May 2, 2008

"Political Questions": an Invasive Species Infecting the Courts

Philip Weinberg
“Political Questions”: an Invasive Species Infecting the Courts

By Philip Weinberg*

Introduction

Recent court rulings have distorted the hoary “political questions” doctrine into an excuse to evade their responsibility to decide serious justiciable issues in environmental law. Unless overturned, these decisions not to decide important legal questions will carve out an unwarranted escape hatch and thwart effective judicial redress for environmental harms. And, ironically, the weightier the legal issue, the more likely these courts will be to dodge it.

Last year the federal district court in People of California v. General Motors Corp.1 (“GMC”) dismissed a public nuisance suit seeking damages from the major auto manufacturers for injuries to the state’s environment stemming from climate change. These asserted injuries included severe loss of water supply due to melting snow pack, increased risk of flooding, beach erosion and forest fires. The court concluded this public nuisance action, no different from hundreds of others brought by states except for the higher stakes, was a political question, therefore beyond the courts’ jurisdiction, since it “would have an inextricable effect on interstate commerce and foreign policy -- issues constitutionally committed to the political branches of government,” and because there was, in the court’s view, “no manageable method of discerning the entities that are creating and contributing to the alleged nuisance.”2

Two years earlier another federal court rebuffed a suit by Connecticut, New York and several other states seeking to enjoin, as a public nuisance, carbon dioxide (CO₂) emissions from the nation’s five largest electric utilities, again citing their impact on
global warming. In *Connecticut v. American Electric Power Co.* \(^3\) (“AEP”) the court likewise found this to be a political question for similar reasons.

Yet other federal courts have more sensibly rejected political question defenses and sustained actions for damages in a variety of environmental areas ranging from injuries from hurricane Katrina to contamination of water supply caused by methyl tertiary butyl ether (MTBE), a pollutant added to gasoline to help comply with air quality standards.\(^4\)

**The Political Question Doctrine**

The reluctance of federal courts to decide political questions is a doctrine with clear and fixed limits. Its genesis lies in Chief Justice Marshall’s observation in *Marbury v. Madison*\(^5\) that “where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, … their acts are only politically examinable.”\(^6\) But Marshall went on to rule for the Court that the government’s legal duty to furnish Marbury’s promised commission to serve as justice of the peace was not such a situation, that he had a “right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of this country afford him a remedy.”\(^7\) This decision, establishing the power of judicial review, of course veered off to hold the provision of the Judiciary Act of 1789 empowering the Supreme Court to issue units of mandamus in its original jurisdiction cases to be unconstitutional. The political question doctrine -- actually grounded in the courts’ reluctance to invade the
constitutionally allocated powers of the executive and legislative branches of government – thereafter assumed a carefully-circumscribed life of its own.

In another salient decision closer to our own day, *Baker v. Carr,* the Supreme Court ruled claims that states’ failure to reapportion legislative districts over decades, resulting in gross inequality of representation since the population of districts varied enormously, were not political questions. In so holding, Justice Brennan, writing for the Court, set forth the modern test for non-justiciable political questions: are they issues “decided, or to be decided, by a political branch of government coequal with this Court,” or leading to “embarrassment of our government abroad,” or “policy determinations for which judicially manageable standards are lacking[?].”

Illustrative of genuine political questions are the early cases seeking judicial rulings as to whether a state has the republican form of government assured by the Constitution’s Guaranty Clause. In *Luther v. Borden,* where the plaintiff contended Rhode Island, in a comic-opera state of insurrection in the early 1840s, lacked a republican government, the Court found that issue to be one for which no judicial standard existed, and which under the Constitution is to be resolved by Congress. Again in *Georgia v. Stanton,* challenging the post-Civil War military occupation of the South, and *Pacific States Telephone & Telegraph Co. v. Oregon,* a claim that enacting laws by popular initiative denied a republican government, the Court rebuffed as political questions attempts to invoke the Guaranty Clause.

Similarly, some issues of foreign policy, such as whether a state of war exists between the United States and another country, or whether a treaty remains valid, have been ruled political questions for the reasons advanced in *Baker v. Carr.* But,
significantly, claims that a treaty interferes with citizens’ rights protected under the Constitution are not political questions and will be decided by the courts. The Court so held in Reid v. Covert (whether an executive agreement with another country denies right to jury trial to dependents of members of Armed Forces serving overseas), and in Kent v. Dulles (limits on right to travel).

One issue the Supreme Court has wrestled with over the past few decades is whether challenges to the gerrymandering of Congressional or state legislative districts -- drawing the lines to disproportionately benefit the party in power -- is a political question. The practice has been challenged as a denial of equal protection as in Baker v. Carr, which, as noted, dealt with state legislatures’ failure to reapportion districts to reflect population shifts. The Court in subsequent decisions ruled this practice to deny equal protection, and enunciated the one person-one vote rule. Then in Davis v. Bandemer a divided Court found gerrymandering to be justiciable, though three justices dissented, considering the issue a political question. More recently in Vieth v. Jubelirer four justices ruled the practice to be a political question, while five found it justiciable. Yet oddly, claims of gerrymandering on racial rather than partisan grounds have routinely been held justiciable and decided on equal protection grounds.

Justice Brennan in Baker v. Carr well summed up the requirements of a nonjusticiable political question:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it
without an initial policy determination of a kind clearly for nonjudicial discretion.[24]

Shortly after that decision the Supreme Court resoundingly rejected a political question defense in *Powell v. McCormack.*[25] The House of Representatives refused to seat Powell, elected by his New York constituents, after a House committee concluded he had “wrongfully diverted House funds.”[26] The defendant, Speaker of the House, claimed this was a political question since the Constitution provides that “each House [of Congress] shall be the Judge of [the] Qualifications of its own Members.”[27] But the Court, by Chief Justice Warren, held the issue not a political question since other provisions of the Constitution list precisely which qualifications the House may consider: age, citizenship and state residence.[28] And, with striking applicability to the recent climate change rulings, the Court added that the nature of our government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.[29]

If true as to interpreting the Constitution itself, how much more apt is this holding to litigation interpreting statutes like the Clean Air Act[30] that federal courts routinely construe?

**Environmental Suits: Political Questions?**

The court sensibly rejected dismissing damage suits for harm to public water supply from methyl tertiary butyl ether (MTBE) as a political question in *In re MTBE*
Products Liability Litigation. The defendant chemical manufacturers argued the suit involved “broad policy goals which can only be achieved by replacing MTBE with ethanol throughout the national fuel supply,” requiring the court to “balance the ‘relevant economic, environmental, energy and security interests’” at stake. But the court found the defendants had “blurred the line between a determination of whether defendants are liable for water pollution caused by MTBE and a policy determination regarding the composition of the country’s fuel supply.” The court went on to distinguish Connecticut v. AEP where it concluded “Congress and the Executive had issued explicit statements” on climate change and “specifically refused to ‘impose limits on carbon dioxide emissions.’” That may have helped the MTBE court avoid the AEP ruling from the same district, but in the end neither suit raises political questions under Baker v. Carr. The very failure of the other two branches of government to act against climate change is precisely what frees the judiciary to do so, just as with legislative redistricting and, for that matter, public school segregation. As the MTBE court noted, as far back as Marbury the Supreme Court recognized “[t]he very essence of civil liberty … the right of every individual to claim the protection of the laws, whenever he receives an injury.”

Similarly, in Barasich v. Columbia Gulf Transmission Co., the court rebuffed a political question defense to a suit for damages from Hurricane Katrina, which the plaintiffs claimed were exacerbated by oil and gas exploration that reduced the protective qualities of wetlands in Louisiana. The defendants contended that since regulation of wetlands, which absorb much of the impact of coastal storms, is the province of the executive and legislative branches through enforcement of the Clean Water Act and similar state laws, there are no judicially manageable standards to weigh the coastal
erosion the destruction of these wetlands causes. The court sensibly ruled that judiciably manageable standards for determining the extent to which drilling in wetlands caused erosion, and erosion worsened storm damage, plainly exist. It relied on a Fifth Circuit ruling rejecting an identical defense to a suit seeking damages for a fish pass, an artificially-created waterway, that assertedly contributed to coastal erosion. And, the court noted, the lack of judiciably manageable standards defense is especially inappropriate to a tort action.

Although the Barasich court distinguished Connecticut v. AEP as a suit for an injunction, its logic applies to that case, and GMC as well. The fact that environmentally harmful activity is potentially subject to regulation by legislative and executive action in no way transforms it into a political question or strips the courts of authority to decide it.

Again in a suit by Vietnamese seeking damages from exposure to Agent Orange, the defoliant applied by the United States military during the Vietnam War, the court, while dismissing the action on the merits, denied that it raised a political question. As the court noted, some actions involving international law issues have been dismissed as political questions, such as whether a president may abrogate a treaty and the extent to which treaties preclude suits for reparations by World War II and Holocaust victims. But, as the Vietnamese action decision pointed out, these do not apply to actions for injunctive relief or damages asserting legally recognizable injury, such as AEP or GMC. See, for example, Kadic v. Karadzic and Sosa v. Alvarez-Machain, seeking damages for torture and the like. Most notably and recently, the Supreme Court, in Rasul v. Bush, denied a political question defense in an Alien Tort Statute and habeas corpus action by
Guantanamo detainees challenging the legality of their detention. Likewise, the Supreme Court had earlier found no political question when it heard a suit brought to direct the Secretary of Commerce to restrict trade with Japan for alleged violations of the International Whaling Convention.\textsuperscript{51} Though it was to deny the injunction the plaintiffs sought, it ruled that only “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch” are barred from judicial review.\textsuperscript{52}

Closer to the \textit{AEP} and \textit{GMC} scenarios is the Supreme Court’s decision in an early water-quality case, \textit{Ohio v. Wyandotte Chemicals Corp.}\textsuperscript{53} Ohio invoked the Court’s original jurisdiction over suits by a state,\textsuperscript{54} seeking an injunction against a chemical manufacturer allegedly discharging pollutants into its waters. Just as in \textit{AEP} the state asserted a public nuisance. While ultimately declining to hear the suit as an original-jurisdiction action, the Court, by Justice Harlan, explicitly distinguished suits asserting political questions and relied on a series of cases decided by the Court that were brought to abate public nuisances with interstate consequences.\textsuperscript{55} Finding no political question, it ruled “precedent leads almost ineluctably … that we are empowered to resolve this dispute [\ldots].”\textsuperscript{56}

This clear, unequivocal rejection of the political question defense by the Supreme Court, congruent with the decisions discussed here, reveals the illogic of the \textit{AEP} and \textit{GMC} anomalies. The complexity, or the high stakes, of litigation concerning climate change, should not bar the courts from hearing suits that are in all other respects no different from any other action to enjoin a public nuisance. The courts have long and consistently rejected assertions that the enactment of regulatory statutes like the Clean
Air Act and Clean Water Act preempt states from public nuisance actions. The fact that Congress has failed to seriously address climate change reduces, not strengthens, the notion that the issue is not a justiciable one.

The Supreme Court had no problem in ruling that the EPA should consider adopting standards to control CO\textsubscript{2} as a pollutant under the Clean Air Act. In Massachusetts v. EPA\textsuperscript{58} the Court upheld the state’s standing and went on to so direct the Agency. If there was no political question there – the Government seems not to have even advanced that argument, and the Court flatly held the suit did not “seek adjudication of a political question”\textsuperscript{59} -- there surely is none where, as in AEP and GMC, states use their more traditional and time-honored powers to abate a public nuisance.

The Baker v. Carr Criteria

Justice Brennan’s cogent analysis in Baker v. Carr, after discussing and easily distinguishing rulings holding issues involving the validity of treaties and the Guaranty Clause to be political questions,\textsuperscript{60} specified four types of suits as non-justiciable: those raising a “question … to be decided, by a political branch of government coequal with this Court,” those posing “risk [of] embarrassment of our government abroad, or [of] disturbance at home,” or seeking “policy determinations for which judicially manageable standards are lacking.”\textsuperscript{61}

None of these suffices to derail the climate change suits in GMC or AEP. There is plainly no issue in these actions to be decided by another branch of government. That could be said of any public nuisance or similar suit seeking judicial relief where administrative agencies such as the EPA have failed to act. The Supreme Court explicitly
rebuffed an asserted political question defense in *Wyandotte Chemicals*, raising similar issues. The greater stakes here, as noted earlier, should not lead to an opposite result.

Nor do these suits pose any risk of embarrassing the United States’ government abroad. Whatever embarrassment this country has suffered from the climate change issue has stemmed from its failure to act, *i.e.*, to ratify the Kyoto Agreement, not from attempts to remedy that failure.

Little need be said of concern over possible disturbances to government from concerns over climate change. And there are surely judicially manageable standards to enjoin, or award damages for, injuries stemming from climate change. Whether those remedies are warranted is of course an issue the courts ought to decide. They should not disqualify themselves by concluding these concerns to be non-justiciable.

**Conclusion**

The political question doctrine is inapplicable to suits to enjoin, or recover damages for, environmental -- and particularly climate change -- injury. Its use by courts amounts to an unwarranted expansion of that limited doctrine into areas where historically the courts have been there to render justice to aggrieved parties.
*Professor of Law, St. John’s University School of Law. J.D., Columbia Law School, 1958. The author, co-author of *Understanding Environmental Law* (2d Ed., 2007) and editor of *Environmental Law: Cases and Materials* (Revised 3d Ed., 2006), is indebted to Delano Ladd (St. John’s University School of Law 2008) for research assistance in preparing this article.


2 *Id.* at 14-15.


5 1 Cranch (5 U.S.) 137 (1803).

6 *Id.* at 166.

7 *Id.* at 168.

8 369 U.S. 186 (1962).

9 *Id.* at 226.

10 *U.S. Const.*, art. IV, §4.

11 7 How. (48 U.S.) 1 (1849).

12 73 U.S. 50 (1867).

13 223 U.S. 118 (1912).


16 345 U.S. 1 (1957).


20 See O’Connor, J., dissenting, id. at 143.


22 See Kennedy, J., concurring, id. at 306, as well as dissents by four justices, id. at 317-355.


24 Baker v. Carr, supra n. 8, at 217.


26 Id. at 492.

27 U.S. Const. art. I, § 5, cl. 1.

28 Id. art. I, § 2, cl. 2.

29 Powell, supra n. 25, at 549.

30 42 U.S.C. §§ 7401-7671q (20-).

31 MTBE Litigation, supra n. 4.

32 Id. at 300.

33 Id.

34 Id. at 301.


36 MTBE Litigation, supra n. 4, at 299, quoting Marbury, supra n. 5, 1 Cranch (5 U.S.)
137 at 163.

37 See Barasich, supra n. 4.


39 Barasich, supra n. 4, at 682.

40 Id. at 684.

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

42 Barasich, supra n. 31, at 684, citing McKay v. United States, 703 F.2d 464, 470 (10th Cir. 1983).

43 Barasich, supra n. 4, at 685-86.

44 In re Agent Orange Product Liab. Litigation, 373 F. Supp.2d 71 (E.D.N.Y. 2005), aff’d, 517 F.3d 104 (2d Cir. 2008).

45 Goldwater v. Carter, supra n. 15.


47 70 F.3d 232 (2d Cir. 1995).


52 Id. at 230.

54 U.S. Const. art. III, § 2, cl. 2 (“In all cases … in which a State shall be Party, the Supreme Court shall have original jurisdiction”); 28 U.S.C. § 1251(b)(2000)(?) (“The Supreme Court shall have original but not exclusive jurisdiction of … [3] All actions… by a State against the citizens of another State …”).

55 Wyandotte, supra n. 53, at 496, citing, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

56 Wyandotte, supra n. 53, at 496.


59 Id. at 1452.

60 Baker, supra n.8, at 209-12.

61 Id. at 226.

62 See text at n. 53-56 supra.