A GATHERING STORM: CLIMATE CHANGE AS COMMON NUISANCE OR POLITICAL QUESTION?

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INTRODUCTION

Politicians, regulators, scientists, and advocacy groups have proposed and debated legislative solutions to climate change since at least 1978.[1] Suggestions have included limiting the amount of Greenhouse Gases (GHGs) released into the atmosphere by increasing the use of renewable energy sources,[2] imposing carbon caps,[3] and attempting to capture the GHGs we already emit using carbon sequestration.[4]

Climate change has become an issue on which nearly every political candidate has a stance. Alexis de Tocqueville observed more than a century and a half ago that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."[5] Perhaps the most surprising feature of the climate change lawsuits that are currently in the federal court system is how long they took to get there.

Like all relatively novel legal issues, climate change lawsuits present attorneys and judges with numerous troubling questions.[6] Among them is a widely-held belief that the issue of global warming is inherently a political debate and should be left to the

[1] *See, e.g.*, National Climate Program Act of 1978, 15 U.S.C. §§ 2901–08 (2006).

[2] *See, e.g.*, Helene Cooper & John M. Broder, *Obama Presses Case for Renewable Energy*, N.Y. TIMES, Oct. 24, 2009, at A13, *available at* http://www.nytimes.com/2009/10/24/us/politics/ 24obama.html.

[3] *See, e.g.*, Lisa Lerer, *Obama Officials Push Carbon Caps*, POLITICO (April 22, 2009), http://www.politico.com/news/stories/0409/21566.html.

[4] *See, e.g., Climate Change – U.S. Policy: Carbon Capture and Storage Interagency Task Force*, ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/policy/ccs_task_force.html (last visited July 21, 2010).

[5] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., George Lawrence trans. 2000) (1840).

[6] Causation and remedies are two such issues that come quickly to mind.

elected branches to determine a solution by consensus, rather than brought to a judge to rule in favor of a particular plaintiff or defendant on an issue that will impact many parties beyond those directly involved in the lawsuit. Indeed, until recently, conventional wisdom presumed that cases raising common law claims based on climate change were barred under the political question doctrine, which requires courts to make a threshold determination that the claim is properly within the judicial branch of government.[7] This note will focus on that aspect of the climate change cases: whether such claims should be dismissed as non-justiciable political questions under the current state of the doctrine.

Part I reviews the origins and evolution of the political question doctrine. Part II discusses three of the major climate change lawsuits recently in the federal courts and summarizes the reasoning behind the outcomes in those cases. Part III argues that under recent political question jurisprudence, climate change plaintiffs can and should advance beyond the threshold political question doctrine analysis. It will also examine the political implications that follow.

I. THE ORIGINS AND EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

The theory behind the political question doctrine can be found in some of the earliest and most influential cases in U.S. history. Over time, other theories have arisen and the form of the analysis has changed substantially. This section examines the shifting of the doctrine as it was employed or rejected by courts in several landmark cases.

A. Marbury *Articulates the Classical Doctrine*

One of the most famous cases in U.S. history, *Marbury v. Madison*, is known for giving courts the power to interpret the law. It also, however, includes Chief Justice Marshall's acknowledgement that the courts do not and should not hold all of that power, indeed, that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive,

[7] *See* Tom Mounteer, *Returning the Common Law to its Rightful Place*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10361 (2010).

can never be made in this court."[8] When such questions are brought before the courts, judges must abstain from resolving them and find that it is the duty of the Executive or Congress to interpret the law. This finding requires that courts make a threshold determination as to whether the Constitution allocates interpretive power to another branch and, if so, how much.[9]

In *Marbury*, Chief Justice Marshall suggests several factors that help identify a political question: one, that the issue respects the nation, not individual rights; another, that the issue involves areas in which the Constitution vests the political branches with discretion.[10] Marshall also provides examples of political questions, such as the presidential power of nominating and appointing and the acts of an executive officer in foreign affairs that are performed at the direction of the President.[11] While announcing a doctrine based on judicial modesty, the resulting analysis also mandates the judiciary make the final finding as to whether or not the case presents a political question, and thus determine the correct allocation of interpretive power to the other branches.[12]

Marshall's understanding of the political question doctrine, grounded in the text, structure, and history of the Constitution, is known as the "classical strand" of the doctrine.[13] However, Marshall also believed that institutional competence concerns were a justification supporting the constitutional separation of powers. Marshall suggested in a speech that the Executive, not the Judiciary, should have the power of extradition because it is the Executive who must "understand precisely the state of political intercourse and connection between the United States and foreign nations."[14] While the Constitution was primary in a Marshall determination, it does seem that competency considerations were not entirely neglected.

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[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

[9] *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002). Professor Barkow's article, which argues in favor of a revived political question doctrine, provides an excellent analysis of its history.

[10] *Marbury*, 5 U.S. at 166–70.

[11] *Id.* at 166–67.

[12] *Id.* at 167–71.

[13] Barkow, *supra* note 9, at 253.

[14] *Id.* at 249-50 (quoting Speech of the Honorable John Marshall (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. Note I, at 16–17 (1820)).

B. *The Court Broadens the Doctrine by Expanding the Analysis to Include Prudential Considerations*

Federal courts went on to develop a less defined but perhaps more convenient variant of the doctrine based on prudential considerations. The prudential strand of the political question doctrine was born out of the classical branch. Because the Constitution does not contain a provision discussing judicial review, it similarly does not declare which provisions, if any, are for Congress or the Executive to interpret alone. Thus, courts must infer which issues require deference to another branch from the constitutional grant of power to that branch and "structural clues that the grant of power cannot be shared with the judicial branch."[15]

Along with structural hints, pragmatic considerations served as suggestions to judges that a case at hand was not suited to a judicial resolution. In *Luther v. Borden*, for example, the Court noted, among other things, the practical difficulties inherent in determining whether a state government was "republican" in reaching its conclusion that Congress had the authority to interpret the Guarantee Clause.[16] Chief Justice Taney, however, emphasized at the end of his majority opinion that it is the Constitution which ultimately determines which cases the Court must decide.[17] Commentators have contrasted *Luther* with *Pacific States Telephone v. Oregon*, in which the Court determined that it did not have interpretive power by "reasoning backward" with a list of the consequences that would flow from a ruling on the Guarantee Clause issue, demonstrating a full acceptance of the significance of prudential considerations in making the political question threshold determination.[18]

The next several decades saw an expansion of the use of pragmatic considerations in the application of the political question doctrine. In particular, the New Deal Court showed an increased deference to Congress. In *Coleman v. Miller*, seven Justices in the majority reasoned that the lack of a standard or rule to employ in analyzing the constitutional amendment process required dismissal

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[15] *Id.* at 253–54.

[16] 48 U.S. (7 How.) 1, 41–42 (1849).

[17] *Id.* at 47.

[18] *See, e.g.*, Barkow, *supra* note 9, at 258 (citing Pac. States Tel. & Telegraph Co. v. Oregon, 223 U.S. 118 (1912)).

of the case.[19] Their opinions did not include the text, history, or structure of Article V as part of their analyses or conclusions.[20]

Some commentators have opined that the Court can and should refuse to reach the merits in controversial cases.[21] Employing the growing prudential strand of the political question doctrine allowed the Court to avoid legitimizing unconstitutional or unsavory policies, but also gave the Court the freedom to pick and choose when and how it would make itself vulnerable to popular attack. From that angle, the prudential strand is a mechanism for providing the Court the leeway to avoid making results-oriented decisions and allowing it to rule only in cases in which it could employ logic and standards. This stance, often associated with Alexander Bickel, has been characterized as the "realpolitik" behind the prudential political question doctrine.[22]

C. *The Six Formulations from* Baker v. Carr

In 1962, the Warren Court held in *Baker v. Carr* that a case alleging that a state apportionment statute violated the Equal Protection Clause did not present a political question, and thus could be decided by the court.[23] In coming to that conclusion, the Brennan opinion analyzed the state of the doctrine, exposing a convoluted and unevenly applied set of rules.[24]

The Court used its review to lay out six "formulations" that should be evaluated when making political question doctrine determinations. A court should consider whether there is:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department, [2] a lack of judicially discoverable and manageable standards for resolving it, [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, [5] an unusual need for unquestioning adherence to a political decision

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[19] 307 U.S. 433, 453–54 (1939).

[20] Barkow, *supra* note 9, at 260 (citing *Coleman*, 307 U.S. 433).

[21] *Id.* at 261–62 (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 69 (2d ed. 1986)).

[22] Martin H. Redish, *Judicial Review and the 'Political Question,'* 79 NW. U. L. REV. 1031, 1032 (1984).

[23] 369 U.S. 186, 226 (1962).

[24] *Id.* at 210.

already made, [and 6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[25]

The Court cautioned that unless one of these factors was "inextricable" from the case under review, there could be no dismissal on political question non-justiciablity.[26]

These factors have undergone substantial scrutiny by judges and scholars alike. Professor Barkow writes that the first factor (and possibly the second, when used to inform the first) acknowledges the classical strand of the doctrine.[27] The growing importance of the prudential strand is recognized in the remaining factors.[28] Others have divided the factors differently, with the Ninth Circuit suggesting in *Corrie v. Caterpillar* that the first three factors "focus on the constitutional limitations of a court's jurisdiction," while the final three acknowledge the prudential considerations that weigh against a judicial resolution.[29] Justice Powell, concurring in *Goldwater v. Carter*, saw three distinct groups of inquiries:

(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?[30]

Regardless of the categories chosen to understand the *Baker* test, it is clear that the six factors allow for flexible use of the doctrine.[31] A court seeking to dismiss a case could fairly easily fit it within one of the six broad formulations articulated by Brennan. And yet, the Warren Court and its successors opted not to employ that flexibility. In the nearly half century since *Baker*, the Court has found only two issues to present political questions[32] and both

[25] *Baker*, 369 U.S. at 217.

[26] *Id*.

[27] Barkow, *supra* note 9, at 265.

[28] *Id*.

[29] 503 F.3d 974, 981 (9th Cir. 2007).

[30] Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring). Four concurring justices based their decision to dismiss the complaint, which had challenged the right of the President to nullify a treaty with China, on political question grounds. *Id.* at 1002.

[31] Barkow, *supra* note 9, at 267.

[32] *See* Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1237 (D.C. Cir. 2009). The cases were *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which the Supreme

cases presented strong textual arguments in favor of finding that the decision rested with the Executive or Legislature, in addition to any prudential concerns that may have been present.[33] Americans largely supported a Court that was adopting progressive values more quickly than the political branches and the Court could play the role of crusading protector of civil rights and liberties without losing its legitimacy, as the New Deal Court had feared.[34]

D. *Courts Struggle to Find the Principle Behind the Doctrine but Come up Short*

Barkow has called *Baker v. Carr* "the beginning of the end of the political question doctrine,"[35] and has argued that the development of the prudential strain of the political question doctrine has led to confusion about the doctrine and resistance to its use.[36] Rather than use the *Baker* factors to develop a robust practice of dismissing controversial cases under the doctrine, the Court has veered away from embracing the prudential strand of the doctrine, perhaps allowing distaste for the prudential strand to dissuade it from using the classical analysis.

Indeed, it is difficult to find an area in which the political question doctrine retains significant bite.[37] In *Webster v. Doe*, the Court's finding that a federal agency's decision to fire an employee was judicially reviewable prompted Justice Scalia to observe that "[t]he assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid."[38] In *Japan Whaling Ass'n v. American Cetacean Society* the Court stated that it has a duty to resolve even highly political

Court dismissed a claim by Kent State students against the Governor of Ohio, finding that the issue was expressly committed to the political branches under the Constitution and *Nixon v. United States*, 506 U.S. 224 (1993), in which the Supreme Court held that impeachment of a federal judge was textually committed to the legislature by the Constitution.

[33] Barkow, *supra* note 9, at 267–68.

[34] *Id.* at 266.

[35] *Id.* at 263.

[36] *Id.* at 243.

[37] To be fair, there have been circuit cases in which the panel has invoked the political question doctrine and the Supreme Court has not granted certiorari. *See, e.g.*, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984); *see also* Made in the USA Found. v. United States, 242 F.3d 1300, 1311-12 (11th Cir.), *cert. denied sub nom.* United Steelworkers v. United States, 534 U.S. 1039 (2001).

[38] 486 U.S. 592, 621 (1988) (Scalia, J., dissenting).

statutory questions and that such cases should not be found to present political questions.[39] And *Baker* itself had held that the doctrine did not apply to claims concerning the relationship between the federal courts and the states, but only among the three branches of the federal government.[40]

On the other hand, the Court has come close to finding a political question in a small number of cases, but could not gather a majority willing to invoke the doctrine. In *Vieth v. Jubelirer*, for example, Justice Scalia's plurality opinion counted only four members of the Court holding that political gerrymandering cases were non-justiciable under the doctrine.[41] In arriving at that conclusion, Justice Scalia highlighted both the textual commitment to the political branches[42] and the lack of a discernable and manageable standard by which to conclude otherwise.[43] Justice Kennedy, concurring in the outcome, was unwilling to invoke the doctrine, noting he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."[44]

Barkow submits that the 2000 case, *Bush v. Gore*, which ultimately decided the presidential election, provides the ultimate illustration of the Court's abandonment of political question doctrine principles — classical and prudential.[45] In fact, only Justice Ginsburg's dissent mentions the phrase "political question" in a footnote.[46]

Ultimately, it is clear that use of the political question doctrine has been severely curtailed by the Supreme Court and by members of the judiciary of all political persuasions, from the Warren Court to the Roberts Court. Whether this is a desirable development or

[39] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

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

[41] Vieth v. Jubelirer, 541 U.S. 267 (2004). Justice Kennedy concurred in the result, but did not agree that political gerrymandering cases were per se political questions. *Id.* at 306–07.

[42] *Id.* at 285.

[43] *Id.* at 290.

[44] *Id.* at 306.

[45] Barkow, *supra* note 9, at 276–77.

[46] Bush v. Gore, 531 U.S. 98, 142 n.2 (2000) (Ginsburg, J., dissenting).

not is beyond the scope of this paper, but the willingness to hear almost any case and the enormous confidence in the judiciary's competency is highly relevant in determining whether the climate change cases should and will fall under the doctrine.

II. AS TEMPERATURES RISE, COURTS DEBATE JURISDICTIONAL REACH

The first decade of the twenty-first century has brought three high-profile climate change cases to the federal courts for resolution. In all three cases, the district courts dismissed on political question grounds. The Second and Fifth Circuits reversed, holding that the claims were justiciable.[47] In the Ninth Circuit, the district court's decision is still on appeal.[48] In June, the Supreme Court reversed the Second Circuit's decision, reaching the merits after only a cursory discussion of the threshold issues.[49]

A. Connecticut v. American Electric Power

In 2004, eight states, one city, and three environmental groups brought an action against five electric companies under federal common law and state law to abate the "public nuisance" of global warming.[50] The plaintiffs asserted that global warming will cause irreparable harm to the property, health, safety, and well-being of citizens.[51] The plaintiffs also alleged that the defendants' combined emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions."[52]

The district court, under Judge Loretta Preska, dismissed the

[47] On February 26, 2010, the Fifth Circuit ordered a rehearing of *Comer v. Murphy Oil USA* en banc. 598 F.3d 208 (2010). Nine members of the sixteen member court had voted the case en banc. On May 28, 2010, after the recusal of one of the nine judges left only eight judges, the Fifth Circuit determined that a quorum no longer existed and it did not have the authority to conduct any judicial business on the appeal. 607 F.3d 1049 (2010). Having already vacated the appellate panel decision, the en banc court could neither decide the appeal nor dis-en banc the case, which would have reinstated the panel ruling. The appeal was thus dismissed and the parties were informed that they now have the right to petition the Supreme Court. *Id*. at 1055.

[48] *9th Circuit Extends Time to Respond to Kivalina Appeal*, 23-9 MEALEY'S POLLUTION LIABILITY REP. 3 (2010).

[49] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

[50] Connecticut. v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

[51] *Id.* at 268.

[52] *Id*.

claims as non-justiciable political questions. In the first paragraph of the opinion, Judge Preska warned that if courts were to decide political questions, the checks and balances system would be disturbed, as courts are not accountable to other branches or to the electorate.[53] She then went on to review congressional action on climate change, noting the U.S. opposition to the Kyoto Protocol, and quoting then-President George W. Bush's policy on climate change, which "emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change."[54]

Looking to the factors discussed by the Supreme Court in *Baker v. Carr*,[55] the court found that the third indicator, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," was "particularly pertinent" to the case.[56] Judge Preska reasoned that balancing the social costs of pollution with industrial development, as required by *Chevron*, would be impossible without a policy determination that the system commits to the elected branches.[57] The opinion listed a sample of the many difficult questions a court would have to decide, from determining the appropriate level at which to cap defendants' carbon dioxide emissions to balancing the merits of injunctive relief against national energy security.[58] Judge Preska distinguished the plaintiffs' supporting cases, which presented examples of pollution-as-public-nuisance claims, as more limited in both the scope and magnitude of relief being sought, and as touching upon fewer areas of national and international policy.[59]

The opinion stateed in a footnote that, because an analysis of the plaintiffs' standing would involve an analysis of the merits of the case, the decision would not address the question of standing. The footnote cited as an example that "determining causation and redressibility in the context of alleged global warming would require me [Judge Preska] to make judgments that could have an impact on the other branches' responses to what is plainly a

[53] *Id.* at 267.

[54] *Id.* at 270 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52933 (Sept. 8, 2003)).

[55] 369 U.S. 186 (1962). *See* discussion *supra* Part I.C.

[56] *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272.

[57] *Id.*

[58] *Id.*

[59] *Id.*

political question."[60] Reasoning that she would have to make a decision on causation to address standing, and worried that her decision would affect a policy determination, Judge Preska opted not to make the decision at all, seeming to embrace the prudential strand of the political question doctrine despite its recent absence from Supreme Court reasoning.[61]

The Second Circuit vacated that ruling and remanded, holding, among other things, that the plaintiffs' claims did not present political questions.[62] Noting the "high bar" set by *Baker* for non-justiciability determinations,[63] the opinion also refers to the Supreme Court's reasoning in *Vieth v. Jubelirer* that the *Baker* factors were "probably listed in descending order of both importance and certainty."[64] Despite the district court's reliance on the third *Baker* factor—the need for an initial policy determination—as the strongest indicator of a political question, the Second Circuit analyzed all six. The panel addressed the first three factors independently and the last three as a group (taking its cue from the defendants, who also characterized the latter together as policy considerations).[65]

The panel was able to conclude fairly easily that the defendants had a weak case arguing for dismissal under the first *Baker* factor—a textually demonstrable constitutional commitment to a political branch. The defendants suggested that the correct level of carbon dioxide emissions fell under the Commerce Clause as "high policy" but failed to explain further, prompting the court to consider the position waived.[66] The court spent more time addressing the defendants' second argument under the first factor—that judicial orders to reduce carbon dioxide emissions in

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[60] *Id.* at 271 n.6.

[61] *Id.* at 392-93.

[62] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 315 (2d Cir. 2009). Justice Sonia Sotomayor was an original member of the panel but was elevated to the Supreme Court before the decision was announced. The two remaining panel members, Justices Peter Hall and Joseph McLaughlin, were in agreement on the result. *Id.* at 314.

[63] *Id.* at 321.

[64] *Id.* (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).

[65] *See id.* at 331.

[66] *Id.* at 324 (finding that "[b]eyond this cursory reference to 'high policy,' Defendants fail to explain how the emissions issue is textually committed to the Commerce Clause. We find this position insufficiently argued and therefore consider it waived.").

U.S. industry would impede the executive branch's attempts "to induce other nations to reduce their emissions."[67] Finding that the defendants exaggerated the effect a decision in this particular lawsuit would have on international policy or negotiations, the court stated: "A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy (assuming that emissions caps are even put into place)."[68]

The panel described the relief sought by plaintiffs as tangential to the policy concerns raised by defendants when compared to other cases in which courts have found political questions that required dismissal.[69] It concluded its analysis of the first *Baker* factor by noting that, in fact, a common law nuisance case was "constitutionally committed" to the judiciary.[70]

The second *Baker* factor indicates that a lack of judicially discoverable and manageable standards will suggest the presence of a political question. Again, the court found that the defendants' arguments on these grounds were overstated.[71] The opinion notes a number of cases in which "federal courts have applied well-settled tort rules to a variety of new and complex problems."[72] The court cited approvingly a number of cases in which federal courts have assessed complicated scientific evidence. It stated that resolving a particular nuisance issue before the court did not require the type of assessment, valuations, and balancing of interests that the political branches would undertake to formulate a national

[67] *Id.* (quoting defendants' brief).

[68] *Id.* at 325 (emphasis in original).

[69] *Id.* (citing, as examples, Whiteman v. Dorotheum GmbH & Co., 431 F.3d 57 (2d Cir. 2005) (holding that deference to U.S. statement of foreign policy urging dismissal of claims against foreign sovereign was appropriate where political branches had entered agreements allowing for resolution of issues in an alternative international forum), and *In re* Austrian & German Holocaust Litigation, 250 F.3d 156 (2d Cir. 2001) (holding that a judicial order that "seemingly requires the German legislature to make a finding of legal peace" improperly intruded into the Executive's powers)).

[70] *Id.* at 325 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

[71] *Id.* at 329.

[72] *Id.* at 328 (citing New Jersey v. City of New York, 283 U.S. 473 (1931), North Dakota v. Minnesota, 263 U.S. 365 (1923), New York v. New Jersey, 256 U.S. 296 (1921), and several others).

emissions policy.[73]

The district court relied on the third *Baker* indicator—the need for an initial policy determination. On appeal, the defendants argued that global warming inherently required a comprehensive response, which could only be supplied by the legislative branch.[74] The Second Circuit opinion notes that the Supreme Court has held that a refusal by Congress to legislate does not suggest a legislative intent to supplant common law in that area.[75] Looking at an analogous case, the court turned to *Illinois v. City of Milwaukee*, in which the Supreme Court held that if federal law governing water pollution did not cover the plaintiff's claims or provide a remedy, the federal common law of nuisance was available to the litigant.[76] Furthermore, the opinion notes that the political branches have demonstrated a concern about global warming and have called for research into technologies that will reduce emissions, indicating that a decision in favor of the plaintiffs would not be as far afield of national policy as Judge Preska had found.[77] Finally, the court returned to its conclusion that the case was, at its core, an ordinary tort suit, which requires no initial policy determination in order to reach a resolution.[78]

The Second Circuit analyzed the final three *Baker* factors together and noted that past rulings have reasoned that these factors seem to be relevant only if a judicial resolution would contradict prior decisions made by a political branch and "such contradiction would seriously interfere with important governmental interests."[79] The court reviewed the defendants' arguments on the issue and concluded that, in fact, there is no national policy on GHGs.[80] Allowing the litigation to go forward to a resolution would therefore not result in a lack of respect for the political branches, contravene a political decision, or embarrass the nation, as there is no existing coherent policy with which such a resolution could conflict. The court acknowledged, of course,

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[73] *Id.* at 329.

[74] *Id.* at 330.

[75] *Id.* (quoting United States v. Texas, 507 U.S. 529, 535 (1993)).

[76] *See id.* at 330 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972)).

[77] *See id.* at 331.

[78] *See id.*

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

[80] *See id.* at 331-32.

that there were political issues at stake in the case, but cited *Baker* in warning against equating political cases with political questions.[81]

Finally, the panel pointed out that the Legislature and Executive would not be prevented by the resolution of this litigation from amending the Clean Air Act, drafting new legislation, or ordering the EPA to regulate differently.[82] The court reasoned that, by the nature of federal common law, Congress may displace those standards with its own, obviating the need for political question doctrine protections.[83]

As noted at the beginning of this section, the Supreme Court granted *certiorari* and reversed the Second Circuit on displacement grounds in June 2011.[84]

B. Comer v. Murphy Oil

The plaintiffs in *Comer*, owners of lands along the Mississippi Gulf coast, brought a class action against the defendants, corporations doing business in the fields of energy, fossil fuels, and chemicals in Mississippi, under state common law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.[85] The plaintiffs asserted that defendants' activities had contributed to global warming, which caused a rise in the sea levels and intensified Hurricane Katrina, both of which destroyed the plaintiffs' property and public land useful to them.[86] The plaintiffs brought the case to federal court on diversity jurisdiction.[87]

The district court, under Judge Louis Guirola, Jr., dismissed the case as a political question but did not issue a written opinion. The subsequent Fifth Circuit opinion summarizes Guirola's reasoning and quotes his ruling from the hearing transcripts:

> [Global warming] is a debate which simply has no place in the

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[81] *Id.* at 332 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

[82] *See id.*

[83] *Id.*

[84] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011). The Court ruled that the Clean Air Act (CAA) and the EPA's recent regulations pursuant to the CAA and *Massachusetts v. EPA*, 549 U.S. 497 (2007), displaced the plaintiffs' claims.

[85] Comer v. Murphy Oil, 585 F.3d 855, 859–60 (5th Cir. 2009).

[86] *Id.* at 859.

[87] *Id.* at 860.

> court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct . . . and develops standards by which . . . juries can adjudicate facts and apply the law . . . Under the circumstances, I think that the plaintiffs are asking the court to develop those standards, and it is something that this court simply is not empowered to do.[88]

Judge Guirola reasoned that the plaintiffs were seeking a balancing of many domestic and international interests that would result in a non-judicial initial policy determination.[89] Judge Guirola expressed concern about deciding many of the same factors Judge Preska sought to avoid deciding in *American Electric*, such as the appropriate level of GHG emissions on which to settle.[90] Despite the differences between the identities of the plaintiffs and nature of the claims, the district courts in *American Electric* and *Comer* seem to have shared almost exactly the same concerns.

The Fifth Circuit reversed the district court, finding that the landowners had standing to bring the nuisance, trespass, and negligence claims and that they did not present non-justiciable political questions. The panel recited the *Marbury* origins of the political question doctrine and the *Baker* formulations, but ultimately found no need to analyze those factors, holding that:

> [I]f a party moving to dismiss under the political question doctrine is unable to identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch, the issue is clearly justiciable and the motion should be denied without applying the *Baker* formulations.[91]

The Fifth Circuit thus employed only the classical strand of the doctrine, without reaching any of the prudential considerations.

The court also noted that federal appellate courts have rarely, if ever, affirmed the dismissal of a state common law suit between private citizens as non-justiciable.[92] Similarly, the Fifth Circuit

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[88] *Id.* at 860 n.2.

[89] *See id.*

[90] *See id.*

[91] *Id.* at 872.

[92] *Id.* at 873 (citing 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.3 at 806 (3d ed. 2008), and Koohi v. United States, 976 F.2d 1328, 1332 n.3 (9th Cir. 1992) (observing that the court could find no Supreme Court or federal appellate

observed that claims for damages are generally considered less likely to present political questions than claims for injunctive relief.[93] Even so, the panel later noted that courts sitting in equity have the discretion to limit relief for reasons of practicality and are not obligated to grant injunctions for every violation of law.[94] Thus, even if a court were to find that defendants were liable for enormous and ongoing damage, that court would have the discretion to deny an injunction for public policy reasons. The Fifth Circuit found that the availability of that discretion indicates "there is no need or authority to invoke the political question doctrine for such reasons."[95]

Interestingly, the opinion went out of its way to criticize the legal reasoning employed by the district court in *American Electric*. The panel found that that decision was based on "a serious error of law."[96] The court's error stemmed from the mistaken belief that the Supreme Court's decision in *Chevron v. Natural Resources Defense Council* held that courts in air pollution cases must balance social and economic interests.[97] According to the Fifth Circuit opinion, this misunderstanding led the *American Electric* district court to reason, circularly and erroneously, that it would have to imitate the legislative process in order to resolve the case, which would be impossible without an initial policy determination.[98]

Finally, it is worth noting that one of the panelists concurred in the holding on political question grounds but stated that he would have affirmed the district court's dismissal on an alternative ground argued by the defendants—that the plaintiffs had failed to

decisions dismissing a suit brought by a private party on the basis of the political question doctrine)).

[93] *See id.* at 874 (noting that in *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Supreme Court refused to take a suit seeking judicial supervision of the training of the Ohio National Guard after the Kent State shootings, but suggested that it might allow a suit against the National Guard for damages, citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which allowed such a lawsuit).

[94] *See id.* at 877 n.17.

[95] *Id.*

[96] *Id.* at 876. The Fifth Circuit also applied its criticism to *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007).

[97] In *Chevron v. NRDC*, 467 U.S. 837 (1984), the court held, among other things, that an agency's construction of a statute was entitled to deference from the courts.

[98] *Comer*, 585 F.3d at 876–77.

allege facts establishing that the defendants' actions were a proximate cause of the injuries alleged, thus failing to state sufficient facts to establish a common law claim.[99] Recognizing the panel's discretion not to address the argument, he concurred in the result on the grounds at issue.[100] This alternative, however, will be addressed in Part III.

The Fifth Circuit agreed to re-hear the case *en banc* and, in a rare twist, determined after vacating the panel's decision that it no longer had a quorum due to recusals from judges who had realized they were conflicted due to connections with the defendant companies. The Fifth Circuit decided that, without a quorum, the only action the *en banc* court could take was to reinstate the district court decision.[101] The Supreme Court denied the plaintiffs' mandamus petition in January 2011, so the district ruling will likely remain in place.

C. Kivalina v. ExxonMobil

Nine days after the Second Circuit vacated and remanded the decision in *American Electric*, the Northern District of California dismissed a suit brought by an Eskimo village against ExxonMobil and others because, among other things, it presented a non-justiciable political question.

The Inupiat Eskimo village and city of Kivalina sued twenty-four oil, energy, and utility companies under a common law nuisance claim, alleging that as a result of global warming the Arctic Sea ice that protects the city's coastline had diminished and would be destroyed, forcing future relocation of the residents.[102] The plaintiffs further alleged that the defendants' emission of GHGs contributed to global warming.[103]

After determining that the case did not implicate the first *Baker* factor—a textual commitment to another branch—the district court, under Judge Saundra Brown Armstrong, determined that the claim was non-justiciable under the second and third *Baker* inquiries— a lack of judicially discoverable and manageable

[99] *See id.* at 880 (Davis, J., concurring).

[100] *Id.*

[101] *See supra* note 47.

[102] Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

[103] *Id.* at 868.

standards and the need for an initial policy determination.[104] Judge Brown was concerned that she or the jury would be forced to balance the energy alternatives that were available when the GHGs were produced against the impact of those alternatives at a variety of levels and then again against the risk of flooding "along the coast of a remote Alaskan locale."[105]

The opinion notes its disagreement with the Second Circuit's decision in *American Electric*, finding that the tort law principles in which the Second Circuit had faith for guidance did not arise out of sufficiently analogous cases.[106] The opinion echoes the *American Electric* district court's concern about the limited scope of the cases cited as precedents.[107]

Finally, and for similar reasons, the court found that an initial policy determination was required from the political branches. In response to the plaintiffs' argument that because they were only seeking monetary relief, the court need not retroactively determine what emission levels should have been imposed, the court found that "[r]egardless of the relief sought, the resolution of Plaintiffs' nuisance claim requires balancing the social utility of Defendants' conduct with the harm it inflicts. That process, by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants."[108]

The *Kivalina* plaintiffs appealed to the Ninth Circuit, where the case is pending.

D. *Summary*

American Electric, *Comer*, and *Kivalina* are not the only global warming cases brought in the federal courts, but they represent the diverse nature of the claims, the plaintiffs, and the defendants, as well as the range of reasoning employed by courts in determining whether to dismiss on political question grounds or allow the case to go forward.[109] They have also been grouped by the media as a collection of recent climate change lawsuits with a

[104] *Id.* at 873–77.
[105] *Id.* at 874–75.
[106] *Id.* at 875.
[107] *Id.*
[108] *Id.* at 876.
[109] *See, e.g.*, California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007) (dismissed on political question grounds).

chance of success.[110] Courts have and will continue to distinguish between the cases when making political question determinations, so it is helpful to classify the ways in which they differ from each other.

In *American Electric*, the plaintiffs were governments and non-profits, while in *Comer* they were private citizens. *Kivalina*'s plaintiffs, suing as a village and city, are seeking reimbursement for their residents' loss of habitable land, as in *Comer*, while the *American Electric* plaintiffs were seeking an injunction. The defendants in *American Electric* were limited to fossil-fuel-fired power plants, while the *Comer* defendants are, more generally, corporations operating energy, fossil fuel, and chemical industries in the U.S. The *Kivalina* defendants also represent a broad spectrum of American industry—twenty-four oil, energy, and utility companies.

The variety of the parties is reflected in the claims. In *American Electric* and *Kivalina*, the plaintiffs, being governmental bodies, alleged a public nuisance under federal common law. In *Comer*, the private landowners brought state common law claims of nuisance (public and private), trespass, and negligence.[111]

Perhaps surprisingly, these variations made little difference in the district or appellate courts' political question analyses. The district courts found the lack of a standard and the absence of a policy determination to be dispositive in all three lawsuits. The *American Electric* and *Comer* appellate panels did not concern themselves with the type of injury (past or future) or the relief sought. The *Comer* court mentioned the dearth of political question dismissals against plaintiffs seeking damages, but it hardly seemed determinative in the panel's decision.[112] Such distinctions may become highly relevant in future climate change litigation, but within the initial round of cases the similarities seemed to define the outcomes.

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[110] John Schwartz, *Courts Emerging as Battlefield for Fights Over Climate Change*, N.Y. TIMES, Jan. 27, 2010, at A1.

[111] The *Comer* plaintiffs also brought unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims, but these were dismissed for lack of standing. Comer v. Murphy Oil, 585 F.3d 855, 867–68 (5th Cir. 2009).

[112] *Id.* at 877 n.17.

II. GOING FORWARD ON CLIMATE CHANGE AND LEAVING POLITICAL QUESTION DOCTRINE BEHIND

District Court judges are understandably wary of litigation that seemingly requires solutions to a problem as complicated and controversial as climate change. The judges presiding over these cases will have to consider and settle, at least initially, many extremely complex questions. Contemplating such questions seems to be at least one factor in explaining why district courts might feel lost without an "initial policy determination," as requested by the *American Electric* district court; a set of standards, as required by the *Comer* district court; or both, as in *Kivalina*. The classical strand of the doctrine, however, does not provide political question cover for the courts in climate change cases because it is not broad enough. The district courts rest their holdings on the prudential strand, but as Part I demonstrated, this version of the doctrine has not been favored by the Supreme Court in decades and was not employed in deciding *American Electric* this term.

This section applies a political question doctrine analysis to the climate change tort cases. Determining that under current doctrine the cases should survive political question dismissal, it then turns to what may and should happen with the cases. Finally, Section C looks at the implications that follow from judicial involvement in climate change litigation.

A. *Political Question Doctrine in 2011*

What remains of the political question doctrine? Beyond some narrow exceptions, the review in Part I suggests very little.[113] *Baker* removed the possibility of applying the doctrine to claims touching on the relationship between federal courts and the states.[114] *Japan Whaling* stated that even very politically controversial statutory decisions have also ceased to present political questions.[115] And, if Justice Scalia is correct, there may

[113] *See* discussion *supra* Part I(b) (observing that Guarantee Clause cases remain political questions). *See also* Nixon v. United States, 506 U.S. 224, 238 (1993) (holding that impeachment is a political question); Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (arguing that Presidential power to terminate treaties is a political question).

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

[115] Barkow, *supra* note 9, at 271.

be no executive decisions that are safe from judicial oversight.[116] Indeed, some commentators have suggested the doctrine never existed.[117]

Professor Laurence Tribe argued recently that the reasoning employed by the appellate panels in *American Electric* and *Comer* "reflect[s] a deep misunderstanding of the political question doctrine and its foundations."[118] While acknowledging that there is no textual commitment of climate change policy to Congress in the Constitution, Tribe submitted that the claims raise "such manifestly insuperable obstacles to principled judicial management that their very identification as a judicially redressable source of injury cries out for the response that the plaintiffs have taken their 'petition for redress of grievances' to the wrong institution altogether."[119] Proposing that the first two *Baker* factors span the spectrum of political question doctrine, with the first asking for a textual commitment to another branch and the second recognizing that courts may be "institutionally incapable of coherent and principled resolution," Tribe then proposed that these two poles of the doctrine actually "collapse" into the same.[120] Because the Constitution's framers could not have foreseen all the matters that should be committed to the legislature for resolution, courts should recognize that cases which do not lend themselves to "principled resolution through lawsuits" implicitly mark a commitment of that issue to another branch.[121] Essentially, the second *Baker* factor simply informs an analysis under the first.[122]

Tribe accused the appellate courts of deceiving themselves into finding that the common law standards which govern the resolution of nuisance claims can be applied to claims involving a worldwide change in temperature and the resulting effects. "Like the proverbial carpenter armed with a hammer to whom everything

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[116] Webster v. Doe, 486 U.S. 592, at 621 (Scalia, J., dissenting).

[117] Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987). *See also*, Redish, *supra* note 22, at 1031.

[118] Laurence H. Tribe, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13 (Wash. Legal Found., Working Paper No. 169, 2010).

[119] *Id.* at 12 (internal quotations omitted).

[120] *Id.* at 4.

[121] *Id*.

[122] *Id.* at 5 n.5 (quoting Nixon v. United States, 506 U.S. 224, 228–29 (1993) ("[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.")).

looks like a nail, those judges are wrong."[123] He suggested that the courts confused the label— a nuisance suit—with a nuisance argument.[124] He neglected, however, to address the response that, having brought a nuisance suit, the plaintiffs will be required to prove the elements of nuisance. This is a difficulty the circuit courts may well have seen in the plaintiffs' futures but which is not properly resolved at the pleading stage under a political question doctrine analysis.[125] Tribe makes many convincing arguments in his working paper, but they have more to do with the tenuous causation link in the climate change cases— a concern that is better addressed by standing doctrine or on the merits of the claim.

Under a robust prudential strand analysis, climate change cases would likely be found to be political questions under several of the *Baker* factors. There could indeed be a lack of manageable standards for resolving it or a need for an initial policy determination. But the Court has provided no indication that it intends to revisit approvingly such a robust doctrine. The unevenly applied discretion employed by judges under the prudential strand is an unavoidable and undesirable effect of the inherent lack of a principled way in which to apply prudential factors.[126] *Ex ante*, it is difficult to determine when the *Baker* factors would call for abstention or when they would weigh in favor of review.[127]

This leaves us with the more limited strand of political question doctrine that arose out of *Marbury*. Professor Barkow has argued persuasively for a reinvigoration of the classical strand of the political question doctrine.[128] But a principled revival of the classical strand would probably not change the appellate analyses of *Comer* or *American Electric*. Recall that the *Comer* court did not even reach the *Baker* analysis after finding that there was no

[123] *Id.* at 3.

[124] *Id.* at 13–14.

[125] The Fifth Circuit in *Comer v. Murphy Oil* stated, "[w]e do not hazard, at this early procedural state, an *Erie* guess into whether these claims actually state all the elements of a claim under Mississippi tort law, e.g., whether the alleged chain of causation satisfied the proximate cause requirement under Mississippi state common law." 585 F.3d 855, 880 (5th Cir. 2009).

[126] *See* discussion *supra* Part I.B. *See also* Redish, *supra* note 22, at 1046. Examining due process and equal protection jurisprudence, Redish states, "one must suspect the disingenuousness of the 'absence-of-standards' rationale." *Id.*

[127] Barkow, *supra* note 9, at 333.

[128] *Id.* at 330–35.

textual commitment of the question to another branch.[129] The *American Electric* panel also did not discuss prudential concerns in depth. A classical analysis is precisely what convinced the appellate panels *not* to find a political question. Thus, to argue against the justiciability of climate change cases under the political question doctrine would require courts to re-embrace the prudential strand of the doctrine.

Having rejected the prudential option, and having determined that there is no textual commitment of climate change to a political branch, tort suits in which the injury arises from climate change present political questions only to the extent that other common law tort cases would as well. Courts in recent years have provided a forum for a number of extraordinarily complex tort cases (asbestos and tobacco lawsuits, for example), which have been analyzed (successfully or not, depending on your viewpoint) by the courts.

There was a possibility that the *Vieth* plurality, which was willing to invoke the doctrine in political gerrymandering cases,[130] could pick up another vote in *American Electric*, either because the Court's membership has changed significantly since 2004, when *Vieth* was decided, or because climate change litigation raises concerns not present in addressing gerrymandering. The Court, however, moved quickly past such threshold issues (on which it was split), thereby passing up the opportunity to clarify its jurisprudence on the doctrine.

B. *Beyond Political Question Doctrine: Climate Change Plaintiffs Have Hurdles at Every Stage*

To the extent climate change cases appear to trigger the prudential factors of the political question doctrine, it seems that what really troubles the courts and commentators are questions of standing, causation, and remedy, which are more properly analyzed under other doctrines. Indeed, Professor Barkow suggests that many of the problems resolved by the prudential strand of the political question doctrine could be resolved with other judicial tools, such as Article III standing or the Court's

[129] *Comer*, 585 F.3d at 872. Note that the court did find that the plaintiffs' unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims did not satisfy the prudential standing requirement. *Id.* at 867–68.

[130] *See* discussion *supra* Part I(D).

power of equitable discretion.[131] Though outside the narrow scope of this paper, perhaps a principled development of jurisprudence on other doctrines in general and as applied to climate change specifically, would best advance understanding of all the issues.

The briefs that were before the Supreme Court in *American Electric* demonstrate that the government (which submitted a brief supporting the power companies) and the plaintiffs foresaw a decision on alternative grounds to political question doctrine. The Solicitor General's brief noted that there were indeed separation of powers concerns raised by the case but, recognizing the uncertain boundaries of political question doctrine, urged the court to dismiss the case instead on prudential standing grounds because it presents a generalized grievance.[132] The Solicitor General argued in the alternative that the Court should find that any federal common law claims should be dismissed because they have been displaced by the actions EPA has taken in the months since the Second Circuit ruled in *American Electric*.[133] The plaintiffs defended themselves against political question dismissal by making many of the same arguments put forward by the Second and Fifth Circuits, summarized in Part II.[134] Neither side was willing to tie its argument to the doctrine, indicating a realization that the Court would not focus its concern on whether climate change plaintiffs trigger political question analysis. The decision handed down in June validated their assumptions. Justice Ginsburg's opinion does not contain a political question analysis

[131] Barkow, *supra* note 9, at 333. *See also Comer*, 585 F.3d at 877 n.17 (noting that courts are not obligated to grant injunctive relief for every violation of law).

[132] *See* Brief for the Tennessee Valley Auth. as Respondent Supporting Petitioners at 34–36, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174) (observing that prudential standing doctrine addresses the same concerns as political question doctrine and that, regarding the latter, "there is no simple and precise test for identifying which questions courts should refrain from addressing lest they 'inappropriate[ly] interfere[] in the business of other branches of Government'" (quoting United States v. Munoz-Florez, 495 U.S. 385, 394 (1990))). The brief goes on to observe that the Court has provided "much additional guidance" after *Baker*. *Id.* at 36. The Solicitor General frames prudential standing limitations as a restrained ground on which to dismiss because they are narrower and judicially imposed. While prudential standing reflects the same Article III concerns that standing and political question doctrine do, it is self-imposed on the judiciary rather than constitutionally compelled. *See id.* at 14.

[133] *Id.* at 42.

[134] *Id.* at 27–37.

but asserts that at least some of the plaintiffs had standing and that there are no threshold questions barring review on the merits.[135]

C. *Beyond the Courts*

Outside of the judicial realm, Congress is always free to preempt these cases explicitly with legislation amending or supplementing the Clean Air Act. Should plaintiffs proceed further, the litigation may drive industry leaders to the political bargaining table to pursue just that. Instead of being the perennial voice of "no" in proposals to legislate on permissible emissions levels, GHG emitters may see the advantage in having a set emissions level that forecloses liability.

Commentators have compared the cases discussed in Part II to the tobacco industry litigation and the asbestos-related claims from recent decades.[136] As with the tobacco industry, should any of these cases advance to the discovery stage, publication of internal emails and policy could prove to be a public relations nightmare for defendants, especially if they suggest that companies have covered up or minimized scientific climate change findings. That possibility could force corporations both to negotiate settlements and to pave the way for comprehensive legislation.[137] Indeed, the likelihood of such lawsuits affecting policy development prompted Carol Browner, director of the White House Office of Energy and Climate Change Policy, to caution that "the courts are starting to take control of this issue," and noting that this development increased pressure on Congress to pass legislation.[138] At their most destructive, these claims could lead to bankruptcy for industry giants.[139]

The judicial branch can fill the vacuum when the political branches are unable to.[140] The nature of climate change is that most people will benefit (at least in the short term) from the processes that lead to it, while the victims will be those with comparatively little access to the legislative process. It is in the

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[135] *Am. Elec. Power Co.*, 131 S. Ct. 2527, 2531 (2011).

[136] *See, e.g.*, Schwartz, *supra* note 110.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that "separate educational facilities are inherently unequal[,]" and thus finding that segregated schools are unconstitutional).

best interests of GHG-emitting corporations to limit the legislative response as much as possible to maintain the status quo, but should tort cases result in damages or injunctions, they may prompt industry leaders to lobby for legislative action on emissions caps with preemption protection.

Many judges and commentators hesitate to allow courts to rule in cases that may shape public policy on climate change because elected branches are probably more equipped to comprehensively and efficiently address the problem. However, because legislating a response to a problem that may not fully materialize during a politician's lifetime (or those of his constituents) is politically difficult for the elected branches, it may be expedient and useful for plaintiffs to force the creation of policy though the justice system. The issue of climate change lends itself well to this path because Congress is free to preempt and regulate federal tort litigation. Assuming that climate change is a problem that should be addressed, judicial decisions that force Congress to act on the issue are a positive step toward a resolution. Those who, like Professor Tribe, are concerned about the ability or relative competency of judges to understand and rule on the complex causation questions as well as the myriad prudential concerns, can take solace in the likelihood that major corporations—and therefore most politicians—share their concerns and will act quickly to lobby and legislate.

The desirability of abandoning political question doctrine in its entirety is more nuanced. Courts should monitor the boundaries of their own power and respect the authority of the branches that enact the will of the people. But history has shown that a flexible doctrine allows courts to manufacture political questions where judicial authority suffices and also to steamroll forward even when jurisdiction is at its most tenuous.[141] Ultimately, a doctrine that focuses on the textual commitment of a controversy to another branch should be reaffirmed and in such cases should be deemed non-justiciable political questions. The presence of the classical doctrine forces courts to remember and acknowledge the limits of their authority. Without the prudential strand in play, however, climate change cases should proceed, at least beyond this

[141] Compare the New Deal Court's acquiescence toward the political branch with the Rehnquist Court's decision in *Bush v. Gore*. *See* discussion *supra* Part II.B–D.

particular threshold question. Indeed, the recent decision in *American Electric* demonstrates that, while there are numerous complications that may impede climate change plaintiffs, political question dismissal is not one of them.

CONCLUSION

The judicial and political resolution of these cases will demonstrate a great deal about both the status of the political question doctrine and the shape of popular and political opinion on climate change. Industries emitting GHGs have powerful political voices and their lobbying efforts may convey to us whether corporations prefer the predictability of a legislative solution to their emissions liability or the risks of taking their causation defenses to court.

Climate change cases may be an opportunity for the nation to reiterate or rethink exactly what it wants from its political and judicial branches. If recent litigation history is any indicator, however, both the American public (as represented by Congress' lack of significant legislation in the area) and the Judicial branch are willing to allow litigants to seek redress in the courts for many a question that also has a political answer.