
Second Circuit Says CO₂ is a Nuisance

INTRODUCTION

In *Connecticut v. American Electric Power Co.*, the Second Circuit ruled that federal courts were competent to deal with tort claims against emitters of greenhouse gases.¹ Although the plaintiffs in this suit only sought injunctive relief in the form of a cap and mandated reductions of greenhouse gas emissions, the court's ruling exposes the nation's utility companies to billions of dollars worth of liability.²

In 2005, eight states, one municipality, and three land trusts brought suit against the five largest greenhouse gas emitters in the country on the theory that their emissions, amounting to 10 percent of all greenhouse gases emitted in the United States, constituted a public nuisance.³ The district court granted defendants' summary judgment motion, holding that the suit raised political questions beyond the court's jurisdiction.⁴ On appeal, the Second Circuit reversed the district court's finding of a non-justiciable political question, and held that plaintiffs had standing,⁵ that plaintiffs had properly stated a federal common law nuisance claim,⁶ and that existing federal regulation did not displace such claims.⁷

I. POLITICAL QUESTION

The political question doctrine is based on separation of power concerns and is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."⁸ The Second Circuit noted, however, that "simply because an issue may have

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1. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009).

2. See MCKINSEY & CO., REDUCING U.S. GREENHOUSE GAS EMISSIONS: HOW MUCH AT WHAT COST? xiii (2007), available at http://www.mckinsey.com/client-service/ccsi/pdf/US_ghg_final_report.pdf (finding that "the incremental capital costs associated with capturing the 3.0 gigatons of abatement in [the] mid-range case would average approximately \$50 billion annually through 2030").

3. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267–68 (S.D.N.Y. 2005).

4. *Id.* at 274.

5. *Am. Elec. Power Co.*, 582 F.3d at 349.

6. *Id.* at 387–88.

7. *Id.* at 388.

8. *Id.* at 321 (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990)).

political implications does not make it non-justiciable.”⁹ The Second Circuit applied the test established in *Baker v. Carr* to determine whether plaintiffs’ claim for relief presented a non-justiciable political question.¹⁰

Regarding the first *Baker* factor, the court found “no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions . . . [and held] that the first *Baker* factor does not apply.”¹¹ With regard to the second *Baker* factor, the court found that though “a case may present complex issues . . . when a court is possessed of jurisdiction, it generally must exercise it,” and held that “[d]efendants [were] not entitled to dismissal based on the second *Baker* factor.”¹² With regard to the third *Baker* factor, the court found that an “ordinary tort suit,” such as the present case, presented no “impossibility of deciding without an initial policy determination”¹³ The court also clarified that the lack of a remedy under the Federal Clean Air Act (CAA) and other statutes relating to greenhouse gases did not require plaintiffs to wait for an initial federal policy decision before bringing their claim. In fact, federal common law is meant to fill such regulatory gaps.¹⁴ Accordingly, the court found that “the third *Baker* factor does not apply.”¹⁵

The court analyzed the fourth, fifth, and sixth *Baker* factors together since they pertain to whether “judicial resolution of a question would contradict prior decisions . . . where such contradiction would seriously interfere with important governmental interests.”¹⁶ The court found that these last three factors did not apply because “[a]llowing this [suit] where there is a lack of a unified policy does not . . . contravene a relevant

9. *See id.* at 323.

10. *Id.* at 321–32. The *Baker* test requires a finding of a non-justiciable political question to be supported by:

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

Baker v. Carr, 369 U.S. 186, 210 (1962).

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

12. *Id.* at 329–30.

13. *Id.* at 331 (citing *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (quoting *Baker*, 369 U.S. at 217)).

14. *Id.* at 330–31.

15. *Id.* at 331.

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

political decision [or] embarrass the nation.”¹⁷ Because none of the *Baker* factors applied, the court held that the political question doctrine did not bar plaintiffs’ federal common law nuisance claims.¹⁸

II. STANDING

A. States’ Standing under *Parens Patriae*

To determine whether the States had standing, the court applied the *parens patriae* doctrine as articulated in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*.¹⁹ The *parens patriae* doctrine is related to the notion that the state can intervene as a parent or protector of its constituency. This power “is inherent in the supreme power of every state . . . [and is] often necessary . . . for the prevention of injury to those who cannot protect themselves.”²⁰ The rationale for this doctrine is that “if the health . . . of the inhabitants of a state [is] threatened, the state [should] defend them.”²¹ The court applied the *parens patriae* test established in *Snapp v. Puerto Rico ex rel. Barez*, which requires a state to (1) “articulate an interest apart from the interests of . . . private parties”; (2) “express a quasi-sovereign interest”; and (3) “allege[] injury to a sufficiently substantial segment of its population.”²² The court found that the state plaintiffs met the *Snapp* test. First the court noted that the states were more than merely “nominal parties” because they have a quasi-sovereign “interest in safeguarding the public health and their resources [that] is apart from any interest held by individual private entities.”²³ The court also noted that it was unlikely that an individual plaintiff could stop its greenhouse gas emissions.²⁴

17. *Id.* at 332.

18. *Id.*

19. *Id.* at 334 (*Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)).

20. *Id.* (quoting *Late Corp.*, 136 U.S. at 57).

21. *Id.* (quoting *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). The *parens patriae* doctrine has been applied to common law public nuisance air pollution cases. See *Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

22. *Am. Elec. Power Co.*, 582 F.3d at 335–36 (quoting *Snapp*, 458 U.S. at 607).

23. *Id.* at 338.

24. *Id.*

B. Article III Standing

Next, the court examined whether the state, land trust, and municipal plaintiffs had Article III standing under the three-part test articulated in *Lujan v. Defenders of Wildlife*.²⁵

First the court examined whether plaintiffs had “suffered an injury in fact . . . which is . . . (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”²⁶ In analyzing the injury in fact question, the court noted that “[w]hile generalized harm to the . . . the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.”²⁷ Injuries here include current injuries caused by global warming and an increased risk of harm from the future effects of global warming.²⁸ All plaintiffs alleged future injuries, including an increased risk of harm, and “assert[ed] that these future injuries constitute ‘special injuries’ to their property interests—injuries different in kind and degree from the injuries suffered by the general public.”²⁹ By contrast, defendants, relying on *Bauer v. Veneman*, contended that “no [p]laintiff has alleged a current injury, that the future harms alleged in the complaints are not ‘imminent’ enough to satisfy Article III injury-in-fact, and that the increased risks of harm cited by [p]laintiffs are not cognizable”³⁰

The court analyzed the states’ claims for current harms beginning with the claim of reduced California snowpack, declining water supplies, and flooding. The court found that the “flooding . . . qualifies as a current injury-in-fact for Article III purposes, as in *Massachusetts v. EPA*, wherein coastal erosion caused by global warming qualified as a concrete and current injury to Massachusetts.”³¹ With regard to the alleged future harms put forth by plaintiffs, including rising sea levels, land inundation, agricultural and ecosystem disruption, and the reduced ecological value of land, the court held that there was no “strict temporal requirement” to establish injury-in-fact, only a requirement of “certainty.”³² The court found sufficient evidence of certainty in plaintiffs’ exposure to current

25. *Id.* at 339 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

26. *Id.* (quoting *Lujan*, 504 U.S. at 560–61).

27. *Id.* at 341 (quoting *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009)).

28. *Id.*

29. *Id.*

30. *Id.* (citing *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003) (holding that increased risks were not a cognizable harm unless “Congress had enacted statutes to prevent the very increased risk the plaintiffs alleged”)).

31. *Am. Elec. Power Co.*, 582 F.3d at 341 (citing *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007)).

32. *Id.* at 342–43 (citing *520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006)).

greenhouse gas emissions and resulting harms, and stated that greenhouse gas emissions “will continue to exacerbate” plaintiffs’ current injuries.³³

The court next analyzed the causation prong of the *Lujan* test, which requires that “the . . . injury [is] ‘fairly traceable to the . . . defendant.’”³⁴ Plaintiffs argued that defendants are “the five largest emitters of [CO₂] in the United States” and together account for approximately 10 percent of all greenhouse gas emissions in the United States.³⁵ Defendants countered that CO₂ is not “inherently harmful” and their greenhouse gas emissions would not alone “cause any future harms.”³⁶ The court was not persuaded, finding that the alleged injuries were “fairly traceable” to defendants’ emissions and that contributing to a global greenhouse gas pollution problem is a cognizable harm.³⁷ The court also noted that at the pleading stage, the “fairly traceable” standard is not as strict a bar as proximate cause.³⁸ According to *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals*, the “fairly traceable” standard “does not mean that plaintiffs must show to a scientific certainty that . . . defendant[s]’ emissions] alone caused [their] precise harm.”³⁹

The final prong of the *Lujan* test requires that the complaint allege “a substantial likelihood that the requested relief will remedy the alleged injury in fact.”⁴⁰ The court found the requirement was met. Using the analysis set in *Massachusetts*, it found that the requested remedy would “slow or reduce” global warming, because “[e]ven if emissions increase elsewhere, . . . [p]laintiffs’ injuries will be less if [d]efendants’ emissions are reduced”⁴¹ Having satisfied the *Lujan* test for proprietary standing and the *Snapp* test for *parens patriae* standing, the court held “that all [p]laintiffs had standing to maintain their actions.”⁴²

33. *Id.* at 344.

34. *Id.* at 345 (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

35. NATURAL RES. DEF. COUNCIL, BENCHMARKING AIR EMISSIONS OF THE 100 LARGEST ELECTRIC POWER PRODUCERS IN THE UNITED STATES 2002, at 13 (2004), available at <http://www.nrdc.org/air/pollution/benchmarking/default.asp>.

36. *Am. Elec. Power Co.*, 582 F.3d at 345.

37. *Id.* at 345–46 (citing RESTATEMENT (SECOND) OF TORTS § 840E (1979) (“[T]he fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.”)).

38. *Id.* at 346 (citing *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006)).

39. *Id.* (citing *Pub. Interest Res. Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 73 (3d Cir. 1990)).

40. *Id.* at 347 (citing *Jana-Rock Const., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006)).

41. *Id.* at 348–49.

42. *Id.* at 349.

III. STATING A CLAIM UNDER THE FEDERAL
COMMON LAW OF NUISANCE

Next, the Second Circuit addressed whether plaintiffs had stated a sufficient claim for relief under the federal common law of public nuisance.⁴³

The court relied on precedent to show that New York City (NYC), as a non-State entity,⁴⁴ and the trusts, as private parties,⁴⁵ could sue based on the federal nature of their interest. The court next examined footnote six of *Illinois v. Milwaukee* and declared that the footnote's sentence structure supported the finding "that it is not necessary for a complaining party to be a state in order to bring a federal common law of nuisance cause of action."⁴⁶ The court also relied on the Restatement to determine whether non-state parties could bring a claim for public nuisance and whether plaintiffs alleged a viable claim.⁴⁷ It found that New York City and the land trust plaintiffs had alleged viable claims and were entitled to bring these claims in cases invoking "an overriding federal interest."⁴⁸ The court found that the land trust and municipal plaintiffs could "properly maintain actions under" section 821C because they "will suffer harms different in kind from the harms suffered by other members of the public" due to the size of their holdings and because they "hold open their land for public use."⁴⁹ In examining whether trust and municipal plaintiffs had alleged a viable claim under section 821B, the court relied upon the same logic and reasoning as that used for the State claims, holding that "New York City and the [t]rusts have stated a claim under the federal common law of nuisance."⁵⁰

43. *Id.*

44. *Id.* at 359–61 (citing *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979)).

45. *Id.* at 361–64 (citing *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233 (3d Cir. 1980) (The "Third Circuit declared that 'the common law nuisance remedy recognized in *Illinois v. Milwaukee* is available in suits by private parties.'")).

46. *Id.* at 364–66 (discussing *Illinois v. Milwaukee*, 406 U.S. 91 (1972)).

47. *Id.* at 366–71 (citing RESTATEMENT (SECOND) OF TORTS § 821B (1979)).

48. *Id.* at 358–71.

49. *Id.* at 368–69. The Restatement provides that

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference. (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must (a) have the right to recover damages, as indicated in Subsection (1), or (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

RESTATEMENT (SECOND) OF TORTS § 821C.

50. *Am. Elec. Power Co.*, 582 F.3d at 371. The Restatement provides that

The court rejected defendants' contention that plaintiffs had failed to state valid federal common law public nuisance claims. The court found that, contrary to defendants' assertion, the scope of the states' cause of action was not limited by constitutional principles.⁵¹ The court then examined defendants' contention that nuisance claims are only available to abate "simple type" nuisances that are localized, poisonous, and directly traceable.⁵² The court found instead that the law had "already evolved from the era when only ['simple type'] nuisances had been actionable,"⁵³ and that the Supreme Court "has not imposed a requirement . . . that the challenged pollution must be 'directly traced' or that plaintiffs must sue all [emitters]."⁵⁴ The court found no case law to support a requirement that the nuisance be poisonous or localized.⁵⁵

IV. DISPLACEMENT

The doctrine of displacement concerns whether a federal statute supersedes federal common law.⁵⁶ A cause of action is displaced when "federal statutory law governs a question previously the subject of federal common law."⁵⁷ Defendants argued that the CAA and five other statutes pertaining to greenhouse gases adequately addressed global climate change and displaced the common law of nuisance.⁵⁸ While the court acknowledged that under the CAA, the Environmental Protection Agency (EPA) set national ambient air quality standards (NAAQS) for criteria pollutants anticipated to endanger public health, the court noted that EPA had yet to set an NAAQS for CO₂.⁵⁹ The court also found that while the Court in *Massachusetts* confirmed that EPA has the authority to

(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

RESTATEMENT (SECOND) OF TORTS § 821B.

51. *Am. Elec. Power Co.*, 582 F.3d at 353–55 (noting that "in circumstances like those of the instant case, in which a state is involved as a party on only one side of a dispute, the . . . state . . . is . . . more certainly entitled to . . . relief than a private party . . .").

52. *Id.* at 355.

53. *Id.* at 356 (citing *Missouri v. Illinois*, 200 U.S. 496 (1906)).

54. *Id.*

55. *Id.* at 357.

56. *Id.* at 371.

57. *Id.* (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)).

58. *Id.* at 375.

59. *Id.* at 375–76.

regulate greenhouse gas emissions,⁶⁰ “no Supreme Court case has held that the CAA has displaced federal common law in the area of air pollution.”⁶¹ The court held that, notwithstanding *Massachusetts*, “[w]ith respect to the [greenhouse gas] emissions causing the alleged nuisance at issue . . . EPA has yet . . . *actually* to regulate the emissions.”⁶²

Defendants also argued that the entire web of federal air quality statutes was “sufficient to displace plaintiffs’ . . . cause of action.”⁶³ After reviewing these statutes at length, the court found that “Congress . . . has not enacted any legislation that ‘addresses’ the problem that climate change presents to [p]laintiffs.”⁶⁴ The court noted that the “linchpin in the displacement analysis concerns whether the legislation *actually* regulates the nuisance at issue. Study is not enough.”⁶⁵ Finally, the court held “that neither Congress nor EPA has regulated greenhouse gas emissions . . . to ‘speak directly’ to [plaintiffs’ issue].”⁶⁶

CONCLUSION

Connecticut illustrates the power of the ancient doctrine of public nuisance to fill the gaps in modern federal environmental legislation by addressing global warming issues neglected by Congress and the executive branch. The case is a step towards mitigating the effects of global warming, but many environmentalists, politicians, and industry officials would prefer that Congress, and not the courts, take the lead in regulating greenhouse gases. In response to this case, White House Climate Coordinator Carol Browner said “[w]hat this means is the courts are starting to take control of this issue and [o]bviously that’s not something that anybody wants. We need a unified set of rules, . . . [which] is best done through legislation.”⁶⁷ While it is unclear whether the courts

60. *Id.* at 377–78 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

61. *Id.*

62. *Id.* at 381.

63. *Id.*

64. *Id.* at 385 (reviewing National Climate Program Act of 1978, 15 U.S.C. §§ 2901–2908 (2006), Global Climate Protection Act of 1987, 15 U.S.C. § 2901, Global Climate Change Act of 1990, 15 U.S.C. §§ 2921, 2931–2938, Energy Policy Act of 1992, 42 U.S.C. §§ 13381–13388 (2006), and Energy Policy Act of 2005, 42 U.S.C. § 13389).

65. *Id.* at 386. See John E. Bryson & Angus MacBeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGY L.Q.* 241, 281 (1972) (stating that “federal public nuisance law could be significantly limited if courts find [displacement] However, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) indicates that [displacement] should not be found.”).

66. *Am. Elec. Power Co.*, 582 F.3d at 387.

67. Press Briefing, Todd Stern, U.S. Special Envoy for Climate Change, Michael Froman, Deputy Nat’l Sec. Advisor for Int’l Econ. Affairs & Carol Browner, Assistant to the President for Energy and Climate Change (Sept. 22, 2009), available at <http://www.whitehouse.gov/>

or the legislature will ultimately succeed in enacting an administrable framework for achieving greenhouse gas reductions, the holding in *Connecticut* requires that *something* be done. Fortunately, defendants

have indicated that, given a clear mandate, they can reduce greenhouse gas emissions.⁶⁸

David Goetz

the_press_office/Briefing-by-Todd-Stern-Mike-Froman-and-Carol-Browner-on-the-Presidents-Climate-Change-Speech.

68. See Jeffrey Ball, *AEP and Cinergy to Outline Ways to Cut Emissions*, WALL ST. J., Feb. 19, 2004, at A8 (quoting the CEO of defendant American Electric Power that “[i]f CO₂ mandates come down the road, we will live [with] them.”); John Carey, *Global Warming*, BUS. WK., Aug. 16, 2004, at 62 (quoting CEO of defendant XCEL Energy, “[g]ive us a date, tell us how much [CO₂] we need to cut, . . . and we’ll get it done”).

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.

