That's not my phrase: it's Jerry Frug's. But it applies here.

Rhead reports that in the Connecticut v. AEP argument,

> Justice Breyer, setting up one of his classic hypotheticals, wanted to know why a judge should not impose a $20-a-ton carbon tax as a judicial remedy. (Answer: because he can't.)

It's not clear to me why Breyer thinks that a judge can't do this. Recall that *Connecticut v. AEP* is formally a nuisance case. Damages are a standard remedy in nuisance cases, especially since *Boomer v. Atlantic Cement,* a standard case from virtually every casebook. Thus, were a court to hold that 1) carbon emissions represent a public nuisance; and 2) because of the multiplicity of sources and victims and issues of judicial administrability, damages are the appropriate remedy, it could simply award permanent damages a la *Boomer* and set the price at some sort of expert consensus as to the price of carbon. That price represents the external costs of carbon emissions, and thus is equivalent to compensatory damages.

I believe that it was an error for the state plaintiffs in *AEP* to ask for injunctive relief. They did it, I assume, because they wanted to avoid having to prove damages, but it puts them in the awkward position that Justice Ginsburg pointed out at the argument:

> "The relief you are seeking," Justice Ruth Bader Ginsburg told Underwood almost as soon as she had stood up, "sounds like the kind of thing EPA does. Congress told EPA to set the standards [in the Clean Air Act]. You are setting up a District judge as a kind of 'super EPA.' "

If the remedy was damages, however, the question of judicial administrability fades away substantially. It would be nice if the justices would see that. But I'm not holding my breath.