. . . . It is just as much a nuisance to block up the street and impair the right by the continual presence of bodies . . . who obstruct the ingress and egress, as it would be to build barricades and embankments in the street.” *American Steel & Wire Co. v. Wire Drawers & Die Makers’ Unions*, 90 F. 608, 612, 614 (N.D. Ohio 1898).

8. Oliver Wendell Holmes Jr., *The Common Law* (John Harvard Library) (1881; Massachusetts: Belknap Press of Harvard University Press, 2009), 3–4.

9. See, e.g., *Mutual Film Co. v. Industrial Comm’s of Ohio*, 215 F. 138 (N.D. Ohio 1914) (upholding the state delegation to a board of censors the power to license moving pictures to determine “moral, educational or amusing and harmless character” of the film); *Mugler v. Kansas*, 123 U.S. 623 (1887).

10. *Mugler*, 123 U.S. at 623.

11. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

12. *Ibid.*, 415.

13. Ohio Gen. Code para. 4366–7–11.

14. For a brief but interesting history of the Standard Zoning Enabling Act and its contemporary model acts relating to land use controls, see Ruth Knack, Stuart Meck, and Israel Stollman, “The Real Story behind the Standard Planning and Zoning Acts of the 1920s,” *Land Use Law & Zoning Digest* 48, no. 2 (February 1996): 3–9, 3. .

15. Village of Euclid, Ohio, Ordinance No. 2812 (adopted November 13, 1922).

16. *Ibid.*

17. Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* (Lawrence: University Press of Kansas, 2008).

18. Village of Euclid, Ohio, Ordinance Nos. 3366, 3367, and 3368 (adopted June 11, 1923).

19. *Amber Realty Co. v. Village of Euclid*, 297 F. 307, 308 (N.D. Ohio 1924).

20. *Ibid.*, 314.

21. *Ibid.*, 313.

22. *Village of Euclid v. Amber Realty*, 272 U.S. 365, 388 (1926). A few months after the U.S. Supreme Court reversed his decision in *Euclid*, Judge Westenhaver was again called upon to rule on the validity of a local land use regulation. By the time *Weiss v. Guion* reached the Northern District in 1926, Westenhaver had been reversed on direct appeal to the U.S. Supreme Court twice in two years. See *United States v. Hubbard*, 266 U.S. 474 (1925) (decided on January 5, 1925, in which the U.S. Supreme Court reversed Judge Westenhaver’s determination that the Interstate Commerce Commission exceeded its authority in finding that passenger fare arrangements for certain interurban electric railroads had a discriminatory effect on interstate commerce; the U.S. Supreme Court’s reversal of Judge Westenhaver’s *Euclid* decision occurred late in 1926). Hence, it might not be surprising that in *Weiss*, which concerned a challenge to building setbacks from a public roadway, Judge Westenhaver attempted to distance himself from his own opinion in the *Euclid* controversy. Ruling that the establishment of building setbacks was well within the scope of the police power, Westenhaver reminded the parties that “no opinion to the contrary has ever been entertained or expressed by me.” *Weiss v. Guion*, 17 F. 202, 204 (N.D. Ohio 1926). This ap-

pears to be the final significant judicial opinion on the matter of the police power from Judge Westenhaver, who only a few years later was one of the first of the important *Euclid* players to pass away.

23. *Euclid*, 272 U.S. at 388.

24. *Buchanon v. Warley*, 245 U.S. 60 (1917).

25. *Euclid*, 297 F. at 316.

26. David Ray Papke, "Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation," *Urban Lawyer* 41 (October 2009): 787, 788.

27. In the more unfortunate but perhaps telling portion of the opinion, Sutherland opined that apartments often posed such a challenge, causing a parasitic, nuisance effect on single-family neighborhoods. *Euclid*, 272 U.S. at 394.

28. *Swetland v. Curtiss*, 41 F.2d 929 (N.D. Ohio 1930), *modified in* 55 F.2d 201 (6th Cir. 1932).

29. See John G. Sprankling, "Owning the Center of the Earth," *UCLA Law Review* 55 (April 2008): 979, 981.

30. *Herrin v. Sutherland*, 241 P. 328, 332 (1925) (Sup. Ct. Mont. 1925).

31. Courts have found it a trespass to "thrust one's arm into the space over a neighbor's land" or to shoot over another's land; overhanging branches and projecting eaves have been found to be either trespass or nuisance; and "a board attached to defendant's building and overhanging plaintiff's land" has been determined to "constitutes a trespass," as have other overhangs. See *Hannabalsen v. Sessions*, 90 N.W. 93 (Iowa 1902); *Whittaker v. Stangvick*, 111 N.W. 295 (Minn. 1907); e.g., *Grandona v. Lovdal*, 70 Cal. 161 (Cal. 1886); *Harrington v. McCarthy*, 48 N.E. 278 (Mass. 1897); *Puerto v. Chieppa*, 62 A. 664 (Conn. 1905).

32. For an account of the Wright brothers' first flight at the beginning of "a turbulent and flamboyant era of aviation development," see Roger E. Bilstein, *Flight in America: From the Wrights to the Astronauts*, rev. ed. (Baltimore, Md.: Johns Hopkins University Press, 1994), 12–17. For a description of the Wright family and its series of firsts, see T. A. Heppenheimer, *First Flight: The Wright Brothers and the Invention of the Airplane* (Hoboken, N.J.: Wiley, 2003), 1–2.

33. See Heppenheimer, *First Flight*, 74–96.

34. See Henry E. Smith, "Exclusion and Property Rights in the Law of Nuisance," *Virginia Law Review* 90 (June 2004): 965.

35. See, e.g., *Herrin v. Sutherland*, 241 P. 328 (Mont. 1925) (shot from a rifle landed on the plaintiff's house and cattle).

36. *Butler v. Frontier Telephone*, 19 N.Y. Ann. Cas. 315 (N.Y. 1906) ("'Usque ad coelum' is upper boundary").

37. A few months before, the Supreme Judicial Court of Massachusetts had recognized that "aerial navigation, as important as it may be, has no inherent superiority over the landowner where the rights and claims are in actual conflict." It then established a line between airspace that could possibly be built into, using the Eiffel Tower as an example, and what was feasibly used: "property which can be seized, touched, occupied, handled, cultivated, built upon and utilized in its every feature." *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930).

38. *Swetland*, 41 F.2d 929, 931 (N.D. Ohio 1930).

39. *Ibid.*, 932 (holding that the mere existence and operation of an airport was determined not to be a nuisance per se under Ohio law).

40. *Ibid.*

41. *Ibid.*, 938; Air Commerce Act, 344 Stat. 574 (1926). Soon thereafter, in 1929, the legislature of the state of Ohio passed its own laws "relative to aeronautics," which appeared to defer to federal control.

42. Swetland, 41 F.2d at 939.

43. *Ibid.*, 938–39.

44. *Ibid.*, 942.

45. Swetland v. Curtiss, 55 F.2d 201 (6th Cir. 1932).

46. *Ibid.*, 203.

47. *Ibid.*, 204. Interestingly, the airport was later acquired by the municipality under eminent domain and operated as an airport. Suit was brought, and it was determined that the previous injunction did not apply to the town. However, the ruling left open the possibility of a similar action being successful against the municipality; still, no further cases were decided. See Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951).

48. U.S. v. Causby, 328 U.S. 256 (1946); Laird v. Nelms, 406 U.S. 797 (1972) (referring to the Air Commerce Act of 1926 enacted in recognition of the dangers of countless trespass suits). Currently, the U.S. Code states that “a citizen of the United States has a public right of transit through the navigable airspace.” 49 U.S.C. § 40103 (1994).

49. Biechelle v. Norfolk & Western Railway Co., 309 F. Supp. 354 (N.D. Ohio 1969). Norfolk & Western was a successor corporation to the Pennsylvania Railroad Company.

50. *Ibid.*, 357.

51. *Ibid.*, 358.

52. The railroad’s argument, in which the absence of negligence constituted a defense in a nuisance action, found authority in Ohio law. See, e.g., Metzger, 66 N.E.2d at 203, 206 (holding that the defendant railroad was entitled to a directed verdict where plaintiff did not allege or prove negligence in stopping under a bridge and emitting black smoke onto plaintiff, who was then injured falling down stairs that she could not see). Even before the *Biechelle* case, however, the Sixth Circuit had questioned the notion of limiting nuisance in such a manner and provided a brief review of Ohio court cases, suggesting that negligence was not such a limitation on nuisance claims. See E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38, 41 (6th Cir. 1943).

53. Biechelle, 309 F. Supp. at 358.

54. See U.S. EPA, “State Activities in Solid Waste Management,” report, EPA SW-158, 1974 (1975); U.S. Department of Health, Education, and Welfare, “Report for Consultation on the Greater Metropolitan Cleveland Intrastate Air Quality Control Region,” (February 1969), 35–37.

55. Biechelle, 309 F. Supp. at 359. Notably, the *Biechelle* controversy preceded the influential opinion in *Boomer v. Atlantic Cement Co.* by a single year, and thus, it may not be surprising that Judge Young so seriously questioned the efficacy of enjoining railroad operations. In *Boomer*, the New York court diverged from the general rule that injunctive relief should follow a finding that a nuisance exists. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970). The *Boomer* decision is notable both for the manner in which the court balanced the costs and benefits of injunctive relief and for endorsing a resolution of payment of permanent damages to the plaintiff as an alternative to injunctive relief. The *Boomer* decision has been criticized for its effect of allowing defendants to pay for the right to pollute. Of course, the question of judicial hesitancy in enjoining major industries did not originally arise with the *Boomer* case. In 1886, for instance, the Pennsylvania Supreme Court held that claims of injury from coal-mining discharges that resulted in significant stream pollution “must yield to the necessities of a great public industry [the coal industry].” *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453, 459 (Pa. 1886).

56. Biechelle, 309 F. Supp. at 358.

57. *Ibid.*

58. *Ibid.*, at 359.

59. *Ibid.*, at 358.

60. *Standard Bag & Paper Co. v. City of Cleveland*, 15 Ohio C.D. 380, 1903 WL 590, at \*9 (Ohio 1903) (noting that it is certain there are contributions, but uncertainty as to the amounts, discharged by “slaughter houses, oil refineries, rolling mills, foundries and other manufacturing establishments, some twenty-one in number and about one hundred private water closets, all located near Kingsbury run and emptying into it”).

61. *Standard Bag & Paper Co.*, 74 N.E. 206 (Ohio 1905).

62. Although Ohio courts would eventually limit prescription as a defense to pollution, the reign of such rules was consistent with judicial resolutions in other pollution contexts. See, e.g., *Industrial Fibre Co. v. State*, 166 N.E. 418 (Ohio Ct. App. 1928) (dismissal of a suit against a rayon plant because the plant was located in the neighborhood first, a defense known as “coming to the nuisance”).

63. Many states had previously adopted piecemeal, nuisance-based legislation making it unlawful to dispose of rubbish or contaminate a drinking supply. However, approximately thirty states adopted “comprehensive” water quality legislation between 1942 and 1955 that sought to both regulate and abate the sources of pollution. See W. B. Smith, “Statutory Treatment of Industrial Stream Pollution,” *George Washington Law Review* 24 (January 1956): 302, 310 n.59. By 1966, all states had adopted some form of water pollution control legislation. See N. William Hines, “Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs,” *Iowa Law Review* 51 (October 1966): 186, 215.

64. Ohio Water Pollution Control Act, 124 Ohio Laws 855 (1951).

65. Adler, “Fables of the Cuyahoga,” 117.

66. Ohio Rev. Code Ann. § 6111.04 (West 2000). Ironically, the statute contained a savings clause that preserved common-law rights and presumably applied to private nuisance. Ohio Rev. Code Ann. § 6111.08 (West 2000). The statute also specifically exempted industrial discharges and acid mine drainage until the board was able to identify practical treatment methodologies. Ohio Rev. Code Ann. § 6111.04 (West 2000).

67. *Meisz v. Village of Mayfield Heights*, 111 N.E.2d 20 (Ohio Ct. App. 1952); *Ketchel v. Bainbridge*, 557 N.E.2d 779 (Ohio 1990); *Cash v. Cincinnati Zoning Board of Appeals*, 690 N.E.2d 593 (Ohio Ct. App. 1996).

68. The Cuyahoga has provided waste removal service to some of the more prominent stalwarts of Cleveland’s economic circumstances: Republic Steel, U.S. Steel, and Jones and Laughlin discharged solids, iron, oil, sulfates, ammonia, acids, and other hazardous materials; discharges from operations at Lamson and Sessions and Sonoco Products caused some sort of reddish tinge; and Firestone, B. F. Goodrich, Goodyear Tire Division, Goodyear Aerospace Division, and Diamond Salt contributed discharges of heavy metals, high temperatures, oils, color, and other hazardous materials. U.S. Department of the Interior, “Lake Erie Report: A Plan for Water Pollution Control,” (August 1968), 47. Available at: <http://nepis.epa.gov>.

69. Damon Sims, “Cuyahoga River Fire 40 Years Ago Ignited an Ongoing Cleanup Campaign,” *Science and Technology News*, June 22, 2009, available at [http://cleveland.com/science/index.ssf/2009/06/cuyahoga\\_river\\_fire\\_40\\_years\\_a.html](http://cleveland.com/science/index.ssf/2009/06/cuyahoga_river_fire_40_years_a.html) (“Even after 40 years, maybe the most surprising thing about the June 22, 1969 fire is that it is remembered at all”).

70. Just one year prior to the 1969 fire, Joe G. Moore, commissioner of the Federal Water Pollution Control Administration, wryly noted: “Man is destroying Lake Erie. Although the accelerating destruction process has been inadvertent, it is as positive as if he had put all his energies into devising and implementing the means. After two generations the process has gained in momentum which now requires a monumental effort to retard.” U.S. Department of the Interior, “Lake Erie Report,” Forward.

71. *New York Times*, October 8, 1969 (abstracts) 94, 1969 WLNR 59999.

72. See Adler, “Fables of the Cuyahoga,” 118.

73. 16 U.S.C. §§ 460ff (2000).

74. *United States v. Detrex Chemical Industries*, 393 F. Supp. 735 (N.D. Ohio 1975) (allowing EPA to pursue both injunctive remedies and civil penalties under the Federal Water Pollution Control Act).

75. “U.S. Steel to Cut Ohio-Pollution,” *Toledo Blade*, September 5, 1980, 5.

76. The state’s inactive regulatory enforcement was the subject of an unsuccessful citizen suit early in this history. See *Pinkey et al. v. Ohio Environmental Protection Agency*, 375 F. Supp. 305 (N.D. Ohio 1974).

77. *United States v. City of Painesville*, 431 F. Supp. 496 (N.D. Ohio 1979).

78. *U.S. v. Liviola*, 605 F. Supp. 96 (N.D. Ohio 1985).

79. In 2000, Judge David D. Dowd Jr. denied a motion by the city of Youngstown to dismiss a Clean Water Act enforcement action brought by the EPA on grounds that the state of Ohio was also prosecuting the alleged CWA violations. Judge Dowd preserved the EPA’s authority to pursue enforcement action despite the EPA’s grant of authority to Ohio to administer the CWA. *United States v. City of Youngstown*, 109 F. Supp. 2d 739 (N.D. Ohio 2000). See also *Natural Resources Defense Council v. Vygen Corporation*, 803 F. Supp. 97 (N.D. Ohio 1992) (finding that enforcement action under state pollution control law did not preclude citizens suit under the Clean Water Act, which precluded citizen enforcement where agency was “diligently prosecuting” CWA).

80. In *United States v. Chrysler Corporation*, 157 F. Supp. 2d 849 (N.D. Ohio 2001), Judge Dowd performed a surgical analysis of the statutory framework and Sixth Circuit precedent to allow the United States to recover hazardous waste response costs under the cost recovery provisions in section 107 of Comprehensive Environmental Response, Compensation, and Liability Act, rather than the contribution provisions in section 113, despite also finding that the United States could not claim the status of innocent landowner. Specifically, when the federal government acquired the contaminated property, it was aware of the contamination. Nevertheless, the federal government’s acquisition was mandated by congressional decree, and the acquisition was made with the intention of remediating the site and establishing a park.

81. *United States v. Cleveland Electric Illuminating Company*, 510 F. Supp. 51, 53 (N.D. Ohio 1981) (ordering compliance with a subpoena *duces tecum* upon finding that “there is no doubt that energy, the environment, and unemployment are all matters of great concern in this society as it enters this new decade. Given the intent of Congress to have the EPA monitor the interrelationships of these factors, this Court is of the opinion that CEI’s motion to quash the subpoena should be overruled.”).

82. Schweda, 736 N.W.2d at 49, 56.

83. See Adler, “Fables of the Cuyahoga.”

84. “Environment: The Cities—The Price of Optimism,” *Time*, August 1, 1969, available at <http://www.time.com/time/magazine/article/0,9171,901182-1,00.html>.

85. Of course, nuisance law has never been completely removed from the scene. Following the adoption of federal and state environmental laws through the 1970s and 1980s, nuisance has retaken a hold in the process of securing environmental quality. See, e.g., *Village of Wilsonville v. SCA Services*, 426 N.E.2d 824 (Ill. 1981) (finding nuisance and enjoining chemical waste disposal facility despite facility’s permits to operate). More recently, nuisance has drawn a great deal of attention in the climate change arena for its adaptive potential in tracking developments in the natural sciences. See J. B. Ruhl, “Making Nuisance Ecological,” *Case Western Reserve Law Review* 58 (Spring 2008): 753, 756.