

**TOO HOT FOR COURTS TO HANDLE:
FUEL TEMPERATURES, GLOBAL WARMING,
AND THE POLITICAL QUESTION DOCTRINE**

By

Professor Laurence H. Tribe

Joshua D. Branson

Tristan L. Duncan

WLF

Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 169
January 2010

TABLE OF CONTENTS

ABOUT WLF'S LEGAL STUDIES DIVISION.....	ii
ABOUT THE AUTHORS.....	iii
INTRODUCTION.....	1
I. FUEL TEMPERATURE AND THE WEIGHTS AND MEASURES CLAUSE.....	6
II. CLIMATE CHANGE AND THE PROBLEMS OF JUDICIAL MANAGEMENT.....	12
A. Nuisance Doctrine's Inability to Provide Judicially Manageable Standards for Redressing Climate Change.....	13
B. The Impact of a Single Lawsuit.....	20
CONCLUSION.....	23

ABOUT WLF'S LEGAL STUDIES DIVISION

The Washington Legal Foundation (WLF) established its Legal Studies Division to address cutting-edge legal issues by producing and distributing substantive, credible publications targeted at educating policy makers, the media, and other key legal policy outlets.

Washington is full of policy centers of one stripe or another. But WLF's Legal Studies Division has deliberately adopted a unique approach that sets it apart from other organizations.

First, the Division deals almost exclusively with legal policy questions as they relate to the principles of free enterprise, legal and judicial restraint, and America's economic and national security.

Second, its publications focus on a highly select legal policy-making audience. Legal Studies aggressively markets its publications to federal and state judges and their clerks; members of the United States Congress and their legal staffs; government attorneys; business leaders and corporate general counsel; law school professors and students; influential legal journalists; and major print and media commentators.

Third, Legal Studies possesses the flexibility and credibility to involve talented individuals from all walks of life - from law students and professors to sitting federal judges and senior partners in established law firms - in its work.

The key to WLF's Legal Studies publications is the timely production of a variety of readable and challenging commentaries with a distinctly common-sense viewpoint rarely reflected in academic law reviews or specialized legal trade journals. The publication formats include the provocative COUNSEL'S ADVISORY, topical LEGAL OPINION LETTERS, concise LEGAL BACKGROUNDERS on emerging issues, in-depth WORKING PAPERS, useful and practical CONTEMPORARY LEGAL NOTES, interactive CONVERSATIONS WITH, law review-length MONOGRAPHS, and occasional books.

WLF's LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "WLF" or by visiting the Washington Legal Foundation's website at www.wlf.org. All WLF publications are also available to Members of Congress and their staffs through the Library of Congress' SCORPIO system.

To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302. Material concerning WLF's other legal activities may be obtained by contacting Daniel J. Popeo, Chairman.

ABOUT THE AUTHORS

Laurence H. Tribe is the Carl M. Loeb University Professor, Harvard Law School (title noted for identification purposes only).

Joshua D. Branson is a J.D. candidate, Harvard Law School (June 2010), has been an Article Editor of the *Harvard Law and Policy Review*, and will be clerking for a federal circuit court judge in the U.S. Court of Appeals for the Fourth Circuit beginning August 2010.

Tristan L. Duncan is a Partner, Shook, Hardy & Bacon L.L.P.; 1988-89 Post Doctoral Scholar, Yale Law School, 1988-89; J.D., University of Iowa Law School, 1989.

Tristan Duncan is counsel to several of the defendants involved in these cases, Laurence Tribe has consulted for some of those defendants, and Joshua Branson has assisted Professor Tribe in that consultation, but the views expressed in this paper are solely the authors' own.

TOO HOT FOR COURTS TO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE

By

Professor Laurence H. Tribe
Joshua D. Branson
Tristan L. Duncan

INTRODUCTION

We can stipulate that the Constitution’s framers were not driven by the relationships among chemistry, temperature, combustion engines, and global climate when they assigned to the judicial process the task of interpreting and applying rules of law, and to the political process the mission of making the basic policy choices underlying those rules. Yet the framework established by the Constitution they promulgated, refined over time but admirably constant in this fundamental respect, wisely embodied the recognition that enacting the ground rules for the conduct of commerce in all of its manifestations—including designing incentives for innovation and creative production (through regimes of intellectual property), establishing the metrics and units for commercial transactions (through regimes of weights and measures), and coping with the cross-boundary effects of economic activity (through the regulation of interstate and foreign commerce)—was a task quintessentially political rather than judicial in character.

Yet the litigious character of American society, observed early in the republic’s history by deTocqueville, has ineluctably drawn American courts, federal as well as

state, into problems within these spheres more properly and productively addressed by the legislative and executive branches. This has occurred in part because political solutions to complex problems of policy choice inevitably leave some citizens and consumers dissatisfied and inclined to seek judicial redress for their woes, real or imagined. And it has occurred in part because the toughest political problems appear on the horizon long before solutions can be identified, much less agreed upon, leaving courts to fill the vacuum that social forces abhor no less than nature itself. One can believe strongly in access to courts for the protection of judicially enforceable rights and the preservation of legal boundaries—as the authors of this WORKING PAPER do—while still deploring the perversion of the judicial process to meddle in matters of policy formation far removed from those judicially manageable realms. Indeed, the two concerns are mutually reinforcing rather than contradictory, for courts squander the social and cultural capital they need in order to do what may be politically unpopular in preserving rights and protecting boundaries when they yield to the temptation to treat lawsuits as ubiquitously useful devices for making the world a better place.

Two sets of problems, one manifested at a microcosmic level and the other about as macrocosmic as imaginable, powerfully illustrate these propositions. Not coincidentally, both stem from concerns about temperature and its chemical and climactic effects, concerns playing an increasingly central role in the American policy process. As those concerns have come to the fore, courts have correspondingly warmed to the idea of judicial intervention, drawn by the siren song of making the world a better place and fueled by the incentives for lawyers to convert public concern into private profit. In both the fuel temperature and global warming cases, litigants, at

times justifying their circumvention of representative democracy by pointing to the slow pace of policy reform, have turned to the courts. By donning the cloak of adjudication, they have found judges for whom the common law doctrines of unjust enrichment, consumer fraud, and nuisance appear to furnish constitutionally acceptable and pragmatically useful tools with which to manage temperature's effects. Like the proverbial carpenter armed with a hammer to whom everything looks like a nail, those judges are wrong. For both retail gasoline and global climate, the judicial application of common law principles provides a constitutionally deficient—and structurally unsound—mechanism for remedying temperature's unwanted effects.

It has been axiomatic throughout our constitutional history that there exist some questions beyond the proper reach of the judiciary. In fact, the political question doctrine originates in no less august a case than *Marbury v. Madison*, where Chief Justice Marshall stated that “[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹ Well over a century after that landmark ruling, the Supreme Court, in *Baker v. Carr*, famously announced six identifying characteristics of such nonjusticiable political questions, which, primarily as a “function of the separation of powers,” courts may not adjudicate.² Of these six characteristics, the Court recently made clear that two are particularly important: (1) the presence of “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” and (2) “a lack of judicially discoverable and manageable standards for resolving it.”³

¹5 U.S. (1 Cranch) 137, 170 (1803).

²369 U.S. 186, 217 (1962).

³*Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (plurality opinion) (quoting *Baker*, 369 U.S. at

The spectrum of nonjusticiable political questions in a sense spans the poles formed by these two principles. At one pole, the Constitution’s specific textual commitments shield issues expressly reserved to the political branches from judicial interference. At the other pole lie matters not necessarily reserved in so many words to one of the political branches but nonetheless institutionally incapable of coherent and principled resolution by courts acting in a truly judicial capacity; such matters are protected from judicial meddling by the requirement that “judicial action must be governed by *standard*, by *rule*” and by the correlative axiom that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”⁴

At a deeper level, however, the two poles collapse into one. The reason emerges if one considers issues that courts are asked to address involving novel problems the Constitution’s framers, farsighted though they were, could not have anticipated with sufficient specificity to entrust their resolution to Congress or to the Executive *in haec verba*. A perfect exemplar of such problems is the nest of puzzles posed by human-induced climate change. When matters of that character are taken to court for resolution by judges, what marks them as “political” for purposes of the “political question doctrine” is not some problem-specific language but, rather, the demonstrable intractability of those matters to principled resolution through lawsuits. And one way to understand that intractability is to view it as itself marking the Constitution’s textual, albeit broadly couched, commitment of the questions presented to the processes we denominate “legislative” or “executive”—that is, to the pluralistic processes of legislation and treaty-making rather than to the principle-bound process

217).

⁴*Id.* at 278 (emphasis in the original).

of judicially resolving what Article III denominates “cases” and “controversies.” In other words, the judicial unmanageability of an issue serves as powerful evidence that the Constitution’s text reserves that issue, even if broadly and implicitly, to the political branches.⁵

It has become commonplace that confusion and controversy have long distinguished the doctrine that determines, as a basic matter of the Constitution’s separation of powers, which questions are “political” in the specific sense of falling outside the constitutional competence of courts and which are properly justiciable despite the “political” issues they may touch. But that the principles in play have yet to be reduced to any generally accepted and readily applied formula cannot mean that courts are simply free to toss the separation of powers to the winds and plunge ahead in blissful disregard of the profoundly important principles that the political question doctrine embodies. Unfortunately, that appears to be just what some courts have done in the two temperature-related cases—one involving hot fuels, the other a hot earth—that inspired this publication. In the first, a court allowed a claim about measuring fuels to proceed despite a constitutional provision specifically reserving the issue to Congress. In the second—a case in which the specific issue could not have been anticipated, much less expressly reserved, but in which the only imaginable solutions clearly lie beyond judicial competence—a court, rather than dismissing the case as it ought to have done, instead summarily dismissed the intractable obstacles to judicial management presented by climate change merely because it was familiar with the

⁵See *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (“the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch”).

underlying cause of action. As this pair of bookend cases demonstrates, the political question doctrine is feeling heat from both directions.

I. FUEL TEMPERATURE AND THE WEIGHTS AND MEASURES CLAUSE

The first dispute centers around the effect of temperature on the density of retail gasoline. In *In Re Motor Fuel Temperature Sales Practice Litigation* (“*Motor Fuel*”),⁶ the plaintiffs, a putative class of gasoline consumers, claim that the defendant gasoline retailers defraud their customers by failing to adjust for or disclose the effects of temperature on the density of gasoline sold at the pump.⁷ Put simply, gasoline expands as it warms, and because retailers sell fuel by the gallon—a volumetric unit—purchasers in warmer climates would receive marginally less energy per unit of the same fuel purchased (although, of course, not necessarily less per dollar spent, which is the key variable) than their counterparts in colder climates.⁸ The plaintiffs claim that state tort law renders the retailers liable for their alleged failure to compensate their customers for heat’s effect on the energy content of their gasoline.⁹

⁶No. 07-MD-1840-KHV (D. Kan. 2007)

⁷See Second Consolidated Amended Complaint ¶¶1-9, *In Re Motor Fuel Temperature Sales Practice Litig.*, No. 07-MD-1840-KHV (D. Kan. 2008).

⁸It is important to note that because retailers’ cost of warmer fuel is reduced, the market correspondingly reduces consumers’ price for warmer fuel, so that even though consumers might receive marginally less energy *per unit bought*, they receive the same amount of energy *per dollar spent*. The California Energy Commission recognized this reality by finding that automatically adjusting for temperature will not alter the total volume sold or amount paid, but simply will change the size of the gallon so that as gasoline warms, the size of the gallon sold will increase but retailers will be expected to charge a higher price for selling fewer, larger gallons. Therefore, no net societal benefit exists from selling fuel in temperature compensated units. Gordon Schremp and Nicholas Janusch, 2009. *Fuel Delivery Temperature Study*, California Energy Commission. CEC-600-2009-002-CMF at 69-71. <http://www.energy.ca.gov/2009publications/CEC-600-2009-002/CEC-600-2009-002-CMF.PDF> (last visited Dec. 31, 2009).

⁹See Second Consolidated Amended Complaint ¶77, *In Re Motor Fuel Temperature Sales Practice Litig.*, No. 07-MD-1840-KHV (D. Kan. 2008).

Of course, retailers do not purport to sell gasoline by units of energy; anyone who has ever pumped gas is aware that fuel is sold by the “gallon,” a unit that describes the volume, as opposed to the mass, of the product bought. But the plaintiffs assert that consumers, for whom high school science is a distant memory, are unaware that energy does not perfectly correlate to volume, and so allege that the sale of fuel in volumetric units implicitly misleads them into thinking they are purchasing more energy content per tank than they are actually buying. It does appear deceptively simple: by packaging the product in volumetric bundles, measured by the temperature-neutral unit that is the gallon, fuel retailers in hot climates may seem to be profiting—if one ignores the way the market itself appears to adjust the price downward to compensate for lower cost at higher temperature—from consumers’ obliviousness to the chemical properties of gasoline.

Dressed in this garb of a rather traditional state law claim, however, lies a challenge to an explicit policy decision by state and federal regulators to favor non-temperature compensated retail sales of gasoline. At bottom, the plaintiffs’ allegations rely upon a judgment that the only fair and non-deceptive definition of a “gallon” of gasoline is 231 cubic inches of gasoline *at 60 degrees Fahrenheit*, as opposed to a purely volumetric measure.¹⁰ Yet the adoption of this precise standard for the retail sale of gasoline has been debated, and consistently rejected, by federal and state regulators for the past 35 years. In fact, the National Conference of Weights and Measures (NCWM)—an organization of state regulatory officials and other interested parties charged by Congress with promulgating model standards for weights and

¹⁰See *id.* ¶3.

measures—has concluded that the confusion and other costs—including spikes in the price of gasoline—of implementing a temperature-compensation system would outweigh the benefits.¹¹

NCWM’s conclusion is of more than academic interest. Indeed, it represents the judgment of those designated to deal with the matter by the branch to which the Constitution explicitly reserves the issue of weights and measures. In so many words, Article I commits to Congress the power to “fix the Standard of Weights and Measures.”¹² Exercising its constitutional authority under this clause, Congress created the National Institute of Standards and Technology (NIST), which was empowered *inter alia* “to develop, maintain, and retain custody of the national standards of measurement, and provide the means and methods for making measurements consistent with those standards.”¹³ In furtherance of this objective, NIST was charged with “cooperat[ing] with the States in securing uniformity in weights and measures laws and methods of inspection.”¹⁴ This cooperation is institutionalized in the partnership between NIST and NCWM, and it reflects Congress’s long-standing recognition that weights and measures policy requires a

¹¹See National Conference on Weights and Measures, *Addendum Sheets to the Interim Report of the Laws and Regulations Committee, Annual NCWM Meeting July 12-16, 2009, San Antonio, TX*, at L&R-3 (withdrawal of proposals either to permit or mandate temperature compensation for retail sales of motor fuel due to “overwhelming” opposition by NCWM voting membership), available at http://www.ncwm.net/sites/default/files/annual%20archive/2009/09_Annual_LR_Addendum.pdf (last visited Dec. 29, 2009); National Conference of Weights and Measures, *Voting Record of the 94th Annual Meeting, July 12-16, 2009, San Antonio, TX*, available at http://www.ncwm.net/sites/default/files/annual%20archive/2009/09_Annual_Voting_Results.pdf (last visited Dec. 29, 2009).

¹²U.S. CONST. Art. I, § 8, cl. 5.

¹³15 U.S.C. § 272(b)(2).

¹⁴15 U.S.C. § 272(c)(4).

delicate balancing of the competing demands of national uniformity and state autonomy.¹⁵

Even though this policy process, designed by Congress acting pursuant to a specific grant of constitutional authority, has resulted in the repeated rejection of temperature-adjusted compensation as too logistically and economically complex to be feasible, the Multi-district Litigation court in *Motor Fuel* recently held justiciable the plaintiffs' claims for relief from retailers' failure to adopt temperature-adjusted compensation. In rejecting the argument that the Constitution's Weights and Measures Clause forbids judicial involvement, the court opined that the plaintiffs' claims do not implicate the specific power reserved to Congress under that Clause.¹⁶ It reasoned that "only by the most strained reasoning—that anything having to do with 'weights and measures' is off limits to federal courts—could this Court find that the issues in these suits are exclusively committed to the political branches."¹⁷

But that argument is a straw man. The point, surely, was not that "*anything* having to do" with "weights and measures" is judicially off limits, but that the task this particular lawsuit called upon courts to perform, however packaged, logically entailed second-guessing the way the political branches had chosen to address the complex economic and other trade-offs implicit in the deceptively simple problem of choosing the units in which to sell gasoline at retail. Reading the Weights and Measures Clause so narrowly that it falls off a court's radar screen unless plaintiffs make the blunder of

¹⁵See David P. Currie, *Weights & Measures*, 2 GREEN BAG 261, 261-63 (1999) (describing the early evolution of weights and measures law as reflecting the tension between the need for uniformity and the desire to respect state autonomy).

¹⁶See Memorandum and Order at 4, *In Re Motor Fuel Temperature Sales Practice Litig.*, No. 07-MD-1840-KHV (D. Kan. 2009).

¹⁷*Id.*

expressly asking courts to redefine for the Nation a unit of measure such as a volumetric “gallon” renders all but empty the Constitution’s delegation to Congress of the task the Clause contemplates. When individual fuel retailers decide to adopt the gallon as the unit of sale for gasoline, acting in complete accord with what the political process has opted to require nationwide, a court is no freer to disrupt that choice in a “retail,” ad hoc manner, in individual lawsuits or class actions targeting groups of sellers, than it would be to override that choice “wholesale” by overtly replacing the congressionally established standard-setting process with a judicially imposed nationwide alternative.

This is not to say, of course, that the Weights and Measures Clause would foreclose the use of state common law to redress outright fraud pertaining to weights and measures. If, for instance, a gasoline retailer were to rig its pumps to falsely display numbers telling motorists they were receiving two gallons for every one actually dispensed, those motorists would surely have a variety of justiciable state law claims against the retailer. But the *Motor Fuel* plaintiffs assert something entirely different. Their claim turns instead on proving that the unit of measurement governing fuel sales—the gallon—is *inherently* misleading. Indeed, it is crucial to understand that, for the *Motor Fuel* plaintiffs, the supposed “fraud” is worked not by any actual misrepresentation on the retailers’ part, but instead by the misleading implications that they assert necessarily flow in our society from the metric politically chosen to measure the product sold. Any judicial remedy for that phenomenon inherently entails a judgment about the wisdom of the metric itself.

The Constitution reserves such a judgment to Congress. The power to “fix the Standard of Weights and Measures” is all but emptied of significance if the process that

Congress puts in motion articulates and defines uniform units of measurement only to have courts decide which units apply to which transactions. Not only is such judicial power at odds with the uniformity and commerce-facilitating purposes of the Weights and Measures Clause,¹⁸ but the use of the word “Standard” in the clause strongly suggests that Congress, rather than being limited to articulating a given metric, is also empowered to specify the kinds of transactions to which that metric applies—thus defining the transactional spheres in which the metric is to serve as “the standard.”¹⁹ To apply this concept to fuel temperature, the “gallon,” as defined by NCWM, governs gasoline transactions at the point-of-sale. Were a court to award relief based on its conclusion that temperature-adjusted metrics are superior to the “gallon” for the purposes of fuel sales, it would essentially be adopting a new standard of measure for the retail sale of gasoline.

Thus the court’s conclusion that “plaintiffs’ claims do not call on the Court to formulate national policies” is wide of the mark.²⁰ The political question doctrine bars more than just those claims that explicitly call on a court to “formulate a national policy;” it prohibits judges from entertaining claims premised on political judgments reserved to Congress by the Constitution. The Constitution expressly reserves to Congress judgments about the desirability, as a policy matter, of specific units of measure, and courts that run roughshod over these judgments merely because the disputes before them involve less than the whole nation turn the political question

¹⁸Eric Chiappinelli, *THE HERITAGE GUIDE TO THE CONSTITUTION* 116 (ed. David Forte, 2005).

¹⁹See *United States v. Porter*, 12 F. Supp. 234, 236 (W.D.N.Y. 1935) (holding that “[i]f Congress can legally say how many pounds shall constitute a ton” under the Weights and Measures Clause, then that Clause must also authorize Congress to “fix a standard of sizes for hampers and baskets for different uses”).

²⁰Memorandum and Order at 5, *In Re Motor Fuel Temperature Sales Practice Litig.*, No. 07-MD-1840-KHV (D. Kan. 2009).

doctrine on its head. In fact, precisely because of the macroeconomic concerns with uniformity that underpin the Weights and Measures Clause, the judicial usurpation of the congressional prerogative under that Clause can be even worse when accomplished piecemeal. And in any event, the “piece” bitten off by the *Motor Fuel* court is in truth a sizable chunk of the national pie, for the claim it is undertaking to address demands relief in twenty-six states and targets the ubiquitous and economically vital gasoline and diesel industry—an industry that helps generate more than \$1 trillion to the national economy or 7.5 percent of the U.S. gross domestic product and contributes over 9 million American jobs.²¹ It is spurious to think that such a claim is of so small a scale that it avoids impinging upon Congress’s constitutional prerogatives.

II. CLIMATE CHANGE AND THE PROBLEMS OF JUDICIAL MANAGEMENT

Climate change lies at the other pole of the spectrum identified earlier: the power to order the abatement of carbon emissions is not vested in Congress by any similarly idiosyncratic and carbon-specific constitutional provision. There is no “Climate Change Clause” akin to the Weights and Measures Clause addressed above. But global climate change raises such manifestly insuperable obstacles to principled judicial management that its very identification as a judicially redressable source of injury cries out for the response that the plaintiffs have taken their “petition for redress of grievances” to the wrong institution altogether.

Yet in a pair of recent high-profile cases, two U.S. Courts of Appeal allowed common law claims against carbon emitters and producers to proceed, holding that

²¹See American Petroleum Institute, *The Economic Impacts of the Oil and Natural Gas Industry*, Sept. 8, 2009, available at <http://www.api.org/aboutoilgas> (last visited on Dec. 31, 2009).

the nuisance doctrine sufficiently equips courts to redress the injuries caused by global climate change.²² Their holdings rested on two basic arguments. First, because the plaintiffs’ cause of action—the common law of nuisance—is both familiar and quintessentially judicial in nature, the claims *must* be justiciable. Second, like the motor fuel plaintiffs, climate change plaintiffs do not ask for an explicitly wholesale rewriting of national energy policy, so their claims are insufficiently legislative in character to be nonjusticiable. Both of these arguments reflect a deep misunderstanding of the political question doctrine and its foundations.

A. Nuisance Doctrine’s Inability to Provide Judicially Manageable Standards for Redressing Climate Change

First, plaintiffs seeking judicial redress of climate change look to entice judicial intervention by emphasizing the traditional common law roots of their asserted cause of action. The Second Circuit in particular took the bait, premising its finding of justiciability in large part on its observation that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”²³ It also noted that, “where a case ‘appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.’”²⁴ Thus, simply because the plaintiffs alleged a traditional cause of action with which courts have experience, the Second Circuit—essentially confusing a label

²²See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321-32 (2d Cir. 2009); *Comer v. Murphy Oil*, 585 F.3d 855, 869-880 (5th Cir. 2009).

²³*AEP*, 582 F.3d at 326.

²⁴*Id.* at 331 (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007)).

with an argument—concluded that it was an “ordinary tort suit” and therefore justiciable.²⁵

But the political question doctrine is about more than wordplay. It governs the judicial resolution of certain types of disputes, not the entertainment of certain causes of action. That courts must look beyond the label attached to the plaintiff’s cause of action should be obvious from the Supreme Court’s political question doctrine cases; in *Baker* itself, the Court emphasized that the determination of whether a dispute is amenable enough to principled resolution to comply with the Article III conception of the “judicial power” requires a “discriminating analysis of the particular question posed” and in particular of “the possible consequences of judicial action.”²⁶ As such, the search for a nonjusticiable political question must be guided by a fact-intensive “discriminating inquiry,” not by mere “semantic cataloguing.”²⁷

The Supreme Court has sensibly identified several obstacles to judicial management that such a “discriminating inquiry” may uncover, including the “difficulty of fashioning relief,”²⁸ the necessity of assessing matters that are “delicate, complex, and involve large elements of prophecy,”²⁹ and the prospect that a court will be plunged into a “sea of imponderables.”³⁰ None of these indicia turns on the formal framing of the plaintiffs’ cause of action; they depend instead on what the process of applying that cause of action to the underlying dispute would entail. In fact, a plurality

²⁵At the early pleadings stage of the *AEP* and *Comer* cases, the courts accepted as true the plaintiffs’ allegations regarding the science of human induced climate change.

²⁶369 U.S. at 211-12.

²⁷*Id.* at 217.

²⁸*Nixon v. United States*, 506 U.S. 224, 236 (1993).

²⁹*Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

³⁰*Vieth*, 541 U.S. at 290.

of the Court has recognized explicitly that the mere fact that a particular legal principle provides a justiciable claim against one type of conduct does not at all imply that the same principle provides a justiciable claim in all topically-related disputes.³¹ Thus, instead of formulaically concluding that the label attached to the plaintiff's cause of action rendered the case justiciable, the Second Circuit should have inquired into whether nuisance doctrine affords courts the tools with which to coherently manage the specific problem of global climate change.

Had the Second Circuit looked beyond the face of the plaintiffs' complaint, it would have recognized that nuisance doctrine is woefully ill-suited to that task. Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the non-linear, collective impact of millions of fungible, climactically indistinguishable, and geographically dispersed emitters.³² Given this fact, granting a plaintiff relief from the coastline-changing or other adverse consequences of global climate change bears no genuine resemblance to identifying a responsible defendant and ordering a reduction in its emissions. To the contrary, worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the adversarial and insulated model of nuisance litigation is structurally incapable of providing.³³

³¹See *Vieth*, 541 U.S. at 290 (distinguishing the “easily administrable standard” provided by the Equal Protection Clause in the one-person one-vote cases from the more problematic standard the same Clause provides in partisan gerrymandering cases).

³²See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009) (noting that global warming “does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution”).

³³See *Native Village of Kivalina v. ExxonMobil Corp.*, 2009 WL 3326613, *8 (N.D. Cal. 2009).

The incompatibility of climate change and nuisance doctrine is further demonstrated by the lack of connection between the plaintiffs allegedly injured by climate change and the conduct of the defendants they target. The principle that plaintiffs lack standing to sue in Article III courts unless they present “something more than generalized grievances”³⁴ is as axiomatic as *Marbury’s* declaration that courts should not adjudicate political questions. To move beyond such “generalized grievances,” plaintiffs must articulate a chain of causation from challenged conduct to injury that possesses a constitutionally “essential dimension of specificity.”³⁵ Such specificity is sorely lacking in the climate change context. In terms of coastal erosion or species destruction allegedly caused by climate change, each carbon emission is like every other; the plaintiffs sue specific emitters not for their particular responsibility for the injuries alleged, but instead for their generic contribution to a collective global problem.

Indeed, the undifferentiated nature of any one defendant’s contribution to plaintiffs’ injuries enables plaintiffs—if courts let them—to wield the hammer of federal common law against any emitter of their choosing. The Supreme Court has recognized that the Constitution forbids such a contortion of standing principles for the same reason that it forbids courts from entertaining nonjusticiable political questions; the adjudication of such abstract and undifferentiated claims “open[s] the Judiciary to [the] charge of providing ‘government by injunction.’”³⁶ And government by injunction is neither accountable to majority will nor a product of the “consent of the

³⁴*United States v. Richardson*, 418 U.S. 166, 180 (1974) (internal quotation omitted).

³⁵*Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

³⁶*Id.* at 222.

governed.” These bedrock democratic principles are what the separation of powers generally, and the political question doctrine specifically, protect.

But the unique and daunting nature of the climate change problem could not shake the Second and Fifth Circuits’ quixotic and unyielding faith in nuisance doctrine. Although conceding that climate change is vastly larger in scale and complexity than traditional pollution problems, both courts were confident in the ability of nuisance doctrine to adapt to the idiosyncrasies of climate change litigation. Yet nuisance doctrine, even if capable of giving courts the tools with which to accurately weigh the costs and benefits of fossil fuel consumption—a questionable conclusion, to be sure³⁷—provides no coherent remedy for the harms caused by carbon emissions. Indeed, both remedies countenanced by the Second and Fifth Circuits—an injunction ordering emissions reductions, and damages for climate-related injuries—are conceptually incommensurable with the problems associated with human-induced climate change.

The Second Circuit, in allowing the plaintiffs’ claim for an injunction to proceed, presumed that any reduction in carbon emissions, no matter how bluntly calibrated or poorly targeted, contributes in some measure, however small, to the overall project of reducing the long-term injurious consequences of climate change. That simply is not so. Wielding the sledgehammer of injunctive relief against arbitrarily selected groups of carbon emitters and producers is as likely to exacerbate as to ameliorate those injurious effects. For one thing, many climate change scholars have identified the phenomenon of “carbon leakage,” whereby poorly thought out carbon reductions in one section of the global economy result in *increased* emissions elsewhere, as fossil

³⁷See *California v. General Motors Corp.*, 2007 WL 2726871, *8 (N.D. Cal. Sept. 17, 2007) (concluding that climate change litigation requires of courts a “balancing of . . . competing interests . . . to be made by the political branches”).

fuel price reductions, coupled with the tendency for global corporations to shift their bases of operations to avoid stringent regulation, spark rising energy consumption in other jurisdictions.³⁸ Such leakage would exacerbate the injuries about which the plaintiffs complain since carbon emissions from non-defendants—even those halfway around the world—“cause” coastal erosion in exactly the same undifferentiated and attenuated manner as do carbon emissions from the defendants they have randomly targeted.

Moreover, there are serious complexities involved in any process of carbon reduction, particularly with respect to the questions of how fast and how much. Slash emissions too fast or too far, and courts risk forcing industry to prematurely retire capital stock, “locking in” inferior technology as companies rush to innovate quickly enough to comply with short-term reduction requirements.³⁹ Such a result would not only entail severe and irretrievable economic costs, but it would exacerbate the long-run harms of climate change by distorting the renewable energy market. On the other hand, slash emissions too little or too slowly, and courts do nothing to ameliorate climate change, while still shaping entitlements in a way that can only inhibit the

³⁸See, e.g., Scott Barrett and Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements* (2003) available at http://ksghome.harvard.edu/~rstavins/Papers/Barrett_and_Stavins_2003.pdf (noting “global emissions may increase” as a result of “carbon leakage”); see also Michael P. Vandenberg and Mark A. Cohen, *Climate Change Governance: Boundaries and Leakage*, Resources for the Future Discussion Paper No. RFF DP 09-51 (Dec. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511797.

³⁹See Michael Toman et. al, *The Economics of “When” Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENVT. 431-460 (1999) (warning of the dangers of “haste further lead[ing] to wrong choice of technology”); see also John P. Weyant and Thomas Olavson, *Issues in Modeling Induced Technological Change in Energy, Environment, and Climate Policy*, 4 ENVT. MODELING AND ASSESSMENT 67 (1999) (observing that “the stochastic nature of the innovation process” forced by climate change requirements “may lead to technology ‘lock-in,’ even by inferior technologies”).

emergence of any ultimate legislative solution.⁴⁰ To ask a court to strike the right balance, given that even a stringent injunction will have no statistically significant impact on global temperatures, is to ask it to do the impossible.

Nor are damages much better. The Fifth Circuit took pains to note that, in contrast to the Second Circuit, its holding extended only to claims for damages relief, claims that are generally more likely to be justiciable.⁴¹ But damages no more provide courts a principled basis upon which to award relief from climate change than do injunctions. To the extent that damages are compensatory in nature, damages awards pin the burden of remedying the climactic harms of global emissions on an arbitrarily chosen set of individual defendants. To award such relief completely short-circuits the question of how to allocate that burden throughout the global economy.

On the other hand, to the extent that damages relief is designed to deter the emission of greenhouse gases (“GHG”), it is little different from equitable relief. The questions that plague the design of injunctive relief from carbon emissions would similarly affect the design of a damages regime: how high should courts set damages so as to optimize the incentives leading to the “right” level of emissions, and on what timetable should the court assess those damages so as to achieve timely reductions? In this way, the award of damages relief is roughly analogous to the imposition of a

⁴⁰Indeed, even those scholars who have professed the belief that the political question doctrine should not apply to bar climate change litigation because of the lack of an express textual commitment of the issue to the political branches, *see e.g.* David A. Dana, *The Mismatch Between Public Nuisance Law and Global Warming*, Northwestern University School of Law Public Law and Legal Theory Series No. 08-16 (2008), available at <http://ssrn.com/abstract=1129838>, at 8, recognize that judicial remedies through the application of common law nuisance theories would frustrate the emergence of legislative solutions. *Id.* at 24 (explaining that any judicial “order itself almost certainly would have shaped senses of entitlements and responsibilities that will influence the substance of any new federal regulation”). Furthermore, Professor Dana’s conclusion about the political question doctrine is based, in part, on his belief that “it is hard to see how global warming is a more ‘political’ issue in the regular senses [sic] of the word than others that federal courts have found justiciable.” *See id.* at 9. Here, the authors explain exactly how climate change presents political questions that are materially different from those raised by the typical “politically charged” case.

⁴¹*See Comer*, 585 F.3d at 874.

carbon tax, since it uses financial penalties to encourage, but not require, carbon abatement. Of course, for the same reason that courts cannot competently design carbon injunctions, they cannot intelligently calibrate carbon “taxes.” But the larger point is this: the choice between the imposition of hard quantitative limitations on carbon emissions (cap and trade) and the exaction of financial penalties for those emissions (a carbon tax) is one the most fundamental and important choices facing climate policymakers, one about which not even climate experts who concur about the need to combat global warming agree.⁴² When courts, guided only by concepts codified in places like the Restatement of Torts, choose between injunctions and damages, they unwittingly usurp the role of Congress and the President in addressing this vitally important and staggeringly complex choice and in deciding how best to cope with the problems for national economic policy and for foreign policy that this choice inescapably presents. This simply is not the stuff of which justiciable legal questions are made.

B. The Impact of a Single Lawsuit

The second argument that underlies the Courts of Appeal’s holdings that climate change nuisance lawsuits present questions suitable for judicial resolution is one that seeks to minimize the importance of those lawsuits. Employing the same logic that led the *Motor Fuel* court astray, the Second Circuit emphasized that “[a] decision by a single federal court concerning a common law of nuisance cause of action, brought

⁴²Compare Carter F. Bales and Rick Duke, *Promoting Economic Recovery Through Climate Legislation* (Feb. 22, 2009) available at http://whatmatters.mckinseydigital.com/climate_change/promoting-economic-recovery-through-climate-legislation (defending cap and trade) with James Hanson, Editorial, *Cap and Fade*, N.Y. TIMES, Dec. 7, 2009, at A30.

by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy.”⁴³ In concluding that the plaintiffs’ modest ambitions insulate the claim from the political question doctrine, the court got it backwards. It is precisely courts’ *inability* to “establish a national or international emissions policy” that renders judicial relief such a conceptual and methodological mismatch with climate change, since it is litigation’s inability to grapple with climate change at a systemic level that deprives courts of “judicially manageable standards” for adjudicating climate change claims. The fact that courts are incapable, as a matter of due process, of binding anyone other than the litigants before them—even if judges were omniscient climate experts imbued with the wisdom required to trade off incommensurable values and interests—automatically makes them institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope.

But that being said, if the Second Circuit was implying that such claims are justiciable in part because they are relatively costless, it was wrong again. In the wake of the recent Copenhagen climate negotiations, America is at a crossroads regarding its energy policy. At Copenhagen, the world—for the first time including both the United States and China—took a tremulous first step towards a comprehensive and truly global solution to climate change.⁴⁴ By securing a modicum of international consensus—albeit not yet with binding commitments—President Obama laid the foundation for what could eventually be a groundbreaking congressional overhaul of American energy policy, an effort that will undoubtedly be shaped by considerations as

⁴³*AEP*, 582 F.3d at 325 (emphasis omitted).

⁴⁴See Editorial, *Copenhagen, and Beyond*, N.Y. TIMES, Dec. 21, 2009, at A30.

obviously political as our energy independence from hostile and unreliable foreign regimes and that will both influence and be influenced by the delicate state of international climate negotiations.⁴⁵

Against this backdrop, courts would be wise to heed the conclusion of one report that what “makes climate change such a difficult policy problem is that decisions made today can have significant, uncertain, and difficult to reverse consequences extending many years into the future.”⁴⁶ This observation is even more salient given that America—and the world—stand at the precipice of major systemic climate reform, if not in the coming year then in the coming decade. It would be disastrous for climate policy if, as at least one commentator has predicted,⁴⁷ courts were to “beat Congress to the punch” and begin to concoct common law “solutions” to climate change problems before the emergence of a legislative resolution. Not only does judicial action in this field require costly and irreversible technological change on the part of defendants, but the prior existence of an ad hoc mishmash of common law regimes will frustrate legislators’ attempts to design coherent and systematic market-based solutions.⁴⁸ Indeed, both emissions trading regimes and carbon taxes seek to harness the fungibility of GHG emissions by creating incentives for reductions to take

⁴⁵See Darren Samuelsohn, ClimateWire, *Obama Negotiates ‘Copenhagen Accord’ With Senate Climate Fight in Mind* (Dec. 21, 2009), available at <http://www.nytimes.com/cwire/2009/12/21/21climatewire-obama-negotiates-copenhagen-accord-with-senat-6121.html?pagewanted=print>.

⁴⁶Robert J. Lempert et. al., *Capital Cycles and the Timing of Climate Change Policy* at 41 (Oct. 2002) available at http://www.pewclimate.org/docUploads/capital_cycles.pdf.

⁴⁷Jennifer Koons, Greenwire, *Courts May Beat Congress, U.N. to Punch on Greenhouse Gases* (Dec. 17, 2009), available at <http://www.nytimes.com/gwire/2009/12/17/17greenwire-courts-may-beat-congress-un-to-punch-on-greenh-26141.html>.

⁴⁸*Cf.* RICHARD STEWART AND JONATHAN WEINER, *BEYOND KYOTO: RECONSTRUCTING CLIMATE POLICY* 36 (2003) (arguing that early miscalculations in crafting climate policy will be costly, because the resultant “institutional design may endure for decades and may be very difficult to revise”).

place where they are most efficient. But if courts were to require reductions of randomly chosen defendants—with no regard for whether they are efficient reducers—they would inhibit the effective operation of legislatively-created, market-based regimes by prematurely and artificially constricting the size of the market. And as one analyst succinctly put it before Congress, “[a]n insufficient number of participants will doom an emissions trading market.”⁴⁹

There is no doubt that the “Copenhagen Accord only begins the battle” against climate change, as diplomats, bureaucrats, and legislators all now begin the lengthy struggle to turn that Accord’s audacious vision into concrete reality.⁵⁰ But whatever one’s position in the debate between emissions trading and carbon taxes, or even in the debate over the extent or indeed the reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding, or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.

CONCLUSION

Some prognosticators opine that the political question doctrine has fallen into disrepute and that it no longer constitutes a viable basis upon which to combat unconstitutional judicial overreaching.⁵¹ No doubt the standing doctrine could

⁴⁹Tradable Emissions: Hearing Before the J. Economic Comm., 105th Cong. 113 (1997) (statement of Daniel J. Dudek, Senior Economist, Environmental Defense Fund).

⁵⁰Bryan Walsh, *Obama's Climate Compromise Leaves a Bitter Aftertaste* TIME, Dec. 19, 2009, available at http://www.time.com/time/specials/packages/article/0,28804,1929071_1929070_1949012,00.html#ixzz0aLbiDHbx.

⁵¹See Robert C. Cook, BNA World Climate Change Report, *Law Professor Says Climate Change Cases Will Be 'Irresistible' to U.S. Supreme Court* (Dec. 15, 2009), available at <http://climate.bna.com/subscriber/World.Climate.Change.Report.html?d=AoC1R3M8D9&dt=News&print=true>.

theoretically suffice to prevent some of the most audacious judicial sallies into the political thicket, as it might in the climate change case, where plaintiffs assert only undifferentiated and generalized causal chains from their chosen defendants to their alleged injuries. But when courts lose sight of the important limitations that the political question doctrine independently imposes upon judicial power—even where standing problems are at low ebb, as with the *Motor Fuel* case—then constitutional governance, and in turn the protection of individual rights and preservation of legal boundaries, suffer. The specter of two leading circuit courts manifestly losing their way in the equally real thicket of political question doctrine underscores the urgency, perhaps through the intervention of the Supreme Court, of restoring the checks and balances of our constitutional system by reinforcing rather than eroding the doctrine’s bulwark against judicial meddling in disputes either expressly entrusted by the Constitution to the political branches or so plainly immune to coherent judicial management as to be implicitly entrusted to political processes. It is not only the climate of the globe that carries profound implications for our future; it is also the climate of the times and its implications for how we govern ourselves.