New and Emerging Constitutional Theories and the Future of Environmental Protection

by James R. May

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I am honored to moderate and participate in today's panel, "New and Emerging Constitutional Theories and the Future of Environmental Protection." My charge is to introduce our esteemed panel speakers, and then to provide preliminary remarks outlining the landscape at the intersection of constitutional and environmental law in general and the political question doctrine in particular. My role is largely provocateur. In short, I'm to raise questions that challenge constitutional order as it applies to environmental protection.

Constitutionalism and constitutional law have unavoidable, ineluctable impacts on the fields of environmental, natural resources, and energy law, and these fields in turn shape constitutional law. The Constitution sets the boundaries for federal and state authority to exploit or protect natural resources and the environment. At the federal level, this includes defining the extent to which Congress may conserve rare species or regulate pollutant releases from mineral extractions on private property. Constitutional questions likewise infuse state actions designed to control the precursors of climate change or the interstate movement of energy, carbon allowances, natural resources, and wastes. Many states in the United States and national constitutions across the globe also explicitly address environmental concerns.

Accordingly, constitutional issues occupy center stage in federal and state efforts to protect land, air, water, species, and habitat,[1] perhaps fueled by the U.S. Supreme Court's ambivalence about environmental protection.[2] Indeed, from 2005–2010, more than 50 percent of the nearly 400 federal cases yielding a reported decision involving environmental, natural resources or energy law and policy turned on a constitutional question, including most often standing, sovereign immunity, takings and due process, and with increasing frequency, political question, preemption and federalism.[3]

Prior panels addressed many of the current developments regarding congressional and state constitutional authority to address environmental matters, including climate change, and judicial authority and capacity to engage environmental law, including legislative, executive and judicial authority, takings and standing. We are here to discuss novel, dormant and emerging constitutional issues that could become more prevalent. We will proceed along largely structural dimensions of the horizontal (separation of powers), the vertical (federalism), and the elliptical (individual rights).

Our panelists—Dan Farber, Rob Glicksman, and Doug Kysar—need no introduction. Each will offer important insights into trends and transformations at the intersection of these two very important fields.

To fit the occasion, you'll observe that I'm wearing a U.S. Constitution necktie, which I purchased in the Constitution shop at the National Constitution Center in Philadelphia. Not often does a speaker have occasion to adorn a tie that is so, ahem, fitting.

An event for disquisition on sartorial splendor this is not, so on to the metaphor. The Constitution necktie is to me what constitutional law is to environmental law. It represents a fitting commentary on how constitutional and environmental law blend, or don't. It has fancy words, is made from imported material, and looks impressive, nearly elegant. And it's well-tied, if I do say so myself. For the most part, it gets the job done. But does it really match my earth-green (naturally) shirt? Okay, maybe not, but you try to find a shirt that matches a busy, bought-in-a-tourist-trap tie. Like the Constitution, it can be distracting, can be hard to match, doesn't fit every occasion, and stays the same. But neckties are still

Author's Note: This essay is adapted from Professor May's remarks, as amended to reflect current developments. The assistance of Will Romanowicz, J.D. class of 2012, George Washington University, with citations is noted with gratitude.

1. *See generally* Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values," 32 Envtl. L. 809, 840 (2002).
2. *See* Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 UCLA L. Rev. 703, 749-52 (2000).
3. Research conducted with "Lexis Focus Search," searching "Environment and Natural Resource and Energy," date restricted to "previous 5 years." Within these cases, an additional search was conducted using the search terms "Environment and Natural Resource and Energy" along with the particular constitutional issue "and [constitutional issue]." For instance, to search 11th amendment issues, "Environment and Natural Resource and Energy and eleventh amendment" was used. Of the results, cases were examined individually to confirm the constitutional issue. Last searched August 1, 2010.

de rigueur, a natural and expected accoutrement for business occasions (is that what this is?). And this one, like paisley, is as certain to fall out of fashion as it is to one day regain its place within it.

Oh, and of course, this necktie can do real harm. It is, after all, around my *neck*. So, to play it safe, let me remove it, place it a safe distance away on the podium, and talk about it like an intervention episode of *Celebrity Rehab*.

I. New and Emerging Issues at the Juncture of Separation of Powers and Environmental Law

What are some emerging issues and trends in separation of powers? It seems as though we have an enfeebled U.S. Congress, which behaves as if its powers are as a majority of the U.S. Supreme Court imagined them to be in 1935. While nondelegation is still in desuetude, and *Raich*[4] revived *Hodel*-style[5] rational basis review of Commerce Clause authority for the time being, it's no wonder that Congress delivers next to nothing about national environmental challenges these days. Are there other constitutional means to achieve environmental protection ends?

First, to what extent does Article I provide untapped authority for environmental protection? For example, if we really are living in wartime, then could Congress invoke its nearly plenary wartime powers—confirmed more than six decades ago in 1948's *Woods v. Cloyd W. Miller Co.*—"to remedy the evils which have arisen from its rise and progress,"[6] to address oil consumption, emission of greenhouse gases, or climate change? Could the president invoke his wartime authority to conserve natural resources, a la Teapot Dome? Does *Missouri v. Holland,*[7] nearly a century old, give the Senate authority unbridled by the Tenth Amendment to enter into treaties to protect international waters, migrating species, and the atmosphere, regardless of state's rights?

If the Commerce Clause isn't a perpetual source of congressional authority to enact environmental laws, then what about under the General Welfare, Tax and Spend, Treaty, Property, or even Enclave Clauses? And if Article I, Section 5 is disabling Congress, as Dan Farber observes, what can be done?

Second, to what extent does Article II provide untapped authority to advance environmental protection? Under *Steel Seizure*[8] and its progeny, a disabled Congress may suggest an opportunity for increased executive opportunities for advancement of environmental protection. As Rob Glicksman observes, does the president have unitary executive authority as Commander and Chief, or under the Take Care Clause, to do more to protect the environment and natural resources? Will *Chevron*[9] and separation-of-powers principles accommodate muscular advancement of environmental policies by agencies? Is the Supreme Court likely to afford *Kensington*[10]-type deference when an agency is abridging rather than allowing development?

Third, should judicial involvement in environmental cases under Article III be reexamined? *Summers*[11] suggests that Scalian standing is alive and well, and that procedural standing is hardly left standing. Is this constitutionally defensible, or did we take a wrong turn? And if *Lochner*[12] is wrong, how can substantive due process limit punitive damages in toxic tort cases to a 1:1 ratio? And how can it be that federal courts can't hear compelling and important cases respecting the *climate of the earth* because of a "political question doctrine," as raised in *Comer*,[13] *Connecticut v. American Electric Power*,[14] and *Kivalina,*[15] discussed below?

II. New and Emerging Issues at the Juncture of Federalism and Environmental Law

Is it time to reconsider the role of federalism in environmental law? Reminding you that our founders "split the atom of sovereignty,"[16] doesn't answer the question of what the "environment" entails, whether it is inherently within the state or federal sphere, or just what the role of cooperative federalism in environmental policy ought to be, and to what extent states may be innovative in responding to environmental challenges. *Oneida*[17] and *Kelo*[18] give the states an opening to do more (and do worse). Yet, preemption still looms large. And sovereign immunity jurisprudence has diminished state accountability, despite *Ex Parte Young*[19] exceptions. Federalism questions continue to abound.

III. New and Emerging Issues at the Juncture of Individualism and Environmental Law

Last, what about individual rights? Should taxpayers really compensate the rich and powerful for "regulatory takings?" Is that what Justice Oliver Wendell Holmes had in mind as restrictions that "go too far?" If "judicial takings" are a constitutionally cognizable question, as was at issue in *Stop the*

4. Gonzales v. Raich, 545 U.S. 1 (2005).
5. Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 11 ELR 20569 (1981).
6. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948) (quoting Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 161 (1919)).
7. 252 U.S. 416 (1920).
8. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
9. Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel Inc., 467 U.S. 837, 14 ELR 20507 (1984).
10. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council (Kensington), 129 S. Ct. 2458, 39 ELR 20133 (2009).
11. Summers v. Earth Island Inst., 129 S. Ct. 1142, 39 ELR 20047(2009).
12. Lochner v. New York, 198 U.S. 45 (1905).
13. Comer v. Murphy Oil USA, 585 F.3d 855, 39 ELR 20237 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049, 40 ELR 20147 (5th Cir. 2010).
14. 582 F.3d 309, 331, 39 ELR 20215 (2d Cir. 2009).
15. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009), *appeal pending,* No. 09-17490 (9th Cir. 2010).
16. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).
17. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 37 ELR 20097 (2007).
18. Kelo v. City of New London, 545 U.S. 469, 35 ELR 20134 (2005).
19. 209 U.S. 123 (1908).

Beach Renourishment,[20] then why not look to more plausible constitutional provisions to promote environmental protection, such as whether there is a fundamental right to a quality environment as a matter of substantive due process, or a fundamental interest at stake under the Equal Protection or Privileges and Immunities Clauses, or the Ninth Amendment (now I've done it!)? And as Richard Lazarus described in his keynote remarks, is it time to reconsider a constitutional amendment to provide a basic human right to environmental quality, encouraged by how that notion has spread worldwide?

IV. Case Study: New and Emerging Issues at the Juncture of the Political Question Doctrine and Environmental Law

Perhaps the most interesting recent injection of constitutional law into environmental policy involves the incipient use of the political question doctrine. The effects of climate change are disproportionately absorbed by states, individuals, and discrete, insular minorities and others who are compromised in the democratic bazaar.[21] Common-law causes of action for public nuisance provide a potential means for addressing these effects.[22] Nonetheless, electing not to "enter the global warming thicket," some federal courts have incorrectly invoked the political question doctrine in declining to entertain common-law causes of action for public nuisance seeking abatement or damages for the effects of climate change.[23]

The Supreme Court has decided that there are certain "political questions"—including matters that are demonstrably committed to a coordinate branch of government, require an initial policy determination, lack ascertainable standards, or could otherwise result in judicial embarrassment—that are nonjusticiable.[24] For example, the Court has recognized executive power over foreign affairs, impeachment, and treaty abrogation as political questions into which courts ought to decline jurisdiction, finding them to be consigned to the elected federal branches of government under the "political question doctrine."[25]

Let me tell you a story about the curious use of the political question doctrine as a means to arrest judicial review of environmental claims. In 2008, the city of Kivalina and the Alaska Native Village of Kivalina—a federally recognized tribe (collectively, Kivalina)—brought a federal lawsuit against a dozen petroleum refining, energy producing, and coal extracting companies (companies).[26] Kivalina claims that the companies' legacy and ongoing greenhouse gas emissions cause and contribute to climate change that is causing Kivalina to be absorbed by the Arctic Ocean, and seeks to recover the estimated $400 million it will cost to relocate the community, which brings us to the political question doctrine's application to climate cases.[27]

In *Connecticut v. American Electric Power Co., Inc.*,[28] a collection of states representing 77 million citizens and private conservation organizations sued the nation's five largest emitters of carbon dioxide in the United States under federal common and state public nuisance law, asking the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy.[29] The defendants, on the other hand, contended that federal courts should exercise judicial restraint in "resolving questions of high policy, which are for the political branches."[30]

The district court agreed with the defendants and dismissed the case as a nonjusticiable political question. The court concluded that it was impossible for it to make the "initial policy determination" "that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim."[31] It concluded that plaintiffs' allegations were "extraordinary,"[32] "patently political,"[33] and "transcendently legislative."[34] It reasoned that the case's soup of environmental, economic, foreign policy, and national security ingredients "present non-justiciable political questions that are consigned to the political branches, not the Judiciary."[35]

In 2009, the U.S. Court of Appeals for the Second Circuit reversed, however, finding climate claims in tort law to be justiciable. In *American Electric Power Co.*,[36] the court held that no aspect of the political question doctrine applied to enjoin judicial review. In particular, the circuit court found that climate change is neither constitutionally consigned to the elected branches, nor prudentially left to them. In particular, it rejected the lower court's determination that there is in fact national climate change policy deserving deference under the political question doctrine: "Lurking behind Defendants' arguments is this salient question: What exactly *is* U.S. 'policy' on greenhouse gas emissions?"[37] Dismissing defendants' position that it is either to reduce emissions or promote research, the court said: "These variegated pronouncements underscore the point that there really is no unified policy on greenhouse gas emissions."[38] Left open is

20. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 40 ELR 20160 (2010).
21. *See* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 Denv. U. L. Rev. 919, 958 (2008).
22. *See id.*
23. *Id.* at 958-59.
24. Baker v. Carr, 369 U.S. 186, 217 (1962).
25. James R. May, *Constitutional Law and the Future of Natural Resource Protection*, *in* The Evolution of Natural Resources Law and Policy 124, 146 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2009).
26. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876, 39 ELR 20236 (N.D. Cal. 2009).
27. May, *supra* note 21, at 920 (footnote omitted).
28. 406 F. Supp. 2d 265, 35 ELR 20186 (S.D.N.Y. 2005), *vacated & remanded*, 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).
29. May, *supra* note 21, at 938 (footnotes omitted).
30. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271.
31. *Id.* at 273.
32. *Id.* at 271 n.6.
33. *Id.*
34. *Id.* at 272.
35. *Id.* at 274.
36. 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).
37. *Id.* at 331.
38. *Id.* at 331-32.

the extent to which federal courts may calculate monetary damages attributable to carbon dioxide emissions in a public nuisance action.

On August 2, 2010, American Electric Power and the other utility defendants filed a petition for certiorari to reverse the Second Circuit's ruling, arguing that (1) the states and other plaintiffs lack standing, (2) federal law preempts plaintiffs' claims, and (3) the case raises nonjusticiable political questions.[39] In late August 2010, the Barack Obama Administration filed a brief in support of the utility defendants' petition, arguing that plaintiffs lack prudential standing, and that federal law displaces the need for common law causes of action for climate change.[40]

In *Comer*,[41] plaintiff property owners filed a class action against several oil, coal, power and chemical companies, and two industry trade associations, alleging that they were liable for property and other damage inflicted by Hurricane Katrina. Under the plaintiffs' theory, the companies caused or exacerbated global warming, which purportedly caused or exacerbated Hurricane Katrina, which then caused plaintiffs' injuries, by going about their business without "currently available mitigation technologies," despite warnings from scientists and government agencies. As in *American Electric Power Co.*, the federal district court dismissed the claims in 2007 on political question and standing grounds from the bench, without a written opinion.

In 2009, a panel of the U.S. Court of Appeals for the Fifth Circuit reversed, finding as the Second Circuit did in *American Electric Power Co.*, that plaintiffs' claims were not committed to a coordinate branch of the government: "There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has such effect."[42] The panel held that state common-law claims for harm attributed to climate change are legally cognizable:

> Until Congress, the president, or a federal agency so acts, however, the Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations.[43]

In a bizarre twist, the Fifth Circuit then vacated the panel's decision and reinstated the district court's dismissal of the case.[44] On May 28, 2010, the Fifth Circuit announced that it had vacated on the ground that the court could not muster a quorum after it had granted a motion for rehearing en banc.[45] The necessary nine of the court's 16 members voted to hear the matter en banc. (The other seven had recused themselves.) Then after granting the motion, one more judge recused, leaving the court one judge short of a quorum. But instead of reinstituting the panel decision, five of the remaining eight "eligible" judges applied local rules and voted to vacate the appeal altogether, without reaching the merits, and to reinstate the district court's dismissal. In dismissing the case, the reconstituted panel wrote:

> In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion or judgment in this case upon which any mandate may issue. Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.[46]

Three judges strongly disagreed. Judge Dennis, for one, wrote in dissent:

> I respectfully dissent from the decision by the majority of this en banc court to refuse to hear oral argument or to decide this appeal on its merits, but to take the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits. The majority's decision to declare that we no longer have a quorum, and to take the drastic action of dismissing the appeal without hearing its merits, but with the intention of reinstating the district court's judgment, is manifestly contrary to law and Supreme Court precedents. The majority's action is deeply lamentable because it was forewarned of the reasons militating against its erroneous rush to judgment by the parties' letter briefs and by internal memoranda. If the five-judge en banc majority's precipitous summary dismissal of the appeal is not corrected, it will cause the sixteen-active judge body of this United States Court of Appeals to default on its absolute duty to hear and decide an appeal of right properly taken from a final district court judgment.[47]

In late August 2010, plaintiffs filed a writ of mandamus asking that the Supreme Court direct the Fifth Circuit to reinstate the panel's unanimous decision that the case is justiciable.[48]

Adding to those that have found tort-based climate cases nonjusticiable under the doctrine, a federal district court in *Native Village of Kivalina v. ExxonMobil Corp.*, held that "neither Plaintiffs nor AEP offers any guidance as to precisely what judicially discoverable and manageable standards are

39. Connecticut v. American Electric Power Co., Petition for Certiorari, Civ. Action No. 10-174; AEP Cert. Petition at i, 13, 20, and 26.
40. Brief for Tenn. Valley Auth. in Supp. of Pet'rs, Connecticut v. American Electric Power Co., No. 10-174.
41. 585 F.3d 855, 39 ELR 20237 (5th Cir. 2009).
42. *Id.* at 870.
43. *Id.* In 2010, the Fifth Circuit dismissed the case and reinstituted the district court decision, finding that it lacked a quorum to hear a properly granted motion for hearing en banc. Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).
44. *See* http://www.nytimes.com/gwire/2010/06/01/01greenwire-court-tosses-landmark-global-warming-ruling-af-26422.html.
45. *See* Comer v. Murphy Oil USA, 607 F.3d 1049, 40 ELR 20147 (5th. Cir. May 28, 2010).
46. *Id.* at 1055.
47. *Id.* at 1056 (Dennis, J., dissenting).
48. In re Ned Comer, Pet'r's Writ of Mandamus, Civil Action No. 10-294.

to be employed in resolving the claims at issue . . . . [other] cases do not provide guidance that would enable the Court to reach a resolution of this case in any 'reasoned' manner."[49] *Native Village of Kivalina* is currently before the U.S. Court of Appeals for the Ninth Circuit.[50]

The prospects for Supreme Court review in these cases seem high. The amalgam of standing, political question, congressional authority, federalism, big business, and a defining issue of our day, coupled with the Court's recent penchant for reversing controversial circuit court decisions in environmental cases, gives these cases an almost irresistible quality. On the other hand, the Court declined to engage arguments steeped in the political question doctrine in holding that the federal Clean Air Act[51] gives the U.S. Environmental Protection Agency (EPA) authority to regulate greenhouse gas emissions from new motor vehicles in *Massachusetts v. EPA*.[52]

I question whether applying the political question doctrine to climate cases is constitutionally legitimate. I believe that the doctrine should not serve as a bar to climate cases due to a lack of both a demonstrable constitutional commitment to an elected branch and countervailing prudential concerns.[53]

That said, I do not presuppose that federal courts in the United States are the only, or the premier, forum for addressing what is arguably the world's most pressing problem.[54] The operative question in these cases is whether the political question doctrine prevents federal courts from hearing climate cases rooted in federal common law, and I conclude that it does not.[55] Thus, while conceding that federal common-law causes of action do not provide an optimal democratic, economic, or societal means to address the effects of climate change, as I have written elsewhere, I conclude that the political question doctrine is an untenable constitutional means for dismissing climate cases invoking federal common law.[56] I conclude that there is no constitutional or prudential justification for relegating climate change entirely to the political branches, and that the political question doctrine does not prevent courts from entering this thicket.[57]

49. 663 F. Supp. 2d 863, 876, 39 ELR 20236 (N.D. Cal. 2009), *appeal pending,* No. 09-17490 (9th Cir. 2010).
50. Appellant's Opening Brief, Native Vill. of Kivalina v. ExxonMobil Corp, No. 09-17490 (9th Cir. 2010).
51. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
52. 549 U.S. 497, 516, 37 ELR 20075 (2007).
53. *See* May, *supra* note 21, at 921:

> Since the time Justice Holmes sat on the Court, federal common law for public nuisance has served as a meaningful cause of action for states and individuals to stop harmful activities and recover the costs of transboundary pollution. So too it can with climate change. Indeed, the legal challenges of climate change seem a particularly cozy fit for federal common law. It is transboundary. Legislative enactments allowing for injunctive relief or money damages do not exist. A patchwork of state common law responses is untenable. So one is left to wonder for what federal common law can exist if not for climate change. And if current circumstances concerning climate change do not warrant its use, then when possibly could it be so.

54. *Id.* at 922.
55. *Id.*
56. *Id.* at 924.
57. *Id.* at 959.