

The Political Question Doctrine: An Update in Response to Recent Case Law*

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The United States has been slow to take steps to mitigate the effects of climate change. Yet climate change is impacting many of its citizens in the form of rising sea levels, increased storm intensity, deeper droughts, and more frequent wildfires. Several plaintiff groups filed public nuisance and other tort claims against automakers and electric power companies for injuries the plaintiffs incurred from climate change. Unfortunately, district courts dismissed these cases under the political question doctrine, failing to reach the merits of the case. The application of the political question doctrine to these climate change cases, which were in essence complex tort cases, was erroneous. These cases demonstrate that the political question doctrine in its current form lacks definition in terms of scope and principle. This Note examines the principles upon which the doctrine is based and the role of the courts in United States to argue for a re-articulated political question doctrine that is narrowed in scope, such that it would not be applied to complex yet justiciable cases.

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* *Ecology Law Quarterly* awarded this Note the 2011 Energy and Climate Change Legal Writing Award. *ELQ* would like to thank Wilson Sonsini Goodrich & Rosati PC for its support of the Award.

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INTRODUCTION

Mitigating and adapting to the consequences of climate change are two of the biggest challenges of the twenty-first century. “The era of procrastination, of half-measures, of soothing and baffling expedients, of delays, is coming to its close. In its place, we are entering a period of consequences.”¹ These words, though spoken more than seventy years ago, hold true today. Climate change is impacting and will continue to impact human “health, food production, and well-being”² due to increased heat waves, floods, respiratory illness, and vector-borne diseases.³ Yet the United States has failed to enact climate change legislation to regulate greenhouse gases, despite the near consensus that anthropogenic climate change is occurring.⁴

In the wake of the government’s failure to legislate, private parties and states have initiated “climate change nuisance” litigation to redress harms incurred due to climate change.⁵ In particular, the plaintiffs in *Comer v. Murphy Oil USA* filed suit against energy production companies, alleging that the defendants’ greenhouse gas emissions contributed to climate change and the intensity of Hurricane Katrina.⁶ The plaintiffs sought monetary damages for property loss caused by Hurricane Katrina.⁷ In *Connecticut v. American Electric Power*, the plaintiffs filed suit against electric power corporations, claiming that the defendants’ greenhouse gas emissions were contributing to climate change, and claiming that climate change harmed and continues to harm the plaintiffs’ residences and property.⁸ The plaintiffs sought an injunction, which would place a cap on the defendants’ greenhouse gas

1. 317 PARL. DEB., H.C. (5th ser.) (1936) 1117 (U.K.) (testimony of Winston Churchill to the House of Commons in the debate on national defense posture).

2. Janine Maney, *Carbon Dioxide Emissions, Climate Change, and the Clean Air Act: An Analysis of Whether Carbon Dioxide Should Be Listed as a Criteria Pollutant*, 13 N.Y.U. ENVTL. L.J. 298, 309 (2005).

3. U.S. GLOBAL CHANGE RESEARCH PROJECT, GLOBAL CLIMATE CHANGE IMPACTS IN UNITED STATES 12 (2009), available at <http://www.globalchange.gov/what-we-do/assessment/previous-assessments/global-climate-change-impacts-in-the-us-2009>.

4. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 5–6 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf (discussing some of the causes of climate change).

5. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), vacated, 607 F.3d 1049 (5th Cir. 2010); *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

6. *Comer*, 585 F.3d at 859.

7. *Id.*

8. *Am. Elec. Power Co.*, 582 F.3d at 317.

emissions.⁹ Unfortunately, these cases were dismissed at the district court level due to the courts' flawed applications of the political question doctrine.¹⁰

These cases exemplify the scholarly debate and discontent surrounding the current formulation of the political question doctrine, which the Supreme Court established in *Baker v. Carr*.¹¹ Some scholars contend that the doctrine should be a prudential—or precautionary—tool that permits courts to dismiss a case when a judicial decision may impede on the province of the representative branches. Others scholars argue that the doctrine simply describes traditional constitutional interpretation.¹² Despite the disagreement about the scope and application of the political question doctrine, scholars agree that as it stands, the doctrine is less useful in application than its lofty purpose—assuring that courts are subject to the constitutional requirement of separation of powers—would suggest. Scholars also generally agree that contentious and politically charged disputes involving novel legal theories do not necessarily implicate the political question doctrine. However, due to the broad nature of the doctrine in its current form, it has been erroneously applied to politically charged issues that are otherwise judiciable. This problem is illustrated by the district court decisions in *Comer* and *American Electric Power*.¹³

Part II of this Note discusses the political question doctrine's purpose and its historical development. Part III provides a summary of the appellate decisions in *Comer* and *American Electric Power*, which both held that the cases did not present a political question. This Part also includes a summary of the Supreme Court's decision in *American Electric Power*, which reversed the Second Circuit's decision. Part III.A analyzes why the political question doctrine should not apply to climate change nuisance claims. Part III.B examines why the application of the political question doctrine in the climate change setting is particularly troubling, especially when one of the primary purposes of the United State's court system is to redress injury. Finally, Part III.C of this Note suggests a re-articulated political question doctrine, which captures the purpose of the doctrine while also acting to limit its application to truly nonjusticiable political questions. The key to this formulation is its foundation: it rests on the classical origin of the doctrine and on principles upon which the judiciary is based. This Note does not suggest a doctrine based on a survey of prior case law (although its suggestion is supported by Supreme

9. *Id.* at 314.

10. See *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); see also *Kivalina*, 663 F. Supp. 2d 863; *Gen. Motors*, 2007 WL 2726871.

11. *Baker v. Carr*, 369 U.S. 186 (1962) (articulating the modern version of the doctrine).

12. Compare Alexander M. Bickel, *The Supreme Court 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), with Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

13. See *Comer*, 2007 WL 6942285; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

Court decisions from the past fifty years); rather, it seeks to articulate a formulation that captures the purpose of the doctrine.

I. HISTORY OF THE POLITICAL QUESTION DOCTRINE

A. *The Classical Form of the Doctrine*

The political question doctrine was first articulated in *Marbury v. Madison* when Justice Marshall stated, “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹⁴ *Marbury v. Madison* directed courts to dismiss a case if “the Constitution’s text, structure, and theory” signified that an issue should be decided by a representative branch.¹⁵

Alexander Hamilton’s *Federalist* papers influenced the classical form of the doctrine. Hamilton endorsed the separation of powers, discussed the important role of the courts as interpreters of the law,¹⁶ and emphasized the judiciary’s predominate role as a “check” on the other branches of government.¹⁷ Hamilton also interpreted the Constitution as creating a “natural presumption” in favor of judicial review.¹⁸ Justice Marshall adopted these concepts and based the classical form of the political question doctrine on a concern for the separation of powers,¹⁹ while maintaining a presumption of judicial review. But the conflict between these principles exacerbated the challenges of defining the political question doctrine—the tension between preventing judicial review of political questions and ensuring judicial review of the constitutionality of challenged actions.

B. *The Development of the Prudential Doctrine*

Federal courts developed the prudential strands of the doctrine to avoid hearing cases that might infringe on the sphere of the representative branches. A prudential inquiry is not tied to the text of the Constitution.²⁰ Instead, this concern embodies the ideology that the judiciary should be restrained from deciding issues that other branches of government are better suited to resolve.²¹

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

15. Robert J. Pushaw, *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1192–93 (2002).

16. THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

17. “It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.” *Id.* at 523.

18. *Id.*; Pushaw, *supra* note 15, at 1185; *see, e.g., Marbury*, 5 U.S. (1 Cranch) at 147–48.

19. *Marbury*, 5 U.S. (1 Cranch) at 164–70; *see discussion infra* Part III.C.2.

20. 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, 253 (2002).

21. *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1232 (2002).

Professor Alexander Bickel, one of the most renowned advocates of the prudential doctrine,²² believes that the prudential strains of the doctrine are necessary to provide courts with tools for avoiding the exercise of their adjudication power.²³ Professor Bickel argues that the doctrine should embody four types of prudential concerns that recognize the inherent limitations of courts:²⁴

- (a) the strangeness of the issue and its intractability to principled resolution;
- (b) the sheer momentousness of it, which tends to unbalance judicial judgment;
- (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
- (d) finally . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.²⁵

While this list was influential and sparked scholarly debate, the Supreme Court did not directly adopt Professor Bickel's formulation when deciding the most influential modern political question case, *Baker v. Carr*.²⁶ Professor Bickel's advocacy of caution through prudence remains part of the doctrine.²⁷

C. *Baker Formulation and the Application of the Doctrine Post-Baker*

Baker set forth the modern political question doctrine when the Court held that a determination of whether state apportionment violated the plaintiffs' equal protection rights was not a political question.²⁸ In *Baker*, Justice Brennan postulated six formulations for when a case may be dismissed under the political question doctrine:²⁹

- [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- [2] a lack of judicially discoverable and manageable standard for resolving it; or
- [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- [5] an unusual need for unquestioning adherence to a political decision already made; or
- [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁰

22. See Tushnet, *supra* note 21, at 1204.

23. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 519 (1966).

24. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

25. Scott Birkey, Case Note, *Gordon v. Texas and the Prudential Approach to Political Questions*, 87 CALIF. L. REV. 1265, 1273 (1999).

26. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (failing to mention either Alexander Bikel or the term *prudential*).

27. Fritz W. Scharpf also agreed with this principle. See Tushnet, *supra* note 21, at 1231.

28. *Baker*, 369 U.S. at 197–98.

29. *Id.* at 217.

30. *Id.*

The first formulation partially captures the classical purpose of the doctrine, while the second through sixth formulations invoke prudential principles. Justice Brennan stated that a finding of any formulation is enough to invoke the doctrine, but that there should be no dismissal unless one of these formulations is “inextricable from the case at bar.”³¹ While the formulations are themselves broad, Justice Brennan limited the doctrine’s scope: “It is to be used sparingly in the context of demonstrable ‘political questions’ devoted to the elective branches, not simply to cases that involve political issues.”³² He derived this limit from a pattern of limited use in prior case law.³³

Justice Brennan conducted a thorough review of prior political question case law in *Baker*, but he did not examine scholarly work on the subject.³⁴ Additionally, he did not explain how he actually distilled the formulations from his review of prior case law. Nor did Justice Brennan explain how courts should determine the relative importance of each formulation, or if and how they are interrelated. The single principle mentioned in *Baker* to explain the purpose of the doctrine was to preserve the separation of powers.³⁵

Since *Baker* was decided in 1962, only two Supreme Court decisions have held that a case should be dismissed under the political question doctrine. The Court in *Gilligan v. Morgan* found that the courts should not scrutinize the training of the Ohio National Guard.³⁶ In *Gilligan*, the plaintiffs alleged violations of their rights of speech and assembly by the National Guard’s actions that injured and killed students at Kent State University during a Vietnam War protest.³⁷ The issue before the Court was whether there was a pattern of training and weaponry that made the use of fatal force in suppressing civilian disorders inevitable, even when nonlethal force would be sufficient.³⁸

31. *Id.*

32. *Id.*; see also Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N.U. L. REV. 523, 528 (2008) (“Observing that political questions are nonjusticiable primarily because they implicate separation of powers concerns, the Court warns against overly broad reliance on ‘the ‘political question’ label’ by the judiciary to avoid having to undertake a ‘case-by-case inquiry.’” (quoting *Baker*, 369 U.S. at 210–11)).

33. James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 933 (2008); see also Breedon, *supra* note 32, at 528 (“[T]he *Baker* Court’s choice of language throughout the case-review section indicates an unequivocal effort to limit the doctrine’s application.”).

34. Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 63 (2006); see *Baker*, 369 U.S. at 211 (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.”).

35. May, *supra* note 33, at 922.

36. *Gilligan v. Morgan*, 413 U.S. 1, 11–12 (1973).

37. *Id.* at 3.

38. *Id.* at 4.

The Court reasoned that remedying this claim would require continued judicial review concerning “training, weaponry and orders.”³⁹ The Court held that deciding the case would invade “critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government”⁴⁰ and, therefore, dismissed the case.

The Supreme Court held that impeachment of a judge was a political question in *Nixon v. United States*.⁴¹ After Judge Nixon was sentenced to prison on criminal charges, the Senate appointed a committee to determine if Nixon should be impeached.⁴² Nixon argued that the Senate’s procedure violated the Constitution because the evidentiary process did not involve the entire Senate.⁴³ The Court examined the text of the Constitution, in particular, the phrase “[t]he Senate shall have the sole Power to try all Impeachments,”⁴⁴ to make its political question determination.⁴⁵ The Court held that the word “sole” in the clause placed the responsibility of this proceeding with the Senate.⁴⁶ Furthermore, the Court noted that constitutional requirements for the Senate proceedings were very precise, suggesting that the Framers did not intend for courts to impose additional limitations.⁴⁷ Finally, the Court held that the history and purpose of the impeachment clause supported its conclusion that the question raised in *Nixon* was nonjusticiable.⁴⁸

Both of these claims were deemed political questions based at least in part on a textual commitment of the issues before the Court—the training and weaponry of the military under the Powers of Congress Clause⁴⁹ and the procedure for impeachment under the Impeachment Trial Clause.⁵⁰ But there is some scholarly disagreement about this determination. One scholar argues that a simple textual commitment cannot explain *Gilligan*.⁵¹ Furthermore, the court in *Nixon* explicitly examined and referred to the “judicially discoverable and manageable standard” in addition to its textual commitment analysis.⁵² However, the prudential concerns in these cases were so interrelated to the

39. *Id.* at 7.

40. *Id.*

41. *Nixon v. United States*, 506 U.S. 224, 236 (1993).

42. *Id.* at 227–28.

43. *Id.* at 228.

44. U.S. CONST. art. I, § 3, cl. 6.

45. The majority in *Nixon* asserted that whether an issue is textually committed is not completely separate from whether there is a lack of a judicially discoverable and manageable standard. *Nixon*, 506 U.S. at 228. However, the Court then noted that a lack of a manageable standard “may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.” *Id.* at 229.

46. *Id.* at 229.

47. *Id.* at 230.

48. *Id.* at 233–35.

49. *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973).

50. U.S. CONST. art. I, § 3, cl. 6; *Nixon*, 506 U.S. at 229.

51. See, e.g., Martin H. Redish, *Judicial Review and the ‘Political Question,’* 79 NW. U. L. REV. 1031, 1035 (1984) (arguing that *Gilligan* and *Goldwater v. Carter*, 444 U.S. 996 (1979), reflect a concern for the prudential policy considerations of the doctrine).

52. *Nixon*, 506 U.S. at 228–29.

textual-commitment analysis that they appear to be either inconsequential or subsumed into the textual inquiry. For example, while the *Nixon* Court did mention that the standard for Senate impeachment proceedings presented a judicially unmanageable standard, the Court, rather than dismissing the case under this formulation, returned to the textually committed formulation and concluded that impeachment proceedings should be determined by the Senate based on the language of the Constitution.⁵³ Regardless, in both cases the Supreme Court explicitly stated that dismissal occurred, at least in part, because the issue was textually committed to a coordinate branch.⁵⁴ More importantly, these cases demonstrate that the prudential form of the doctrine—at least on its own—may never be enough to find that an issue is a political question and thus nonjusticiable.

D. Confusion Regarding the Application and Scope of the Doctrine

The Supreme Court's rare invocation of the doctrine masks the confusion and dispute surrounding the political question doctrine. First, there is confusion as to when and why the doctrine applies to any particular issue.⁵⁵ Part of this lack of clarity is linked to uncertainty regarding the origin of the doctrine. In fact, "[t]he Court has never determined—when faced with a controversy that is sufficiently concrete, developed, and adverse to fulfill the explicit requirements of Article III—whether the political question doctrine is rooted in the Constitution or is simply a judicial construct."⁵⁶ This issue is particularly troubling because, without an origin, it is difficult to define the purpose of the doctrine.

Additionally, scholars disagree on the scope of the doctrine. At one end of the spectrum is Professor Louis Henkin, who argues that there is no political question doctrine. He asserts that in political question cases, courts simply find that the executive or legislative branch was acting within the province of the Constitution.⁵⁷ At the other end of the scholarly spectrum is Professor Bickel,

53. *Id.* at 230.

54. *See id.* at 238 (holding that "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate" and, thus, the Court was forced to dismiss the case under the political question doctrine); *Gilligan*, 413 U.S. at 11–12 (holding that this case raised a political question because military training is textually committed to the political branches).

55. Henkin, *supra* note 12, at 599–600.

56. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1477 (2005).

57. Henkin, *supra* note 12, at 600–01. Professor Henkin described Bickel's call for extension as "extra-ordinary" and asserts that this form of the doctrine is invalid. *See id.* at 602. Thus, in Professor Henkin's view, neither the *Comer* nor the *American Electric Power* cases raised a political question as neither case involved a strong argument that the Constitution required a representative branch to resolve the issue at hand. Instead, he believes that a court may deny equitable remedies in some instances under the principle of "want of equity." *See id.* at 617. How the principle of "want of equity" would apply to *American Electric Power* is outside the scope of this Note, but it should be noted that because the plaintiffs in *Comer* requested damages, the principle would not apply to that case.

who argues for a flexible application of the doctrine based on prudential concerns.⁵⁸ Professor Herbert Wechsler falls somewhere in between and asserts that “the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”⁵⁹ Professor Wechsler, however, argues that the Constitution commits a larger number of issues to the political branches than Supreme Court precedent suggests.⁶⁰ These scholars also disagree about whether the scope should be determined based on precedent,⁶¹ judicial limitations,⁶² or the Constitutional text.⁶³

Unfortunately, the *Baker* Court did not discuss scholarly justifications or examine the purpose of the doctrine.⁶⁴ The Supreme Court has not followed Professor Henkin’s line of reasoning and continues to recognize the doctrine.⁶⁵ However, its test seemingly incorporates both Professor Bickel’s and Professor Wechsler’s ideas without discussing whether the classical and prudential forms of the doctrine stand on equal footing. The *Baker* decision did little to reduce confusion because it simply postulated categories to describe past decisions, rather than discussing the doctrine itself and how it should function to effectuate the principles it embodies. The Supreme Court decisions post-*Baker* have not resulted in any clarification because, while the Court has relied heavily, if not exclusively, on the textual commitment formulation, it continues to recognize the prudential formulations. The Supreme Court has also not attempted to redefine the doctrine, explain the role of the prudential formulations, or further define its current theory.

The result of the *Baker* test and its subsequent application in Supreme Court case law is that the doctrine is “ill-defined and lack[s] proper guideposts.”⁶⁶ Without guidance, it is difficult for courts to determine when to abstain from deciding an issue under a prudential factor.⁶⁷ Therefore, some scholars argue that application of the doctrine in its current form depends “almost entirely on the discretion of the majority of Justices, untethered to any legal principles rooted in the Constitution’s structure, theory, history, or early precedent.”⁶⁸

58. Bickel, *supra* note 12, at 46.

59. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959).

60. Henkin, *supra* note 12, at 604.

61. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (establishing the political question doctrine based on review of prior case law).

62. *See Bickel, supra* note 12, at 79.

63. Wechsler, *supra* note 59, at 7–8, 9.

64. Pettinato, *supra* note 34, at 63 (“Simply put, the *Baker* factors have no cohesive guiding principle.”).

65. The *Baker* decision came out before Professor Henkin published his article on the topic.

66. Breedon, *supra* note 32, at 526.

67. Shawn M. LaTourette, *Global Climate Change: A Political Question?*, 40 RUTGERS L.J. 219, 282 (2008).

68. Pushaw, *supra* note 15, at 1196.

II. CASE STUDIES: CLIMATE CHANGE NUISANCE CASES

A. *Comer v. Murphy Oil USA*⁶⁹

In *Comer*, the Fifth Circuit addressed claims by owners of property located adjacent to the Mississippi Gulf coast.⁷⁰ The plaintiffs filed nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims against oil and energy companies.⁷¹ They alleged that greenhouse gas emissions by these companies exacerbated the strength of and damage caused by Hurricane Katrina. The Fifth Circuit examined whether the parties had standing and whether these claims invoked a nonjusticiable political question. The Fifth Circuit held that the parties had standing to bring the nuisance, trespass, and negligence claims, but did not have standing to bring the other claims.⁷² The Fifth Circuit also held that the political question doctrine did not bar the nuisance, trespass, and negligence claims.⁷³

A court must look to “the Constitution and federal laws to decide whether a particular constitutional or statutory provision commits a question solely to a

69. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 607 F.3d 1049 (5th Cir. 2010). The Fifth Circuit vacated its earlier decision because there were not enough judges available to hold an en banc hearing of the case. This decision reinstated the district court decision in *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). See *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010). This Note uses *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), solely for its analysis regarding the political question doctrine, not for its precedential value.

70. *Comer*, 585 F.3d at 855.

71. This Note focuses exclusively on the nuisance claim and how the political question doctrine relates to this nuisance claim in the context of climate change nuisance litigation.

72. The Fifth Circuit applied the *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), test to determine if the plaintiffs met the constitutional standing requirement. The *Lujan* test requires that plaintiffs demonstrate: “[1] they [] suffered an injury in fact; [2] the injury is fairly traceable to the defendant’s actions; and [3] the injury will likely . . . be redressed by a favorable decision.” *Comer*, 585 F.3d at 862 (internal citations omitted).

For the first set of claims, there was little dispute that the plaintiffs satisfied the first and third elements of the *Lujan* test. The novel question was whether the damage was “fairly traceable” to the defendants. The defendants argued that they only emit a small percentage of all anthropogenic greenhouse gas emissions, making it impossible to determine whether their actions actually contribute significantly to climate change. The Fifth Circuit noted that the arguments raised here were similar to those rejected by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Supreme Court in *Comer* specifically recognized the link between anthropogenic emissions and climate change. *Comer*, 585 F.3d at 865. Moreover, the Fifth Circuit noted that there is no requirement that the defendants be the only cause of the injury, such that a plaintiff can file suit against a party that is a significant contributor to the plaintiff’s injury. *Id.* at 866. Due to the close parallels between the claims and facts of *Massachusetts v. EPA* and the claims and facts of *Comer*, the Fifth Circuit adopted the reasoning of the Supreme Court and held that the plaintiffs had standing for their nuisance, trespass, and negligence claims. *Id.* at 868.

However, the plaintiffs did not meet standing requirements for their enrichment, civil conspiracy, and fraudulent misrepresentation claims. The prudential standing principle bars courts from hearing suits of “generalized grievances.” *Id.* The Fifth Circuit found that they did not have standing because the plaintiffs did not identify a particularized injury in relation to these three claims. *Id.* at 869.

73. *Comer*, 585 F.3d at 880.

political branch”⁷⁴ to determine whether a claim must be dismissed as a nonjusticiable political question. Additionally, the Fifth Circuit noted that the political question doctrine is an exception to the usual rule that if a federal court has jurisdiction, it must hear a case.⁷⁵ It also may only be used when there is a true violation of the constitutional requirement of separation of powers and it does not apply if a case is simply politically charged.⁷⁶

The Fifth Circuit examined the nuisance, negligence, and trespass claims in this case to decide if a federal constitutional provision or statute directed them to a political branch.⁷⁷ The Fifth Circuit concluded that these claims were state common law claims and courts have long held the power to hear these types of claims.⁷⁸ The defendants did not show how any constitutional or statutory provision was implicated by these claims. Moreover, the Fifth Circuit noted that it is rare that claims for damages result in a holding that a case should be dismissed due to the political question doctrine.⁷⁹ Thus, the Fifth Circuit determined that it was unnecessary to fully review the *Baker* formulations, and held this case did not implicate the political question doctrine.⁸⁰

B. Connecticut v. American Electric Power Co.

In *American Electric Power*, eight states, New York City, and three land trusts filed suit against six electric power corporations under federal nuisance law.⁸¹ The plaintiffs alleged that greenhouse gas emissions from the defendants’ power plants contributed to climate change and was harming the plaintiffs. The Second Circuit addressed whether (1) the plaintiffs’ suit was barred by the political question doctrine, (2) the plaintiffs had standing, (3) the plaintiffs stated a claim under federal nuisance law, and (4) the plaintiffs’ claim was displaced by federal statutes. The Second Circuit held that the plaintiffs’ claims were not barred by the political question doctrine, the plaintiffs had

74. *Id.* at 872. This description of the standard is probably incorrect. Whether a federal statute speaks to the matter is an issue of displacement, and alternatively it is unclear if a statute can expand the role of the executive or legislature beyond that provided by the Constitution. Thus, this standard should state that the court looks only to the Constitution, not federal laws.

75. *Id.*

76. *Id.* at 873.

77. *Id.* at 875.

78. *Id.*

79. *Id.* at 874.

80. *Id.*

81. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011). The famous *Erie* decision abolished the federal common law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The federal common law of nuisance is one of the few exceptions to this rule. The Supreme Court in *Illinois v. Milwaukee* stated that the federal common law of nuisance could give rise to a claim when there is no federal legislation on a particular water pollution issue. 406 U.S. 91, 103–04 (1972). The court in *American Electric Power* applied this accepted federal common law tort to an air pollution case. *Am. Elec. Power Co.*, 582 F.3d at 315.

standing,⁸² the plaintiffs stated a claim,⁸³ and, finally, that federal legislation did not displace federal nuisance law.⁸⁴

To address the political question issue, the Second Circuit turned to the *Baker* formulations and noted that they set a “high bar for nonjusticiability.”⁸⁵ The Second Circuit stated that determining whether a case raises a political question requires weighing the facts and analyzing each framework independently.⁸⁶

First, the Second Circuit examined whether the Constitution placed regulation of the defendants’ greenhouse gas emissions in the hands of a representative branch.⁸⁷ The defendants argued that a decision in this case would essentially create a national and international greenhouse gas emissions policy, infringing on the Commerce Clause and the president’s authority over foreign relations.⁸⁸ But the defendants did not explain how relief in this action, which would pertain only to the named defendants, would establish a “national

82. The Second Circuit, like the Fifth Circuit in *Comer*, analyzed standing under the *Lujan* test. *Am. Elec. Power Co.*, 582 F.3d at 333. This standard requires that the plaintiff assert an injury that is concrete, particularized, and imminent. *Id.* at 340–41. The defendants argued that the plaintiffs’ injuries were not imminent because they stemmed from possible future effects of climate change. *Id.* at 342–43. However, the Second Circuit astutely recognized that some of the injuries had already occurred and claims of potential future harm did not defeat a finding of immanency. *Id.* at 344.

The *Lujan* test also requires the plaintiff show the injury was caused by the defendant. *Id.* at 337. The defendants here, as in *Comer*, argued that they merely contribute to climate change, and that the mere contribution does not satisfy the requirement of causation. *Id.* at 345. However, the Second Circuit held that the plaintiffs were not required to show that the defendants were the only cause of climate change and that a showing that they “contribute” to climate change satisfied the element of causation. *Id.* at 347.

Lastly, the *Lujan* test requires plaintiffs to demonstrate that a court will be able to redress the injury. *Id.* at 337. The defendants argued that the plaintiffs failed to show that a reduction in the defendants’ emissions would mitigate the effects of climate change. *Id.* at 348. The Second Circuit turned to the decision in *Massachusetts v. EPA* and held that it was sufficient for the plaintiffs to show that the remedy would “slow or reduce” the injury. *Id.* Since the defendants were large emitters of greenhouse gases, the Second Circuit held that requiring them to reduce emissions satisfied this requirement. *Id.* at 348–49.

83. The Second Circuit defined a public nuisance as “an unreasonable interference with a right common to the general public.” *Am. Elec. Power Co.*, 582 F.3d at 351 (internal quotations omitted). The defendants argued that only “simple” nuisances—nuisances which are easily detected by a human being—were actionable under the federal common law. *Id.* at 355–56. However, the Second Circuit found ample case law to support the assertion that a nuisance claim that has more than one cause, is not “observably” noxious, and results in harm that is not immediate—in other words, a complex nuisance claim—was a valid claim. *Id.* at 356–67.

84. The Second Circuit stated that a cause of action is displaced when “federal statutory law governs a question previously the subject of federal common law.” *Id.* at 371 (internal quotations omitted). The Second Circuit held that the Clean Air Act was not comprehensive and did not displace federal nuisance law in this case. *Id.* at 381. Additionally, while the Supreme Court in *Massachusetts v. EPA* held that the EPA has the statutory authority to regulate greenhouse gas emissions, the Second Circuit found that the Legislature’s mere authority to regulate was not the same as federal regulation. *Id.* at 379–81.

85. *Id.* at 321.

86. *Id.* at 323.

87. *Id.* at 324.

88. *Id.* at 325.

or international emissions policy.”⁸⁹ The Second Circuit held that the defendants did not adequately support their argument, and rejected the claim.⁹⁰

Next, the Second Circuit examined whether there was a clear standard or rule that applied to this case.⁹¹ The defendants argued that this case was fundamentally different from previous nuisance cases because of the inherent complexity of climate change.⁹² However, the Second Circuit examined the history of nuisance law and found examples of courts addressing similarly complex nuisance cases.⁹³ These cases involved large environmental nuisances such as water and air pollution. The Second Circuit also noted that scholars generally recognize a definition of a public nuisance that it could apply to this case.⁹⁴ Therefore, the Second Circuit rejected the defendants’ arguments, finding that, although the issue may be complex, the complexity did not remove the case from the realm of nuisance law.⁹⁵

In *American Electric Power*, the most contentious issue was whether the Second Circuit would need to make an initial policy determination to decide this case. The district court below had dismissed the plaintiffs’ claims on this issue.⁹⁶ The district court found it significant that the representative branches had failed to enact climate change legislation and held that the relief sought here—a cap on the defendants’ greenhouse gas emissions that would tighten over time—conflicted with Congress’s lack of action.⁹⁷ However, the Second Circuit rejected this reasoning and instead held that a lack of action was not dispositive because inaction “falls far short of an expression of legislative intent to supplant the existing common law in that area.”⁹⁸ Rather, common law fills regulatory gaps.⁹⁹ Thus, the Second Circuit held that no initial policy determination was necessary for it to adjudicate a case based on common law claims.¹⁰⁰

Finally, the Second Circuit noted that its decision would not disrespect another branch of the government, there was no need to adhere to a former policy decision, and a decision would not lead to undue embarrassment; thus, the fourth, fifth, and sixth *Baker* factors did not apply. Therefore, the Second Circuit held that this case did not implicate a political question and should not be dismissed on political question grounds.¹⁰¹

89. *Id.*

90. *Id.* at 324.

91. *Id.* at 326.

92. *Id.*

93. *Id.* at 326–27.

94. *Id.* at 328. Public nuisance law involves an “unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (1979).

95. *Id.* at 329.

96. *Id.* at 330.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 332.

The Supreme Court granted certiorari to decide the displacement and standing issues addressed in this case.¹⁰² In an 8-0 decision, the Court held that the plaintiffs' case should be dismissed under the doctrine of displacement.¹⁰³ Interestingly, four members of the Court also would have ruled that there were no justiciability issues barring this suit.¹⁰⁴ In her analysis, Justice Ginsburg recognized that when the plaintiffs initiated this lawsuit, the federal government and the Environmental Protection Agency (EPA) had yet to enact greenhouse gas regulations.¹⁰⁵ However, the Court pointed out that the EPA is currently working on several forms of greenhouse gas regulation, thereby displacing federal nuisance common law in this area.¹⁰⁶ The Court remanded this case for a consideration of only the state law claims.¹⁰⁷

III. APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO CLIMATE CHANGE NUISANCE CASES, AND SUGGESTED REVISIONS TO THE POLITICAL QUESTION DOCTRINE

A. *The Political Question Doctrine Does Not Apply to the Claims Raised in Comer and American Electric Power*

While the Fifth Circuit in *Comer* and the Second Circuit in *American Electric Power* held the climate change nuisance issue before the courts did not raise a political question, this issue is far from settled. First, the Fifth Circuit decision was subsequently vacated, reinstating the district court ruling, because the Fifth Circuit was unable to rehear the case en banc.¹⁰⁸ Only eight judges were qualified to sit on the panel, which is one short of the en banc quorum requirement.¹⁰⁹ Therefore, the district court's holding that the case presented a political question is now the final ruling.¹¹⁰ This fascinating procedural history leaves the Second Circuit's decision as the only appellate-level precedent on the issue.¹¹¹

102. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011).

103. *Id.*

104. *Id.* at 2535.

105. *Id.*

106. *Id.* at 2537.

107. *Id.* at 2540.

108. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

109. *Id.* at 1058.

110. *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007).

111. Based on the displacement issue, the Supreme Court reversed the Second Circuit's decision. *Am. Elec. Power Co.*, 131 S. Ct. at 2537. While four justices would have held that justiciability issues did not bar the plaintiffs' claims, this statement on justiciability was arguably dictum and did not garner majority support. *Id.* at 2535. Therefore, while this statement on justiciability lends support to the finding that *American Electric Power* does not involve a political question, it is not dispositive. See also *Kivalina v. ExxonMobil Corp.*, 2009 WL 3326113, at *8 (N.D. Cal. Oct. 15, 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

This Part focuses solely on the nuisance claims in *Comer* and *American Electric Power* and analyzes why these claims do not present a political question. This analysis includes an examination of the district and appellate court decisions in order to capture a breath of arguments and issues.

1. There Is No Textual Commitment of the Issues Asserted in Comer and American Electric Power to a Representative Branch of Government

Although there is no precise definition of what is required for an issue to be textually committed by the Constitution, it is generally thought that for issues to fall within this formulation, they must be “expressly addressed by the Constitution.”¹¹² Thus, an issue is textually committed if the Constitution provides that a representative branch is the “final arbiter” of that issue.¹¹³

The district court in *Comer* granted the defendants’ motion to dismiss under the political question doctrine and incorporated their arguments into its decision.¹¹⁴ The defendants claimed that the basis of the plaintiffs’ claims were textually committed by the constitutional provisions that permitted “the President to make treaties with the advice and consent of the Senate . . . and the power of Congress to regulate commerce with foreign nations.”¹¹⁵ The defendants then proffered that the policy of the Bush administration was a rejection of the Kyoto Protocol, unless developing nations joined the treaty.¹¹⁶ Thus, the defendants argued that the court should not decide this case because a decision would interfere with the United State’s climate change foreign policy.¹¹⁷ But the Second Circuit in *American Electric Power* found that the Constitution did not textually commit to a political branch a tort action based on damages incurred due to climate change.¹¹⁸

The Second Circuit was correct; there is no textual commitment because the “commitment must be ‘textual,’ not inferential.”¹¹⁹ The defendants in these cases merely argued that this decision would implicate the representative

112. May, *supra* note 33, at 934.

113. Choper, *supra* note 56, at 1464; *see also* Breedon, *supra* note 32, at 535.

114. *Comer*, 2007 WL 6942285, at *1 (“For the reasons stated into the record at hearing, the Court finds that . . . Plaintiffs’ claims are non-justiciable pursuant to the political question doctrine.”).

115. Memorandum in Support of Oil Company Defendants’ Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *Comer*, 2007 WL 6942285 (No. 1:05-CV-436), 2006 WL 4756406, at *23. While the defendants mention that a decision may impact commerce, there is no analysis to support this point. The only case the defendants cited that mentioned a textual commitment, based its analysis on the Commerce Clause. *See California v. Gen. Motors*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). But *General Motors* relied heavily on the overruled *American Electric Power* decision, which greatly calls into question the precedential value of *General Motors*’s use of the Commerce Clause.

116. Memorandum in Support of Oil Company Defendants’ Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *23.

117. *Id.*

118. *See* discussion *supra* Part III.B. Likewise, the Fifth Circuit in *Comer* held that there was no textual commitment of the issue. *See* discussion *supra* Part III.A.

119. May, *supra* note 33, at 938–39.

branches because it would affect foreign affairs. However, the argument overextends the scope of the doctrine, as not all issues related to foreign affairs are nonjusticiable.¹²⁰ “For example, though a court will not ordinarily inquire whether a treaty has been terminated . . . if there has been no conclusive ‘government action’ then a court can construe a treaty and may find it provides the answer.”¹²¹ To determine whether an issue directly implicates matters of foreign affairs, courts must examine the underlying claims, rather than the “broader context” or implications of a ruling.¹²²

Furthermore, the defendants in *Comer* erroneously relied on *Schneider v. Kissinger* to support their arguments.¹²³ In *Schneider*, the plaintiffs brought an action against the United States and its former national security advisor claiming damages for the kidnapping and murder of a Chilean general.¹²⁴ This case required the judiciary to review specific actions by the Central Intelligence Agency and top United States foreign officials with regard to foreign security matters. Thus, the court dismissed the case under the political question doctrine because a decision would impact foreign affairs.¹²⁵ But this fact pattern is a far cry from the vague, attenuated interference with foreign policy that may occur due to a judgment related to the domestic parties involved in *Comer*.¹²⁶ While climate change is undoubtedly a global issue, the claims made in *Comer* and *American Electric Power* were common law tort claims. Common law tort claims and their remedies are distinguishable from the larger foreign policy implications of climate change legislation or national regulation.¹²⁷ Therefore, there is no textual commitment because these cases do not involve issues that the Constitution specifically delegates to the representative branches.

2. *Public Nuisance Law, as Part of the Common Law, Is an Inherently Manageable Standard*

A manageable standard exists if a court has developed or can develop a rule or principle upon which to base its decision. Thus, “[w]hether judicially discoverable and manageable standards already exist is not dispositive of whether such standards are available.”¹²⁸ Most scholars describe this

120. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

121. *Id.* (comparing *Terlinden v. Ames*, 184 U.S. 270, 285 (1902), with *Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823)).

122. LaTourette, *supra* note 67, at 229–231, 248.

123. See *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

124. *Id.* at 191.

125. *Id.* at 193.

126. The Supreme Court’s analysis in *Baker* of claims dismissed under the political question doctrine as a matter of foreign affairs demonstrates that these cases all involved more specific impacts on the distribution of foreign relations policymaking power than that of the climate change nuisance cases. *Baker*, 369 U.S. at 211–13.

127. LaTourette, *supra* note 67, at 229–231, 253.

128. May, *supra* note 33, at 944.

formulation as whether a court can establish the criteria necessary to make a judicial determination.¹²⁹

The *Comer* district court decision incorporated the defendants' argument that there was no justiciably manageable standard.¹³⁰ The defendants asserted that "the act of recasting national policy questions in tort terms does not provide standards for making or reviewing policy judgments."¹³¹ They further characterized the tort claim as creating "a new duty" to keep carbon emissions under a certain level¹³² because the court would have to determine "what constitutes an 'actionable' level of greenhouse gas emissions."¹³³ The defendants asserted that deciding what is actionable in the climate change context is a policy decision and, thus, the court did not have a standard upon which to base its decision. In the end, the Second Circuit in *American Electric Power* held that common law nuisance claims were judicially manageable.¹³⁴

As the Second Circuit recognized, tort law does provide a standard under which courts may decide climate change nuisance cases: the well-accepted definition of a public nuisance is whether there is an unreasonable interference with a public right.¹³⁵ Determining what is unreasonable in light of the complexities of climate change is undoubtedly challenging. However, reasonableness standards exist as part of many different tort claims. Also, while liability for emission of greenhouse gases may be a new concept, the duty to refrain from creating a public nuisance has existed for many years. "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."¹³⁶ Finally, the common law functions by evolving to address new and evolving

129. See Breedon, *supra* note 32, at 536; Choper, *supra* note 56, at 1470 ("The real question is whether a particular standard is constitutionally warranted ('judicially discoverable'), desirable, and sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways.").

130. See Memorandum in Support of Oil Company Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *18.

131. See *id.* at *24.

132. See *id.*

133. See *id.* at *22.

134. However, the Supreme Court "has never made a finding of a lack of judicially manageable standards in a normal tort dispute between two private parties." Tressie K. Kamp, *Emerging as Heroes After the Devastation of Natural Disaster: Can Women and Children Utilize Public Nuisance Claims to Catalyze Regulation of Greenhouse Gas Emissions by U.S. Corporations?*, 16 CARDOZO J.L. & GENDER 119, 139 (2009).

135. See *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009); see also Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L. 79, 101 (2008). ("[T]he fact that a tort action involves conduct for which the courts have not previously determined standards of reasonableness is not sufficient to render it a non-justiciable political question."); RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

136. May, *supra* note 33, at 921.

grievances.¹³⁷ This evolution occurs through case decisions, without the requirement of large doctrinal shifts.¹³⁸ Here, the standard for public nuisance law is available to the courts along with rules for how to determine liability among several defendants.¹³⁹

Moreover, the defendants' claims in *American Electric Power* frame the issue by expanding the scope of the nuisance claim outside of the bounds of the case before the court.¹⁴⁰ The defendants argued that, in order to determine whether they were liable under nuisance law, the court would have to perform unprecedented balancing of "commercial, environmental, national security, foreign policy, energy, and private property interests."¹⁴¹ The defendants do not explain why the resolution of the case would implicate all of these factors, nor does the assertion distinguish climate change nuisance cases from other, ostensibly judiciable environmental nuisance cases. The claims raised in *Comer* and *American Electric Power* are complex, but they are also claims involving discrete parties and injuries of a type long recognized by the common law.¹⁴² Thus, these courts may resolve these cases with an inherently manageable standard.

3. *There Is No Requirement That the Federal Government Make a Prior Political Determination in Order to Apply Tort Law*

A political question is invoked under the third *Baker* factor when a court finds that it cannot resolve a case without a prior policy determination by the political branches.¹⁴³ The limited number of cases decided under this factor suggests that this inquiry is fairly narrow and occurs when "a particular and discrete diplomatic determination by a political branch about a party to, or a fact in, the specific controversy under judicial review must be made before the court can decide the legal issues."¹⁴⁴

137. Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 100 (2007); see generally Emily Sangi, Note, *The Gap-Filling Role of Nuisance in Interstate Air Pollution*, 38 ECOLOGY L.Q. 479 (2011) (arguing that state nuisance law is an essential gap-filler where the Clean Air Act fails to address air pollution grievances).

138. *Id.* at 100.

139. Public nuisance law involves an "unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (1979). "Any defendant that plays a substantial role in causing the nuisance can be liable." May, *supra* note 33, at 929–30. "When the harm is indivisible, liability for public nuisance is joint and several." *Id.* at 930.

140. See Erin C. Borisso, Note, *Global Warming: A Questionable Use of the Political Question Doctrine*, 41 IND. L. REV. 415, 443 (2008).

141. See Memorandum in Support of Oil Company Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *22.

142. While climate change liability poses a great challenge to courts, nuisance law is still inherently manageable. LaTourette, *supra* note 67, at 238.

143. See Thorpe, *supra* note 135, at 86.

144. Breedon, *supra* note 32, at 539. There has not been a Supreme Court case decided under this factor. See *id.* ("[C]ourts have not generally relied on this factor to find cases nonjusticiable.").

The defendants in *Comer* argued that a determination of the issues in that case would raise many policy questions which should be addressed by Congress, not the courts.¹⁴⁵ They based this assertion on the values-laden nature of the problem.¹⁴⁶ The district court in *American Electric Power* also relied on this formulation as the basis for its dismissal under the political question doctrine.¹⁴⁷ The district court held that the nuisance claim in *American Electric Power* implicated national and international policy decisions and listed numerous questions it believed the representative branches needed to answer before it could resolve such a case.¹⁴⁸

However, the Second Circuit overruled the district court decision in *American Electric Power* and found that the facts did not satisfy the third *Baker* formulation.¹⁴⁹ The Second Circuit held that the mere refusal of the representative branches to legislate was not determinative of whether a prior policy decision was required.¹⁵⁰ In fact, the Second Circuit noted that the purpose of common law is to fill regulatory gaps, which did exist.¹⁵¹

Besides, in both of these cases, there was no need for a prior policy determination because tort law, in and of itself, acts as the decision that the courts should provide redress in those established instances.¹⁵² Moreover, the district court holdings were an overly broad application of this formulation.¹⁵³ This factor requires a policy decision that implicates a specific issue or party, not one that requires the “balancing of economic, environmental, foreign policy, and national security interests,” as the district court asserted in *American Electric Power*.¹⁵⁴ The application of tort law to climate change

145. See Memorandum in Support of Oil Company Defendants’ Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *19.

146. See *id.* at *20–21.

147. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

148. *Id.* at 272–73 (providing just a few such questions: “[G]iven the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers? Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries? What are the economic implications of these choices? What are the implications for the nation’s energy independence and, by extension, its national security?”).

149. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009). While the Supreme Court did reverse the Second Circuit’s decision, it based its decision on grounds other than the political question doctrine. The Supreme Court held that the issue before the Court was displaced. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531 (2011). Justice Ginsburg did specifically mention that four of the Justices would have held that there were no justiciability issues at bar. *Id.* at 2535. But, other than Justice Ginsburg’s comment, the Court did not address the political question issue.

150. *Am. Elec. Power Co.*, 582 F.3d at 330.

151. *Id.*

152. See Thorpe, *supra* note 135, at 86–97; LaTourette, *supra* note 67, at 233–34 (“[T]ort and related damage claims generally do not require an initial policy decision. This makes sense considering that tort law is itself an expression of a policy decision already in place, one with a long history of being implemented by the judiciary.”).

153. Breedon, *supra* note 32, at 564.

154. *Id.*; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

nuisance cases does not require a prior policy determination by the representative branches.

4. *The Last Three Elements of the Baker Test Did Not Play a Substantial Role in Any of the Climate Change Cases*

To determine whether judicial review would disrespect the political branches, whether there is a need for an adherence to a prior policy decision, or whether judicial review could result in embarrassing contradictory decisions (the fourth, fifth, and sixth *Baker* factors, respectively), courts usually examine “whether the political branches had expressed a position as to the underlying claims.”¹⁵⁵ These factors have played an insignificant role—if they have played one at all—in Supreme Court political question case law post-*Baker*. Most courts have held that these formulations are “only relevant in the ‘limited context when such [judicial] contradictions[s] would seriously interfere with important governmental interests.”¹⁵⁶

In climate change cases, the fourth through sixth *Baker* formulations have not played a predominate role.¹⁵⁷ The district court in *American Electric Power* did not address these factors. While the defendants in *Comer* asserted that these formulations mandated a finding of a political question, they made this argument using conclusory language that lacked explanation or elaboration.¹⁵⁸ Their discussion did not analyze how the court’s consideration of these tort claims would conflict with a governmental interest.

Moreover, this argument first required a determination of United States greenhouse gas policy.¹⁵⁹ As of yet, the federal government has not passed any climate change legislation¹⁶⁰ or formed a consistent and cohesive policy on the issue, calling into question whether there is even a prior policy determination to which the courts could adhere. Alternatively, the federal government has

155. See LaTourette, *supra* note 67, at 234–35, 239–40.

156. *Id.* at 234–35, 274 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

157. See *id.* at 234–35, 239.

158. The defendants stated,

“Moreover, any adjudication of Plaintiffs’ claims would express a profound disrespect (fourth *Baker* test) for the political branches’ carefully reasoned decisions that efforts to address global climate change must involve emissions reduction commitments from developed and developing nations alike, and must be pursued in a way that will not cause harm to the nation’s economy, energy policy, and security. In light of the critical national interests at stake, unquestioning adherence to the political branches’ decisions is necessary (fifth *Baker* test), and any adjudication of Plaintiffs’ claims that would effectively create a standard for limits on emissions of greenhouse gases would undermine the political branches in their attempts to work with the international community to develop a coordinated response to global climate change (sixth *Baker* test).”

See Memorandum in Support of Oil Company Defendants’ Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *23.

159. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009).

160. *Id.* at 331–32; see *infra* Part III.B.1.

declared mitigating climate change a priority.¹⁶¹ A decision in these cases would not disrespect the political branches since it would either deny relief alleviating any problems raised by the defendants or, if the court held in favor of the plaintiffs, be consistent with the goal of mitigating greenhouse gas emissions.¹⁶² Finally, there is no sound basis for why contradictory decisions in this context would be any more embarrassing for the judiciary than in other cases which are justiciable. In sum, these formulations do not provide a valid means to dismiss these cases.

B. The Issues Raised in Comer and American Electric Power Are of the Type That Courts Are Designed to Address

The United States is realizing the effects of climate change through increased sea level, reduced snow pack, increased temperatures, and changing weather patterns.¹⁶³ Yet the United States has not enacted climate change legislation and, when the *Comer* and *American Electric Power* cases were initiated, the EPA still had not promulgated any regulations for greenhouse gases. The plaintiffs, however, experienced harms they claimed were due to climate change. It was against this backdrop that these plaintiffs turned to the common law to redress their harms. This Part examines why holding that a climate change nuisance case is a political question is troubling.

1. When the Plaintiffs Filed Suit, Neither Congress Nor the EPA Had Acted to Regulate Greenhouse Gas Emissions

Federal legislative action in the climate change arena has consisted only of research funding; “Congress has not allocated or appropriated funds to pay for the direct effects of climate change.”¹⁶⁴ The Bush administration created a voluntary participation program for greenhouse gas reduction, but did not mandate any emission reductions.¹⁶⁵ While the Obama administration has been friendly towards the idea of climate change mitigation, Congress has been unable to pass climate change legislation. This is despite the near-consensus in the scientific community that climate change is occurring, and despite the Supreme Court’s recognition in *Massachusetts v. EPA* that climate change

161. *Am. Elec. Power Co.*, 582 F.3d at 331.

162. *Id.* at 332.

163. Patricia McCubbin, *EPA’s Endangerment Finding for Greenhouse Gases and the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change*, 33 S. ILL. U. L.J. 437, 443 (2009).

164. May, *supra* note 33, at 927; see *Am. Elec. Power Co.*, 582 F.3d at 381–85 (reviewing federal statutes which require research on climate change issues).

165. Kaswan, *supra* note 137, at 42. This plan included voluntary reporting guidelines issued by the Department of Energy. Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26A STAN. ENVTL. L.J. 77, 83 (2007).

“may be a crisis, even the most pressing environmental problem of our time.”¹⁶⁶

Additionally, the EPA only recently started the process of enacting regulations for greenhouse gases under the Clean Air Act.¹⁶⁷ Under the Clean Air Act, how pollution is regulated depends on whether it originates from a stationary or mobile source.¹⁶⁸ In response to the Supreme Court’s decision in *Massachusetts v. EPA*, which rejected the EPA’s argument that it lacked the authority to regulate greenhouse gas emissions from motor vehicles, the EPA issued a Proposed Rule for mobile emissions.¹⁶⁹ However, this proposed rule had yet to go into effect when the plaintiffs filed suit.¹⁷⁰

The EPA also recently released its proposal for the Tailoring Rule, which would regulate greenhouse gases from stationary sources under the Clean Air Act’s Title V permitting program.¹⁷¹ This rule did not exist when *Comer* and *American Electric Power* were decided—important because in both these cases the plaintiffs were seeking damages from stationary sources of greenhouse gas emissions. The promulgation of this rule clearly influenced the Supreme Court’s decision in *American Electric Power* regarding whether a climate change nuisance claim against a stationary source is displaced by the Clean Air Act.¹⁷² However, a discussion of the displacement issue is outside the scope of this Note. Instead, what is relevant for the purpose of the arguments presented here is that, prior to this regulation, the plaintiffs challenged greenhouse gas emission under tort law, only to have their cases dismissed under a justiciability doctrine, even though there was no other form of redress.

166. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007) (Roberts, C.J., dissenting) (internal quotations omitted).

167. The 1990 Amendments to the Clean Air Act included a provision requiring the EPA to “monitor” greenhouse gases. Pub. L. No. 101-549, § 821(a). However, “[t]he [Environmental Appeals Board] found that the phrase ‘subject to regulation’ was ‘not so clear and unequivocal’ as to dictate whether EPA must impose . . . limit for carbon dioxide, essentially leaving the matter to the EPA’s discretion.” *Am. Elec. Power Co.*, 582 F.3d at 376 n.46.

168. Mobile sources are primarily regulated through tailpipe emissions standards, which are set by the federal government with the exception of California, which is permitted to set its own standards. *See* 42 U.S.C. §§ 7521, 7543, 7545 (2006).

169. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

170. *See id.*; *Am. Elec. Power Co.*, 582 F.3d at 379.

171. This rule was finalized in May 2010. EPA, FACT SHEET: PROPOSED RULES ON CLEAN AIR ACT PERMITS FOR SOURCES OF GREENHOUSE GAS EMISSIONS UNDER THE PREVENTION OF SIGNIFICANT DETERIORATION PROGRAM (2010), <http://www.epa.gov/NSR/documents/20100810SIPFIPFactSheet.pdf>.

172. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011).

2. *A Finding of a Political Question Bars All Future Suits Regarding the Same Issue*

A dismissal of a case based on the political question doctrine has a much broader impact than a dismissal based on lack of jurisdiction, standing, ripeness, or mootness.¹⁷³ The political question doctrine is different because the precedent set by a dismissal under the political question doctrine attaches to the issue rather than to the parties.¹⁷⁴ Because the designation of a political question attaches to the issue,¹⁷⁵ future parties may be unable to raise that same issue even with regards to different circumstances (depending on the precedential value of the prior case).¹⁷⁶

This pattern is evidenced in climate change nuisance cases. In *California v. General Motors Corp.*, the court relied heavily on the district court decision in *American Electric Power* to determine that the political question doctrine barred a decision on the merits of the case.¹⁷⁷ This is despite the significant difference in the relief requested: the plaintiffs sought damages in *General Motors*, while the plaintiffs sought equitable relief in *American Electric Power*.¹⁷⁸ Additionally, the plaintiffs in *General Motors* brought claims against auto manufacturers for damages related to greenhouse gas emissions from motor vehicles.¹⁷⁹ In *American Electric Power*, however, plaintiffs brought claims against power companies for emissions resulting from the use of fossil fuel to generate electricity.¹⁸⁰ The court in *General Motors* found these differences immaterial.¹⁸¹

The potential for far-reaching implications of the political question doctrine should lead courts to be cautious when applying the doctrine. The use of the political question doctrine as a means of dismissal places great weight on precedent that could have been wrongly decided, poorly argued, or based on “bad” facts. Thus, “[u]ntil the Supreme Court more fully delineates the political question doctrine, lower courts should be hesitant to dismiss on political question grounds when other doctrines will yield the same result.”¹⁸² Otherwise, courts may misapply or unnecessarily overuse the doctrine, leading

173. Breedon, *supra* note 32, at 525.

174. Scharpf, *supra* note 23, at 537.

175. *Id.*

176. Louis Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 937 (1994).

177. *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *7–8 (N.D. Cal. Sept. 17, 2007). However, the Second Circuit vacated the *American Electric Power* case on which *General Motors* relied. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009).

178. *Gen. Motors*, 2007 WL 2726871, at *7.

179. *Id.* at *1.

180. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

181. *Gen. Motors*, 2007 WL 2726871, at *16.

182. Breedon, *supra* note 32, at 566.

to a cascade of poorly decided cases such as the district court climate change nuisance cases.¹⁸³

3. *Dismissal Under the Political Question Doctrine Leaves Plaintiffs Without Redress*

One essential purpose of the common law is to provide an injured plaintiff with redress.¹⁸⁴ “Since the nation’s founding, the common law has afforded the means for states and citizens to stop or curtail harmful and insufficiently-regulated activities and to recover demonstrable personal and property damages.”¹⁸⁵ Today, common law still plays an important function by regulating harmful conduct not covered by federal or state statutes.¹⁸⁶

The Holmes Court decided the issue of whether a court is the correct forum for a common law nuisance case over one-hundred years ago.¹⁸⁷ Many courts have accepted that “[t]he theory of nuisance lends itself naturally to combating the harms created by environmental problems.”¹⁸⁸ Nuisance claims have involved pollution related to land, water, and air.¹⁸⁹ These climate change cases similarly fall under the category of nuisance law¹⁹⁰ because there is no federal regulation.¹⁹¹

When a court dismisses common law claims under a justiciability doctrine, the federal government’s failure to act results in a “vacuum” that leaves plaintiffs without recourse.¹⁹² Even though the Obama administration has made climate change legislation a priority and the EPA is currently working on proposed standards for vehicle tailpipe and stationary source emissions, there is still no form of recourse for damages incurred due to climate change other than common law tort principles. More importantly, even though the federal government has changed its stance towards greenhouse gas regulation, “[t]he fact that a widely shared grievance is strongly opposed neither guarantees nor perhaps makes it likely that the political branches will correct it.”¹⁹³ Hopefully, the EPA will regulate greenhouse gas emissions, filling this void. But future conduct does nothing to ameliorate the problems

183. See, e.g., *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); *Am. Elec. Power Co.*, 406 F. Supp. 2d 265.

184. Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1755 (2007).

185. May, *supra* note 33, at 930.

186. Kaswan, *supra* note 137, at 106.

187. Alex, *supra* note 165, at 84.

188. *Id.* at 85.

189. *Id.*

190. The plaintiffs in *Comer* and *American Electric Power* brought nuisance claims (among others) for harm caused by climate change. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009), *vacated*, 607 F.3d 1049 (5th Cir. 2010); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 317 (2d Cir. 2009).

191. See Alex, *supra* note 165, at 83.

192. Kaswan, *supra* note 137, at 106.

193. Choper, *supra* note 56, at 1476.

that plaintiffs are facing now. Thus, the common law acts to fill this gap in the federal regulatory scheme.¹⁹⁴

Furthermore, that the plaintiffs in climate change nuisance cases are left without redress contravenes the purpose of the common law.¹⁹⁵ Public nuisance is a recognized common law tort claim, and “where a specific duty is assigned by law the individual who considers himself injured[] has a right to resort to the laws of his country for a remedy.”¹⁹⁶ As Justice Holmes emphasized, the right to seek redress for an injury “lies at the heart of our country’s union.”¹⁹⁷ In great disregard of this purpose, district court dismissals of the common law claims in climate change nuisance cases left plaintiffs without a means for redress.

C. *The Political Question Doctrine Should Be Restrained to Avoid Erroneous Applications of the Doctrine*

In light of the erroneous lower court decisions in *Comer* and *American Electric Power* and the confusion surrounding the political question doctrine, this Note proposes a revised articulation of the doctrine. This revision is different than other attempts to characterize the doctrine in that it is primarily based on the principles underlying the doctrine. Other scholarship focuses on prior case law or other theories of constitutional interpretation or abstention. The goal of the revised doctrine this Note proposes is to reduce confusion regarding the scope and application of the doctrine, while also restraining the doctrine so that it is not applied in clearly erroneous settings such as climate change nuisance cases.

1. *The Doctrine Plays an Important Role in a Few Limited Instances*

The political question doctrine rests on the idea of separation of powers.¹⁹⁸ “[S]ome constitutional requirements are entrusted exclusively and finally to the political branches of government for ‘self-monitoring.’”¹⁹⁹ In these instances, the doctrine plays a critical role of preventing the judiciary from expanding beyond its constitutionally mandated bounds. Thus, even though “the range of nonjusticiable political questions has shrunk,”²⁰⁰ the

194. See Kaswan, *supra* note 137, at 104; see also *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690, 710 (E.D.N.Y. 1984) (“Given a failure of the legislature and the executive, the federal courts could be expected to step in by creating federal common law to cover a national problem.”).

195. See May, *supra* note 33, at 930.

196. LaTourette, *supra* note 67, at 225–26.

197. Alex, *supra* note 165, at 97.

198. Recent Case, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), 121 HARV. L. REV. 898, 901–02 (2008).

199. Henkin, *supra* note 12, at 599.

200. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L. J. 1363, 1374 (1973).

doctrine still plays an important role in the rare case that goes to the heart of a separation of powers issue.²⁰¹

2. *Courts Have a Duty to Hear Cases Properly Before Them*

The role of the federal courts is based on the constitutional text that states “the judicial power of the United States’ shall extend to . . . ‘cases and controversies.’”²⁰² This description of the power of the courts does little to specify when it is proper and when it is mandatory for a court to hear an issue.²⁰³

In *Marbury v. Madison*, Justice Marshall “repeatedly emphasized the necessity for the judicial protection of . . . ‘legal’ rights.”²⁰⁴ Many of his passages in this case set the foundation for assertions of comprehensive judicial review.²⁰⁵ Justice Marshall based his analysis in part on the *Federalist* paper in which Alexander Hamilton wrote: “[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of laws is the proper and peculiar province of the courts.”²⁰⁶ These words suggest that not only do the courts act as a check on the other branches of government, they are also responsible for interpreting the law. Justice Marshall’s opinion in *Marbury v. Madison* established a strong precedent that judicial review is mandatory.²⁰⁷

The combination of the role of the courts as a protector of legal rights and its duty to “say what the law is”²⁰⁸ logically results in the principle that a court must hear a case that is properly before it.²⁰⁹ This principle was aptly articulated by the Supreme Court almost two hundred years ago:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.²¹⁰

201. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); *Gilligan v. Morgan*, 413 U.S. 1 (1973).

202. *Monaghan*, *supra* note 200, at 1264 (quoting U.S. CONST. art. III, § 2, cl. 1).

203. *Id.* at 1264.

204. *Id.* at 1266.

205. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 362 (2006).

206. THE FEDERALIST No. 78, at 524–26 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

207. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–70, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

208. *Id.*

209. *Wechsler*, *supra* note 59, at 6.

210. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

A right to judicial review is required by the underlying principles of our democracy: the protection of liberty and promotion of fairness. There is a “widely shared conviction that if one has been wronged, one ought, in fairness, to have some recourse through the state against the wrongdoer.”²¹¹ In order to uphold its responsibilities, a court should not apply the political question doctrine in a manner that prevents it from fulfilling its constitutional duty.²¹²

3. *The Political Question—A Revision Based on the Purposes of the Doctrine*

The political question doctrine should act to uphold the principles of liberty and fairness, yet the doctrine in its current form contravenes these principles. This occurs because the *Baker* formulations are not logically connected with a broader context of the purposes the doctrine is meant to uphold.²¹³ “The six formulations from *Baker* take no account of the need—also mandated by the separation of powers—to ensure that individual rights are not swept up in the passions of the political branches without recourse to an independent judiciary.”²¹⁴

Additionally, the prudential form of the doctrine²¹⁵ simply cannot be reconciled with the duty of the courts to hear cases and, thus, these considerations should not be part of the political question doctrine. The Supreme Court has not dismissed a case based only on a prudential strand of the doctrine since *Baker*.²¹⁶ Furthermore, these considerations violate a court’s mandate to hear cases properly before it, as they permit dismissal based on caution rather than on a constitutional mandate.²¹⁷ Also, the prudential factors raise “particular challenges of indeterminacy. The difficulty is that these factors lack substance and therefore leave much to discretion.”²¹⁸ This indeterminacy results in unpredictability in the application of these formulations to different fact patterns. Unfortunately, courts may also use this discretion to apply the

211. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 84 (1998).

212. Lisa A. Kainec, *Judicial Review of Senate Impeachment Proceedings: Hands Off Approach Appropriate?*, 43 CASE W. RES. L. REV. 1499, 1506–07 (1993).

213. The Court in *Baker* does assert that the doctrine is meant to uphold separation of powers concerns. *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). However, this assertion is very general and does not include considerations for other constitutional principles such as fairness, access to the courts, and upholding individual liberties.

214. Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 143.

215. The prudential form of the doctrine includes *Baker* formulations two through six. *Baker*, 369 U.S. at 217.

216. In fact, “the Supreme Court has never applied the prudential strand alone, and scholars have remarked that the classical strand is, in reality, all that guides the political question analysis.” LaTourette, *supra* note 67, at 281.

217. Choper, *supra* note 56, at 1478.

218. Recent Case, *supra* note 198, at 903.

political question doctrine to a case which it simply does not want to hear, even if there is no true political question.²¹⁹

Thus, the doctrine should be limited so that it only applies when a court interprets the text of the Constitution and finds that the power to adjudicate the issue before it is committed to a coordinate branch of government. This test was articulated by Professor Wechsler when he wrote:

[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. . . . [W]hat is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally.²²⁰

This test is not equivalent to the first *Baker* factor—textual commitment of an issue. Instead, it requires that the courts interpret the principles, political theory, structure, and text of the Constitution to determine if the adjudication power has been entrusted in a representative branch, rather than simply examining the words alone.²²¹ However, while Professor Wechsler called for a broad application of this doctrine in order to effectuate separation of powers concerns, courts should instead greatly limit its application in order to hear cases *unless* there is a clear commitment of the duty of adjudication to a coordinate branch of government.

Due to the drastic implications of this doctrine, its application should be rare and calculated. A court should base its determination on the principle that “[a] doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.”²²² This concern was raised in *Baker* when the Court acknowledged that “political questions could endanger the enforcement of individual rights and should be found only where that was not a serious risk.”²²³ Thus, a court’s inquiry into whether an issue is textually committed to a coordinate branch of government should weigh in favor of judicial review.

Additionally, the two Supreme Court political question dismissals post-*Baker* support a restrained application of the doctrine based on textual interpretation.²²⁴ In *Nixon*, the Court analyzed the language and structure of

219. See *supra* Part III.A.

220. Wechsler, *supra* note 59, at 9. Justice White acknowledged this formulation in his concurrence in *Nixon v. United States*: “Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.” 506 U.S. 224, 240 (1993) (White, J., concurring).

221. As Professor Wechsler eloquently wrote, “the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation” of the Constitution. Wechsler, *supra* note 59, at 7–8; see also Pushaw, *supra* note 15, at 1176–77.

222. Henkin, *supra* note 12, at 600.

223. Brown, *supra* note 214, at 142.

224. See *Baker v. Carr*, 369 U.S. 186 (1962) (concluding that the political question doctrine did not bar review of Tennessee’s method of apportioning its state legislature because this issue was simply political); *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (failing to dismiss the case under the political question doctrine because broad political questions frequently contain aspects that are outside

the Impeachment Trial Clause to hold that the validity of the Senate's impeachment procedure was a political question.²²⁵ The Court in *Nixon* supported its textual analysis by reviewing the history and current understanding of the Impeachment Trial Clause.²²⁶ In *Gilligan*, the Court similarly conducted a thorough textual analysis of the Constitution to determine that training of the militia was a political question.²²⁷ "The depth of these searches suggests a more pervasive inquiry than a mere textual one. The Supreme Court has been looking not for *textual* commitment to another branch, but for *actual* commitment to another branch."²²⁸ These cases also demonstrate a restrained application of the doctrine because they both explicitly involve constitutional provisions, rather than prudential concerns alone.

Finally, while this re-articulation limits the application of the doctrine, it is not a demise of the doctrine. When a court dismisses a case due to the political question doctrine, it only reaches the very outer layer of facts: whether the question is one which a representative branch is slated to address. This is roughly analogous to a standing inquiry—an inquiry into whether there is a proper "case and controversy" such that the court should hear the issue, rather than an inquiry that goes to the heart of the merits. Though Professor Harkin has argued that there is no such thing as a political question doctrine and that this form of constitutional interpretation is nothing more than a regular inquiry into the constitutionality of the case,²²⁹ courts have not recognized his view,²³⁰ which also fails to distinguish between the scope of a political question inquiry and a determination on the merits. The political question doctrine inquiry only requires an initial constitutional interpretation; it does not address the merits of the claim.

the contours of the political question doctrine and, thus, are justiciable); *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality decided that it was a political question for the President to terminate a treaty without a two-thirds vote from each house); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that there was no political question issue despite objections based on separation of powers); *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (holding that a challenge to a statute on the ground that it did not originate in the House of Representatives as required by the Origination Clause was justiciable); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality avoided formulating a standard by which to adjudicate partisan gerrymandering due to a claimed lack of judicially discernible and manageable standards).

225. *Nixon*, 506 U.S. at 229–33 (The Court examined an array of dictionary definitions of *try* and analyzed the word within the context of the clause. It then turned to the word *sole* and found this word unambiguous such that this decision was textually committed to a political branch.).

226. *Id.* at 242–43.

227. *Gilligan v. Morgan*, 413 U.S. 1, 11–12 (1973) (holding that the text of the clause as well as the nature of the inquiry and the lack of judicial competence required dismissal under the political question doctrine).

228. Pettinato, *supra* note 34, at 70.

229. Henkin, *supra* note 12, at 600–01.

230. Redish, *supra* note 51, at 1033.

4. *The Application of This Revised Test Would Likely Have Changed the Results of the District Court Decisions in Comer and American Electric Power*

Under the re-articulated theory of the political question doctrine, a court should first determine if the issue implicates a portion of the Constitution that delegates decision-making power to a representative branch. If a court finds that the Constitution touches on the issue before the court, it should then conduct an analysis of the text by reviewing the language itself, the context of the language, the structure of the Constitution, and the principles upon which the Constitution is based. After a thorough inquiry, the court should then dismiss a case if there is an *actual* commitment of the final arbitration power of an issue to a representative branch of government.

Under this test, it is unlikely that the district court in *American Electric Power* would have come to the same result. The district court in *American Electric Power* referenced the defendants' arguments that a decision would implicate matters of foreign policy, which is a duty committed to the representative branch.²³¹ However, the basis of the district court's decision rested on the third *Baker* factor—whether a decision is possible without a prior policy determination.²³² This portion of the analysis is not consistent with the re-articulated test, as it is a prudential concern. Thus, the court would be left with a mere mention of “foreign policy concerns” upon which to base a dismissal under the political question doctrine. Simply touching on foreign policy, however, is not enough to place an issue outside the realm of justiciability.²³³

The district court in *Comer* did not delineate its reasoning for dismissing the case under the political question doctrine and instead incorporated the defendants' arguments from their motion to dismiss.²³⁴ The defendants argued that the constitutional provisions that permitted “the President to make treaties with the advice and consent of the Senate . . . and the power of Congress to regulate commerce with foreign nations” textually committed the tort claims brought by the plaintiffs.²³⁵ However, the defendants did not conduct a thorough analysis of the text of these constitutional provisions. Nor did they explain how the relief requested—damages—would interfere with the formation of treaties or the regulation of commerce. The depth of this analysis does not approach that of *Nixon* or *Gilligan*. Even the Court in *Gilligan*, while it gave only a short explanation of why the Constitution committed the issue, at

231. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005).

232. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

233. *Id.* at 211–12.

234. *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007).

235. *Id.*

235. Memorandum in Support of Oil Company Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Based on Federal Law Grounds, *supra* note 115, at *23.

least provided an explanation for its reasoning. Given the peripheral analysis the defendants provided in *Comer*, it is unlikely that the mention of constitutional factors, standing alone, would be enough to sway a court under the re-articulated test to dismiss a case on political question grounds.

CONCLUSION

The district court decisions in *Comer* and *American Electric Power* demonstrate a misapplication of the political question doctrine.²³⁶ Because lower courts must hear cases properly before them, there may be issues that lower courts have dismissed under the political question doctrine where “the Supreme Court has the luxury of simply denying review.”²³⁷ Lower courts might use the doctrine to avoid deciding politically charged, cumbersome, and novel cases, such as the climate change nuisance cases. But this would be less likely to occur if the purposes of the doctrine were enumerated by the Supreme Court and if the doctrine was narrowed in scope.²³⁸ This much-needed clarification would provide courts with guideposts upon which to apply the doctrine. Furthermore, by narrowing the doctrine, it would be clearly inapplicable to cases which previously may have been dismissed under the prudential formulations of the doctrine.

Additionally, the revised form of the political question doctrine would better preserve the principles of the doctrine. “The core purpose of the separation of powers [is] the protection of liberty.”²³⁹ Thus, a doctrine which is premised on separation of powers concerns should act to promote the preservation of liberty a court achieves through interpreting and applying the law.²⁴⁰ The political question doctrine, when used incorrectly, acts to undermine the principles that it stands for by depriving individuals of access to the courts. Courts should invoke the political question doctrine only when a court finds, based on a thorough interpretation of the text of the Constitution, that the final decision-making authority on that particular issue has been delegated to a representative branch of government.

Finally, the most troubling aspect of *Comer* and *American Electric Power* is the notion that complex issues may simply be ignored by the courts. Our government is structured based on checks and balances, which does create tensions between the branches of government. Yet this tension is not only

236. See, e.g., *Comer*, 2007 WL 6942285; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

237. Redish, *supra* note 51, at 1053.

238. “This pattern of overwrought political question arguments in the lower courts suggests that the time may be ripe to reign in the overuse of the political question doctrine.” LaTourette, *supra* note 67, at 228.

239. Brown, *supra* note 214, at 136.

240. “Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law.” Wechsler, *supra* note 59, at 16.

beneficial, but is intended to ensure that no one branch abuses its power. The political question doctrine helps the courts define this boundary. However, this doctrine should not provide the courts with a means to skirt their responsibilities by dismissing difficult cases. Through a narrowed and principled articulation of the doctrine, courts will better uphold their “constitutional responsibility for the protection of individual rights”²⁴¹ while respecting the separation of powers established by the Constitution.

241. Scharpf, *supra* note 23, at 596.

