

GLOBAL WARMING: A QUESTIONABLE USE OF THE POLITICAL QUESTION DOCTRINE

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INTRODUCTION

My seventh grade science teacher told our class that global warming was a myth. Good thing—otherwise we might have had to worry about the future of our environment. Then there was the Chief of Staff for the White House Council on Environmental Quality who censored and edited reports prepared by government scientists to down-play the link between greenhouse gas emissions and global warming.¹ At least the American public was “saved” from having to pay higher prices for energy—prices that would more accurately reflect the cost of consuming that energy.² My former science teacher and the White House Administration aide must take solace in the fact that, for the time being, the federal government remains on the sidelines as the scientific community grows closer to a consensus that climate change is occurring and that human activity (i.e., burning fossil fuels) is significantly contributing to that change.³

Not everyone is as content as the federal government to remain idle as domestic greenhouse gas emissions continue to escalate. Several states have taken steps to begin to reduce emissions from electric generation plants, automobiles, and other sources of carbon dioxide emissions.⁴ Some of the more significant measures include regional cap-and-trade programs by groups of both eastern and western states,⁵ administrative agency regulation of emissions,⁶ and

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1. Andrew C. Revkin, *Bush Aide Softened Greenhouse Gas Links to Global Warming*, N.Y. TIMES, June 8, 2005, at A1.

2. See, e.g., Felicity Barringer, *California, Taking Big Gamble, Tries to Curb Greenhouse Gases*, N.Y. TIMES, Sept. 15, 2006, at A1.

3. In February 2007, the Intergovernmental Panel on Climate Change (“IPCC”) released a summary of its findings from its Fourth Assessment Report due to be released later in 2007. The IPCC reported with ninety percent certainty that the increase in global temperatures over the past fifty years is due to the increase in human-caused greenhouse gas levels. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 10 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf> [hereinafter IPCC REPORT].

4. Juliet Eilperin, *Cities, States Take Lead on Global Warming*, BOSTON GLOBE, Aug. 13, 2006, at A5.

5. See, e.g., Timothy Gardner, *Western States United to Bypass Bush on Climate*, REUTERS, Feb. 26, 2007, <http://www.reuters.com/article/environmentNews/idUSN2636822120070226>; Regional Greenhouse Gas Initiative, About RGGI, <http://www.rggi.org/about.htm> (last visited Nov. 5, 2007).

6. In 2004, the California Air Resources Board promulgated regulations to limit carbon dioxide emissions from automobiles sold in California beginning in 2009. CAL. CODE REGS. tit.

broad policy initiatives such as the California Global Warming Solutions Act.⁷ States have also resorted to traditional common law to try to achieve results outside of their boundaries. In one such case, *Connecticut v. American Electric Power Co.*,⁸ eight states, the City of New York, and three private plaintiffs brought an action in federal court alleging that the carbon dioxide emissions of five large electric utility companies caused a public nuisance (i.e. global warming) that must be abated.⁹

American Electric Power is noteworthy because it is the first case in which plaintiffs sought to abate global warming as a public nuisance.¹⁰ The plaintiffs sought an order “enjoining each of the [d]efendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.”¹¹ However, the plaintiffs must scale a jurisprudential mountain including separation of powers obstacles and justiciability barriers before they can present the merits of their public nuisance claim. Ultimately, the case was dismissed by the district court as a non-justiciable political question.¹²

The purpose of this Note is to examine the major hurdles associated with bringing a public nuisance action for the emission of large quantities of carbon dioxide and the resulting change in global climate and to demonstrate that such a claim is *not* a non-justiciable political question. Part I presents a synopsis of *American Electric Power*. Part II provides background information on public nuisance as a cause of action under federal common law. Part III discusses the issues of preemption and standing which are obstacles the plaintiffs must defeat before the merits of their case will be considered. Part IV introduces the political question doctrine and argues that the plaintiffs’ claim in *American Electric Power* does not constitute a non-justiciable political question. Finally, the Note

13, § 1961.1 (2006). Subsequently, several auto manufacturers filed suit alleging that the regulations were preempted by several federal statutes and on the basis of foreign affairs preemption. *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1183, *stay granted*, 2007 U.S. Dist. LEXIS 3002 (E.D. Cal 2007). A district court denied California’s motion to dismiss the auto manufacturers’ complaint and found that they had stated valid claims for preemption by federal statute and foreign affairs preemption. *Id.* at 1188.

7. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38500 (West Supp. 2008).

8. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

9. *Id.* at 267.

10. *States, NYC File Public Nuisance Lawsuit Against Utilities for Carbon Dioxide Cases*, Legal News—Notable News Developments in the Law, 73 U.S.L.W. 2055 (Aug. 2004). Subsequently, in September 2006, California brought another public nuisance action against six auto manufacturers alleging that the carbon dioxide emissions from their automobiles greatly contribute to global warming. Office of the Attorney Gen., Cal. Dep’t of Justice, News and Alerts, *Attorney General Lockyer Files Lawsuit Against “Big Six” Automakers for Global Warming Damages in California* (Sept. 20, 2006), <http://ag.ca.gov/newsalerts/release.php?id=1338>.

11. *Am. Elec. Power*, 406 F. Supp. 2d at 270.

12. *Id.* at 271.

concludes that although the district court decision should be overturned on political question grounds, it will not be surprising if the Second Circuit finds that the plaintiffs have failed to overcome at least *one* of the many hurdles they face.

I. *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.*

In July 2004, eight states and the City of New York brought an action under federal common law and, in the alternative, state common law, seeking to abate a public nuisance caused by carbon dioxide emissions of the five electric utilities which represented the largest emitters of carbon dioxide in the country.¹³ The plaintiffs included the states of Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and the City of New York, and the defendants included large electric utility companies, specifically American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation.¹⁴

The plaintiffs alleged that “[t]here is a clear scientific consensus that global warming has begun,” that greenhouse gas emissions are a significant cause of global warming, that “carbon dioxide is by far the most significant greenhouse gas emitted by human activity,” and that “global warming is expected to accelerate as concentrations of greenhouse gases, and in particular of carbon dioxide, increase.”¹⁵ According to the plaintiffs’ complaint, defendants emit approximately 650 million tons of carbon dioxide per year, which accounts for about ten percent of all carbon dioxide emissions produced from “human activities in the United States,” which substantially contribute to “elevated levels of carbon dioxide and global warming.”¹⁶

The plaintiffs alleged that global warming is a public nuisance under federal common law because increasing temperatures over the next 100 years will have “substantial adverse impacts upon people, environment and property in the plaintiffs’ jurisdictions and will require the plaintiffs to expend billions of dollars to respond to the impacts.”¹⁷ The plaintiffs claimed that “[d]efendants’ carbon dioxide emissions are a direct and proximate contributing cause of global

13. *Id.* at 267. Three private parties filed a companion suit that was dismissed by the district court in the same decision. *Id.* This Note does not discuss issues specifically related to private plaintiffs.

14. *Id.* Cinergy Corporation merged with Duke Energy in April 2006. Duke Energy, Cinergy Complete Merger, <http://www.duke-energy.com/news/releases/2006/Apr/2006040301.asp> (last visited Nov. 5, 2007).

15. Complaint at 22-24, *Am. Elec. Power*, 406 F. Supp. 2d 265 (1:04-CV-05669).

16. *Id.* at 1.

17. *Id.* at 29. The plaintiffs cite threatened injuries to public health, coastal resources, water supplies, the Great Lakes, agriculture, ecosystems, forests, fisheries, and wildlife, increased risk of wildfires, increased risk of abrupt and catastrophic climate change, and injury to states’ interests in ecological integrity as some of the adverse effects of global warming. *Id.* at 30-42.

warming and of the injuries and threatened injuries to the plaintiffs,” which interfere with public rights including “the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.”¹⁸ Therefore, the plaintiffs sought to hold defendants jointly and severally liable for creating a public nuisance, cap the defendants’ carbon dioxide emissions so as to abate the public nuisance, and reduce the defendants’ carbon dioxide emissions going forward “by a specified percentage each year.”¹⁹

The United States District Court for the Southern District of New York dismissed the case for lack of jurisdiction because the case presented a political question, which “the Judiciary is without power to resolve.”²⁰ The district court cited separation of powers, foreign policy, and national security interests implicated by global warming as support for its decision.²¹ On June 21, 2007, the Second Circuit ordered the parties to file supplemental letter briefs addressing the impact of the April 2, 2007, Supreme Court decision in *Massachusetts v. EPA*.²² As of the date this Note went to print, February 4, 2008, the Second Circuit had not yet issued a decision.

II. PUBLIC NUISANCE AND THE FEDERAL COMMON LAW

The concept of a public (or common) nuisance began as an invasion against the crown and eventually expanded to encompass an invasion against the right of the public at large.²³ Although many states have enacted statutes which deem certain activities to be “nuisances,” nuisance as a common law tort continues to be “judge-made” law.²⁴ Like any area of common law, the specific elements of a public nuisance action brought under state common law vary by state, but the Restatement is a good starting place. The Restatement (Second) of Torts section 821B(1) defines a public nuisance as “an unreasonable interference with a right common to the general public.”²⁵ Prior to the enactment of federal environmental legislation in the late 1960s and early 1970s, public nuisance played a major role in addressing environmental harms.²⁶

18. *Id.* at 43-44.

19. *Id.* at 49.

20. *Am. Elec. Power*, 406 F. Supp. 2d at 267.

21. *Id.* at 273.

22. 127 S. Ct. 1438 (2007).

23. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979).

24. *Id.* § 821B cmt. b-c.

25. *Id.* § 821B(1).

26. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.1, at 112-13 (2d ed. 1994) (“Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation”); see also Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What’s Worked; What’s Failed; What May Work*, 21 ENVTL. L. 1549, 1554-55 (1991).

A. Federal Common Law of Public Nuisance

In contrast to state court, where “judge-made” common law is the norm, the *Erie* doctrine has significantly reduced the role of the federal judiciary as a lawmaking entity.²⁷ However, “the [Supreme] Court has found it necessary, in a ‘few and restricted’ instances . . . to develop federal common law.”²⁸ Generally this occurs when the conflict presents a federal question (i.e. conflicts between states or interferences with states’ rights as quasi-sovereign entities) and when federal statutory law does not directly address the issue.²⁹

It is important to note that in the context of a public nuisance action, the application of both state common law and federal common law is inherently inconsistent. A plaintiff cannot bring a public nuisance complaint under *both* state and federal common law because federal common law is only appropriate when there is a federal question involved, and the presence of that federal question necessarily precludes the use of state law.³⁰ The plaintiffs in *American Electric Power* pleaded in the alternative, bringing their public nuisance action under federal common law and, *in the alternative*, state common law.³¹ Their federal common law claim was based on the interstate nature of the carbon dioxide emissions and the alleged injuries to the plaintiffs’ quasi-sovereign interests.³²

B. History of Public Nuisance Cases Involving Pollution Under Federal Common Law

The United States Supreme Court has recognized federal common law claims sounding in public nuisance in a variety of noteworthy environmental or pollution-related cases. In *Missouri v. Illinois* (“*Missouri I*”),³³ the Court found that Missouri stated a claim to enjoin the State of Illinois and the Sanitary District of Chicago from constructing a channel that would have reversed the flow of a river and released large quantities of sewage into the Mississippi River.³⁴ Missouri claimed that such a release would cause injury to “the health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River.”³⁵

27. *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 312 (1981).

28. *Id.* at 313 (quoting *Wheelden v. Wheeler*, 373 U.S. 647, 651 (1963)).

29. *Id.*

30. *Id.* at 313 n.7; *see also* *Illinois v. City of Milwaukee*, 731 F.2d 403, 410-11 (7th Cir. 1984).

31. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

32. Brief for Plaintiffs-Appellants at 46-48, *Connecticut v. Am. Elec. Power Co.*, No. 05-5104 (2d Cir. Dec. 15, 2005).

33. 180 U.S. 208 (1901).

34. *Id.* at 248.

35. *Id.* at 241. In a later proceeding, the Court reaffirmed its position in *Missouri I* that “a case such as is made by the bill may be a ground for relief.” *Missouri v. Illinois* (*Missouri II*), 200 U.S. 496, 520 (1906). However, after reviewing the evidence presented by Missouri, the Court

In *Georgia v. Tennessee Copper Co.*,³⁶ Georgia brought action in public nuisance against an out-of-state copper producer seeking to abate the emission of sulfurous acid.³⁷ The Court held that Georgia had stated a claim because it alleged “wholesale destruction of forests, orchards, and crops” in five counties in the state.³⁸

In *New Jersey v. City of New York*,³⁹ New Jersey sought an injunction to prohibit the City of New York from dumping garbage into the Atlantic Ocean.⁴⁰ The Court described New Jersey’s alleged injury as “[v]ast amounts of garbage . . . cast on the beaches . . . extend[ing] in piles and windrows along them.”⁴¹ The Court found that the garbage was a threat to public health, noxious, ugly, and a negative influence on property values and held that even though the City claimed to be acting pursuant to a permit, the City was still subject to “liability for damage or injury thereby caused to others.”⁴²

Finally, in *Illinois v. City of Milwaukee* (“*Milwaukee I*”),⁴³ Illinois brought a public nuisance action to abate the daily release by the City of Milwaukee of about 200 million gallons of “raw or inadequately treated sewage” into Lake Michigan.⁴⁴ The Court recognized the cause of action, noting “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.”⁴⁵

Missouri I and *II*, *Tennessee Copper*, *New Jersey*, and *Milwaukee I* and *II* support much of the discussion in the *American Electric Power* appeal on the issue of whether plaintiffs have stated a claim under federal common law and other issues such as preemption and standing discussed *infra*.

C. Federal Common Law—Essential Elements

The elements of a federal common law public nuisance action do not necessarily follow the Restatement definition. To the contrary, they tend to have

found that it was insufficient to prove the allegations of the bill. *Id.* at 526.

36. 206 U.S. 230 (1907).

37. *Id.* at 236.

38. *Id.*

39. 283 U.S. 473 (1931).

40. *Id.* at 476.

41. *Id.* at 478.

42. *Id.* at 478, 482-83.

43. 406 U.S. 91 (1972).

44. *Id.* at 92-93.

45. *Id.* at 103. In *Milwaukee I*, the Supreme Court declined to exercise original jurisdiction and remanded the case to the district court. *Id.* at 108. On remand, the district court found defendants’ dumping of sewage constituted a public nuisance and issued an injunction, which was upheld by the Seventh Circuit. *Illinois v. City of Milwaukee*, 599 F.2d 151, 169-170 (7th Cir. 1979). However, in *Milwaukee II*, the Supreme Court vacated the Seventh Circuit’s decision, finding that the 1972 and 1977 Amendments to the Federal Water Pollution Control Act had preempted the federal common law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 322-23 (1981).

a “we’ll know it when we see it” quality. For example, in *Milwaukee I*, the Court stated, “federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.”⁴⁶ Rather than defining the elements of a federal common law public nuisance, the Court in *Milwaukee I* gave examples of activities which had been deemed public nuisances in prior decisions.⁴⁷ The Court emphasized that “[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.”⁴⁸

In *American Electric Power*, the defendant electric utilities argued that federal common law only contemplates a cause of action in a “simple type” public nuisance.⁴⁹ They relied on language from *North Dakota v. Minnesota*⁵⁰ and prior Supreme Court decisions to support their contention that only “simple type” nuisances “where immediately noxious or harmful substances invade a State and cause severe localized harms” are actionable under federal common law.⁵¹

Whereas the defendants contended that a public nuisance claim under federal common law requires a certain type of activity and invasion,⁵² the plaintiffs argued that interstate nuisance cases are “intricately linked to our constitutional structure” and that because “States’ right to seek redress in federal court for injuries from out-of-state sources to their quasi-sovereign interests was a precondition for ratification of the Constitution,” any serious injury to their quasi-sovereign interest is actionable under federal common law.⁵³ Interestingly, the plaintiffs relied on most of the same cases as the defendants to support their broad interpretation of the scope of a federal common law public nuisance action.⁵⁴ This idea stems from early Supreme Court cases, such as *Tennessee Copper*, in which the Court emphasized that an injured State must have recourse in federal court because States gave up their right to forcibly abate a nuisance by joining the United States.⁵⁵ The *Tennessee Copper* Court also described the nature of the public nuisance claim in terms of the quasi-sovereign interests at

46. *Milwaukee I*, 406 U.S. at 107-08.

47. *Id.* at 108.

48. *Id.* at 107-09.

49. Brief for Defendants-Appellees American Electric Power Company, Inc. et al. at 20-23, *Connecticut v. Am. Elec. Power Co.*, No. 05-5104 (2d Cir. Feb. 20, 2006) [hereinafter Brief for Defendants-Appellees].

50. 263 U.S. 365, 374 (1923) (“It is the creation of a public nuisance of simple type for which a state may properly ask an injunction.”).

51. *New Jersey v. City of New York*, 283 U.S. 473 (1931); Brief for Defendants-Appellees, *supra* note 49, at 21 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906)).

52. *Id.* at 20-21.

53. Brief for Plaintiffs-Appellants, *supra* note 32, at 48.

54. *Id.* at 51-53 (citing *Illinois v. City of Milwaukee*, 599 F.2d 151 (1979); *Tenn. Copper*, 206 U.S. at 237; *Missouri II*, 200 U.S. at 518, 521).

55. *Tenn. Copper*, 206 U.S. at 237.

stake.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.⁵⁶

Therefore, the plaintiffs argued that “a complaint states a claim where it alleges injuries to quasi-sovereign interests of ‘serious magnitude.’”⁵⁷

The widely divergent positions of the plaintiffs and the defendants illustrate that the essential elements of a public nuisance claim under federal common law have not been precisely defined. The lack of a precise definition is due in part to the small number of cases in which a State or any other plaintiff has successfully obtained an injunction to abate a public nuisance under federal common law.⁵⁸ In large part, the rarity of these types of public nuisance cases is the result of several major hurdles a plaintiff must clear before the merits of its case will be considered.

III. HURDLES: PUBLIC NUISANCE ACTION FOR ABATEMENT OF POLLUTION

Plaintiffs seeking to bring a common law public nuisance action in a federal court face major hurdles including foreign affairs preemption, preemption of federal common law, preemption of state law, and justiciability issues such as standing and the political question doctrine.

In the late 1960s and early 1970s, Congress began to pass environmental legislation with teeth. Injuries stemming from interstate air and water pollution which were once redressable primarily in the courts were suddenly the subject of broad regulatory schemes at the federal level.⁵⁹ As a result, both federalism and separation of powers concerns prompted courts to question the validity of state and federal common law to adjudicate environmental nuisance cases, and

56. *Id.* at 238.

57. Brief for Plaintiffs-Appellants, *supra* note 32, at 52-53 (citing *Tenn. Copper*, 206 U.S. at 237).

58. *See, e.g.*, *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117, 120 (3d Cir. 1983); *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981); *Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982).

59. *See, e.g.*, Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (2000 & Supp. IV 2004) (establishing a comprehensive regulatory scheme to address water pollution); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000 & Supp. IV 2004) (establishing a regulatory regime for hazardous waste); Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000 & Supp. IV 2004) (establishing a broad regulation regime to address air pollution); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000 & Supp. IV 2004) (establishing a regulatory and remediation regime for hazardous substances).

the issue of preemption started taking center stage.⁶⁰

The concept of preemption encompasses three distinct scenarios: (1) foreign affairs policy preempting state or federal common law; (2) federal statutory law preempting federal common law (sometimes called “displacement”); and (3) federal statutory law preempting state statutory or common law.⁶¹ Either of the first or second scenarios could figure prominently in the upcoming decision of the Second Circuit in *American Electric Power*.⁶²

A. Foreign Affairs Preemption

The defendants in *American Electric Power* have argued that global warming is an issue of international dimensions, and, as such, all decisions relating to domestic global warming policy should be made by the political branches of the federal government.⁶³ Although the arguments relating to foreign affairs preemption are similar to the arguments made by the district court in finding the case to be a non-justiciable political question, foreign affairs preemption includes several distinct criteria. First, a claim, whether based on federal common law, state common law, or state statutory law, might be preempted if the claim involves engagement in conduct of foreign policy.⁶⁴ Second, a claim might be preempted if the remedy sought by the claim would impair the federal government’s bargaining power during negotiations with foreign governments.⁶⁵

The defendants argued that a judicial decision to enjoin their carbon dioxide emissions would “undermine the foreign policy approach to global climate change that Congress established and the Executive Branch is implementing.”⁶⁶ They pointed to the President’s policy of “not mandating unilateral reductions in [carbon dioxide] emissions” and Congress’s endorsement of that policy to show that the plaintiffs’ claim does interfere with foreign affairs policy.⁶⁷ Professor

60. See generally Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 747 (2006).

61. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294, 311 (2005).

62. Because the plaintiffs in *American Electric Power* pleaded in the alternative, relying first on federal common law public nuisance and, in the alternative, state public nuisance, the third scenario would not come into play until the federal claims were dismissed in a final judgment.

63. Brief for Defendants-Appellees, *supra* note 49, at 44-48.

64. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (involving an Oregon law which based a foreigner’s right to inherit property on whether his home country would allow an American citizen to inherit property).

65. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (involving a California law related to insurance policies issued to holocaust survivors which interfered with federal government negotiations with foreign governments); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000) (involving a Massachusetts law that denied certain rights to companies doing business in Burma).

66. Brief for Defendants-Appellees, *supra* note 49, at 44.

67. Norman W. Fichthorn & Allison D. Wood, *Constitutional Principles Prohibit States from*

Merrill points out that a broad reading of *American Insurance Ass'n v. Garamendi* and *Crosby v. National Foreign Trade Council* suggests that states may never interfere in matters which are “under active negotiation between the United States and . . . foreign nations” because such interference will reduce the bargaining power of the United States.⁶⁸

The first response to that argument is that *Garamendi* and *Crosby* cannot be read broadly because just about any state action *could* impair the federal government’s negotiating leverage in some way, and therefore a broad reading would be a limitless reading.⁶⁹ The second response is that none of the President’s international partnerships contemplate mandatory reductions in greenhouse gas emissions.⁷⁰ For the most part, international partnerships focus on cooperation to develop better technology, facilitate markets for renewable and other clean sources of energy, and develop policy approaches to help reduce greenhouse gas emissions.⁷¹ Therefore, it is difficult to see how a judicial ruling that would affect the five named defendants would interfere with any ongoing “active negotiations” between the President and the international community on global climate change. Along these lines, the plaintiffs have argued that foreign affairs preemption should *not* apply to the plaintiffs’ federal common law public nuisance claim because the abatement of domestic carbon dioxide emissions simply does not involve relations between domestic and foreign actors.⁷² The plaintiffs only seek to cap and reduce the *defendants’* emissions.

The defendants must rely on a broad reading of the relevant case law coupled with an assumption that the executive branch is actually engaging in negotiations to cut greenhouse gas emissions with foreign nations to mount a viable foreign affairs preemption argument. Although it is certainly not the defendants’ strongest defense, it is one that the plaintiffs will have to defeat.

B. Preemption (or “Displacement”) of Federal Common Law

The plaintiffs have brought a case under the federal common law of public nuisance because there is no federal statute that limits carbon dioxide emissions. As the district court noted, “[t]he EPA has ruled that the Clean Air Act does not

Regulating CO2 Emissions, 26 No. 5 ANDREWS ENVTL. LITIG. REP. 11 (2005).

68. Merrill, *supra* note 61, at 323-24.

69. *Id.* at 327-28.

70. Council on Environmental Quality, Clean Energy and Climate Change, <http://www.whitehouse.gov/ceq/clean-energy.html> (last visited Nov. 5, 2007).

71. *Id.*

72. See Reply Brief for Plaintiffs-Appellants at 27-28, *Connecticut v. Am. Elec. Power Co.*, No. 05-5104 (2d Cir. Sept. 22, 2005); Merrill, *supra* note 61, at 328 (arguing that foreign affairs preemption should not bar plaintiffs’ claim in *American Electric Power* because it is grounded in federal common law and it only seeks a remedy within the United States); Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1898-99 (2006) (arguing for a rule which would limit foreign affairs preemption to circumstances in which a state was actually interacting with foreign entities).

authorize carbon dioxide regulation.”⁷³ This begs the essential question: does the lack of federal regulation of carbon dioxide emissions indicate that Congress meant to preempt a federal common law public nuisance action to limit them? The Supreme Court has dealt with the interplay between federal statutory law and pre-existing federal common law in several key cases.

1. *Milwaukee II*.—In *Milwaukee II*, the Supreme Court held that the 1972 and 1977 Amendments to the Federal Water Pollution Control Act preempted Illinois’s federal common law public nuisance action to enjoin the continuing discharge of inadequately treated sewage into Lake Michigan by the City of Milwaukee and several other political subdivisions of the State of Wisconsin.⁷⁴ Among other things, the 1972 Amendments prohibited any discharge of pollutants into public waters from any source “except pursuant to a permit.”⁷⁵ The Environmental Protection Agency (“EPA”) and any “qualifying state agency” were authorized to issue permits to sources of discharges, such as the Sewerage Commission of the City of Milwaukee, with “specific effluent limitations” set by EPA rules.⁷⁶ The Amendments also provided “for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress” by participating in public hearings, submitting written recommendations during the permitting process, or requesting an EPA veto of a pending permit.⁷⁷

In *Milwaukee II*, the Court held that “Congress has not left the formulation of appropriate federal standards to the courts . . . but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.”⁷⁸ In finding that the Federal Water Pollution Control Act (“FWPCA”) had preempted a federal common law action in public nuisance, the Court provided a thorough analysis of federal common law and its relationship to federal statutory law. First, the Court emphasized that federal courts do not generally “develop and apply their own rules of decision” like state courts.⁷⁹ Rather, “[f]ederal common law is a ‘necessary expedient’ . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”⁸⁰ The Court stated the relevant inquiry as follows: “whether the legislative scheme ‘[speaks] directly to a question’ . . . not whether Congress [has] affirmatively proscribed the use of federal common law.”⁸¹ Moreover, the Court indicated that there is a presumption against the use of federal common law because “it is for Congress, not federal courts, to articulate

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

74. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 320 (1981).

75. *Id.* at 310-11.

76. *Id.* at 311.

77. *Id.* at 325-26.

78. *Id.* at 317.

79. *Id.* at 312.

80. *Id.* at 314 (quoting *Comm. for Consideration of Jones Falls Sewage v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)).

81. *Id.* at 315.

the appropriate standards to be applied as a matter of federal law.”⁸²

The Court found the 1972 Amendments to be comprehensive and, thus, a bar to a federal common law nuisance action for several reasons. First, congressional intent was clearly to “establish an all-encompassing program of water pollution regulation.”⁸³ Second, the 1972 Amendments established an administrative regime to thoroughly deal with the “problem of effluent limitations,”⁸⁴ and therefore, “[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency . . . administering this comprehensive scheme.”⁸⁵ Finally, the Court noted that the complex nature of the plaintiff’s claims made “[t]he invocation of federal common law . . . in the face of congressional legislation supplanting it . . . peculiarly inappropriate.”⁸⁶

2. *United States v. Texas*.—In *United States v. Texas*,⁸⁷ the Supreme Court held that the Debt Collection Act of 1982 (“DCA”) did not preempt the federal common law right of the United States to collect prejudgment interest on debts owed to it by the states.⁸⁸ The “longstanding” federal common law rule required states and private persons to pay prejudgment interest on debts owed to the United States if the debt stemmed from a contractual obligation.⁸⁹ The DCA established specific rules regarding prejudgment interest on debts owed to the federal government by private persons, but was silent with respect to debts owed by states.⁹⁰ The Court noted that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”⁹¹ Citing, *inter alia*, *Milwaukee II*, the Court described the standard by which it would determine whether a federal statute had preempted a federal common law principle. “In order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.”⁹² Although the statute “need not ‘affirmatively proscribe’ the common-law doctrine,”⁹³ “courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident.”⁹⁴

Several factors supported the Court’s holding that the DCA did not preempt

82. *Id.* at 305.

83. *Id.* at 318.

84. *Id.* at 320.

85. *Id.*

86. *Id.* at 324-25.

87. 507 U.S. 529 (1993).

88. *Id.* at 530.

89. *Id.* at 533.

90. *Id.* at 534-35.

91. *Id.* at 534 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

92. *Id.* (citing *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 315 (1981)).

93. *Id.*

94. *Id.* (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)).

federal common law. First, the Court found that the DCA did “not speak directly” to the issue addressed by the common law because it only imposed minimum requirements pertaining to prejudgment interest owed to the federal government by private persons.⁹⁵ The Court rejected Texas’s argument that because the DCA exempted states from those stringent requirements, the DCA “spoke directly” to the issue addressed by the common law. “Congress’s mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area.”⁹⁶ Second, the Court found that the DCA was “more onerous than the common law” and that the purpose of the DCA was “to strengthen the Government’s hand in collecting its debts.”⁹⁷ As a result, the preemption of the federal common law would have had the “anomalous effect” of reducing the federal government’s ability to collect debts from states under the DCA.⁹⁸ In essence, the Court held that gaps in a statutory scheme could be filled by pre-existing federal common law.

3. *Preemption of Federal Common Law in American Electric Power.*— Given the inconsistencies between *Milwaukee II* and *Texas*, the standard for determining whether congressional action preempts federal common law is far from clear.⁹⁹ The plaintiffs in *American Electric Power* argued that under *Milwaukee II* and its progeny, federal common law is only preempted if Congress has regulated carbon dioxide emissions or otherwise provided a remedy for injuries caused by carbon dioxide emissions.¹⁰⁰ Therefore, the plaintiffs argued, because “EPA has determined that the Clean Air Act does not regulate carbon dioxide emissions, and Congress has not enacted any other legislation that provides a remedy for harm caused by carbon dioxide emissions,” the federal common law public nuisance claim is not preempted.¹⁰¹ Recently, the Supreme Court ruled in *Massachusetts v. EPA*¹⁰² that the EPA does have the authority and the duty to regulate carbon dioxide emissions from automobiles under the Clean Air Act unless the EPA finds that such emissions do not endanger public health

95. *Id.*

96. *Id.* at 535.

97. *Id.* at 536-37.

98. *Id.* at 537-38 (“Congress in the Act tightened the screws . . . on the prejudgment interest obligations of private debtors to the Government, and not on the States. . . . But it does not at all follow that because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed. The more logical conclusion is that it left the screws in place, untightened.”).

99. Merrill, *supra* note 61, at 311 (arguing that *Milwaukee II* is itself not clear on the standard for preemption of federal common law).

100. Brief for Plaintiffs-Appellants, *supra* note 32, at 58.

101. *Id.* at 60. Professor Merrill calls this the “conflict displacement theory,” which asks whether the federal statute regulates the specific substance at issue (carbon dioxide emissions) and whether the federal regulations conflict with the federal common law remedy. Merrill, *supra* note 61, at 311-12.

102. 127 S. Ct. 1438 (2007).

or welfare.¹⁰³ Despite the ruling in *Massachusetts*, the plaintiffs' argument that there is no comprehensive regulation remains strong because that case only addressed the EPA's authority and duty to regulate emissions from automobiles and because the EPA must still make its "endangerment finding" and promulgate rules before it regulates those emissions.¹⁰⁴ Moreover, *Texas* supports the idea that pre-existing common law is presumed not to be preempted by Congress's "refusal to legislate" on the issue.¹⁰⁵

The defendants in *American Electric Power* argued that federal common law is preempted any time Congress legislates "on the subject."¹⁰⁶ Therefore, because several federal statutes discuss (but do not regulate in any way) carbon dioxide emissions,¹⁰⁷ the defendants argued that "Congress has plainly legislated on the subjects of air pollution and carbon dioxide emissions in the context of global climate change."¹⁰⁸ The district court in *American Electric Power* emphasized this point.¹⁰⁹

Under the defendants' theory of preemption, the key question is whether the Clean Air Act and other legislation related to climate change establish a "comprehensive" regulatory scheme that occupies the field of air pollution. This question remains largely unanswered.¹¹⁰ A few district courts have ruled that the Clean Air Act preempts nuisance actions based on air pollution under federal common law.¹¹¹ However, the Second Circuit specifically declined to decide that

103. *Id.* at 1462-64.

104. *Id.*

105. *United States v. Texas*, 507 U.S. 529, 535 (1993).

106. Brief for Defendants-Appellees, *supra* note 49, at 37. Professor Merrill calls this the "field displacement theory" which asks whether there are comprehensive federal regulations relating to air pollution in general and whether those regulations "occup[y] the field." Merrill, *supra* note 61, at 311-12.

107. *See* Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) (codified in scattered sections of 7 U.S.C., 15 U.S.C., 30 U.S.C., 42 U.S.C., and 50 U.S.C.) (directing a study of the projected impact of carbon dioxide levels in the atmosphere); National Climate Program Act, 15 U.S.C. §§ 2901-2908 (2006) (establishing a national program to help develop understanding and response methods to climate change); Global Change Research Program, 15 U.S.C. §§ 2931-2938 (2000) (establishing a ten-year program to research global climate issues); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified in scattered sections of 16 U.S.C., 25 U.S.C., 26 U.S.C., 30 U.S.C., and 42 U.S.C.) (instructing the Energy Secretary to research and report to Congress on a "least-cost energy strategy" to, inter alia, reduce greenhouse gas emissions).

108. Brief for Defendants-Appellees, *supra* note 49, at 37.

109. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268-69 (S.D.N.Y. 2005).

110. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 35-37 (2003); Merrill, *supra* note 61, at 311-12.

111. *See, e.g., Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982). Neither *Reeger* nor *Kin-Buc* addressed the question of whether the Clean Air Act preempted nuisance actions based on carbon dioxide emissions.

issue in *New England Legal Foundation v. Costle*,¹¹² and the Supreme Court has not decided the issue either.¹¹³ The issue has become even more complex given the Supreme Court's recent decision that the EPA *does* have the authority to regulate carbon dioxide emissions from at least one source, automobiles, under the Clean Air Act.¹¹⁴ The point is that the question of whether federal statutory law preempts public nuisance actions for carbon dioxide emissions under federal common law is most certainly a large hurdle the plaintiffs in *American Electric Power* must overstep before presenting the merits of their case.

C. Standing

Considering the line of cases discussed *supra* in which states have successfully litigated federal common law public nuisance actions, it seems odd that the state plaintiffs in *American Electric Power* would face a serious challenge that they lack standing. However, a quick review of the doctrine of standing indicates that the defendants could craft a strong argument to that effect. The Supreme Court has developed a "two-strand" approach to the doctrine of standing including "Article III standing, which enforces the Constitution's case or controversy requirement . . . and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"¹¹⁵

Article III establishes three "constitutional minimum" standing requirements.¹¹⁶ The first requirement, injury-in-fact, entails "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'"¹¹⁷ The second requirement, traceability, demands that the injury be "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'"¹¹⁸ The third requirement, redressability, requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury

112. 666 F.2d 30, 32 n.2 (2d Cir. 1981) ("[W]e leave for a more appropriate case the question of whether all federal common law nuisance actions involving the emission of chemical pollutants into the air are precluded by the statutory scheme set forth in the Clean Air Act.").

113. Merrill, *supra* note 61, at 311.

114. Massachusetts v. EPA, 127 S. Ct. 1438, 1462 (2007).

115. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992) and Allen v. Wright, 468 U.S. 737, 751 (1984)). Because the minimum Article III standing requirements present a sufficient barrier for plaintiffs to overcome in *American Electric Power*, this Note will not discuss the prudential standing requirements. However, it is important to recognize that "'the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches'" overlaps with other concepts addressed in this Note, such as the political question doctrine and preemption, which could be problematic for the plaintiffs. *Id.* at 11-12 (quoting *Allen*, 468 U.S. at 751).

116. *Lujan*, 504 U.S. at 560.

117. *Id.* (citations omitted).

118. *Id.* at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (alteration in original)).

will be ‘redressed by a favorable decision.’”¹¹⁹

1. *Parens Patriae Standing*.—The state plaintiffs in *American Electric Power* argued that they were asserting injuries to a “quasi-sovereign interest” which confers upon them *parens patriae* standing.¹²⁰ Essentially, a *parens patriae* action must rest upon “an interest apart from the interests of particular private parties,” and “[t]he State must express a quasi-sovereign interest.”¹²¹ One example of a quasi-sovereign interest is the “health and well-being—both physical and economic—of [the State’s] residents in general.”¹²² Finally, after considering both direct and indirect affects, the State must allege injury to a “sufficiently substantial segment of its population.”¹²³

Scholars have generally assumed that the plaintiff states in *American Electric Power* do satisfy the requirements for *parens patriae* standing as set forth in *Snapp*.¹²⁴ For one thing, the impact of global warming will affect all citizens of a state in one way or another.¹²⁵ Secondly, protecting the health and well-being of a state’s citizens from an out-of-state nuisance is a “paradigm case of a quasi-sovereign interest.”¹²⁶

Whereas scholars have generally acknowledged that the state plaintiffs in *American Electric Power* satisfy the requirements for *parens patriae* standing, they have not all agreed that this “obviates the need to also establish the traditional elements of private party standing.”¹²⁷ *Snapp* indicates that the Court was cognizant of the relationship between *parens patriae* standing and Article III standing. The Court explained that quasi-sovereign interest in the well-being of a state’s residents is a very broad interest that “risks being too vague to survive the standing requirements of [Article] III.”¹²⁸ Therefore, a *parens patriae* action must rest upon a quasi-sovereign interest that is “sufficiently concrete to create an actual controversy between the State and the defendant.”¹²⁹

One scholar has argued that public officials have automatic standing to bring a public nuisance action because “they are among the paradigmatic public nuisance plaintiffs.”¹³⁰ This argument is rather circular because it is based on the nature of a public nuisance action. However, it does make logical sense, and it is supported by a good deal of precedent in which the Supreme Court has decided

119. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

120. Brief for Plaintiffs-Appellants, *supra* note 32, at 39.

121. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

122. *Id.*

123. *Id.*

124. See Grossman, *supra* note 110, at 55; Merrill, *supra* note 61, at 304; Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L.J. 407, 470 (2005).

125. See *supra* notes 17-18 and accompanying text.

126. Merrill, *supra* note 61, at 304; see also Grossman, *supra* note 110, at 55.

127. Pawa & Krass, *supra* note 124, at 469.

128. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

129. *Id.*

130. Grossman, *supra* note 110, at 55.

actions brought by States to enjoin public nuisances.¹³¹ Moreover, these cases did not include discussions about Article III standing.¹³²

Scholars have also compared *parens patriae* standing in a public nuisance action to criminal prosecution, noting that the government does not have to satisfy Article III requirements in the latter.¹³³ Standing is not an issue in criminal prosecutions because “criminal prosecutions fall squarely within the ‘class of cases and controversies of the sort traditionally amenable to and resolved by the judicial process.’”¹³⁴ The flaw in this argument is that the prosecution of a criminal case, unlike *parens patriae* standing, is based upon a state’s police power. Indeed, the Supreme Court distinguished police power, *sovereign* power, from the *quasi-sovereign* interest in the well-being of a state’s citizens that supports *parens patriae* standing.¹³⁵ Whereas *sovereign* power inherently grants the state “the power to create and enforce a legal code, both civil and criminal,” *quasi-sovereign* interests must be “sufficiently concrete to create an actual controversy between the State and the defendant” in order to avoid being too broad to “survive the standing requirements of [Article] III.”¹³⁶ Despite the source of authority, public nuisance actions by States are analogous to criminal prosecutions, and if criminal cases are a “familiar part of the ‘judicial power’” that are not subject to traditional standing requirements, there is “little reason why the judicial power should not also extend to public nuisance actions brought by public officials.”¹³⁷

The Supreme Court’s recent decision in *Massachusetts v. EPA* seems to support the notion that the plaintiff states do have *parens patriae* standing based on quasi-sovereign interests.¹³⁸ The Supreme Court ruled that Massachusetts had standing to challenge an EPA action that denied Massachusetts’s petition for a rulemaking to regulate carbon dioxide emissions from automobiles.¹³⁹ The Court emphasized that when a plaintiff is a sovereign state and not a private party and when the State’s interest in the outcome of the litigation is “sufficiently concrete,” a State “is entitled to special solicitude in [the Court’s] standing analysis.”¹⁴⁰ The Court cited *Tennessee Copper* for the proposition that “States are not normal litigants for the purposes of invoking federal jurisdiction.”¹⁴¹ Although the Court referred to *parens patriae* only once in a footnote, its initial discussion of standing seemed to indicate that Massachusetts had standing based

131. See *supra* notes 32-45 and accompanying text.

132. Merrill, *supra* note 61, at 306.

133. Pawa & Krass, *supra* note 124, at 470.

134. Merrill, *supra* note 61, at 300 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

135. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02 (1982).

136. *Id.*

137. Merrill, *supra* note 61, at 300-01.

138. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007).

139. *Id.* at 1458.

140. *Id.* at 1454-55.

141. *Id.* at 1454.

on its quasi-sovereign interests.¹⁴²

2. *Article III Standing.*—The Court in *Massachusetts* did not limit the standing analysis to Massachusetts's quasi-sovereign interests. It also discussed the nature of the injury, the fact that EPA's denial of the rulemaking petition contributed to the State's injuries from global warming, and the fact that a judicial remedy *could* slow the pace of global emissions.¹⁴³ Unfortunately, the Court did not explicitly state whether it was reviewing the Article III requirements because Massachusetts needed to satisfy them or simply to illustrate that Massachusetts *could* satisfy the more demanding requirements of Article III standing.¹⁴⁴ Therefore, it was unclear whether Massachusetts's quasi-sovereign interests were sufficient to confer standing or whether Massachusetts's satisfaction of the Article III requirements was the determining factor.

Once the discussion moves past *parens patriae* standing, there is far more debate as to whether the plaintiffs (state or private) in *American Electric Power* could satisfy the traditional Article III requirements of injury-in-fact, traceability, and redressability. Although the Supreme Court found that Massachusetts satisfied the Article III standing requirements to sue for injuries caused by global warming, *Massachusetts* can be distinguished from *American Electric Power* in several meaningful ways.¹⁴⁵ Therefore, it is not entirely clear that the standing analysis in *Massachusetts v. EPA* would bind the Second Circuit in *American Electric Power*.

a. *Injury-in-fact.*—The plaintiffs have alleged numerous injuries that are *likely to occur* as a result of global warming. The problem from a "standing" point of view is that all of the alleged injuries are *future* injuries.¹⁴⁶ Although the scientific community is in general agreement that carbon dioxide emissions are contributing to global warming,¹⁴⁷ there remains uncertainty regarding the specific effects of global warming and when those effects will occur.¹⁴⁸ Thus the defendants can make a strong argument that the injuries alleged by the plaintiffs are not "actual or imminent."

142. *Id.* at 1454-55.

143. *Id.* at 1455.

144. *Id.*

145. First, Massachusetts sued the EPA under the Clean Air Act, which grants a *procedural right* to challenge an agency action. *Id.* at 1453. Therefore, a litigant "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992)). The plaintiffs in *American Electric Power* rely on common law to challenge the alleged nuisance directly. Second, Massachusetts essentially asserted that because it gave up certain rights to the federal government when it became a state, it had standing to sue the federal government to compel protection of its quasi-sovereign interests. The Court in *Massachusetts v. EPA* seemed to imply that a state had standing to ask the federal government to take action that only *it* could take. *Id.* at 1454. This concept does not necessarily carry over when a state sues a private party to enjoin particular behavior.

146. See *supra* notes 17-18 and accompanying text; see also Merrill, *supra* note 61, at 295.

147. IPCC REPORT, *supra* note 3, at 10.

148. *Id.* at 10-16.

Proponents for standing generally give more weight to the available scientific evidence and argue that the effects of global warming are both “actual and imminent.”¹⁴⁹ Such actual and imminent effects include “changes in Arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, [and] heat waves.”¹⁵⁰ Unlike a case in which a plaintiff alleges a hypothetical harm,¹⁵¹ a court would certainly need to review and weigh this scientific information before determining that the plaintiffs’ alleged injuries were not “actual” or “imminent.” Depending on one’s opinion of the current scientific evidence, the injuries alleged by the plaintiffs could certainly be considered “actual” or “imminent.” The Supreme Court in *Massachusetts v. EPA* found that “rising seas have already begun to swallow Massachusetts’ coastal land” which constituted a particularized injury due to lost land and remediation costs and that in general “[t]he harms associated with climate change are serious and well recognized.”¹⁵² The Court indicated that Massachusetts’s injuries from global warming satisfied the first prong of Article III standing which appears to defeat the defendants’ argument in *American Electric Power*.¹⁵³

b. Traceability.—The “traceability” prong requires the plaintiffs to show that the activity of the defendants, not the independent action of a third party, is responsible for the alleged injury.¹⁵⁴ A narrow interpretation of this prong requires the plaintiffs to prove that specific carbon dioxide molecules emitted by the five defendants, rather than total global carbon emissions, which include the defendants’ emissions, caused the plaintiffs’ injuries. One scholar has argued that “[g]lobal warming plaintiffs will fail to prove causation because the causal chain between their injuries and the emissions of a *particular* defendant is too attenuated by the multiple alternative factors that could be the source of the global warming.”¹⁵⁵

This interpretation is too narrow. Even though Professor Merrill notes that the “defendants are responsible at most for 2.5% of the world’s greenhouse gases,” he acknowledges that this “market share” problem is not really a standing

149. Grossman, *supra* note 110, at 40.

150. IPCC REPORT, *supra* note 3, at 8-9. Although the plaintiffs did not allege that these present effects *have* caused injury, they cited many of these facts in their complaint as support for their allegations of *future* injuries. Complaint, *supra* note 15, at 22-23.

151. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiffs’ alleged injuries that some of the species that plaintiffs *might* have observed and studied *if* they ever returned to the foreign nation *might* be harmed *due to* the government’s failure to enforce the Endangered Species Act were too conjectural).

152. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455-56 (2007).

153. *Id.* at 1455-57.

154. *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

155. Blake R. Bertagna, Comment, “*Standing*” Up for the Environment: The Ability of Plaintiffs To Establish Legal Standing to Redress Injuries Caused by Global Warming, 2006 BYU L. REV. 415, 447 (2006) (emphasis added).

issue.¹⁵⁶ To be sure, Supreme Court jurisprudence with respect to the “traceability” prong does not speak to a situation in which multiple actors have engaged in the same harmful conduct, but only a few have been named as a defendant. Rather, traceability goes to whether the injury alleged is proximately traceable to a person or entity other than the named defendant.¹⁵⁷ Lower court decisions have also recognized this distinction.¹⁵⁸ Therefore, the plaintiffs in *American Electric Power* can make a strong traceability showing because defendants emit a significant amount of carbon dioxide,¹⁵⁹ and carbon dioxide emissions are significantly contributing to the plaintiffs’ alleged injuries.¹⁶⁰ Indeed, the Court in *Massachusetts v. EPA* found that the transportation industry, which contributes about six percent of the global carbon dioxide emissions, “make[s] a meaningful contribution” to global warming and that the “EPA’s refusal to regulate such emissions ‘contributes’ to Massachusetts’ injuries.”¹⁶¹

c. Redressability.—Finally, the plaintiffs must show that if they succeed in obtaining an injunction, their injuries will be redressed. The redressability prong seemingly poses the largest problem for the plaintiffs. Clearly a favorable judicial ruling would only *mitigate* the impacts of global warming because there are multiple domestic and global sources of carbon dioxide emissions including, inter alia, manufacturing, residential and commercial buildings, and highway, rail, and air travel.¹⁶²

The Supreme Court has acknowledged this “multiple source” problem in the context of redressability in several cases.¹⁶³ The question is whether eliminating or reducing by judicial ruling *one* source of the plaintiffs’ injury will in fact “redress” the injury. Stated another way, does “redress” include reducing the likelihood of the plaintiffs’ injury, or must the judicial remedy *actually* reduce the magnitude of the injury? In *Warth, Simon, and Lujan*, the Supreme Court adopted the latter definition. In *Massachusetts v. EPA*, the Supreme Court seemed to soften this requirement by holding that an incremental step to mitigate an injury does satisfy the redressability prong.¹⁶⁴

In *Lujan*, the plaintiffs alleged that United States government-funded projects

156. Merrill, *supra* note 61, at 297-98.

157. See, e.g., *Simon*, 426 U.S. at 43; *Warth v. Seldin*, 422 U.S. 490, 505-07 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

158. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000); *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992); *Pub. Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 n.8 (3d Cir. 1990).

159. Complaint, *supra* note 15, at 1.

160. See *supra* notes 17-18 and accompanying text.

161. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456-58 (2007).

162. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2007, at 101 (2007) available at [http://www.eia.doe.gov/oiaf/archive/aeo07/pdf/0383\(2007\).pdf](http://www.eia.doe.gov/oiaf/archive/aeo07/pdf/0383(2007).pdf) [hereinafter EIA OUTLOOK].

163. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43-44 (1976); *Warth v. Seldin*, 422 U.S. 490, 504 (1975).

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

in places like Egypt and Sri Lanka were adversely affecting endangered species and sought a court order to compel the Secretary of the Interior to apply the Endangered Species Act to federal action taken in foreign nations.¹⁶⁵ In holding that the plaintiffs' alleged injuries were not redressable by a favorable judicial ruling, the Court noted, *inter alia*, that the government "generally suppl[ies] only a fraction of the funding for a foreign project," and there was no reason to believe that the projects would be discontinued if the United States withdrew funding.¹⁶⁶ Therefore, because there were many other sources of funding for a project, a judicial order to eliminate federal funding would not ensure that the endangered species would no longer be adversely affected by a project.¹⁶⁷

In *Simon*, the plaintiffs alleged that a new Internal Revenue Service ("IRS") policy that allowed a hospital to retain its nonprofit (or charitable) status even if it didn't provide free services to indigent patients caused injury to those patients by discouraging hospitals to provide free service.¹⁶⁸ First, the Court noted that, even if the old IRS policy of requiring a hospital to provide free service "to the extent of its financial ability for those not able to pay for the services rendered" was followed, a hospital's decision to provide free services to indigent patients would be based on factors other than the IRS policy including its financial ability and its dependence on its "nonprofit" status.¹⁶⁹ Second, a more favorable IRS policy would not ensure that the *plaintiffs* would have access to free services because the former IRS policy did not require hospitals to provide free services to *all* indigents.¹⁷⁰ Therefore, a court order to implement the old IRS policy would, at best, increase the chance that the indigent plaintiffs would receive free services. This, according to the Court, was not sufficient to satisfy the redressability requirement.¹⁷¹

Finally, in *Warth*, low income plaintiffs complained that their town zoning ordinances caused injury by precluding persons of low income from living in the town.¹⁷² The Supreme Court observed that the plaintiffs' injuries were not redressable by a favorable court decision because "their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."¹⁷³ The Court also noted that the plaintiffs' ability to live in the town was dependent on "efforts and willingness of third parties to build low- and moderate-cost housing" and that the "record [was] devoid of any indication that . . . , were the court to remove the

165. *Lujan*, 504 U.S. at 559, 563.

166. *Id.* at 571.

167. *Id.*

168. *Simon*, 426 U.S. at 42.

169. *Id.* at 31-32 (quoting Rev. Rul. 56-185, 1956-1 C.B. 202).

170. *Id.* at 43.

171. *Id.* at 45-46 ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire.").

172. *Warth v. Seldin*, 422 U.S. 490, 493 (1975).

173. *Id.* at 506.

obstructions attributable to respondents, such relief would benefit petitioners.”¹⁷⁴

In all three cases, the Court rejected the idea that the redressability prong was satisfied by merely increasing the likelihood that the plaintiffs’ alleged injuries would be remedied. In *American Electric Power*, obtaining an injunction to reduce and cap the defendants’ carbon dioxide emissions will not halt global warming for several reasons. First, the defendants only create about 2.5% of the global carbon dioxide emissions each year.¹⁷⁵ Just like *Lujan*, where cutting off the small percentage of funding supplied by the U.S. government to a foreign project allegedly causing harm to endangered species would not likely halt the injurious project,¹⁷⁶ capping and reducing emissions of the five defendants will not halt global warming.

Second, an immediate curtailment of global carbon dioxide emissions (even a drastic curtailment) would not halt the process of global warming because the greenhouse gases that have already been emitted will remain in the atmosphere and continue to cause surface and sea temperatures to rise.¹⁷⁷ Similar to *Warth*, where a court order to remove zoning restrictions would not necessarily lead to affordable housing for the plaintiffs due to existing market conditions and the plaintiffs’ poor financial health,¹⁷⁸ capping and reducing emissions from the five defendants would not necessarily lead to a reduction in the effects of global warming due to existing climate conditions.

Finally, although a reduction in the *defendants’* emissions would reduce the current global level of carbon dioxide emissions, it is safe to assume that global carbon dioxide emissions from other sources will continue to grow.¹⁷⁹ Unless the other domestic and international sources of carbon dioxide are also curbed, any reduction in emissions due to a favorable judicial ruling will be quickly swallowed by increases from other sources.¹⁸⁰ *Simon* and *Warth* both present situations in which the plaintiffs’ injuries, lack of access to free hospital services, and lack of access to affordable housing are caused by multiple sources and, therefore, not redressable by eliminating any one source.¹⁸¹ Assuming, for a moment, that carbon dioxide emissions are the only cause of global warming,

174. *Id.*

175. Merrill, *supra* note 61, at 297.

176. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992).

177. IPCC REPORT, *supra* note 3, at 17. The report also cited the slow response time of ocean temperatures as another reason why global temperatures would continue to rise. *Id.* at 13.

178. *Warth*, 422 U.S. at 506.

179. The Energy Information Administration (“EIA”) projects an average annual growth rate in carbon dioxide emissions from the combustion of fossil fuels of 1.2 percent in the United States alone over the period from 2005 to 2030. EIA OUTLOOK, *supra* note 162, at 101.

180. EIA projects the domestic average annual growth rate over the period from 2005 to 2030 for residential sources to be 1.0%, for commercial sources to be 1.8%, for industrial sources to be 0.7%, for transportation sources to be 1.3%, and for electric power generation to be 1.4%. *Id.* at 164.

181. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 n.23 (1976); *Warth*, 422 U.S. at 506.

there are still many sources of carbon dioxide emissions, and a favorable judicial ruling in *American Electric Power* would address only five sources. Recognizing that carbon dioxide emissions are not the *only* cause of global warming further supports the argument that the plaintiffs' alleged injuries are not redressable by a favorable ruling.¹⁸²

However, in *Massachusetts v. EPA*, the Court found that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."¹⁸³ As such, a judicial decision to overturn EPA's refusal to regulate carbon dioxide emissions from vehicles would reduce Massachusetts's injury.¹⁸⁴ If the plaintiffs in *American Electric Power* argue from the perspective of the baseline level of emissions, they can show that a favorable judicial ruling could mitigate their injuries. The Energy Information Administration ("EIA") has projected *total* domestic carbon dioxide emissions for the years 2010 and 2030 using baseline average annual growth rates of 0.93% for the period from 2005 to 2010 and 1.22% for the period from 2005 to 2030.¹⁸⁵ By capping and reducing the defendants' emissions, the *growth rates* of annual emissions and of atmospheric carbon dioxide will be less than the baseline growth rates.¹⁸⁶ Although the total levels of annual emissions and atmospheric carbon dioxide will be higher in five years than they are today, they will be less than they would have been in five years but for capping and reducing the defendants' emissions. Unlike *Simon* and *Warth*, a reduction in the plaintiffs' future injuries (compared to a baseline level) is not dependant upon the activity of any other sources. Contrary to *Lujan*, where cutting government funding of a specific project might not alter the parameters of the project, capping and reducing emissions from the five defendants *will* reduce the future level of emissions as compared to the baseline. Therefore, the plaintiffs can argue that abating the defendants' emissions will satisfy the redressability prong by directly reducing their future injury.

The plaintiffs' strongest argument for standing is that they have *parens patriae* standing and the Supreme Court's recent decision in *Massachusetts v. EPA* seems to support this idea. Even if the Second Circuit agrees, it is not clear whether *parens patriae* standing precludes the need to demonstrate the Article III requirements of injury-in-fact, traceability, and redressability, and *Massachusetts v. EPA* did not definitively answer that question. With respect to injuries caused by global warming, scholars have made valid arguments on both sides of each Article III requirement. However, given the Supreme Court's recent determination that injuries from global warming are concrete, traceable to

182. Bertagna, *supra* note 155, at 447.

183. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1458 (2007).

184. *Id.*

185. EIA OUTLOOK, *supra* note 162, at 164. These figures come from a reference case model. EIA also projected emissions based on lower and higher economic growth models. *Id.* at ii.

186. EIA's reference case is "policy-neutral" so it assumes that current laws and regulations will apply throughout the forecast period. *Id.* Therefore, the EIA reference case does not adjust for potential reduction in emissions due to a successful public nuisance action. *Id.*

EPA's failure to regulate, and redressable by a favorable court decision, the defendants in *American Electric Power* will have to distinguish the cause of the plaintiffs' injuries from the cause of the injuries in *Massachusetts v. EPA* in order to convince the Second Circuit that the plaintiffs cannot satisfy Article III standing.

IV. QUESTIONABLE USE OF THE POLITICAL QUESTION DOCTRINE

In the modern legal environment, federalism and separation of powers concerns dictate that a court must intensely scrutinize a common law public nuisance action based on environmental harm to ensure that it is not preempted by federal statutory law¹⁸⁷ and that it is not preempted because it involves conduct of foreign policy.¹⁸⁸ Even under such scrutiny, it is far from certain whether federal statutory law or foreign affairs preempts the plaintiffs' public nuisance claim in *American Electric Power*. It is far from certain whether the plaintiffs lack standing and whether the plaintiffs' public nuisance claim does not satisfy the essential elements of a federal common law public nuisance claim. Still, the defendant electric companies need only convince the court that the claim fails to overcome *one* of these obstacles. Therefore, it is not that surprising that the case was dismissed at the district court level. What *was* surprising was the district court's *sua sponte* refusal to even consider the plaintiffs' claim as a non-justiciable political question given the wide array of theories upon which the case *could* have been dismissed.¹⁸⁹

The remainder of this Note discusses the political question doctrine as it relates to *American Electric Power*. It shows that the district court framed the plaintiffs' public nuisance claim in such a way as to *create* a political question. It argues that the district court improperly framed the issue in terms of a broad environmental policy question rather than focusing only on the specific public nuisance claim presented by the plaintiffs. Finally, it demonstrates that when the plaintiffs' claim is properly framed, *American Electric Power* does not involve a non-justiciable political question.

A. The Political Question Doctrine

Like the doctrine of standing, the political question doctrine places limits on the types of cases a federal court can decide. The doctrine bars judicial review when "the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."¹⁹⁰ In *Vieth v. Jubelirer*, the Court

187. See *supra* text accompanying notes 100-14.

188. See *supra* text accompanying notes 63-72.

189. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) ("Defendants argue that 'separation-of-powers principles foreclose recognition of the unprecedented "nuisance" action plaintiffs assert,' which I take to be an argument that Plaintiffs raise a non-justiciable political question." (citation omitted) (footnote omitted) (emphasis added)).

190. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

restated the six-factor test set forth in *Baker v. Carr*¹⁹¹ as the standard by which to determine whether a case presents a non-justiciable political question.¹⁹² Because the six factors are independent, only one of the following factors need be present for the case to be non-justiciable:

[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 the 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.¹⁹³

In articulating this test, the *Baker* Court was careful to distinguish between “political cases” and “political questions.”¹⁹⁴ The political question doctrine is “primarily a function of the separation of powers” and turns upon “the relationship between the judiciary and the coordinate branches of the Federal Government.”¹⁹⁵ In general, a court should not invoke the political question doctrine unless one of the factors is “inextricable” from the case.¹⁹⁶

The political question doctrine is invoked sparingly and is generally applied to a limited set of circumstances. Since *Baker*, the Supreme Court and the Second Circuit have most commonly invoked or discussed the doctrine in cases involving voting or political gerrymandering,¹⁹⁷ treaty-making authority,¹⁹⁸ war and peace,¹⁹⁹ and certain matters involving foreign policy.²⁰⁰ In an exhaustive

191. 369 U.S. 186 (1962).

192. *Vieth*, 541 U.S. at 277-78.

193. *Id.* (quoting *Baker*, 369 U.S. at 217).

194. *Baker*, 369 U.S. at 217.

195. *Id.* at 210.

196. *Id.* at 217.

197. Compare *Vieth*, 541 U.S. at 277-78 (holding by plurality that political gerrymandering cases are not justiciable), with *Davis v. Bandemer*, 478 U.S. 109, 113 (1986) (holding that political gerrymandering cases are justiciable).

198. Compare *Goldwater v. Carter*, 444 U.S. 996, 1002-05 (1979) (refusing to hear a non-justiciable challenge to the President's power to terminate a treaty brought by members of Congress), with *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (discussing the political question doctrine, but finding that the Court could properly interpret treaties and executive agreements).

199. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973) (dismissing a congresswoman's claim that the President's hostilities in Cambodia were unconstitutional because the manner in which the legislative and executive branches share warmaking power is a non-justiciable political question).

200. See, e.g., *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69 (2d Cir. 2005)

search for cases in which the political question doctrine has been invoked, very few are even remotely analogous to the common law public nuisance claim in *American Electric Power*.²⁰¹ This research is confirmed by the fact that the district court in *American Electric Power* did not cite *any* authority other than *Vieth* and *Baker* to support its finding that the plaintiffs' public nuisance claim presented a political question.²⁰²

B. The Doctrine in Practice

Although the district court's decision to dismiss *American Electric Power* can be attacked based on the *Baker* factors alone, it is helpful to consider how other courts have applied the doctrine. The following three cases present issues that do not fall squarely into the traditional political question categories of voting or political gerrymandering, treaties, war and peace, and the status of a foreign sovereign and are therefore useful in analyzing the use of the political question doctrine in *American Electric Power*.

1. *Gordon v. Texas*.—In *Gordon v. Texas*,²⁰³ owners of beachfront property sought injunctive relief and damages for erosion caused by a fish pass owned and used by a combination of private and public defendants and permitted by the Army Corps of Engineers.²⁰⁴ The Fifth Circuit found the case to be justiciable.²⁰⁵ Although the court noted that claims for injunctive relief are more "susceptible to justiciability problems," it stated that it is "the potential for a clash between a federal court and other branches of the federal government" that creates a political question.²⁰⁶

The Fifth Circuit found that the land owners' request for injunctive relief "would require little federal involvement" despite the fact that the federal government, through the Army Corps of Engineers, issued an original permit for the fish pass, approved other dredging projects, and actively denied requests to remedy the erosion problem.²⁰⁷ The land owners' request for injunctive relief

(dismissing claims against Austria for property taken by Nazis as non-justiciable because the United States had entered into an agreement with the Austrian government); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994) (dismissing as a political question a claim by former citizens of South Vietnam for title as successors in interest to frozen assets of the former South Vietnam because the executive branch has the constitutional authority to recognize property rights of succession with respect to a foreign sovereign).

201. The plaintiffs in *American Electric Power* assert that "[a]ll of the *domestic* controversies in which the Supreme Court or Second Circuit have found a political question have involved a constitutional issue." Brief for Plaintiffs-Appellants, *supra* note 32, at 18 (emphasis omitted) (emphasis added).

202. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005).

203. 153 F.3d 190 (5th Cir. 1998).

204. *Id.* at 191-92.

205. *Id.* at 196.

206. *Id.* at 194 (emphasis omitted).

207. *Id.* at 195.

sought to require “the State to fill in the [fish pass] and provide some additional beachfront restoration in its immediate vicinity.”²⁰⁸ The court found that, because the land owners’ request for injunctive relief did not require any action on the part of the federal government and thus would not “require the district court to abrogate any significant federal policies,” a judicial decision to order injunctive relief would not “create a conflict with the federal government.”²⁰⁹ The court also stated that “[t]here is nothing inherent in erosion claims making them difficult to manage judicially; the district court need only determine the existence of liability and, if necessary, the extent of damages.”²¹⁰ Therefore, the case did not present a political question.²¹¹

2. *Schroder v. Bush*.—In *Schroder v. Bush*,²¹² small independent farmers sued the President and several other federal officials for declaratory and injunctive relief.²¹³ The farmers sought an order requiring the President and other defendants to “maintain market conditions favorable to small farmers” by controlling currency, engaging in more favorable trade agreements, imposing a moratorium on farm foreclosures due to disparity in purchasing power, and stepping up enforcement of anti-trust laws with respect to agri-business.²¹⁴ The Tenth Circuit applied the *Baker* factors to the farmers’ claims, finding that the claims presented “textbook examples of political questions.”²¹⁵

First and foremost, the Constitution textually commits regulation of foreign and domestic commerce, enactment of bankruptcy rules, and regulation of currency to the legislative branch.²¹⁶ Likewise, the power to make treaties, make foreign policy, and enter into international agreements is constitutionally committed to the executive branch.²¹⁷ The farmers’ request easily failed the first *Baker* factor.

The court described the farmers’ request for injunctive relief as a request that the court “re-formulate national policies” by *requiring the federal government* to alter many federal policies to “maintain market conditions.”²¹⁸ They rejected the farmers’ request because “[c]ourts are ill-equipped to make highly technical, complex, and on-going decisions regarding *how* to maintain market conditions, negotiate trade agreements, and control currency.”²¹⁹ Such decisions would require the court “to make ‘initial policy determinations’ in an area devoid of ‘judicially discoverable and manageable standards’ and where ‘multifarious

208. *Id.*

209. *Id.* at 194-95.

210. *Id.* at 195.

211. *Id.* at 194.

212. 263 F.3d 1169 (10th Cir. 2001).

213. *Id.* at 1171.

214. *Id.* at 1172-73.

215. *Id.* at 1174.

216. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3-5).

217. *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2).

218. *Id.* at 1175-76.

219. *Id.* at 1175 (emphasis added).

pronouncements by various departments' would lead to confusion and disarray."²²⁰ As a result, the farmers' request failed the second, third, and sixth *Baker* factors.²²¹

3. *Klinghoffer v. S.N.C. Achille Lauro*.—In *Klinghoffer v. S.N.C. Achille Lauro*,²²² the plaintiffs brought suit against the Palestine Liberation Organization ("PLO"), claiming that the PLO breached a duty of care owed to the plaintiffs as a result of the PLO's alleged involvement in the hijacking of an Italian cruise liner and the murder of an American passenger.²²³ The Second Circuit found that, although the issues before the court arose in a "politically charged context," that did "not convert what [was] essentially an ordinary tort suit into a non-justiciable political question."²²⁴

The Second Circuit applied the *Baker* factors, noting that the first factor, "whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department,'" is the most important factor.²²⁵ The court described the case as "an ordinary tort suit" in which the issue was whether "defendants breached a duty of care."²²⁶ The Second Circuit held that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary."²²⁷ The court also emphasized that common law tort principles provide "clear and well-settled rules on which the district court can easily rely."²²⁸ Therefore, the second *Baker* factor was not present. The court went on to find that even though "any decision the . . . court enters will surely exacerbate the controversy surrounding the PLO's activities,"²²⁹ none of the *Baker* factors were implicated by an ordinary tort suit.²³⁰

Gordon and *Klinghoffer* highlight the difference between tort cases, in which the plaintiffs asked the court to apply specific facts to established tort laws such as negligence and nuisance to determine liability, and cases that present non-justiciable political questions like *Schroder*, in which the plaintiffs asked the court to *order the federal government* to implement different policies *at the federal level*. In *Gordon* and *Klinghoffer*, the judiciary could rely on discoverable and manageable tort principles to evaluate the plaintiffs' claims without having to make initial policy decisions.²³¹ In contrast, a request to change *national* policies in order to change *national* market conditions was not limited to the specific facts of the plaintiffs' case, but rather sought relief at the

220. *Id.* at 1174 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

221. *Id.* at 1175.

222. 937 F.2d 44 (2d Cir. 1991).

223. *Id.* at 47.

224. *Id.* at 49.

225. *Id.* (quoting *Baker*, 369 U.S. at 217).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 49-50.

231. *Gordon v. Texas*, 153 F.3d 190, 195 (5th Cir. 1998); *Klinghoffer*, 937 F.2d at 49.

national level.²³² As such, it was constitutionally committed to the legislative branch and required “initial policy determination[s] of a kind clearly for nonjudicial discretion.”²³³

C. Analysis: Framing Matters

Like most legal matters, the way in which an issue is framed is highly relevant to whether the issue is justiciable. In *American Electric Power*, the district court accepted the defendants’ “framing” of the issue as “an environmental policy question with sweeping implications for the nation’s economy, its foreign relations, and even potentially its national security.”²³⁴ The court characterized the plaintiffs’ claim as “transcendently legislative” and stated that it touched upon “many areas of national and international policy.”²³⁵ Rather than stating the issue in terms of whether defendants’ carbon dioxide emissions amount to a public nuisance, the district court queried whether the interest in imposing “strict schemes to reduce pollution rapidly”²³⁶ outweighed the economic implications to industrial development of such a “strict” scheme.²³⁷ As to the latter question, the district court concluded that it was “impossible” to balance those interests “without an ‘initial policy determination’ first having been made by the elected branches.”²³⁸

By framing the issue so broadly, the district court was able to expand the reach of any potential judicial decision well beyond the specific parties and allegations of the complaint. Under the district court’s interpretation of the issue, the entire nation (even the world) would be significantly affected by any potential decision.²³⁹ The court insisted the plaintiffs were asking it to “determine and balance the implications of [an injunction] on the United States’ ongoing negotiations with other nations concerning global climate change.”²⁴⁰ The district court also maintained that the public nuisance claim would require it to “assess and measure available alternative energy resources” and to “determine and balance the implications of such relief on the United States’ energy sufficiency and *thus its national security*.”²⁴¹

Although *American Electric Power* is novel in the sense that it is the first case in which plaintiffs sought to abate global warming as a public nuisance, it

232. See *Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001).

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

234. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (quoting Transcript of Oral Argument at 6:1-6:5).

235. *Id.* at 272.

236. *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984)).

237. *Id.*

238. *Id.*

239. *Id.* at 273.

240. *Id.* at 272.

241. *Id.* (emphasis added).

is still a regular public nuisance case. The plaintiffs asserted that “[d]efendants’ carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries to the plaintiffs”²⁴² which interfere with public rights including “the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.”²⁴³ Therefore, plaintiffs sought to hold defendants liable for creating a public nuisance and to cap and reduce *defendants’* carbon dioxide emissions.²⁴⁴ Under the Restatement definition, plaintiffs simply asked the district court to decide whether defendants’ carbon dioxide emissions are unreasonable and whether they interfere with a public right.²⁴⁵ This is the type of task that courts are asked to do on a regular basis.²⁴⁶ As the Second Circuit in *Klinghoffer* noted, “[t]he fact that the issues before [the court] arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.”²⁴⁷ The proper way to frame the issue before the court is whether defendants’ carbon dioxide emissions amount to an unreasonable interference with a public right. The answer to this question may very well be “no,” but a potentially weak case on the merits does not morph into a non-justiciable political question.

It is easy to see that the district court’s “framing” of the issue in *American Electric Power* facilitated its conclusion that the judicial branch should not hear the case. One can fairly argue that the question of whether the interest in imposing a “strict scheme to reduce pollution rapidly” outweighs the economic implications to industrial development of such a “strict” scheme would violate several *Baker* factors. Indeed, the issue framed this way seems to contemplate a *comprehensive* scheme to reduce *all* pollution by *all* polluters which must be balanced against the economic costs to *all* industry.

First, a “judicial fiat” purporting to bind more than the specific parties to the case *would* be “transcendently legislative.”²⁴⁸ This would be analogous to *Schroder* in which the farmers asked the court for an injunction to “maintain market conditions favorable to small farmers” by controlling currency, engaging in more favorable trade agreements, imposing a moratorium on farm foreclosures, and stepping up enforcement of anti-trust laws with respect to agribusiness.²⁴⁹ As the Tenth Circuit noted in *Schroder*, such regulatory action was constitutionally committed to the legislative and executive branches, and the

242. Complaint, *supra* note 15, at 44.

243. *Id.* at 43.

244. *Id.* at 49.

245. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

246. *See, e.g.,* New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) (“We have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and this is a public nuisance . . .”).

247. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

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

249. *Schroder v. Bush*, 263 F.3d 1169, 1171-73 (10th Cir. 2001).

farmers' request easily failed the first *Baker* factor.²⁵⁰ Likewise, a comprehensive scheme to reduce pollution might require a determination and balancing of "the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change," if the President was actually engaging in said negotiations.²⁵¹ This would contemplate foreign relations policy, which is constitutionally committed to the executive branch.²⁵²

However, when the plaintiffs' claim is framed properly, a judicial determination of whether defendants' carbon dioxide emissions amount to an unreasonable interference with a public right does not impinge upon the executive or legislative branches. Such a decision would apply only to the specific parties in the case, and any relief would likewise be limited. This does not present a *Schroder* problem whereby the court is "re-formulat[ing] national policies"²⁵³ by requiring the federal government to alter many federal programs to "maintain market conditions."²⁵⁴ The plaintiffs' public nuisance suit is more like *Gordon*, where the court found that because the land owners' request for injunctive relief to fill the federally permitted fish pass did not require any action on the part of the federal government, a judicial decision to order injunctive relief would not "create a conflict with the federal government."²⁵⁵ Here, the plaintiffs sought a common law remedy to be implemented by a common law court. In a public nuisance tort suit, "[t]he department to whom this issue has been 'constitutionally committed' is . . . the Judiciary,"²⁵⁶ and the court should not shirk its responsibility to hear this "case or controversy."²⁵⁷

Second, broadly framing the issue to ask whether a "strict scheme to reduce pollution rapidly" outweighs the economic implications of such a "strict" scheme presents a "factor two" problem of a "lack of judicially discoverable and manageable standards."²⁵⁸ Of course a court cannot "discover and manage" a scheme to reduce pollution if there are no parameters placed on the "pollution" it is trying to reduce. As the Tenth Circuit noted in *Schroder*, "[c]ourts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency."²⁵⁹ The same is true with respect to broad environmental regulation.

250. *Id.* at 1174.

251. *Am. Elec. Power*, 406 F. Supp. 2d at 272. It is questionable whether the United States is actually "negotiating" with other nations since the current international partnerships all focus on researching and developing new technologies rather than on reducing the existing level of emissions. See *supra* notes 71-72 and accompanying text.

252. *Schroder*, 263 F.3d at 1174.

253. *Id.* at 1176.

254. *Id.* at 1172.

255. *Gordon v. Texas*, 153 F.3d 190, 194-95 (5th Cir. 1998).

256. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

257. U.S. CONST. art. III, § 2, cl. 1.

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

259. *Schroder*, 263 F.3d at 1175.

Likewise, there are no judicially discoverable and manageable standards to determine the effect of a “strict scheme to reduce pollution” on national security because the court does not have access to the proper information relating to national security.²⁶⁰

However, the plaintiffs have not requested relief in the form of a broad regulatory scheme. The plaintiffs’ public nuisance claim seeks an injunction limiting the carbon emissions of the *named* defendants.²⁶¹ If the court defines the pollution as “carbon dioxide emissions from *these five defendants*,” it can discover whether those defendants are polluting, how they are polluting, and how much.²⁶² The court can also discover the potential economic impact of a scheme to reduce the pollution of *those five defendants*. As the Second Circuit stated in *Klinghoffer*, common law tort principles provide “clear and well-settled rules on which the district court can easily rely.”²⁶³ By framing the issue more narrowly, the second *Baker* factor is no longer a major problem.

The third *Baker* factor also becomes a problem if the issue is framed broadly. The district court identified the question as “an environmental policy question with sweeping implications for the nation’s economy, its foreign relations, and even potentially its national security.”²⁶⁴ The court asserted that it was being asked to decide this question “without an ‘initial policy determination’ first having been made by the elected branches.”²⁶⁵ The characterization of the issue as “an environmental policy question” implicates the third *Baker* factor by definition. Additionally, the decision to broadly mandate a “strict scheme to reduce pollution rapidly” to all who might release pollutants would be both inappropriate and impossible for a federal court to implement “without an initial policy determination of a kind clearly for nonjudicial discretion.”²⁶⁶

Conversely, a decision to limit pollution of a certain type, amount, and source which is causing a specific harm does not require an “initial policy determination of a kind *clearly for nonjudicial discretion*.”²⁶⁷ It requires the sort of policy determination that courts make all the time. As discussed above, the Supreme Court has heard several public nuisance cases involving pollution,²⁶⁸ and a cursory overview of the Reporter’s Notes accompanying section 826 of the

260. See, e.g., *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973).

261. Complaint, *supra* note 15, at 49.

262. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (holding a defendant landowner liable for a public nuisance for failing to clean up a hazardous waste site). The court found that “several crucial facts [were] undisputed: the tanks [had] leaked and [were] corroding; the groundwater [had] been contaminated; and Shore [was] unwilling and unable to transform the site into a stable, licensed storage facility.” *Id.* at 1051.

263. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

264. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (quoting Transcript of Oral Argument at 6:1-6:5).

265. *Id.* at 272-73.

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

267. *Id.* (emphasis added).

268. See *supra* notes 33-45 and accompanying text.

Restatement (Second) of Torts indicates that courts do not hesitate to balance the gravity of harm caused by an activity against the utility of the conduct in a nuisance action.²⁶⁹ Moreover, “an initial policy determination is unnecessary when there are judicially manageable standards to guide the Court’s decision.”²⁷⁰

The Supreme Court undertook such a task in *Tennessee Copper* when it ordered an injunction to cap sulphur emissions to prevent the release of noxious gases and the destruction of vegetation.²⁷¹ It was not sufficient for the Court to simply order an injunction and walk away. Initially, the Court gave the smelting companies time to install purifying technology and negotiate a settlement with Georgia.²⁷² After evidence showed that the sulphur reduction technology did not sufficiently reduce emissions, Georgia returned to the Court seeking the injunction.²⁷³ The Court considered the interests of the defendant smelting companies, the interests of the State of Georgia, available purifying technology, and the available data on sulphur emissions in reaching its decision.²⁷⁴ The Court found that the only way to prevent injury to Georgia was to order a hard cap on sulphur emissions at twenty tons per day in the summer months and a reporting and monitoring regime including a court-appointed inspector.²⁷⁵ The Court did not hesitate to consider complex scientific data and balance competing interests in *Tennessee Copper*, and it was quite willing to make the “initial policy determination” to provide relief to the injured State.²⁷⁶

Although the district court in *American Electric Power* did not specifically cite the fourth, fifth, or sixth *Baker* factors, it appeared to be particularly sensitive to congressional and executive *inaction* with respect to regulation of carbon dioxide.²⁷⁷ The court reasoned that “[t]he explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions” confirm that the political branches should make the initial policy determination addressing global climate change.²⁷⁸

Is this an argument that the adjudication of *American Electric Power* in a

269. RESTATEMENT (SECOND) OF TORTS § 826, reporter’s notes (1979).

270. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 686-87 (E.D. La. 2006).

271. *Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 475 (1915).

272. *Id.* at 474.

273. *Id.*

274. *Id.* at 474, 477.

275. *Id.*

276. *Id.*

277. The court went to some length to describe the history of climate change politics in the United States in the “background” section of the opinion. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268-70 (S.D.N.Y. 2005). It cited current Bush Administration policy that “emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change.” *Id.* at 270 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,933 (Sept. 8, 2003)).

278. *Am. Elec. Power*, 406 F. Supp. 2d at 274.

federal court would express a “lack of the respect due coordinate branches of government” or lead to potential “embarrassment from multifarious pronouncements by various departments on one question”?²⁷⁹ If so, the district court need not worry. It does not follow that if an activity is not proscribed by statute, it cannot be deemed a public nuisance.²⁸⁰ Tortious conduct is not contingent upon legislative proscription. For example, in *Gordon*, the federal government had specifically permitted the fish run that was causing erosion.²⁸¹ The Fifth Circuit did not, however, find that issuing an injunction to fill the federally permitted fish run would “abrogate any significant federal policies.”²⁸² Likewise in *Tennessee Copper* the defendants were engaged in lawful smelting operations, but the Supreme Court still enjoined the emission of sulphur.²⁸³

The Second Circuit has stated that “[t]he fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.”²⁸⁴ An injunction capping carbon dioxide emissions of the *specific defendant utilities* does not meet this standard. First, the plaintiffs have argued that the executive branch has expressed a policy in favor of reducing carbon dioxide emissions (through voluntary measures) when President George H.W. Bush signed the United Nations Framework Convention on Climate Change (“UNFCCC”), and Congress expressed its agreement when it ratified the treaty.²⁸⁵ The current administration has expressed a policy that encourages research and the advancement of new technologies to address climate change.²⁸⁶ Second, the argument that a judicial ruling would undermine the President’s policy to negotiate with the international community does not hold water because the President is *not* currently engaging in international discussions to impose mandatory limits on existing sources of carbon dioxide emissions.²⁸⁷ There simply is no concern that a judicial decision to enjoin carbon dioxide emissions of five defendant utilities would “express[] a lack of the respect due coordinate branches of government.”²⁸⁸

Although global warming is a “politically charged issue,” the plaintiffs’ claim does not present a non-justiciable political question. The case does not fall into any of the typical categories in which the political question doctrine has been

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

280. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972). The reason Illinois brought a common law nuisance action to abate Milwaukee’s water pollution was that there was no statute that proscribed Milwaukee’s specific activity. *Id.*

281. *Gordon v. Texas*, 153 F.3d 190, 195 (5th Cir. 1998).

282. *Id.* at 194-95.

283. *Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 477 (1915).

284. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

285. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 273-74 (S.D.N.Y. 2005).

286. Council on Environmental Quality, *supra* note 70.

287. *See supra* notes 70-72 and accompanying text.

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

invoked, such as voting/political gerrymandering, treaty-making authority, war and peace, or certain matters involving foreign policy. Contrary to the district court's description of the case as "an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security,"²⁸⁹ the plaintiffs sought a remedy that is limited to the injurious conduct of the specific defendants named in the suit. When the issue presented in *American Electric Power* is framed properly, it does not violate any of the *Baker* factors and does not present a non-justiciable political question.

CONCLUSION

By dismissing *American Electric Power* as a non-justiciable political question, the district court made a bold statement reflecting its opinion about the role (or lack thereof) of the courts with respect to global climate change. However, the plaintiffs did not ask the court to engage in a broad discussion of global climate change. They simply asked the court to evaluate whether the injuries allegedly caused by the defendants' carbon dioxide emissions amounted to an unreasonable interference with a public right. For this reason, the district court's decision to dismiss the plaintiffs' public nuisance action on political question grounds should be overturned.

Given how the district court went out of its way to frame *American Electric Power* in such a way as to create a political question, the phrase "outcome-based-jurisprudence" comes to mind. Cases are certainly more susceptible to outcome-based-jurisprudence when both the defendants and the plaintiffs can present valid arguments because, very often, the outcome is determined by the way in which the issue is framed.

American Electric Power raises other "pre-merits" issues including foreign affairs preemption, preemption/displacement of federal common law, and standing, and there are legitimate arguments on both sides of each issue. Therefore, the Second Circuit could very easily reason its way to its desired outcome on any of these issues by framing the plaintiffs' request for relief either as a broad policy question or as a more narrow issue of liability in tort. The Second Circuit may very well find that the plaintiffs have failed to overcome one of these hurdles. Hopefully the court will make such a determination *after* it properly frames the plaintiffs' claims.

289. *Am. Elec. Power*, 406 F. Supp. 2d at 271 (quoting Transcript of Oral Argument at 6:1-6:5).