2013 JAMES L. HUFFMAN LECTURE IN HONOR OF THE WESTERN RESOURCES LEGAL CENTER

GLOBAL WARMING AND THE LIMITS OF FEDERAL JUDICIAL POWER

by
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The issue of global warming is one that has engaged the attention of the entire public. Some issues of public policy, especially those touching on science and technology, seem terribly complex and arcane. They seem, simply put, beyond our ken and entirely the stuff for experts and blue-ribbon commissions. But the possibility that the Earth is indeed warming translates into concerns each of us faces every day—as manifested most dramatically, recently, by Hurricane Sandy on the East Coast or, in 2005, Hurricane Katrina on the Gulf Coast. Many leading climate scientists, such as Dr. Kerry Emanuel at MIT, contend that the effects of these storms have been amplified by rising global sea levels due to climate change.

This weighty, controversial issue is often viewed as primarily a twenty-first century concern, but the scientific community began investigating our global climate several decades ago. In 1988, the UN created the Intergovernmental Panel on Climate Change, or IPCC, a scientific body

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tasked with studying global climate change that had occurred throughout the twentieth century.[1]

In response to early findings of the IPCC, in 1992 the UN convened the Earth Summit in Rio de Janeiro. There, President George H.W. Bush signed a nonbinding agreement encouraging all nations to reduce greenhouse gases. In a rare display of bipartisan harmony, the United States Senate unanimously ratified this symbolic agreement. Despite this harmonious opening act, international controversy was soon to follow.

Five years later, in response to more troubling findings from the IPCC, another summit was called in Kyoto. This time, the resulting protocol was binding. Famously, that Kyoto Protocol established mandatory greenhouse gas targets for major world nations. But there was a major problem. The Kyoto Protocol excluded developing (and heavily polluting) nations, including China and India. Once again, bipartisan harmony prevailed. The U.S. Senate unanimously passed a resolution opposing the Kyoto Protocol. For his part, President Clinton chose never to submit the Protocol to the Senate for formal consideration and possible ratification.

Meanwhile, the scientific studies continued. In its most recent report,[2] released five years ago, the IPCC concluded:

- First, over the past 100 years, the Earth has warmed by 0.74° centigrade. (To nonscientists like me, this may seem insignificant. But according to the IPCC report, this small change has already given rise to more frequent heat waves and drought across the globe.)
- Second, 11 of the prior 12 years broke the record for highest average surface temperatures—a record that had previously stood since the 1850s. In fact, average temperatures over the last 50 years have been higher than any other half-century for at least half a millennium.
- Third, if climate change continues at the current pace, the Earth will experience—by the end of this century—a 2° to 4.5° centigrade temperature increase.

By that time, the U.S. National Research Council predicts that the average sea level will rise between 56 and 200 centimeters—a highly significant change. By comparison, during the twentieth century, sea levels rose only 15 centimeters. Rising sea levels will, in turn, predictably lead to increased flooding of coastal areas—a troubling prospect since 75% of Americans live within 50 miles of the sea. Downtown Portland is about 60 miles from the sea, as the crow flies, as is Lewis & Clark.

Today, the presence of rising global temperatures is widely accepted as proven science. However, the *cause* of this troubling phenomenon re-

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[1] *History*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, www.ipcc.ch/organization/organization_history.shtml.

[2] CLIMATE CHANGE 2007: SYNTHESIS REPORT, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Core Writing Team, Rajendra K. Pachauri, Andy Reisinger eds., 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

mains a subject of intense debate. A recent survey conducted jointly by the University of Alberta and the Vienna University of Economics and Business found that over 99% of geoscientists and professional engineers believe that global climate change is occurring.[3] However, only 36% of those scientists and engineers believe that this change is caused by human activity.

To state the obvious, the myriad factors influencing global temperatures are complex, and indisputably go beyond emissions and pollution. By way of example, a 2006 report from the UN Food and Agriculture Organization concluded that the raising of livestock around the world produces more greenhouse gases than all forms of human transportation combined.[4] In addition, many geoscientists—such as Dr. Willie Soon at the Harvard-Smithsonian Center for Astrophysics—contend that global temperatures are rising due to increasing solar radiation.

To be sure, human activity has certainly contributed to increasing greenhouse gases over the past century. However, we do well to recognize the scientific, economic, and public policy complexities and uncertainties in this unfolding debate. With that overly-simplified backdrop, we turn next to the issue of global warming as it has found its way into the federal courts.

We should begin—as Maria Von Trapp whimsically suggested—"at the very beginning, a very good place to start." We thus turn to the text of the Constitution itself, and in particular Article III. It is surprisingly short. But two key terms pop out early on in the brief text. The terms are "Cases" and "Controversies." These pivotal words are not defined. We do know this: The Supreme Court is not in the business of rendering advice and counsel to the other branches. The federal judicial power extends not to important issues under national debate, but more narrowly to the adjudicatory process. In its first decade, the Supreme Court addressed one specific question of its appropriate role in response to a query posed by no lesser light than General Washington.

The year was 1793. Our young constitutional republic was facing its first foreign policy crisis. With France's recent declaration of war against Great Britain, General Washington was determined to fashion a position of American neutrality. But would the country favor *strict neutrality* (effectively siding with the Mother Country) or the more-popular position of *loose neutrality*, thus seeming to side with France. Throughout his life, including as our nation's first president, General Washington consistently sought wise advice and counsel. He thus directed the nation's first Secretary of State—future president Thomas Jefferson—to write a letter to

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[3] Lianne M. Lesfrud & Renate E. Meyer, *Science or Science Fiction? Professionals' Discursive Construction of Climate Change*, 33 ORG. STUD. 1477 (2012), *available at* http://oss.sagepub.com/content/33/11/1477.full.pdf+html.

[4] LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS, FOOD & AGRICULTURE ORGANIZATION OF THE UN (2006), *available at* ftp://ftp.fao.org/docrep/fao/010/a0701e/a0701e.pdf.

Chief Justice John Jay, asking the Supreme Court to provide an advisory opinion on the issue. In response, Chief Justice Jay respectfully declined. His words have stood the test of time:

> "These [lines of separation drawn by the Constitution between the three departments of the government] being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments."[5]

The federal judiciary, in short, is not to be in the business of providing advisory opinions.

In addition to the bedrock requirement of a "Case" or "Controversy," there has also been—especially in the twentieth Century—a case-by-case development of certain largely agreed-upon principles as to the proper judicial role. Consider the enumeration in *Baker v. Carr*[6] of factors in the so-called political question doctrine. Federal courts, historically, have been reluctant to address a limited category of nettlesome questions, such as those deeply rooted in the conduct of foreign policy.

Examples (see addenda for full explanations):

- *Gilligan v. Morgan* (1973)[7]
  - In 1970, when students were killed and injured during a Kent State University protest over the Cambodian Campaign, the Court ruled that oversight of the training and operations of the National Guard belongs to the Legislative and Executive branches.
- Also in the Burger Court era was *Goldwater v. Carter* (1979)[8]
  - When a group of U.S. Senators filed suit against President Carter for his termination of the Sino-American Mutual Defense Treaty, the Court held that the case was, in the words of Justice Rehnquist's concurring opinion, "nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[9]
- *Luther v. Borden* (1849)[10]

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[5] Letter from Chief Justice John Jay to President George Washington (Aug. 8, 1793), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html.

[6] 369 U.S. 186 (1962).

[7] 413 U.S. 1 (1973).

[8] 444 U.S. 996 (1979).

[9] *Id.* at 1002 (Rehnquist, J., concurring).

[10] 48 U.S. 1 (1849).

- A man named Martin Luther was arrested for his part in a protest against the Rhode Island charter government. Luther felt that the charter government, because of its voting qualifications, did not qualify as a "republic." The Court held that it was within Congress's jurisdiction—not the Court's—to evaluate a given State's form of government.

- *Nixon v. United States* (1993)[11]
  - When former Chief Judge of the U.S. District Court Walker Nixon filed suit claiming the U.S. Senate did not properly try his impeachment case, the Court unanimously held that it could not be involved in the impeachment process, and that the Senate had full discretion over its own processes for evaluating impeachments, thereby making the case nonjusticiable.

Less headline-grabbing—but appropriate as the foundation for our reflections this evening—one well-known "discovery" (at least to bench and bar) of the limits of the federal judicial role came in the case of *Erie Railroad Co. v. Tompkins* in 1938.[12] This was an extraordinary story. Indeed, the story actually began a century earlier with Justice Joseph Story—frequently identified, and rightly so, as one of the most distinguished jurists ever to serve on the American judiciary.

The year was 1842. In interpreting a provision of the iconic Judiciary Act of 1789, Justice Story wrote with robust self-confidence that federal courts, sitting in diversity, were at liberty to weave the common law—which was dubbed, for lack of a better term, "general law." Under this principle, given voice most clearly in *Swift v. Tyson* in 1842,[13] there was no need for federal courts in diversity cases to adhere to state decisional law. State statutes, yes, those were fully binding on the federal courts. But not so with state judge-made law.

Now, conceptually, this was quite an achievement for federal judicial power. Led by Justice Story, the *Swift v. Tyson* Court assumed that *Congress* had no power to craft or codify common law rules. But congressional powerlessness did not disable the federal courts. For decades, the *Swift v. Tyson* regime ruled triumphantly in federal courthouses throughout the land. Congress, no; federal courts, be my guest.

Then, late in his great life, Justice Brandeis grappled with the long-established *Swift v. Tyson* question in a sad, but simple case. First-year law students study the case in Civil Procedure: *Erie Railroad Co. v. Tompkins*.[14] On a dark night, Harry Tompkins was walking along the right of way, as was his custom, of the Erie Railroad Company. While enjoying the night air

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[11] 506 U.S. 224 (1993).
[12] 304 U.S. 64 (1938).
[13] 41 U.S. 1 (1842).
[14] 304 U.S. 64 (1938).

on his ramble, Harry was injured by a door-like object projecting outward from one of the moving cars of a passing freight train. Litigation followed.

According to the Erie Railroad Company, even though the case was filed in federal court, the issue was to be controlled by Pennsylvania tort law: Was Harry Tompkins, as the Railroad contended, a trespasser, thus excusing the railroad from liability unless its alleged negligence rose to the level of wanton or willful? For his part, Mr. Tompkins argued that the Railroad's proposed principle was not the rule in Pennsylvania, but in any event that the issue should be decided by the federal courts under *Swift v. Tyson*-ordained principles of general law.

Stare decisis considerations, one would think, would have been weighing heavily in the judicial balance. This had been, again, the governing rule in federal court for a century. But a huge judicial about-face occurred. Carefully analyzing the costs exacted by the *Swift v. Tyson* regime, the Brandeis Court ruled that what the Supreme Court had been doing for nearly a century was, well, *unconstitutional*. Justice Brandeis quoted extensively from the lamentation of Justice Field in his critique of *Swift v. Tyson* in the late eighteenth century:

> I confess that, moved and governed by the authority of the great names of [learned] judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states . . . .[15]

And so the era of *Swift v. Tyson* came to a screeching halt in Harry Tompkins' case. Federal judges sitting in diversity were henceforth to be bound—by virtue of power principles flowing out of the Constitution itself—faithfully to apply the common law of the relevant State, no matter how bitter that jurisprudential pill might be.

But, as the old song inquires, "is that all there is?" Isn't there more to the story? This great law school's renowned focus on environmental law yields up a nifty answer. Yes, there is jurisprudential life after *Erie*, not with respect to state law or would-be "general law," but in the weaving of what we familiarly call *federal common law*. And therein lies another story that will bring us into the constellation of legal issues swirling around global warming.

Let's now turn to a law review article. The distinction—"general law" versus federal common law—is captured in a magnificent essay by one of the twentieth century's most renowned federal judges, Henry Friendly of the Second Circuit. Almost 50 years ago, in January 1964, Judge Friendly delivered the annual Cardozo Lecture of the Bar of the City of New York.

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[15] *Erie Railroad Co.*, 304 U.S. at 78 (quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

There, in his deeply learned fashion, Judge Friendly probed the depths of what federal courts appropriately do. His Cardozo Lecture's title: "In Praise of *Erie*—and of the New Federal Common Law."[16] Not many law review articles stand the demandingly daunting test of time. But Judge Friendly's paean to *Erie*—and the then-new federal common law—has weathered the most biting winds of critical commentary. Drawing from this judge whose mind was described by one of his former law clerks after the Judge's untimely death as "a national treasure," Judge Friendly set forth the constitutional basis for the *Erie Railroad* decision this way:

> Let us begin by hypothesizing an act of Congress depriving charities of immunity in tort. It will be generally agreed that such a statute is neither within any power enumerated in section 8 of Article I nor within the "necessary and proper" clause insofar as that relates to implementing Congress' enumerated powers. . . . Yet it would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not. Power to deal with [the subject] and others like it is thus reserved by the Tenth Amendment "to the States respectively, or to the people."[17]

That's it. Short, sweet, simple.

Now I fully recognize that Judge Friendly's argument gives real bite to the Tenth Amendment, which is not everyone's favorite provision in the venerably original Bill of Rights. But, in truth, Judge Friendly—who I belatedly note served as a law clerk to Justice Brandeis of *Erie Railroad v. Tompkins* fame—was simply setting forth in brief compass the reasoning undergirding *Erie* itself.

And so as of 1938, the federal courts got out of the business of weaving the common law of the States. So much so that federal courts will occasionally refer unsettled state-law issues for resolution to the state courts, rather than opine on what the particular state supreme court would perhaps do. That happened in the Proposition 8 case on same-sex marriage, to be argued next Tuesday in the U.S. Supreme Court.

Indeed, while *Erie Railroad v. Tompkins* is now an integral part of the received wisdom handed down to succeeding generations of law students, the reality is that *Erie* was not welcomed at the time with open arms by bench and bar—nor by the academy. There was, to the contrary, a Hamiltonian-like trend toward nationalism in federal law in the FDR-dominated Supreme Court, and *Erie* sounded a rather discordant pro-States rights note. As one federal appellate judge put it, *Erie* caused an "extreme resurgence of state law in the federal courts."[18] That was not intended as a compliment. But *Erie* also focused the judicial mind on a potential gap in an era of energetic congressional outpouring of federal

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[16] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

[17] *Id.* at 394–95 (footnote omitted).

[18] Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 218 (1962).

laws—as urged on by FDR during the days of *Erie* itself, and then by his presidential successors—of both political parties.

In a delicious irony, the death of *Swift v. Tyson* came on the same day as the birth announcement, so to speak, of the *new federal common law.* Speaking again through the venerable Justice Brandeis, the Court reversed a state court decision as to the apportionment of waters of an interstate stream in a case known as *Hinderlider v. La Plata River & Cherry Creek Ditch Company.*[19] The issue was to be governed by federal law—not federal statutes, for Congress had not legislated. Rather, federal courts were to weave the *federal* common law.

Now I must concede: This was not entirely new. Here's one way of thinking about this: Consider the body of what we now call the federal common law as a constitutionally refined form of the old "general law" that federal courts had been merrily weaving during the *Swift v. Tyson* era. Indeed, the federal common law rule articulated in the watershed case of *Clearfield Trust Company v. United States*[20]—decided five years after *Erie Railroad*—did not come full blown from the head of the U.S. Supreme Court. To the contrary, taking Justice Douglas's description of what the Supreme Court was doing, the *Clearfield Trust* rule was fashioned from "the federal law merchant, developed for about a century under the regime of *Swift v. Tyson.*"[21] A sort of reincarnation or borrowing of state common law.

The rest, as they say, is unfolding history. As relevant to our reflections this evening in the arena of global warming and environmental law, let me quickly turn to a particular doctrine of federal common law—that of public nuisance. Post-*Erie Railroad*, federal common law includes, as a particularly robust category, the general subject of non-statutory environmental law, and in particular the nettlesome subjects of interstate air and water pollution. This was given the clearest authoritative expression 41 years ago in the early years of the Burger Court in the case of *Illinois v. City of Milwaukee.*[22] The good folks of Illinois were aghast at the rather unpleasant forms of debris pouring into the waters of Lake Michigan from numerous sources in Milwaukee. Drawing from common law principles, the Supreme Court embraced the definition of public nuisance from the Restatement (Second) of Torts: "A public nuisance is an unreasonable interference with a right common to the general public."[23] Notice the key word, familiar to us from Fourth Amendment law, "unreasonable." That is, as the cases developed the federal common law, the harm in question had to be widespread and substantial. Dumping all manner of detritus into Lake Michigan abundantly qualified under this common-law informed notion. Note the methodology. The federal courts

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[19] 304 U.S. 92 (1938).

[20] 318 U.S. 363 (1943).

[21] *Id.* at 367.

[22] 406 U.S. 91 (1972).

[23] RESTATEMENT (SECOND) OF TORTS § 821B.

are weaving the federal common law, but they repair to the body of state common law to carry out their work. It's a substantive partnership, so to speak.

At the same time, there is a huge wrinkle. Like the proverbial elephant in the room, separation of powers concerns abound. Remember the principle: federal courts are courts of limited jurisdiction. That is, while empowered under *Erie Railroad*-like principles to fashion the federal common law, federal courts—like horses I have been challenged to ride at times—are skittish. They get jumpy. In particular, they look around to inquire whether the Article I branch may be lurking about, and if so, what the legislative presence means.

That is the message to be drawn from the Supreme Court's second chapter of dealing with Illinois's squabble with Milwaukee.[24] A deeply divided Court determined that Congress's enacting amendments to what is commonly called the Clean Water Act entirely displaced federal common law. As to interstate water pollution, the federal courts were to remain on the sidelines. Three dissenting Justices emphatically disagreed.[25] In their view, the continuing application of federal common law was entirely appropriate in light of the statutory scheme of the Clean Water Act. For our purposes, that was, at one level, a plain-vanilla disagreement on statutory interpretation. That happens all the time. But a broader principle was at work, which would prove to be a harbinger of things to come in the global warming narrative. That is, judges were quickly to step aside and fold up their federal common law portfolios when Congress legislated in a particular arena.

We now turn to the most recent part of this story—global warming comes to the federal courthouse. We begin this part of the story with the Supreme Court's decision in *Massachusetts v. EPA*,[26] decided in 2007. Mighty forces were arrayed for judicial battle. Eight States, including Oregon, remonstrated with the federal Environmental Protection Agency for denying a rulemaking petition to regulate, under the Clean Air Act, greenhouse gas emissions from motor vehicles. The rulemaking petition recounted, elaborately, the scientific opinions that the undisputed rise in global temperatures had resulted from a significant increase in the atmospheric concentration of greenhouse gases. The various petitioners urged EPA to regulate such greenhouse gases—in particular, carbon dioxide—under the Agency's statutory authority to regulate (in the words of the Clean Air Act) "any air pollutant from any class . . . of new motor vehicles."[27] EPA had responded, in effect, "No thank you, we're busy." The Agency articulated several grounds for saying "no," including a lack

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[24] City of Milwaukee v. Illinois, 451 U.S. 304 (1980).

[25] *Id.* at 332 (Blackmun, J., dissenting). Justices Marshall and Stevens joined in the dissent. *Id.*

[26] 549 U.S. 497 (2007).

[27] 42 U.S.C. § 7521 (2006).

(as the Agency saw it) of statutory authority to issue mandatory regulations addressing global climate change.

Speaking through Justice Stevens, a barebones five-member majority concluded that while the issue of standing to sue was fundamental and important, the States could indeed be heard in federal court. A federalism-state's rights-informed "nudge" pushed the States across the transom of federal courthouse power. Perhaps private organizations—such as the 19 groups which had filed the rulemaking petition in the first place—would not be able to surmount the standing-to-sue barrier. But the States, in contrast, would be heard. They were entitled, as sovereigns, to what the majority described as "special solicitude."[28] That was huge. Moving to the merits, the majority instructed the EPA: "You do have power, granted by Congress under the Clean Air Act, to regulate motor vehicle emissions. Go ye forward with the rulemaking process." More precisely, the Court determined that tailpipe emissions of greenhouse gases "fit well within the Clean Air Act's capacious definition of 'air pollutant.'"[29]

Yes, this was one of those pesky 5-4 decisions that our friends in the Fourth Estate cite as evidence that the Supreme Court is a political institution. Remember *Bush v. Gore*[30] and *Citizens United*.[31] But let's leave that large issue aside for now. The point is this: The Court was deeply divided not over the science of global warming. After all, in his dissenting opinion, Chief Justice Roberts said this: "Global warming may be a 'crisis' . . . and it may be that governments have done too little to address it."[32]

Rather, the gravamen of the dissent was that the issue was one for the political branches to address, not the federal courts. In writing for the four-member minority, Chief Justice Roberts concluded that Massachusetts and the other plaintiffs lacked standing. Those States were not suffering from a distinctive injury—indeed, all States faced the same negative effects of global warming.

The Chief Justice concluded his dissent by accusing the majority Justices of allowing the Court to be used as a forum for public policy debate. In the Chief Justice's words:

> "The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. . . . No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."[33]

The ever-burgeoning law of standing is one in which the Court is, well, not of one cheerful accord. An entire body of law has grown up

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[28] *Massachusetts v. EPA*, 549 U.S. at 520.

[29] *Id.* at 532.

[30] 531 U.S. 98 (2000).

[31] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[32] *Massachusetts v. EPA*, 549 U.S. at 535 (Roberts, C.J., dissenting).

[33] *Id.* at 560 (Roberts, C.J., dissenting).

around the question of who gets to sue—at least in federal court. This is, as environmental law students know, a very important subject. Before one gets to address the substantive issues on the merits, the litigant has to properly show that he, she, or the organization is properly there. On this threshold question, the judicial world divides into two camps: judges who say, "bring it on," and those who say, "go away." That was, indeed, the stark *Massachusetts v. EPA* divide. The majority, pivotally including Justice Kennedy, were willing to entertain the case, in part because several of the plaintiffs were States. A federalism-informed nudge or "tie goes to the runner" kind of approach to standing. Other plaintiffs might not get into court, but States are special.

Our friends reporting on the Court might say: "This is simple. Liberals welcome litigation, conservatives just say no." Not surprisingly, it's really not quite that simple, and law school should teach us all to be rigorous and deeply analytical in understanding an institution as complex as the Court. But let's move along in our story.

Now *Massachusetts v. EPA*, to coin a corny metaphor, made quite a splash. This was a huge win for environmental organizations, which for years had pressed the EPA, without success, to focus on the greenhouse gases question. But a moment's reflection will suggest that any champagne-uncorking would have been somewhat premature. And, in any event, this was—ironically—the sounding of the "death knell" for truly substantial federal court involvement in global climate change issues. For what the *Massachusetts v. EPA* majority did, at bottom, was to direct EPA to become engaged on the question of global warming. Once that was done, and the federal agency came off the sidelines and onto the playing field, the federal courts were soon destined to withdraw from the entire field.

Indeed, *Massachusetts v. EPA* brings us to the penultimate port of call in our voyage. Two years ago, the Court heard arguments in *American Electric Power Company v. Connecticut*,[34] an enormous loss for those urging greater federal regulation of carbon dioxide and other greenhouse gases. *Massachusetts v. EPA* was, it would now turn out, (please forgive me) the "high-water mark" of federal judicial engagement in global warming issues. In June 2011, a unanimous Court handed down its decision. The result was devastating to pro-regulatory forces and turned the States—led by Connecticut—into big-time losers. For now, the Supreme Court—in an 8-0 decision—embraced the approach and rationale of the majority in *Illinois v. Milwaukee II*.[35] The departure of Justice Stevens—architect of the tenuous 5-4 majority in *Massachusetts v. EPA*—perhaps (again, perhaps) changed the internal dynamic on the Court. The liberal and conservative camps remained frozen in their warring positions on standing to sue, as reflected in the battle royale of *Massachusetts v. EPA*. But now all the Justices were harmoniously together.

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[34] 131 S. Ct. 2527 (2011).

[35] City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

In *American Electric Power Company v. Connecticut*, several States filed suit against four large utility and energy companies, and the Tennessee Valley Authority, alleging that by their emissions they had contributed substantially to greenhouse gases.[36] Once again, the Court was deeply divided as to standing. Four said yes there's standing; the four dissenters from *Massachusetts v. EPA* said, once again, no there was not. Because Justice Sotomayor was not participating (since she had been on the Second Circuit when the issue was pending before that court), the judgment of the Court of Appeals—permitting standing—was affirmed.

Notwithstanding that deep division, however, the Court was cheerfully unanimous on the subject of the appropriateness of weaving the federal common law. Speaking through Justice Ginsburg, the Court said no. We must cease and desist. Why? Because federal common law had been *displaced*—a key word. That body of judge-made law had been *displaced* by Congress—more specifically, by the Clean Air Act and the EPA actions that it authorizes.

Now please take note: In this instance, EPA had not taken any regulatory action. It had not set standards governing emissions from the five mega-polluters' facilities. But Justice Ginsburg bowed to the presence of Congress and the *authorized* presence of EPA. Congress had made its call—it delegated to EPA the decision whether and how to regulate CO_2 emissions from power plants. That decision—the decision by Congress to delegate—"is what displaces federal common law."[37] Even if EPA eventually declined to regulate CO_2 emissions altogether, the federal courts would have to remain on the sidelines. Why? The agency that Congress had selected to regulate in the arena of greenhouse gases had made an expert determination. It was up to the agency, not the courts. Now, the Court emphasized, EPA's decision-making would itself be subject to judicial review under the Administrative Procedure Act. Here, briefly, is the heart of Justice Ginsburg's rationale:

> "[T]his prescribed order of decision making—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."[38]

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[36] Plaintiffs alleged that the five largest emitters of CO^2 in the U.S were four private power companies: American Electric Power Company, Southern Company, Xcel Energy Inc., Cinergy Corporation, and the Tennessee Valley Authority—federally-owned corporation that operates power plants in several states.

[37] *American Elec. Power Co.*, 131 S. Ct. at 2538.

[38] *Id.* at 2539.

This is, of course, a familiar cost-benefit analysis. And that complex weighing of competing factors was grist for the political branches' mill, not the federal courts. This was, shall we say, a deeply conservative (in judicial terms) result. Judicial restraint, to coin a familiar term, had triumphed. Let's put it this way: Chief Justice John Jay, who wrote the iconic response of "don't ask us; we're just judges" to General Washington in 1793 would be proud.[39]

Over two centuries after that foundational response by the federal judiciary, through its Chief Justice, of: "No, respectfully, Your Excellency, federal courts don't hand down advisory opinions," the modern-day Court had embraced the controversial view articulated by then-Justice (and future Chief Justice) Rehnquist in *Illinois v. Milwaukee II*.[40] It was now—it bears repeating—unanimous: Federal courts were to exit the stage of judicial lawmaking. Clear the way for the Article II branch—the expert administrative agency. And the spokesperson for the Court in sounding the retreat was no lesser luminary than renowned-liberal Justice Ruth Bader Ginsburg. To repeat: The expert federal agency was now on the beat—*Massachusetts v. EPA* had assured that result. But that was it. That judicial command for the administrative agency to get on with the regulatory process ended the federal judicial role.

We return, as it were, back to the future—to *Illinois v. Milwaukee II*. That proved to be the harbinger of judicial things to come in the arena of global warming. The lead dissenter in that now long-ago case—involving the unspeakably unpleasant stuff being dumped into Lake Michigan by cheeseheads in Milwaukee—Justice Blackmun, would truly be aghast. Federal common law, like the song about the day the music died, had now expired. It was no more—in the profoundly important arena of interstate—or global—pollution. For sports fans of some considerable age, the musical parallel is that of the late Dandy Don Meredith, who would intone in a lopsided gridiron match on Monday Night Football, "turn out the lights, the party's over." The federal common law party, so impressively launched in 1938 at the very same time as *Erie Railroad v. Tompkins*, had ended with respect to global warming.

The funeral dirge was sounded very recently by the Ninth Circuit in the poignant case of *Native Village of Kivalina v. ExxonMobil*.[41] This was a plaintiffs' global-warming dream case—or nightmare. The indigenous people of the Alaskan coastal community of Kivalina—60 miles north of the Arctic Circle—are being forced, by virtue of the relentless forces of nature, to abandon their village and move inland. The sea ice—which for generations protected this community from the fury of winter Arctic storms—has been slowly but surely disappearing. The alleged reason: global warming. In contrast to bygone years, the protective sea ice forms later in the fall, melts earlier in the spring, and throughout the long Arc-

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[39] *See* Letter from Chief Justice John Jay, *supra* note 5.

[40] 451 U.S. at 306.

[41] 696 F.3d 849 (9th Cir. 2012).

tic winter is perilously thin. The upshot: the Army Corps of Engineers has instructed Kivalina residents literally to evacuate, as the Village is in serious physical danger. Think Hurricane Sandy or Katrina.

The good people of Kivalina repaired to federal court, invoking the federal common law of public nuisance. But you already can anticipate, as Paul Harvey was wont to say, the rest of the story. While the *Kivalina* litigation was pending, the Supreme Court handed down *American Electric Power v. Connecticut*. True, there was a huge difference in the cases: The State plaintiffs in the Connecticut case wanted federal courts, using their injunctive power, to set emission limits on the big polluters. That was a lot to ask. In stark contrast, the *Kivalina* plaintiffs forswore any request for potentially industry-changing equitable relief. They said, simply: "major polluters, compensate us for this profound dislocation. Pay us damages, the time-honored, traditional remedy at law." It should come as no surprise that, in the wake of *American Electric Power*, the citizens of Kivalina roundly lost in the Ninth Circuit. And that was the end of the litigation. No cert petition was filed. The long-lived *Kivalina* litigation ended not with a bang, but with a silent withdrawal from the litigation battlefront. Whatever remedy, if any, the people of Kivalina might hope for would have to come from the political branches—or from state courthouses and state law. Echoes of Harry Tompkins' case now rang through federal courthouse corridors. State law had triumphed.

Would Justice Brandeis be in accord with this remedy-challenged state of affairs? Would he be at peace with the enduring plight of Kivalina? Somehow, from a legal and litigation perspective, I think he would be ok—that great Justice, brimming with empathy and compassion for those most needy and most vulnerable in society. For the democratic process had triumphed, and federal courts had resumed their historic posture as courts of limited jurisdiction. That was the overarching message of *Erie Railroad v. Tompkins*. And in the process, that noble but elusive goal of unanimity had been achieved on the Roberts Court.

Sad as the result is for the good people of Kivalina, that in itself is a great triumph for the Article III branch and the enduring legitimacy of the federal judiciary.

ADDENDUM: POLITICAL QUESTION EXAMPLES

Gilligan v. Morgan:[42]

In May of 1970, students at Kent State University were publically protesting the recently-announced Cambodian Campaign. When the protests continued despite university and local efforts to end the civil disturbance, the Ohio Governor commanded the National Guard to disperse the crowd. At some point, the guardsmen opened fire at the unarmed students. Four students were killed, and nine others were injured. Students at the university filed suit, alleging that the Governor violated students' rights of speech and assembly, and subsequently caused unnecessary injury and death. Writing for the Court in a 5-4 decision, Chief Justice Burger concluded:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[43]

Goldwater v. Carter (also in the Burger Court era):[44]

Senator Barry Goldwater and other members of Congress filed suit against President Carter, claiming that the President had acted beyond his powers by singlehandedly terminating the Sino-American Mutual Defense Treaty. Goldwater and his counterparts argued that such action required Senate approval. The Court held that the issue was "not ripe for judicial review." In his concurring statement, Justice Rehnquist wrote:

> [T]he basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.[45]

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[42] 413 U.S. 1 (1973).

[43] *Id.* at 10.

[44] 444 U.S. 996 (1979).

[45] *Id.* at 1002 (Rehnquist, J., concurring).

Luther v. Borden:[46]

After the American Revolution, Rhode Island did not (like the other States) adopt a new constitution, but rather maintained the form of government established by the charter of Charles the Second in 1663. Martin Luther took part in the Dorr Rebellion—a violent attempt to overthrow Rhode Island's charter government because it was not "republican" in nature. Luther believed that because the charter government restricted voting rights to individuals holding significant property, the government violated Article IV of the Constitution, which guaranteed a republican form of government for all States. When the insurrection turned violent, Luther was arrested and his home was searched. A lawsuit followed. Chief Justice Taney wrote for an almost-unanimous (8-1) Court:

> Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. . . . For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.[47]

Nixon v. United States:[48]

Having been convicted of perjury before a grand jury, former Chief Judge of the U.S. District Court Walker Nixon was impeached by the U.S. House of Representatives. A Senate subcommittee reviewed the impeachment articles and reported its findings to the Senate. The full Senate then voted to confirm Nixon's impeachment. Nixon filed a lawsuit alleging that the U.S. Senate had not properly tried his impeachment. The Court unanimously held that it could not be involved in the impeachment process, and that the Senate had full discretion over its own processes for evaluating impeachments, thereby making the case nonjusticiable.

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[46] 48 U.S. (7 How.) 1 (1849).

[47] *Id.* at 40, 42.

[48] 506 U.S. 224 (1993).