

A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine

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Touted as a landmark decision reviving a legal theory once essentially left for dead, the Second Circuit Court of Appeals recently reversed a district court order dismissing a lawsuit brought by eight states, New York City and several private land trusts against six major energy producers, alleging that the energy producers' carbon dioxide emissions constituted an actionable nuisance.¹ In its opinion, the court suggested that the judicial branch can set limits on carbon dioxide emissions of such producers without legislative action under the federal common law nuisance doctrine.²

The harmful nature of greenhouse gases is approaching a point of being scientifically beyond dispute and dramatic action needs to be taken to prevent calamitous consequences. However, this article will argue that any determination of precisely how such harmful pollutants should be regulated is beyond the reach of the judicial branch through the common law doctrine of nuisance, and must come instead from the elected officials of the coordinate branches of government.

This is not to suggest, however, that the Second Circuit's decision cannot be of use in the battle against global warming. The threat of emissions caps created by the judiciary through piecemeal litigation could be precisely the motivation that Congress—and the energy lobby—needs to enact uniform, widespread emissions reduction policies.

* Riggs, Abney, Neal, Turpen, Orbison & Lewis, Denver, CO. J.D. (2007), Loyola Law School, Los Angeles.

¹ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

² *Id.* at 315.

INTRODUCTION

Persistent Congressional and Executive inaction in regulating harmful carbon dioxide emissions, particularly from energy producers, has forced the hand of the judicial branch. Many countries agree that something needs to be done soon, in order to mitigate the potentially calamitous consequences of global climate change.³ However, widespread regulation of harmful emissions requires the setting of policy—specifically, a determination of how the United States should value global environmental interests relative to its own economic interests. The courts of this country are not the appropriate forum in which to resolve these complex policy issues.

In an attempt to achieve what Congress and the President have not been able to, the concept of suing large emitters of carbon dioxide under the common law nuisance doctrine was contemplated several years ago.⁴ After an outright defeat of this strategy at the district court level in the Second Circuit in 2005 on grounds that the political question doctrine prohibited the courts from intervening in the global warming debate at this juncture,⁵ the nuisance route seemed untenable. However, with a single decision, the Second Circuit revived the nuisance doctrine as a potentially viable means for addressing climate change.⁶

In *Connecticut v. American Electric Power Co.*, the Second Circuit held that courts are not precluded by the political question doctrine from granting injunctive relief, including potentially setting specific emissions restrictions on domestic emitters of carbon dioxide, to plaintiffs claiming damages caused by global warming.⁷ The court reasoned that, because its holding was limited to the six energy producing entities identified as defendants in the lawsuit, it was not engaged in setting any sort of national policy on emissions reductions.⁸

While reasonable minds agree that action must be taken on climate change, taking such action via the common law nuisance doctrine presents serious problems, both under Article III standing and the political question doctrine.

³ Richard Black, *55 countries send UN their carbon-curbing plans*, BBC NEWS, Feb. 1, 2010, <http://news.bbc.co.uk/2/hi/science/nature/8492450.stm>.

⁴ See *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

⁵ *Id.* at 265, 267.

⁶ *Am. Elec. Power Co.*, 582 F.3d at 315.

⁷ *Id.*

⁸ *Id.* at 325.

In order to have standing, a plaintiff must bring grievances before a court which could be redressed through an order of that court.⁹ Unlike previous environmental disputes adjudicated by the courts involving pollution from a specific source damaging a particular river or airspace,¹⁰ global warming is a worldwide issue with countless contributors.¹¹ Simply limiting the emissions of six domestic energy companies, as the Second Circuit has seemingly allowed for,¹² is extremely unlikely to redress any harm caused by global warming. Instead, a comprehensive, international policy is needed to curb the tide of human-induced climate change.

However, the judicial branch cannot be the body which sets any sort of broad based policy on global warming. To begin with, it can be argued that Congress has already spoken on the appropriate timing for the implementation of any emissions restrictions on domestic energy producers.¹³ Both houses of Congress separately urged that no emissions restrictions be agreed to absent a comprehensive global agreement by which other nations, including developing countries, agree to reduce their own emissions accordingly.¹⁴ The theory behind such a policy would be that enacting domestic restrictions prior to completing negotiations on a global agreement would reduce the President's bargaining power in seeking emission reduction concessions from other nations. Congress likewise enacted legislation prohibiting domestic enforcement of the Kyoto Protocol on the grounds that it does not require developing nations to reduce their emissions.¹⁵ If Congress has announced a policy of refraining from restricting domestic emissions absent a global agreement, any decision from the judiciary in contravention of this policy would be prohibited by the political question doctrine.¹⁶

Even if Congress has yet to announce an official policy stance, the judicial branch would run afoul of the political

⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁰ *See, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

¹¹ *See* U.S. ENERGY INFORMATION ADMINISTRATION, INTERNATIONAL ENERGY STATISTICS, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY (2006), <http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=90&pid=44&aid=8> (last visited Mar. 2, 2010) (showing carbon dioxide emissions from recognized nations throughout the world).

¹² *Am. Elec. Power Co.*, 582 F.3d at 314–15.

¹³ *See* H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. Res. 98, 105th Cong. (1997).

¹⁴ *Id.*

¹⁵ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp.2d 265, 269 (S.D.N.Y. 2005).

¹⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See also* discussion *infra* Part II.B.1.

question doctrine should it attempt to set a broad based emissions reduction policy. The political question doctrine prohibits the judicial branch from issuing decisions which would require an “initial policy determination” of a kind not ordinarily made by the courts.¹⁷ In order to create carbon dioxide emission restrictions, the judicial branch would be charged with making numerous value-based policy decisions.¹⁸ These policy decisions would include whether the United States, as a nation, should commit to emissions restrictions for energy producers before a global accord is reached, and if so, the court would be required to weigh domestic economic interests against the need for emissions reductions to determine the appropriate schedule and degree of the required reductions.¹⁹ In fact, the inordinate policy setting that would be required by a court in this context would exceed even those decisions made by courts widely accused of demonstrating unrestrained judicial activism—the New Deal era court and the Warren Court.²⁰ Through comparison to the “activist” decisions of these courts, it becomes apparent that judicial creation and implementation of emissions restrictions for domestic energy producers would be extraordinary action for the judicial branch to undertake.

In short, the judicial branch is faced with a conundrum in its attempts to set emission standards: if it attempts to set widespread policy, it runs afoul of the political question doctrine, but if it tries to narrowly tailor emissions restrictions to a given defendant, the impact of the decision would be so slight on the consequences of global warming that the redressability prong of traditional Article III standing analysis cannot be met. As such, the only appropriate means by which to regulate carbon dioxide or other greenhouse gas emissions is through the other coordinate branches of government.

However, despite the fact that cases using the nuisance doctrine to set emissions policies may not be legally sound and may not survive the scrutiny of the Supreme Court, they can still serve a useful role in encouraging the legislative and executive branches to take action in order to prevent piecemeal carbon dioxide emission regulations at the hands of the judicial branch. In fact, this may have been the subtle intention of the Second Circuit in issuing its recent decision in *Connecticut v. American Electric Power Co.*²¹

¹⁷ *Baker*, 369 U.S. at 217.

¹⁸ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272–73. See also *infra* Part II.B.2.

¹⁹ See discussion *infra* Part II.B.2.

²⁰ See PETER WOLL, PUBLIC POLICY 223–29 (1974).

²¹ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

Part I of this article sets forth the Second Circuit's reasoning in reaching its decision, specifically focusing on the types of environmental disputes that the court cites as evidence that nuisance is an appropriate means for resolving this case. The majority of the authorities cited by the court involve specific acts of pollution contained in a finite geographical area which, on their own, provably caused or were sufficiently likely to cause harm to the plaintiff.

Part II discusses the critical differences between the nature of the previous environmental disputes successfully resolved by courts and cited by the *American Electric Power Co.* Court and the present dispute involving carbon dioxide emissions which place carbon dioxide emission standards in the realm of non-justiciable political questions. Rather than specific and geographically finite acts of pollution that result in readily attributable harm subject to redressability, harmful carbon dioxide emissions are a worldwide problem requiring a global (or at least national) solution. This posits an unsolvable conundrum for the courts. The political question doctrine precludes the judicial branch from imposing emission restrictions that are sufficiently widespread to result in meaningful reductions or postponements of the consequences of global warming, but anything short of meaningful reductions or postponements prevents litigants claiming injuries under nuisance laws from having standing to assert their claims.

Part III argues that even though the reasoning in this opinion should not withstand further scrutiny, it can still serve an important purpose in encouraging the legislative branch to act in setting emission restriction policies. Perhaps this was in fact the primary intent of the Second Circuit in issuing its decision after acknowledging that global warming is a serious problem that requires prompt and unified action.

I. THE REVIVAL OF THE COMMON LAW NUISANCE DOCTRINE IN THE GLOBAL WARMING DEBATE: *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.*

On September 21, 2009, more than three years after argument, the Second Circuit issued its decision in *Connecticut v. American Electric Power Co.*²² Plaintiffs—eight states, New York

²² 582 F.3d 309. Interestingly, a rare two-judge panel of the Second Circuit issued the decision. The case was originally assigned to the two deciding judges, along with Justice (then Judge) Sonia Sotomayor. Justice Sotomayor was promoted to the United States Supreme Court before this case was decided, making her unable to participate in the decision. Since the two remaining judges agreed on the result, the decision was issued by the two remaining judges rather than be reassigned to a new panel. *Id.* at 314.

City and three private land trusts—sued six major electric power companies which operate fossil-fuel-fire power plants in twenty states, alleging that the defendants' carbon dioxide emissions constituted a nuisance in that they contributed to global warming and its harmful effects.²³ Plaintiffs' objective in bringing the suit was to force the defendants to "cap and then reduce their carbon dioxide emissions," which Plaintiffs alleged were causing damages to their interests.²⁴ Plaintiffs identified both present and future harms attributable to global warming, including the reduction of snow mass in California (and corresponding reduction in water for the State), respiratory problems for residents, beach erosion and coastal flooding.²⁵ The Court of Appeals reversed the District Court's determination that the political question doctrine serves as a bar to judicial resolution of the lawsuit, and further held that Plaintiffs had sufficiently demonstrated standing to pursue their nuisance claims.²⁶

A. The Second Circuit's Political Question Doctrine Analysis

In analyzing the application of the political question doctrine to this case, the Second Circuit turned to the six factors set forth in *Baker v. Carr*:

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁷

Some pundits have speculated that the case, which was decided by the District Court in 2005, was purposefully delayed until after Sotomayor's promotion to the Supreme Court to make her confirmation an easier process. See, e.g., Marcia Coyle, *Questions Arise About Long Delay by Sotomayor-Led Panel in Climate Case*, THE NATIONAL LAW JOURNAL, May 29, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431051311>.

²³ *Am. Elec. Power Co.*, 582 F.3d at 310, 314.

²⁴ *Id.*

²⁵ *Id.* at 317–18.

²⁶ *Id.* at 315. The court further held that Plaintiffs' claims were not displaced by existing federal law. *Id.* While this holding may present its own issues, they are outside the scope of this article.

²⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

After noting that *Baker* “set a high bar for nonjusticiability,” the court explained why each *Baker* factor is inapplicable to the issues presented.²⁸

The first factor, a textual constitutional commitment to a coordinate political department, was quickly dismissed as an untenable argument by the court.²⁹ Defendants argued that the first factor was applicable based on the commerce clause and executive powers.³⁰ As to the commerce clause, the court declined to consider the argument as it was “insufficiently argued” and thereby waived.³¹ As to executive powers, defendants argued that judicial intervention would usurp the executive’s authority to “resolve fundamental [global] policy questions,” thereby impermissibly interfering with the executive’s right to manage foreign relations.³² The court rejected this argument, holding that Plaintiffs sought only to limit the emissions from six energy producers, not set global policy on climate change.³³

The second factor, a lack of judicially-discoverable and manageable standards for resolving the case, was likewise clearly rejected by the court.³⁴ Defendants argued that the uncertainties surrounding the impact of greenhouse gases render judicial intervention, particularly in the form of setting emission standards, unmanageable.³⁵ The court responded to this argument by noting that “federal courts have successfully adjudicated complex common law nuisance cases for over a century.”³⁶ For instance, the court cited cases in which courts reached the merits: Missouri sued to prevent Illinois from dumping sewage into a channel that emptied into the Missouri River above St. Louis;³⁷ Georgia sued to stop a Tennessee company’s “noxious emissions” from continuing to harm Georgian forests and crops;³⁸ and New Jersey sued to prevent New York City from dumping trash into the ocean, causing New Jersey waters and beaches to become polluted.³⁹ These disputes, the court reasoned, required judicial determinations of complex scientific issues as to the harm or prospective harm caused by

²⁸ *Am. Elec. Power Co.*, 582 F.3d at 321–32.

²⁹ *Id.* at 324–25.

³⁰ *Id.* at 324.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 325.

³⁴ *Id.* at 326–29.

³⁵ *Id.* at 326.

³⁶ *Id.*

³⁷ *Id.* (citing *Missouri v. Illinois*, 200 U.S. 496 (1906)).

³⁸ *Id.* at 327 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915)).

³⁹ *Id.* (citing *New Jersey v. City of New York*, 283 U.S. 473 (1931)).

purported environmental pollutants.⁴⁰ Just as those courts were able to wade through the complexities to make reasoned decisions, so too, concluded the court, could it do with respect to carbon dioxide emissions.⁴¹

As to the third *Baker* factor, the impossibility of deciding the case without an “initial policy determination of a kind clearly for nonjudicial discretion,” defendants argued, and the District Court agreed, that the “very nature of [global warming] requires a comprehensive response” which specifically requires the decision of whether to adopt a policy limiting greenhouse gas emissions.⁴² Defendants further argued that Congress has contemplated such limits, calling for further study of the propriety of such action, but to date has refrained from enacting any specific policy.⁴³ According to defendants and the District Court, the judicial branch cannot act without this initial policy determination from the legislative branch.⁴⁴ The court minimized the importance of Congress’ “refusal to legislate,” citing *Illinois v. City of Milwaukee* (Milwaukee I)⁴⁵ for the proposition that, where a gap exists in a federal regulatory scheme, common law exists to fill those gaps.⁴⁶

Milwaukee I specifically dealt with a water pollution abatement remedy sought by the State of Illinois not expressly covered by the Federal Water Pollution Control Act or any other federal environmental statutes.⁴⁷ The *Milwaukee I* Court, like Plaintiffs in this case, turned to federal common law nuisance to authorize the remedy sought.⁴⁸ The court further noted that a plaintiff should not be required to wait until comprehensive legislation has been enacted covering the specific grievance alleged.⁴⁹ Further, the court stated that ordinary tort suits do not require any initial policy determination that would be problematic under *Baker*, and that this nuisance action was consistent with an ordinary tort suit.⁵⁰

⁴⁰ *Id.* at 327.

⁴¹ *Id.* at 328–29.

⁴² *Id.* at 330; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005).

⁴³ *Am. Elec. Power Co.*, 582 F.3d at 330.

⁴⁴ *Id.* at 331.

⁴⁵ 406 U.S. 91 (1972).

⁴⁶ *Am. Elec. Power Co.*, 582 F.3d at 330.

⁴⁷ *Milwaukee I*, 406 U.S. at 103–04.

⁴⁸ *Id.* at 107.

⁴⁹ *Id.* at 101–04; *Am. Elec. Power Co.*, 582 F.3d at 331.

⁵⁰ *Am. Elec. Power Co.*, 582 F.3d at 331 (citing *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007)).

Finally, the court lumped the discussion of the fourth, fifth and sixth *Baker* factors together, deciding that all three factors are premised on some existing policy which might lead to uncertainty or inconsistent results.⁵¹ The court held that there is no unified United States policy on greenhouse gas emissions.⁵² While recognizing the “political overtones” of issues concerning global warming, because there is no identifiable policy that would be violated or contradicted by a decision from the judicial branch, the court ultimately concluded that these *Baker* factors likewise were not implicated.⁵³

B. The Second Circuit’s Standing Analysis

Despite the fact that the court held that its decision was not creating any national or global policy and was limited solely to the twelve plaintiffs and six defendants, the court nonetheless found that the plaintiffs had sufficiently demonstrated standing to pursue their nuisance claims.⁵⁴

The court began its standing analysis by questioning whether the 2007 Supreme Court decision in *Massachusetts v. EPA*⁵⁵ eliminated the need for traditional Article III standing requirements (injury in fact, causation and redressability) when a State sues as *parens patriae*—that is, on behalf of its injured citizens.⁵⁶ Concluding that the matter was an open question, the court proceeded to analyze standing in this case under both the *parens patriae* approach and the standard Article III formulations.⁵⁷ Of particular interest to this article is the traditional Article III standing issue, and most importantly, the issue of redressability.⁵⁸

⁵¹ *Id.* at 331–32.

⁵² *Id.*

⁵³ *Id.* at 332.

⁵⁴ *Id.* at 314–15.

⁵⁵ 127 S. Ct. 1438 (2007).

⁵⁶ *Am. Elec. Power Co.*, 582 F.3d at 336–37.

⁵⁷ *Id.* at 338–39.

⁵⁸ While the Second Circuit described the state of the law regarding whether traditional Article III standing analysis is required for states suing as *parens patriae* as an open question, the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), found it necessary to apply the traditional elements of injury in fact, causation and redressability in spite of any analysis under a *parens patriae* theory. Moreover, the article cited by the *Am. Electric Power Co.* Court in its opinion, Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008), concludes that the *parens patriae* analysis provides for a slackened application of the traditional elements, but applies them nonetheless. Although outside the subject of this paper, this author would posit that the *parens patriae* analysis takes the place of the “injury in fact” prong of the traditional analysis, leaving the remainder of the traditional analysis in tact. In any event, the Second Circuit held that the private land trust plaintiffs, who do not fit under

As the court noted, a showing of redressability requires “a substantial likelihood that the requested relief will remedy the alleged injury in fact.”⁵⁹ Defendants essentially argued that because they contribute such a small amount on a global scale to the causes of global warming, alleged to be “2.5% of man-made carbon dioxide emissions,” capping their emissions would not prevent or reduce the harm and future harm alleged by Plaintiffs.⁶⁰ The Court summarily rejected this argument, stating that *Massachusetts v. EPA* foreclosed this argument by holding that the EPA’s failure to regulate United States automobile emissions which contribute to global warming was redressable because even of the remedy sought would not “by itself reverse global warming,” but would “slow or reduce it.”⁶¹ Likewise, the court reasoned, reducing upwards of 2.5 percent of total man-made carbon dioxide emissions would slow or reduce the effects of global warming, and concluded the injury claimed was redressable through the remedy sought, reduction of defendants’ emissions.⁶²

II. JUDICIAL CREATION OF EMISSIONS STANDARDS IS EITHER TOO INSUBSTANTIAL TO CONFER ARTICLE III STANDING OR SO PERVASIVE AS TO RUN AFOUL OF THE POLITICAL QUESTION DOCTRINE

The Second Circuit in *American Electric Power Co.* found itself in an impossible position. The court was forced to try and delicately avoid the political question doctrine by attempting to describe its holding as narrow and independent of any initial policy determination regarding balancing environmental and economic interests of United States carbon dioxide emitters, while at the same time making clear that its decision would redress the claimed injuries and future injuries caused by global warming. As is apparent from the court’s decision, this balance cannot adequately be struck.

the *parens patriae* analysis, also had standing, making the traditional standing analysis relevant regardless of the final answer on *parens patriae* standing requirements.

⁵⁹ *Am. Elec. Power Co.*, 582 F.3d at 347 (quoting *Jana-Rock Const., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006)).

⁶⁰ *Am. Elec. Power Co.*, 582 F.3d at 347.

⁶¹ *Id.* at 348 (quoting *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)).

⁶² *Id.* at 349.

A. In Order to Meaningfully Redress Injuries Caused by Global Warming, a Unified, Widespread Emissions Reduction Policy is Needed.

In order for a litigant to have standing to pursue a claim, that litigant must show that she suffered an injury in fact caused by the complained of conduct that would be redressable by the relief requested from the court.⁶³ There must be “a substantial likelihood that the requested relief will remedy the alleged injury in fact.”⁶⁴ “[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.”⁶⁵

Global warming and its consequences are an environmental problem different than any the judicial branch has previously dealt with.⁶⁶ As noted above, the Second Circuit justified its conclusion that the judicial branch was suited to adjudicate this kind of dispute and could redress the injuries claimed in this case in large part on the fact that courts had previously resolved “complex” environmental problems, including various cases involving the effects of pollution.⁶⁷ These pollution cases include the dumping of sewage into a river,⁶⁸ noxious fumes from a factory damaging nearby crops and forests,⁶⁹ and the dumping of garbage into the ocean, which washed up on the shores of a neighboring state.⁷⁰

However, these examples all involved a specific act of pollution directly damaging a protectable interest. If sewage going into a river is damaging interests downstream, it seems simple enough to conclude that stopping the dumping will prevent the damage. Global warming is unique in that it does not fit this model.

Global warming is a global problem. While an individual emitter of carbon dioxide is undoubtedly contributing to the problem on some level, any individual contribution is likely so minimal as to have no measurable effect in terms of the injury causing consequences such as warming and sea level rise. The

⁶³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁶⁴ *Jana-Rock Const. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006).

⁶⁵ *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982).

⁶⁶ *See, e.g., infra* note 71.

⁶⁷ *Am. Elec. Power Co.*, 582 F.3d at 326–27.

⁶⁸ *Missouri v. Illinois*, 200 U.S. 496 (1906).

⁶⁹ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915).

⁷⁰ *New Jersey v. City of New York*, 283 U.S. 473 (1931).

Intergovernmental Panel on Climate Change concluded in its Climate Change 2001: Synthesis Report that even if every developed nation in the world reduced its emissions by 2 percent per year from 2000 through 2010, global warming and sea level rise would only be diminished by a “small amount” by the year 2030.⁷¹ Moreover, the 2007 Synthesis Report anticipates greenhouse gas increases of 25–90 percent between 2000 and 2030 absent mitigation efforts.⁷² As further evidence of recognition of the insufficiency of a one-time 2.5 percent (or less) reduction, it should be noted that the American Clean Energy and Security Act of 2009 (commonly referred to as the Waxman-Markey bill) recently passed by the House of Representatives with a competing bill expected sometime in the near future from the Senate, calls for an 83 percent reduction from 2005 levels in all domestic carbon dioxide emissions by 2050.⁷³

Imagine, then, reducing not the emissions of every developed nation in the world, but instead allowing the emissions of all developed and developing nations to go unchecked and continue to grow while reducing only the emissions from six discrete companies within the United States. Clearly, some greater scheme than this is required to have any measurable impact on global warming or sea level rise, the factors causing the injuries complained of in *American Electric Power Co.*

In attempting to avoid this problem, the court in *American Electric Power Co.* brushed aside the issue of redressability, holding that *Massachusetts v. EPA* foreclosed the argument that the impact of emissions regulations could be too insignificant to redress injuries stemming from those emissions.⁷⁴ However, the facts in *Massachusetts* are substantially different than the issue facing the court in *American Electric Power Co.*

To begin with, *Massachusetts* concerned not the judicial branch imposing specific limitations on select energy producers, but rather whether the EPA had an obligation to regulate emissions from motor vehicles across the entire United States.⁷⁵ It has been estimated that United States motor vehicle emissions constitute upwards of 6 percent of the world’s carbon dioxide

⁷¹ THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2001 SYNTHESIS REPORT, EXECUTIVE SUMMARY QUESTION 6 98 (2001), available at http://www.grida.no/climate/ipcc_tar/vol4/english/pdf/q1to9.pdf.

⁷² THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2007 SYNTHESIS REPORT, EXECUTIVE SUMMARY 7 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

⁷³ H.R. 2454, 111th Cong. § 702 (2009).

⁷⁴ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 349 (2d Cir. 2009).

⁷⁵ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

emissions contributing to global warming.⁷⁶ Not only is this close to three times the amount of emissions directly at stake in the litigation in *American Electric Power Co.*, but also the fact that the EPA was the defendant in *Massachusetts* rather than individual emitters is a critical distinction. As the Supreme Court noted in *Massachusetts*: “Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.”⁷⁷

In other words, the Supreme Court was acknowledging that even the impact of regulating all new automobiles in the United States was likely insufficient on its own to have a meaningful impact on the injuries caused by global warming, but recognized that the EPA, as the agency charged with implementing the Clean Air Act and regulating various emissions standards could, over time, design a comprehensive policy that would be substantial enough to make a dent in the effects of global warming. It is in this context that the remaining language in the court’s opinion must be read.

The court in *American Electric Power Co.* relied heavily (indeed, almost exclusively) on the Supreme Court’s language in *Massachusetts* that redressability was not defeated merely because the regulation of emission standards for new automobiles could not “by itself reverse global warming” because it could “slow or reduce it.”⁷⁸ The *American Electric Power Co.* court found the emissions of the six energy producers analogous to the emissions of new motor vehicles across the United States.⁷⁹ However, the analogy does not hold when the *Massachusetts* language is taken in context.

Where the EPA is the defendant rather than individual emitters, it follows that an initial step in creating a comprehensive policy might be sufficient to meet the Article III standing requirement of redressability. The EPA was directed by Congress to create and implement climate change initiatives in

⁷⁶ *Id.* at 1457–58. See also U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (showing that the United States produced approximately 20.3 percent of the world’s carbon dioxide emissions). See also U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY 8 (2006), available at http://www.epa.gov/climatechange/emissions/downloads/08_ES.pdf (noting that 33 percent of U.S. man-made carbon dioxide emissions come from transportation activities, with 60 percent of transportation emissions coming from personal car use).

⁷⁷ *Massachusetts*, 127 S. Ct. at 1457.

⁷⁸ *Id.* at 1458.

⁷⁹ *Am. Elec. Power Co.*, 582 F.3d at 378.

order to successfully reduce the impact of global warming.⁸⁰ In this manner, regulating new motor vehicle emissions would not completely alleviate the consequences of global warming, but it begins to “whittle away” at the overarching global problem.⁸¹ Given that Congress directed the EPA to take action, it is perfectly conceivable that new motor vehicle emissions restrictions were just the first phase of a broader policy envisioned by Congress to be enacted over time, as the legislature “develop[s] a more nuanced understanding of how best to proceed” in tackling the imposing problem of global warming.⁸²

Judicial imposition of emission restrictions on individual emitters, by contrast, cannot be said to be the initial step in some larger comprehensive scheme. Unlike the EPA, courts are not charged with creating an emissions reduction scheme. While a single court decision directed toward individual emitters would reduce the amount of global emissions by some insignificant amount, that court cannot on its own take any future steps in order to continue to whittle away at the massive problem that is global warming.⁸³

Without the scenario presented in *Massachusetts*, where an agency is compelled by Congress to take the first step in creating a presumably broader emissions reduction policy, the independently insignificant act of requiring six individual emitters to reduce their emissions is insufficient to satisfy the redressability prong of the standing analysis. Gone is the justification of “whittling away” at a larger problem by taking a small initial step. All that remains is a single, independent remedy devoid of any practical significance that fails to redress the complained of injuries.

Therefore, in order for the judicial branch to sufficiently redress an injury caused by global warming, that court (or multiple courts through piecemeal litigation directed at specific individual emitters) would have to enact a broad based emissions scheme sufficient to make some measureable impact on the ramifications of global warming. There are two means by which this might be accomplished: (1) a single court (perhaps the Supreme Court) setting forth a uniform policy of emission

⁸⁰ 42 U.S.C. § 7521(a)(1) (2006).

⁸¹ See *id.* See also *supra* notes 77 and 78.

⁸² See *supra* notes 77 and 78.

⁸³ That is to say, courts are at the mercy of plaintiffs who bring disputes before them pursuant to the case or controversy requirement, and cannot independently pursue any sort of larger agenda, as could a legislative or authorized administrative body. U.S. CONST. art. III, § 2.

reductions for energy producers; or (2) gradual piecemeal litigation directed toward specific energy producers in multiple courts which eventually impose specific restrictions on all (or virtually all) major energy producers. However, both of these methods are problematic, due to the political question doctrine, as discussed below.

B. In Order to Enact a Sufficiently Widespread Emissions Reduction Scheme to Redress Injuries Caused by Global Warming, Courts Would Have to Resolve a Non-Justiciable Political Question

“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed to the halls of Congress or the confines of the Executive Branch.”⁸⁴ The doctrine is “designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government.”⁸⁵ In 1962, the Supreme Court set forth six categories of non-justiciable political questions (the *Baker* factors):

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸⁶

Should a court (or multiple courts, though a series of piecemeal litigation directed at specific energy producers) decide to create a uniform, across the board policy to avoid the redressability problem discussed above, it would run afoul of the political question doctrine under either the third⁸⁷ or the fourth, fifth and sixth *Baker* factors⁸⁸ depending on whether Congress has sufficiently expressed a policy on regulating energy producer

⁸⁴ *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

⁸⁵ *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

⁸⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁸⁷ See *infra* Part II.B.2.

⁸⁸ See *infra* Part II.B.1.

emissions to date. Notably, the creation of such a policy likely would not contravene the first *Baker* factor.⁸⁹

Arguably, Congress has already made an initial policy determination inconsistent with the judicial branch setting emission restrictions on domestic energy producers prior to a global agreement being reached.⁹⁰ If this is the case, the judicial branch is precluded from setting emissions limitations before such an agreement is reached. If, on the other hand, Congress has not sufficiently expressed such a policy on domestic energy producers, then an initial policy determination must be made. Courts are prohibited from making such a determination by the third *Baker* factor.⁹¹ In either case, the judiciary runs afoul of the political question doctrine under either the third or the fourth, fifth and sixth *Baker* factors, but not under the first *Baker* factor.⁹²

1. If Congress Has Sufficiently Expressed a Policy on Regulating Emissions of Domestic Energy Producers, Judicial Intervention Establishing Such Standards Conflicts with that Policy in Violation of the Fourth, Fifth and Sixth Baker Factors

The fourth, fifth and sixth *Baker* factors depend on the existence of a policy expressed by a coequal branch of government which would be contradicted by a court's decision in a particular case.⁹³ If such a policy is in existence, and the court's decision would in some way undermine that policy, the court may be presented with a non-justiciable political question and be forced to refrain from issuing an opinion on the merits.⁹⁴

Arguably, Congress has already set forth a policy on regulating domestic emissions. Congress is no stranger to the debate over global climate change policy. In 1987, Congress enacted the Global Climate Act of 1987, which compelled the Secretary of State to engage in global negotiations on climate change on behalf of the United States.⁹⁵ In 1992, the House of Representatives weighed whether to enact domestic emissions restrictions and specifically found that domestic emissions reduction action should only be taken "in the context of concerted

⁸⁹ See *infra* Part II.B.2.

⁹⁰ H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. Res. 98, 105th Cong. (1997). See also *infra* Part II.A.1.

⁹¹ See *infra* Part II.B.2.

⁹² See *infra* Parts II.B.1 and II.B.2.

⁹³ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009).

⁹⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁹⁵ 15 U.S.C. § 2901 (2006).

international action.”⁹⁶ Through the negotiations authorized under the Global Climate Act of 1987, the United States entered, with ratification by the Senate, the United Nations Framework Convention on Climate Change (UNFCCC), which was designed to achieve a global accord as to how to best handle climate change.⁹⁷ The fruit of the UNFCCC was the Kyoto Protocol, which President Clinton signed in 1997, but was never presented to the Senate for ratification.⁹⁸ Had the Kyoto Protocol been presented to the Senate, the evidence overwhelmingly suggests it would not have been ratified; also in 1997, the Senate passed a resolution with a 95-0 vote urging President Clinton not to sign any agreement that did not include emissions restrictions on developing nations, as the Kyoto Protocol failed to contain.⁹⁹ Moreover, Congress subsequently “passed a series of bills that affirmatively barred the EPA from enforcing the [Kyoto] Protocol.”¹⁰⁰ Based on the resolutions passed separately by each house of Congress, it appears reasonable to conclude that the primary objection to the Kyoto Protocol is that it failed to include a truly global agreement—that is, one that would include restrictions on both developed and developing nations.

The reasoning that supports the United States refraining from enacting domestic emissions reductions prior to entering a true global agreement requiring other nations, including developing nations, to likewise reduce their emissions is centered around the United States’ bargaining power in negotiating such an agreement.¹⁰¹ Presumably, if the United States already had domestic restrictions on emissions in place, there would remain less to bargain with in convincing other nations to restrict their emissions.

This rationale is particularly apt with respect to domestic energy production. As of 2006, it was estimated that approximately 41 percent of the United States’ man-made carbon dioxide emissions come from energy production.¹⁰² Moreover, global energy has been projected to increase 60 percent from 2002 levels by 2030,¹⁰³ underscoring the importance of energy production emissions to any global agreement. If these

⁹⁶ H.R. REP. NO. 102-474 (I), Purpose and Summary (1992).

⁹⁷ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 269. (S.D.N.Y. 2005).

⁹⁸ *Id.*

⁹⁹ S. RES. 98, 105th Cong. (1997).

¹⁰⁰ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 269.

¹⁰¹ S. RES. 98, 105th Cong. (1997).

¹⁰² U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY, *supra* note 76, at 8.

¹⁰³ INTERNATIONAL ENERGY AGENCY, WORLD OUTLOOK 2004, EXECUTIVE SUMMARY 31 (2004), <http://www.iea.org/Textbase/npsum/WEO2004SUM.pdf>.

emissions, bound to be a major component of any comprehensive agreement, are restricted before the President sits down with the international community to negotiate a global solution, the concessions available for the President to offer (and hence, the concessions the President can seek in return) would be severely limited. This is of particular concern with respect to India and China, who are rapidly ascending the list of largest global polluters¹⁰⁴ as well as assuming the role of major economic competitors with the United States.¹⁰⁵

If the 1992 House Report, 1997 Senate Resolution, and subsequent legislation by both houses of Congress preventing domestic enforcement of the Kyoto Protocol are sufficient to establish a policy that no comprehensive emission reduction scheme be enacted absent a global agreement requiring developing nations to likewise reduce their emissions, any court opinion or series of court opinions imposing mandatory emissions reductions would conflict with this policy. Certainly, a court decision that directly contradicts an existing policy of the legislative branch would implicate the fourth, fifth, and sixth *Baker* factors and therefore contravene the political question doctrine.¹⁰⁶

However, the issue of whether Congress has expressed an official policy on global warming is far from settled. Two major clouds hover, preventing clarity on this issue. Specifically, (1) both houses of Congress have never come together to pass legislation explicitly setting forth this policy; and (2) Congress has passed other legislation authorizing emissions restrictions on certain industries.¹⁰⁷

The best evidence to date of Congress' intention not to pass comprehensive domestic emissions restrictions until a global agreement is reached appears through a House Report and a Senate Resolution.¹⁰⁸ However, as the Report and Resolution express only a non-binding opinion of one house of Congress and are not subject to a vote in the other house or any action by the President, it is difficult to conclude that any official policy has been set forth. It seems the only information available confirms

¹⁰⁴ U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (reporting that as of 2006, China and India were the first and fourth largest emitters, respectively).

¹⁰⁵ James G. Neuger, *G-8's Dominance Faces Challenges from China, India*, Bloomberg.com, July 10, 2009, <http://www.bloomberg.com/apps/news?pid=20601068&sid=aQlvD4kX5bE8>.

¹⁰⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁰⁷ *See, e.g.*, 42 U.S.C. § 7521(a)(1) (2006).

¹⁰⁸ H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. RES. 98, 105th Cong. (1997).

nothing more than that, as of 1992, the House of Representatives thought it unwise to enact comprehensive emissions reduction legislation absent a global agreement compelling developing nations to likewise reduce emissions to minimize the impact of global warming, and as of 1997 the Senate reached a similar consensus.¹⁰⁹

The court seized upon this absence of formal legislation setting forth a policy on emissions reduction in *American Electric Power Co.* As the court noted, “Congress’s mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area.”¹¹⁰ The court went on to construe the common law doctrine of nuisance as the “existing common law” that Congress failed to supplant through legislative action.¹¹¹ As the court eventually concluded, it seems that the fairest interpretation of the dual independent Resolutions is that they are insufficient to establish a national policy on emissions restrictions.¹¹²

Moreover, Congress has passed legislation authorizing emissions regulation on other industries, specifically the auto industry.¹¹³ The Clean Air Act instructed the Environmental Protection Agency to implement restrictions on new motor vehicles to make them more environmentally friendly.¹¹⁴ In 2007, the Supreme Court interpreted the Clean Air Act as giving Congressional authorization to the E.P.A. to regulate carbon dioxide emissions from such new vehicles.¹¹⁵ Thus, Congress has in fact authorized the restriction of a major source of emissions¹¹⁶ in some form without any qualification regarding a global agreement being reached first. This cuts sharply against any contention that Congress has expressed a national policy to refrain from restricting emissions until a global agreement has been reached. However, the Clean Air Act does not completely foreclose the argument that a policy exists favoring abstention from restrictions on the emissions of domestic energy producers, which account for a larger percentage of U.S. man made carbon

¹⁰⁹ See *supra* note 108 and accompanying text.

¹¹⁰ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 330 (2d Cir. 2009) (citing *United States v. Texas*, 507 U.S. 529, 535 (1993)).

¹¹¹ See *id.* at 331.

¹¹² *Id.* at 331–32.

¹¹³ 42 U.S.C. § 7521(a)(1) (2006).

¹¹⁴ *Id.*

¹¹⁵ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007).

¹¹⁶ See U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY, *supra* note 76, at 8 (noting that 33 percent of U.S. man-made carbon dioxide emissions come from transportation activities).

dioxide than do motor vehicles,¹¹⁷ as the Clean Air Act does not mandate emissions restrictions of energy producers.¹¹⁸

Notably, although a clear expression of a national policy in favor of refraining from enacting mandatory domestic emissions restrictions prior to a global agreement would simplify the analysis, judicial imposition of such restrictions would violate the political question doctrine regardless of the existence of such a policy, as discussed below.

2. If Congress Has Not Sufficiently Expressed a Policy on Regulating Emissions of Domestic Energy Producers, Judicial Intervention Establishing Such Standards Requires an Initial Policy Determination in Violation of the Third *Baker* Factor

Even if the court in *American Electric Power Co.* was correct in deciding that no policy determination was made by Congress, judicial regulation of emissions violates the political question doctrine. If no such policy was established by Congress, a court deciding to impose emissions restrictions would be required to make an “initial policy determination” in violation of the third *Baker* factor.¹¹⁹

a. Unlike Previous “Direct Pollution” Cases, Global Warming Requires the Balancing of Numerous Factors with Far Reaching Global Policy Implications

In the context of water pollution, the Supreme Court held in 1972 that, where existing laws and regulation did not encompass the specific environmental nuisance alleged by a plaintiff, that plaintiff was not required to wait for comprehensive legislation to be enacted specifically outlawing that nuisance in order to bring a suit for injunctive relief.¹²⁰ Instead, the plaintiff could proceed with a common law nuisance action designed to halt the injurious conduct, despite the fact that future legislation may preempt the common law with respect to the particular nuisance.¹²¹ The court gave no suggestion of the need to make an initial policy determination in such a scenario.

However, as referenced above, global climate change occupies a different realm than direct pollution cases.¹²² Global

¹¹⁷ *Id.* (noting that energy production accounts for more than 40 percent of U.S. man made carbon dioxide emissions, as compared with 33 percent created by transportation).

¹¹⁸ *See generally* 42 U.S.C. § 7401 (2006).

¹¹⁹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹²⁰ *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 104 (1972).

¹²¹ *Id.* at 107.

¹²² *See supra* Part II.A.

climate change is not nearly as cut and dry as water pollution, which involves a direct injury attributable to a particular source and would not ordinarily require the weighing of many complex factors in constructing a remedy. Any relief sufficient to redress injuries and future injuries caused by global warming would require extended consideration of numerous incredibly complex factors. As the District Court put it in its opinion in *Connecticut v. American Electric Power Co.*:

Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an "initial policy determination" having been made by the elected branches.¹²³

Certainly, as spelled out by the District Court, many complex decisions need to be made in order to set emissions restrictions. As an initial matter, a court would need to determine whether domestic emissions should be capped at all, or whether the economic detriment caused by setting such limits, especially before any global agreement has been reached, would be too great to warrant restricting emissions of domestic energy producers.

The Second Circuit attempted to adjudicate around having to make an initial policy determination by casting the case before it as a simple nuisance action that required no policy considerations.¹²⁴ Perhaps, in a vacuum, a court determining that six energy producers' emissions contributed to damaging the interests of the plaintiffs could simply apply the common law doctrine of nuisance to determine whether injunctive relief was appropriate without any concern for overarching policy. However, as discussed above,¹²⁵ in order for a court to be able to redress the grievances of such plaintiffs for purposes of Article III standing where the complained of conduct is a contribution to global warming, some broader-reaching decision (or series of decisions) is necessary to confer any meaningful relief on the

¹²³ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005), *rev'd* 582 F.3d 309 (2d Cir. 2009).

¹²⁴ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009) (describing the lawsuit as "an ordinary tort suit").

¹²⁵ See *supra* Parts I and II for further discussion.

plaintiffs.¹²⁶ Any broader decision seems to require consideration of, at a minimum, the necessary policy determinations set forth by the District Court in *Connecticut v. American Electric Power Co.*¹²⁷ As the District Court emphatically and convincingly established, absent some initial policy determination from the executive or legislative branches, the judicial branch would be required to determine whether it is in the best interests of the United States to restrict emissions of its largest energy producers before other nations have agreed to respond in kind.¹²⁸

The wisdom of this far-reaching action would hinge on the delicate consideration of numerous complex global and domestic factors that are beyond the scope of question typically reserved for the judicial branch. Such action would require the judicial branch to balance concerns including the need for global action in combating climate change and the degree to which restricting emissions on domestic energy producers without corresponding restrictions on foreign energy producers would handicap domestic economic interests. This plainly goes far beyond routine application of longstanding nuisance principles that the Second Circuit asserted was all that it would be undertaking.

b. While Courts Have Previously Intervened in Politically Charged Issues, Even Those Courts Accused of Undertaking Judicial Activism Rarely, If Ever, Engage in Initial Policy Creation and Implementation

It is beyond dispute that courts often weigh in, either explicitly or as a consequence of the decisions that they make, on certain policy issues. However, the manner in which policy issues are influenced by the judiciary has historically largely been limited to decisions upholding, striking down or interpreting acts of the legislature. For instance, examine the most significant cases of the courts that commentators often point to in identifying judicial activism. Two periods of the Supreme Court's history are continually identified as particularly "activist" periods in which the Court ventured into the realm of determining policy issues: The New Deal era and the Warren Court.¹²⁹

Before the New Deal era, the Supreme Court repeatedly declared legislative attempts to regulate worker rights, including

¹²⁶ See *supra* Part II.A for further discussion.

¹²⁷ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272–73.

¹²⁸ *Id.* at 274.

¹²⁹ See WOLL, *supra* note 20, at 220–29.

setting wage and hour requirements, unconstitutional, holding that such laws would impermissibly restrict the right to freedom of contract.¹³⁰ Following the famed “Switch in Time that Saved Nine,” the Court suddenly began to uphold regulations setting maximum hours and minimum wages, overruling its previous precedents holding the opposite.¹³¹ The Court decided that freedom of contract was not absolute and could permissibly be restricted where the restriction would improve health and safety or protect vulnerable groups.¹³² In other words, the Court made a clear policy determination that freedom of contract should yield to worker protections where health and safety or vulnerable groups were concerned. However, it should be noted that the legislature had already made this policy choice in enacting the health and safety oriented laws in the first place, and so there was nothing “initial” about any policy determination made by the Court in these instances.

The Warren Court is likewise frequently cited as being an “activist” Court for its decisions striking down numerous laws harmful to minorities and other historically vulnerable groups.¹³³ The Warren Court is perhaps best known for striking down the “separate but equal” doctrine in schools through *Brown v. Board of Education*,¹³⁴ predicated on the Court’s determination that separate educational facilities based on race were inherently unequal, and thus ran afoul of equal protection. But even this decision was not setting any sort of initial policy. Instead, it was a determination that the policy previously set forth via the equal protection guaranteed by the 14th Amendment was not being advanced through segregated education. The Warren Court also recognized a constitutional right to privacy, which it held outweighed a state’s interest in prohibiting its citizens from using contraceptives in striking down such a law enacted by the State of Connecticut.¹³⁵ While this could be considered a policy determination of sorts in some respects, the real policy being advanced by that decision is the Supremacy Clause—the Court in

¹³⁰ *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York’s attempt to cap bakery workers’ hours at a maximum of 60 per week and 10 per day on grounds that such a law would impermissibly interfere with the right to freedom of contract).

¹³¹ *E.g.*, *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 391 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), and holding that freedom of contract was not absolute, and that the right to contract could be permissibly restricted where the restriction related to health and safety or protection of vulnerable groups).

¹³² *See id.* at 394.

¹³³ Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 255 (2008) (noting that the Warren Court is “virtually synonymous with the term ‘judicial activism’”).

¹³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

¹³⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

effect prohibited a state from enacting a law that, in the Court's view, conflicted with the Constitution. Advancement of such a policy did not require any "initial" policy determination by the Court, as the Supremacy Clause is of course written into the Constitution.

Some of the Court's brightest and most important moments have come amid accusations of judicial policy setting, including cases like *Brown*.¹³⁶ By the same token, some of the Court's lowest points, such as *Korematsu v. United States*, resulted from the Court's failure to inject itself into politically charged issues.¹³⁷ However, should the judicial branch be permitted to set far reaching emissions restriction policy, it would be taking a step beyond the purportedly "activist" decisions of The New Deal era or the Warren Court.

As the District Court in *Connecticut v. American Electric Power Co.* correctly noted, the relief sought by the plaintiffs in that case would require the court to unilaterally set an appropriate level of emissions reduction as well as setting a schedule by which those reductions were to occur.¹³⁸ Moreover, any policy sufficient to redress the injuries claimed by the plaintiffs would require, at a minimum, a broad-based decision (or series of decisions) setting restrictions on many (or all) domestic energy producers in order to make any measurable dent on the consequences of global warming complained of by the plaintiffs.¹³⁹ In other words, contrary to the vehicles used by the Warren Court in eliminating "separate but equal" education, the judicial branch would not be simply evaluating actions taken by the elected officials of the legislative branch and making a decision to uphold or declare unconstitutional those actions. Instead, the judicial branch would be required to set forth, in the first instance, the policy options that should prevail in the ongoing debate on global warming and the mechanisms which should be implemented to achieve those policy goals.

Consider an analogy to what the Warren Court would have had to undertake in *Brown* to match the largely legislative function that the judicial branch would have to assume in the global warming debate to determine the guiding policies for

¹³⁶ *Brown*, 347 U.S. 483. See generally Frank J. Macchiarola, Dorothy Kerzner Lipsky, & Alan Gartner, *The Judicial System & Equality in Schooling*, 23 FORDHAM URB. L.J. 567 (1996).

¹³⁷ 323 U.S. 214 (1944) (upholding the executive order mandating Japanese internment during World War II, specifically deferring to the determination made by Congress and the President that such measures were warranted).

¹³⁸ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272-73 (S.D.N.Y. 2005).

¹³⁹ See *supra* Part II.A.

emissions restrictions and implement the necessary changes in one fell swoop. First, allowing the judiciary to determine that domestic energy producers should be subject to emissions restrictions without any legislative action setting forth this policy would be akin to the Warren Court creating the concept of equal protection on its own, rather than extracting it from the 14th Amendment. There is no provision of legislatively enacted law to support such a decree from the judiciary at this point in time. Further, allowing the judiciary to set specific emissions restrictions on specific domestic energy producers to combat global warming would be the equivalent of the Supreme Court in *Brown* requiring that “Topeka High School A is to consist of no more than 70 percent white students, whereas Topeka High School B is to consist of no more than 60 percent white students, and Topeka High School C is to consist of no more than 65 percent white students.”

These, of course, were not the tactics taken by the Supreme Court in *Brown*. Rather, after initially striking down segregated education as unconstitutional under the equal protection clause of the 14th Amendment, the Court set further hearing on the matter of how to implement the necessary changes.¹⁴⁰ The following year, the case came back to the Supreme Court in *Brown II*.¹⁴¹ In that case, the Court recognized that the judicial branch should not be charged with creating the programs to implement desegregation.¹⁴² Rather, the Court held that “[f]ull implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”¹⁴³

The *Brown* and *Brown II* Courts followed a traditional pattern of legislation and jurisprudence in the context of major policy change.¹⁴⁴ First, a legislative body enacts a law. Second, a plaintiff damaged by the law challenges its validity before the courts. Third, the courts are charged with evaluating the validity of the law. Fourth, the courts either uphold or invalidate the law. Fifth, if the courts invalidate the law, they allow for the legislative branch (or if the legislative branch has delegated

¹⁴⁰ *Brown*, 347 U.S. at 495–96.

¹⁴¹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

¹⁴² *See id.* at 299–301.

¹⁴³ *Id.* at 299.

¹⁴⁴ All of the New Deal and Warren Court decisions cited previously likewise conform to this same traditional pattern.

rulemaking to an agency, that agency) to amend the scheme to bring it into compliance with the previously existing law, namely in *Brown*, the 14th Amendment.

By contrast, judicial intervention into the global warming debate steps far outside this framework. To date, no legislative body has acted to set emissions restrictions for domestic energy producers. Rather, through cases like *Connecticut v. American Electric Power Co.*, plaintiffs are attempting to fit an issue requiring widespread legislation into common law doctrines such as nuisance.¹⁴⁵ As such, rather than being charged with evaluating the validity of a law enacted by the elected officials of the legislature, the judicial branch, should it intervene, is instead left to create not only its own policies, but also the mechanisms for enforcing those policies.

In sum, the actions that would necessarily be undertaken by the judiciary should it intervene in the global warming debate and attempt to create its own set of emissions restrictions without allowing for the other coordinate branches of government to act would exceed the actions of even those courts long accused of “judicial activism.” The courts would need to determine whether emissions restrictions should be imposed on domestic energy producers at all, and if so, such restrictions should be imposed prior to the creation of a global emissions reduction agreement and how the emissions restriction scheme should be structured. These far reaching initial policy determinations that would be required of the judiciary are precisely what the third *Baker* factor is aimed to prevent, and so the political question doctrine precludes judicial intervention in this debate absent action by at least one of the other two branches of government.

3. Although Setting Emissions Restrictions Through the Judiciary Would Contravene the Political Question Doctrine as Set Forth Above, Judicial Branch Intervention in Setting Broad-Based Emissions Restrictions Would Not Directly Conflict with the Executive’s Constitutional Authority to Manage Foreign Relations, and So Would Not Violate the First *Baker* Factor

The first *Baker* factor precludes a court from intervening in a dispute where the court’s decision would intrude on the constitutional authority of a coordinate political branch to act.¹⁴⁶ In the context of global warming, and the roundly recognized

¹⁴⁵ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009).

¹⁴⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

need for a global agreement, the Constitution commits the right to negotiate and reach a global accord to the executive branch.¹⁴⁷ However, because judicial intervention in setting emissions restrictions would not directly interfere with the executive's ability to negotiate and enter such an agreement, it would not contravene the first *Baker* factor despite arguments to the contrary from the plaintiffs in *American Electric Power Co.*¹⁴⁸

While the Second Circuit ultimately reached the correct conclusion in *American Electric Power Co.*, holding that the first *Baker* factor would not be contravened by the court's intervention in the global warming debate,¹⁴⁹ its reasoning is unpersuasive. The court continually leaned upon the fact that courts have been adjudicating environmental disputes for over a century.¹⁵⁰ This logic is insufficient to satisfy the real issues involving executive authority to manage foreign relations in the context of entering the dispute over global warming, as the issues presented by global warming are distinguishable from the direct pollution cases previously adjudicated by the courts.

As noted above, the environmental disputes previously adjudicated by the judiciary involved discrete acts of pollution in well defined geographical areas—and not just any well defined geographical areas, but always *domestic* geographic areas.¹⁵¹ When a factory in Tennessee was emitting noxious fumes into Georgia causing damage to orchards and forests, the solution involved resolving only a single dispute between two domestic entities.¹⁵² Global warming and its consequences are different monsters altogether. Analysis of injuries directly and immediately caused by actors and actions contained entirely within the United States shed little light on the propriety of judicial intervention in the worldwide problem of global warming.¹⁵³

Rather, global warming needs to be considered in the context in which it is agreed it must be addressed in order to be effective. Global change, not merely domestic change, is required. It has long been the concern of Congress that enacting domestic

¹⁴⁷ U.S. CONST. art. II, § 2; *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

¹⁴⁸ *Am. Elec. Power Co.*, 582 F.3d at 325.

¹⁴⁹ *Id.* at 325–26.

¹⁵⁰ *See, e.g., id.* at 326–27.

¹⁵¹ *E.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *New Jersey v. City of New York*, 283 U.S. 473 (1931).

¹⁵² *Tenn. Copper Co.*, 206 U.S. 230.

¹⁵³ U.S. Environmental Protection Agency, *Climate Change-Health and Environmental Effects: International Impacts*, <http://www.epa.gov/climatechange/effects/international.html> (last visited Feb. 5, 2010).

restrictions before a global agreement is reached could weaken United States bargaining power, especially with respect to the developing nations that are likely to see dramatic growth in the level of harmful emissions generated.¹⁵⁴ Of particular concern are India and China, who are rapidly ascending the list of largest global polluters.¹⁵⁵ In 1992, the House of Representatives specifically found that domestic emissions reduction requires should only be taken “in the context of concerted international action.”¹⁵⁶

However, as the court in *American Electric Power Co.* correctly noted, this is not the type of “direct challenge” to an action committed to another branch of government to which the first *Baker* factor applies.¹⁵⁷ In the cases leading up to and cited by *Baker* as well as the cases decided in the four plus decades since *Baker*, courts finding the existence of a non-justiciable political question based on the first *Baker* factor have typically done so only where resolution of the case would preclude another branch of the government from undertaking an action constitutionally committed to it, such as a court decision recognizing a sovereign to the exclusion of the executive’s authority to do so or precluding the executive from dispatching troops overseas.¹⁵⁸ Contrary to these examples, judicial regulation of emissions created by domestic energy producers would not usurp the President’s authority to enter a global agreement. While it would seem likely to reduce the President’s bargaining power in negotiating such an agreement, this is distinct from assigning to the courts a function constitutionally committed to one of the other branches of government.

Because reduction in bargaining power in negotiating an international agreement is not sufficient to be considered a “direct challenge” to a function textually committed by the Constitution to another branch of government, the first *Baker* factor is not an impediment to judicial determination of

¹⁵⁴ See H.R. REP. NO. 102-474 (I), Greenhouse Warming—Energy Implications (1992).

¹⁵⁵ U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (reporting that, as of 2006, China and India were the first and fourth largest emitters, respectively).

¹⁵⁶ H.R. REP. NO. 102-474 (I), Greenhouse Warming—Energy Implications (1992).

¹⁵⁷ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 n.3 (2d Cir. 2009).

¹⁵⁸ *E.g.*, *Jones v. United States*, 137 U.S. 202, 212 (1890) (demonstrating a plaintiff’s attempt to challenge President’s determination that the Guano Islands were a territory of the United States presented a non-justiciable political question); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (stating that the attempted challenge to the President’s decision to deploy troops in a foreign nation was non-justiciable political question); *Can v. United States*, 14 F.3d 160, 162–63 (2d Cir. 1994) (stating that the court could not make determination of title to blocked South Vietnamese assets because it would preclude President’s authority to recognize foreign governments).

emissions restrictions, despite the argument to the contrary by the energy producer defendants in *American Electric Power Co.*¹⁵⁹ Rather, the problematic *Baker* factors are three, four, five and six, as set forth above.¹⁶⁰

C. The Solution is to Allow the Executive and/or Legislative Branches to Act Before the Judicial Branch Becomes Involved

The above analysis concluding that the judicial branch should not be setting emissions restrictions on domestic energy producers is not to suggest that emissions from domestic energy producers cannot or should not be restricted, as certainly the vast majority of scientific evidence points to climate change as a real and serious problem with potentially devastating consequences. However, instead of the judicial branch setting emission standards either in one fell swoop or over time through piecemeal litigation against specific contributing entities, courts should refrain from entering the dispute until the executive reaches a global accord ratified by the legislature which the legislature passes laws or delegates the authority to enforce, or until the legislature makes clear that a national policy of emissions restrictions on domestic energy producers should be put in place even prior to a global agreement.

Legislative action is precisely what occurred in *Massachusetts v. EPA*.¹⁶¹ In that case, multiple states relied on action taken by the legislative branch to attempt to compel the EPA to regulate new motor vehicle carbon dioxide emissions.¹⁶² Congress enacted the Clean Air Act and charged the EPA with designing mechanisms for its enforcement.¹⁶³ The court was then left to assume its traditional role of interpreting the laws enacted by the legislature.

However, as noted above, the Clean Air Act does not mandate restricting the carbon dioxide emissions of domestic energy producers.¹⁶⁴ While there is a strong push for a global agreement emerging from the international community, few would say that a comprehensive global agreement to which the United States and other major emitters are likely to join is

¹⁵⁹ *Am. Elec. Power Co.*, 582 F.3d 309 at 324–25.

¹⁶⁰ See Part II.B.

¹⁶¹ 127 S. Ct. 1438 (2007).

¹⁶² *Id.*

¹⁶³ 42 U.S.C. § 7521(a)(1) (2006).

¹⁶⁴ See 42 U.S.C. § 7401 (2006).

imminent.¹⁶⁵ Unless and until some global agreement is reached, Congress would do well to make a determination as to which policy course to take: either pass legislation preventing further emissions restrictions until a global agreement is reached, or press forward with domestic regulation despite the lack of an international agreement.

III. HOW THE SECOND CIRCUIT'S DECISION IN *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.* REMAINS USEFUL

Although the Second Circuit's opinion holding that the political question doctrine does not preclude courts from setting emissions restrictions on defendant energy producers under the common law nuisance doctrine should not withstand further scrutiny, it remains a useful opinion in the race to mitigate the consequences of global warming. This is because, as the law currently stands (at least in the Second Circuit), the judicial branch can now seemingly unilaterally impose emissions restrictions on emitters of carbon dioxide without the influence of either of the other two branches of government.¹⁶⁶ This is an undesirable scenario for many important players in the global climate change debate, and may help spur long awaited action by the executive and legislative branches.

The energy lobby has long been accused of attempting to prevent, delay or at a minimum, assure the energy industry favorable terms in any comprehensive policy on climate change.¹⁶⁷ Energy companies have committed large sums of money to these causes. For instance, The American Coalition for Clean Coal Electricity, an advocacy group consisting of 48 energy producers, mining companies, and railroads, had committed \$9.95 million to those ends as of March 2009.¹⁶⁸ Energy producers routinely make large campaign contributions to high-ranking members of Congressional committees charged with energy regulation and environmental action. For example, one of the largest contributors during the 2009–2010 campaign cycle to Rep. Joe Barton, Chairman of the House Committee on Energy &

¹⁶⁵ See Bryan Walsh, *Climate Accord Suggests a Global Will, if Not a Way*, Feb. 2, 2010, TIME.COM, <http://www.time.com/time/health/article/0,8599,1958234,00.html>.

¹⁶⁶ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

¹⁶⁷ *Public Health and Natural Resources: A Review of the Implementation of Our Environmental Laws: Hearing Before S. Comm. on Governmental Affairs*, 107th Cong., 2nd Sess., (2002) (testimony of Eric Shaeffer). Shaeffer, the former director of the Office of Regulatory Enforcement at the EPA, testified that the "energy lobbyists . . . are working furiously to weaken" regulation of emissions created by energy producers. *Id.*

¹⁶⁸ Wayne Berman, *Energy Reform: Heavy Hitters Seek to Sway Cap and Trade Debate*, FOXNEWS.COM, Mar. 12, 2009, <http://www.foxnews.com/politics/2009/03/12/heavy-hitters-sway-cap-and-trade/>.

Commerce, is none other than American Electric Power Co., the lead defendant in *Connecticut v. American Electric Power Co.*¹⁶⁹ The industries making the two largest contributions to Rep. Barton are the electric utilities and oil & gas industries.¹⁷⁰

Given the aggressive attempts to influence climate change legislation that the energy lobby has demonstrated, an event causing energy producers to support emissions reduction legislation would be significant in making progress in this area. A decision authorizing piecemeal judicial regulation of emissions could be such an event.

While the energy lobby has long resisted comprehensive emissions reduction policies, if such policies are to be initiated, it follows that energy producers would prefer they come from a source over which influence can be asserted to assure favorable terms. A judicially created emissions restriction seems to be a worst case scenario for energy producers. Unlike the political branches of government, the judiciary is intended to be beyond reproach by lobbyists. Without the need for (or the ability to accept) political contributions, the influence that can be asserted over the judiciary should be markedly less than that over the legislative process in Congress. The executive can be influenced in a similar manner, especially a first-term President needing cooperation on other major policy initiatives, including health care reform.

However, with the potential for increased efforts by the energy lobby to assert legislative or executive driven policies on emissions reductions comes the increased risk that any such policy will be too favorable to energy producers, and correspondingly too lenient on emissions. This has already proven to be an area for concern, as several notable pundits have criticized the Waxman-Markey bill on this basis.¹⁷¹ An increased focus from energy producers in achieving favorable terms could exacerbate this issue.

While only time will tell the nature of the impact the Second Circuit's decision in *American Electric Power Co.*, the decision seems likely to shift the incentives for the energy industry toward encouraging some action by the legislature and/or the executive. The optimal scenario would seem to be a global

¹⁶⁹ *Joe Barton*, OpenSecrets.org, <http://www.opensecrets.org/politicians/summary.php?cid=N00005656&cycle=2010#> (last visited Mar. 9, 2010).

¹⁷⁰ *Id.*

¹⁷¹ *E.g.*, Press Release, Rep. Dennis Kucinich, Passing a Weak Bill Today Gives Us Weak Environmental Policy Tomorrow, (June 25, 2009), available at <http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=134813>.

accord, followed by legislative action to enforce the terms of that accord domestically. The courts would then be restored to their customary role of adjudicating disputes over the meaning of the global accord and the subsequent legislation passed by Congress, rather than attempting to create policy in the first instance.

CONCLUSION

The time for significant new policy on climate change is now. Widespread, dramatic reductions are required in order to reduce the looming and potentially devastating consequences of global warming. The judicial branch, along with the public, is rightfully growing frustrated with the lack of action both internationally and domestically. The Second Circuit has boldly asserted itself as a decision-maker where Congress has been unwilling.

However, despite the fact that the world can no longer afford to wait, the judicial branch is simply not the appropriate body to set forth the policies that will govern the global warming crisis going forward. While the Second Circuit's decision should not withstand further legal scrutiny, it may turn out to be an underappreciated hero on climate change.