

# The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?

by Nathan Howe

Nathan Howe is a third-year law student at Washington and Lee School of Law.

---

## Editors' Summary

---

Two recent circuit court decisions, *Connecticut v. American Electric Power* and *Comer v. Murphy Oil USA*, have ruled on the political question doctrine as it is applied in climate change nuisance litigation. These decisions focused on the critical third *Baker* formulation—requiring an initial policy decision, in determining that these cases were justiciable and within the judiciary's jurisdiction, paving the way for climate change litigation. However, it is still uncertain what role litigation will hold in this period before legislation, and there may be options available to emitters who may now be subject to litigation.

Energy utilities beware—litigation is upon you. Two decisions from the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Fifth Circuit have disposed of the political question doctrine as a defense and are now permitting common-law nuisance actions to proceed that seek damages arising from the effects of carbon emissions from large coal power companies, and a host of other greenhouse gas (GHG) emitters in the energy sector. Imagine the consequences if either of these actions are successful in subjecting utilities to liability. The damages and injunctions, if successful, would impose large costs on these companies, which may then decide to transfer these costs to consumers resulting in higher energy bills for those consumers dependent on them. Even with significant causation hurdles to overcome in their nuisance claims diminishing the likelihood of success,<sup>1</sup> the potential for spending millions of dollars on discovery alone in future litigation should be a cause of concern for stationary sources. Moreover, it is unlikely that coal utilities could shield themselves from litigation by reducing carbon emissions or adopting carbon-balancing efforts<sup>2</sup> in the absence of a political question defense, because such efforts would only be considered mitigating activities when evaluating the reasonableness of the tort, and would not likely produce legal protections resulting in the dismissals of suits. This Article will address four pressing questions on the minds of both defendants and plaintiffs in upcoming climate change litigation raised by the recent decisions of *Connecticut v. American Electric Power Inc. (AEP)*<sup>3</sup> and *Comer v. Murphy Oil USA*,<sup>4</sup> and investigate the significance of the political question doctrine through an analysis of these two opinions and their implications in the climate change litigation fora: (1) whether the Second and Fifth Circuits misconstrued or manipulated the political question doctrine in order to evade it; (2) what role has

---

*Editors' Note: This Article was the winner of the Environmental Law Institute's Fifth Annual "Endangered Environmental Laws" Student Writing Competition. For information on the competition, see [http://www.eli.org/writing\\_contest.cfm](http://www.eli.org/writing_contest.cfm).*

1. See Congressional Research Service (CRS), *Global Warming: The Litigation Heats Up*, at 19, available at <http://ncseonline.org/nle/crsreports/06apr/r132764.pdf> (last visited Mar. 15, 2010) (describing the challenges of climate change litigation as an uphill battle common to many environmental law claims where liability is sought for harms remote in time and place from the pollution that is the subject of the controversy); see also David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003).
2. Carbon-balancing schemes have been included in proposed legislation as a way for emitters to offset their emissions by funding carbon sequestration efforts, either domestically or abroad. For an example of a proposed carbon-balancing scheme, see the Lieberman-Warner Climate Security Act of 2008, S. 3036, 110th Cong., 2d Sess. (2008) (the Lieberman-Warner Act) (permitting offsets for up to 30% of emissions released).
3. 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).
4. 585 F.3d 855, 39 ELR 20237 (5th Cir. 2009).

the third formulation from the *Baker v. Carr*<sup>5</sup> test, requiring an initial policy decision, served in this context; (3) should coal power companies seek preemptive federal legislation to save themselves from litigation in the future; (4) and briefly, what is the role of the courts as a regulatory power in these common-law actions?

The general theme of this Article is that the appellate courts in *AEP* and *Comer* were correct to maintain a reserved approach to the political question doctrine in its application to climate change nuisance litigation, maintaining its application to those cases that were clearly intended for political resolution, namely, matters directly challenging decisions by the other two branches related to the military or foreign affairs.<sup>6</sup> Awaiting future legislative action is an unreliable basis for courts to defer their judgment on politically charged issues, even when those issues are as immense as climate change, despite the political unrest these decisions may create. It is this author's view that the issue of climate change is such that, while political action may be more desirable, in its absence, courts should not abstain from confronting the issues of alleged harm caused by it.

Part I of the Article discusses a brief history of the political question doctrine, focusing on its common-law development. Part I will also provide a brief overview of *AEP*'s and *Comer*'s litigation history to give some context for the appellate decisions, focusing on the differences between these two suits should a circuit split arise, and the courts' analyses regarding the "initial policy" prong of the *Baker* test, which has had a recurring importance in climate change nuisance actions.

Part II analyzes the appellate decisions and their application of the political question doctrine. This interpretation predominantly focuses on the two circuits' conceptualization of the current political question doctrine, and interprets the framework applied by each circuit through the lens of the competing classical and prudential political question doctrines.<sup>7</sup> Such a historical and theoretical comparison is necessary because the two circuits have applied different tests in overturning the lower court decisions, one of them creating a novel approach to the political question doctrine's application. The Second Circuit's approach more closely resembles the spirit of the *Baker* test than the Fifth Circuit's, which appears to adopt a classical interpretation of the doctrine<sup>8</sup> dating as far back as the doctrine's original conception in

*Marbury v. Madison*.<sup>9</sup> Furthermore, this part focuses on the findings of the Second Circuit's opinion in rebutting the analysis performed by the lower court, and compares this to other prominent climate change nuisance cases where courts have made decisions based primarily on the pivotal third *Baker* formulation.<sup>10</sup> Moreover, it is important to note that this remains an unsettled area of law, and the recent opinion of *Native Village of Kivalina v. ExxonMobil Corp.*<sup>11</sup> demonstrates a lack of uniformity in judicial outcomes regarding the effects of climate change as a political question.

Part III will discuss this author's assertion that the ulterior motive of the circuits in not employing the political question doctrine is to encourage political action. Their true rationale is not to impose additional costs to the utility companies, though they may be poised to impose these costs in the meantime. As this Article will discuss, there are notable passages in each of the two recent circuit opinions where the courts allude to this goal by providing examples of actions that would trigger the political question doctrine or preemption, thus rendering the common-law claims nonjusticiable. They also posit the question as to what form such preemption should take. Briefly, this part will discuss the role of litigation as a regulatory device in the absence of legislation in the context of climate change, and address one of the key criticisms against the courts exercising this authority—that they are not controlled by the electorate in the same manner as the two political branches.

Part IV will address some options available to heavy emitters in the face of approaching litigation. This part provides a brief overview of preemptive legislation that may be available, and which form would likely be more desirable for emitters supporting legislation to replace potential litigation. There are a couple of other measures companies seeking reprieve from litigation might take to make them less attractive targets, such as adopting cleaner technology, but they would not likely provide adequate legal protection should a claim be filed against them.

## I. Background

### A. The Political Question Doctrine and Justiciability

Simply put, the political question doctrine is the judicial recognition of the separation of powers. If a case presents issues that are so far outside of courts' expertise that they would be unable to fashion a suitable remedy, the case is deemed nonjusticiable as a political question and dismissed. But the political question doctrine has a storied and controversial history. Dubbed a "misnomer" by several leading scholars,<sup>12</sup> its

5. 369 U.S. 186 (1962).

6. *Baker v. Carr*, 369 U.S. 186, 211 (1963) ("Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."); *see, e.g.,* *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1983) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.")

7. *See, e.g.,* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 566-82 (1966) ("[Looking at] the factors listed in *Baker v. Carr*, it is evident that the first, 'a textually demonstrable constitutional commitment to a coordinate political department,' reflects essentially classical concerns. The last three factors . . . —all partake of prudential considerations.") (emphasis omitted).

8. *See infra* Part I.A.

9. 5 U.S. 137 (1803). *See infra* Part I., note 13.

10. *AEP*, 406 F. Supp. 2d 265, 272, 35 ELR 20186 (S.D.N.Y. 2005) ("[T]he third indicator is particularly pertinent to this case"); *California v. General Motors Corp.*, 2007 WL 2726871, 37 ELR 20239 (N.D. Cal. 2007) ("[T]he third indicator is most relevant on the current record").

11. 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009).

12. It has been characterized this way because the judiciary frequently decides political issues and plays a vital role in the political process, thus, having political significance is not the determinative factor in considering justiciability. *See* Erwin Chemerinsky, *Federal Jurisdiction* §2.6.1, at 143 (2d ed. 1994), and

validity has frequently come under attack. Surprisingly, as one of the oldest American legal doctrines,<sup>13</sup> it has served a narrow and neglected existence in the American legal system, serving as a basis to dismiss cases in only a handful of instances, yet has garnered significant scholarly attention.

The modern test for justiciability was developed in the landmark decision of *Baker*. *Baker* involved a challenge to the Guaranty Clause as violating individual rights under the Equal Protection Clause. In devising a workable standard, Justice William J. Brennan looked at past cases with political question analyses and pulled out the implicit considerations and underlying reasoning for those decisions to create a multifactor test.<sup>14</sup> As applied, the aforementioned *Baker* test is composed of six formulations for investigation to determine whether a case is nonjusticiable:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. A lack of judicially discoverable and manageable standards for resolving it;
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. An unusual need for unquestioning adherence to a political decision already made;
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question<sup>15</sup>

However, the U.S. Supreme Court has invoked the doctrine on only three occasions to dismiss a case since then.<sup>16</sup> The lower federal courts have not been as moderate in apply-

ing the doctrine, dismissing a larger body of cases, but these cases have primarily been those that involve military affairs, even if the connection is somewhat attenuated.<sup>17</sup> State courts have found more use for the doctrine, and have begun to expand its application, including cases challenging educational adequacy,<sup>18</sup> and decreased the scope of justiciability when foreign affairs are concerned.<sup>19</sup>

In the aftermath of this test, two theoretical frameworks emerged—the prudential and classical approaches. Under the classical application, the test originally focused exclusively on the text, structure, and history of the U.S. Constitution.<sup>20</sup> The *Baker* test has been characterized as the prudential political question doctrine because it employs prudential considerations in the later five factors, while the first factor incorporates the classical view as only one part of the test—requiring a “textually demonstrable commitment.” The modern Supreme Court view is discussed by Justice Antonin Scalia in *Vieth v. Jubelirer*,<sup>21</sup> where the six formulations are listed in “descending order of both importance and certainty.”<sup>22</sup> While remaining true to the prudential application, this latter application of the factors does provide some weight in support of the classical approach by giving extra consideration to the first prong of the test. As will be demonstrated below, the *AEP* decision stays true to this modern framework and application, whereas the *Comer* opinion illustrates the conflict between these two competing approaches and ultimately adopts a novel classical view.<sup>23</sup>

## B. Procedural Posture

As a preliminary matter, a background into the procedural history of these cases is necessary to inform the analysis in the appellate courts' decisions to reverse. In both cases, plaintiffs are seeking redress from the harms caused by the contributions of large carbon dioxide (CO<sub>2</sub>) emitters to global anthropogenic climate change. However, there are two key distinctions between the two cases, and should *Comer* be

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, 244 (2002); see also Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68-69 (1977) (proposing Chief Justice John Marshall's meaning was “discretionary” rather than “political,” and in accord with his notion of deference, courts should refuse independent review when a discretionary function of the president or the U.S. Congress is at stake).

13. Its origin goes all the way back to Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made by this court.”).

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

15. *Id.*

16. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding political gerrymandering claims to be nonjusticiable); *Nixon v. United States*, 506 U.S. 224 (1993) (finding the U.S. Senate's procedural rules requiring no preliminary evidentiary hearing by its designated committee nonjusticiable because the Senate has sole discretion over impeachment procedures); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (determining the adequacy of national guardsmen's training and equipment was exclusively within the jurisdiction of Congress). *But see* *Bush v. Gore*, 531 U.S. 98 (2000). This case is often criticized as one where the Court should have abstained from exercising jurisdiction, because it is argued the power to determine the procedure for presidential elections was beyond the Court's expertise and better left to democratic mechanisms; see, e.g., Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094-95 (2001); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

17. See *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009) (affirming dismissal of tort suit for injuries sustained due to civilian contractor's negligent driving while part of a convoy in Iraq, the court found no manageable standards without making determinations on military decisions involving convoy protocols); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (dismissing tort claim for manufacturing defects in fighter jets causing Marines pilots' deaths during war); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981) (dismissing claim against Nevada senator who utilized a paid government employee's services toward his reelection campaign for presenting “no manageable standards”).

18. For insight into the decisions of three states that have borrowed federal political question law to bar claims seeking to enforce affirmative rights to education, see Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009). The focus of two courts was largely on the second and third factors, which were also the focus in these public nuisance claims. The third court construed the doctrine as a more general instrument of the separation-of-powers doctrine without indicating specific analysis under the formulations.

19. See *Access to Courts*, 122 HARV. L. REV. 1151 (2009) (proposing courts should, instead, requisition foreign fora and dismiss suits under the notion of comity, rather than invoking the political question doctrine).

20. See Barkow, *supra* note 12, at 246-48.

21. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

22. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 321, 39 ELR 20215 (2d Cir. 2009) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

23. See *infra* Part II.

reversed through its rehearing en banc, speculatively, there could be an explanation for distinguishing the cases rather than creating a circuit split.<sup>24</sup>

## 1. AEP

In *AEP*, several states and two private land trusts brought the suit against five large power plant companies that contribute large amounts of CO<sub>2</sub> emissions.<sup>25</sup> Their suit seeks relief for projected future harms caused by anthropogenic climate change, with the states referring to a varied list of injuries they would suffer including both economic and physical harms, whereas the private parties sue for continuing harm to sensitive private land trusts that have depreciated in both value and utility.<sup>26</sup> They requested injunctive relief in the form of setting caps on the amount of allowable emissions from these companies under the federal claim, in addition to joint and several liability for past harms in state common-law claims.

The district court relied on the third *Baker* factor in dismissing the action, finding that an initial policy decision would be required for the court to adequately adjudicate the claim. The court listed several questions raised by the defendants that it found would require initial policy decisions, including whether the energy industry and its consumers should bear the cost while they are among a world full of emitters,<sup>27</sup> whether the costs should be spread across the entire industry, and what are the implications for the nation's energy independence and national security.<sup>28</sup>

## 2. Comer

Comparatively, *Comer* is an action by private landowners along the Gulf Coast region against numerous oil, gas, and chemical companies.<sup>29</sup> The plaintiffs allege that the carbon emissions contributing to global climate change have resulted in the increasing severity of storms, and request damages for properties that were situated along the coastline and destroyed by Hurricane Katrina.<sup>30</sup> The district court here, as in *AEP*, relied on the third *Baker* factor to dismiss the suit, though Judge Louis Guirola Jr. did direct attention to the second factor, stating that there is also a need for the politi-

cal branches to inform the reasonableness standard. During the hearing on the motion to dismiss, Judge Guirola stated that the suit would require “balanc[ing] economic, environmental, foreign policy, and national security interest and . . . would necessitate the formulation of standards . . . and the scientific and policy reasons behind those standards.”<sup>31</sup>

## 3. Two Distinguishing Features

There are two readily apparent ways in which these two decisions, might be distinguished in the event *Comer* is reversed, mitigating a potential circuit split. These two cases differ in their common-law basis and their pleas for relief. *AEP* contains federal nuisance claims requesting injunctive relief to curtail present and future harm,<sup>32</sup> whereas *Comer* includes only state-law claims and seeks damages for harm that has already occurred.<sup>33</sup>

However, in regard to the difference in the type of relief requested, it is those cases seeking damages that are found to be further within the province of the court, rather than those requesting injunctions.<sup>34</sup> The argument is that courts are better suited to impose compensation for harm, rather than demand action that is less judicially manageable.<sup>35</sup> But here, *Comer* is the likely candidate for reversal. It is also the case where damages were requested. Therefore, it is unlikely that distinguishing the two cases on these grounds would offer any support to *AEP*. As a plea for injunctive relief, this case should be further removed from the court's authority than *Comer*, because this form of remedy is theoretically less manageable when compared to the remedy of damages, based on the reasoning in *Barisch v. Columbia Gulf Transmission Co.*<sup>36</sup>

Comparing the federal and state common law does not seem much more fruitful in distinguishing these decisions because it would seem more likely that the state common law would be further from the political question's concern. It may hold the potential to create a federalism debate, perhaps, but as an issue defining the scope of state judicial enforcement power, it is further removed from the federal separation-of-powers debate.<sup>37</sup> Because *Comer* is the case using state

24. During the publication of this Article, the Fifth Circuit vacated this opinion in a surprising procedural action. After successfully voting to rehear the case en banc, one judge later recused herself, leaving the circuit without a quorum to further conduct judicial business. As a result of removing this opinion rather than reversing it, a circuit split has been averted. See generally *Comer v. Murphy Oil USA*, 607 F.3d 1049, 40 ELR 20147 (5th Cir. 2010). Comparatively, the Second Circuit has denied a rehearing en banc altogether. *AEP*, 582 F.3d 309 (petition for rehearing en banc denied Mar. 5, 2010).

25. *AEP*, 406 F. Supp. 2d 265, 268, 35 ELR 20186 (S.D.N.Y. 2005) (contending they are responsible for 25% of domestic GHG emissions).

26. See *AEP*, 582 F.3d at 318-19, for this list of projected injuries to both states and land trusts.

27. “Virtually every sector of the U.S. economy is either directly or indirectly a source of [GHG] emissions[.]” *AEP*, 406 F. Supp. 2d at 272 (quoting 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003)).

28. *Id.* at 272-73.

29. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859, 39 ELR 20237 (5th Cir. 2009).

30. *Id.*

31. Transcript of Hearing on Defendants' Motion to Dismiss at 40, *Comer*, No. 1:05-CV-436-LG-RHW (S.D. Miss. 2005).

32. While *AEP* also included state-law claims requesting damages, it was the federal claims that served as the basis for dismissal by the lower court. *AEP*, 406 F. Supp. 2d at 269-70.

33. At least one district court has already distinguished suits requesting damages as opposed to injunctive relief when applying political question analysis, see *Barisch v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 679 (E.D. La. 2006) (“Indeed, as compared to injunctive relief, requests for monetary damages are less likely to raise political questions. Monetary damages might but typically do not require courts to dictate policy to federal agencies, nor do they constitute a form of relief that is not judicially manageable.”) (quoting *Gordon v. Texas*, 154 F.3d 190, 195, 29 ELR 20134 (5th Cir. 1998)).

34. See *supra* note 32.

35. See *id.*

36. 467 F. Supp. 2d 676, 679 (E.D. La. 2006).

37. Support for this proposition can be found in Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 465 (2010) (“[H]istory has established that in federal law, Congress is the gatekeeper in determining whether individuals aggrieved by government action can make their way to court to obtain redress of their grievances.”). Furthermore, the appellate opinion in *Comer* distinguishes the case from *AEP* based on this, though the support behind this assertion is not provided in the opinion. *Comer v. Murphy*

common law as the basis for its claim, again, *AEP* appears to be the weaker case in this regard, and it is not likely to provide a sufficient basis for averting a circuit split in the event of *Comer*'s reversal.

There does, however, remain the possibility that *Comer* is not reversed on rehearing. The Supreme Court could then grant certiorari to *AEP* and not *Comer*, reversing the Second Circuit decision, but not the Fifth Circuit. In this unlikely turn of events, the state-law claim for damages would stand, whereas the federal-law claim for injunctive relief would be reversed. Under these circumstances, these two distinguishing features may become relevant in shaping the decision by the Supreme Court and its applicability to future suits that are based in state law or requesting damages.

## II. Interpretation of the *Baker* Test in the Second Circuit and Fifth Circuit Decisions

While the Second and Fifth Circuits reach the same conclusion that the political question doctrine does not render common-law nuisance claims caused by climate change non-justiciable, their approaches in applying the *Baker* test differ dramatically. In the event that the *Comer* test withstands the rehearing en banc, it could have future implications for the political question doctrine's role in climate change nuisance litigation, negating the crucial third formulation's weight in these decisions. However, given the format of this new test, which relies on finding the first formulation before reaching the others, the *Comer* decision does not contribute much in its analysis of the later *Baker* formulations. The *AEP* opinion, on the other hand, discusses these other considerations in much greater detail and provides some insight into how the Second Circuit conceptualized the claim as falling outside of these prudential concerns.

### A. The Fifth Circuit's New Classical Approach

Historically, the *Baker* test has been composed of six independent factors. The Second Circuit borrowed from Justice Scalia's application in *Vieth*, where the six formulations are listed hierarchically, with the first formulation commanding the most importance, and the sixth, the least. Comparatively, in the opinion delivered by Judge James L. Dennis, the Fifth Circuit appears to have recast the test by promoting the first factor from the most important consideration to a requirement. The opinion places particular emphasis on the historical roots of the political question doctrine prior to *Baker*, noting the importance of providing a forum for adjudication when individual rights are at stake. However, it is difficult to square this application of the test with recent Supreme Court precedent in *Vieth*, which relied on the second formulation without demonstrating a finding of the first.

The Fifth Circuit in *Comer*<sup>38</sup> dedicated a significant portion of its opinion to Justice John Marshall's original identification of the doctrine long ago in *Marbury*. This is relevant because the Fifth Circuit's decision marks a novel departure from the way in which the prudential *Baker* test has been applied in the past, with the new test having strong roots in the classical *Marbury* approach. This Article takes the view that the Fifth Circuit has vacated the prudential test in favor of a return to the classical approach, albeit slightly modified.

The essence of the political question decision in *Comer* rests on Judge Dennis' introductory thesis to this section of the opinion, stating: "[T]h[e]se claims do not present any specific question that is *exclusively committed by law* to the discretion of the legislative or executive branch."<sup>39</sup> This language signals an endorsement of a strict and rigid interpretation of Justice Marshall's opinion. Not only is a textual commitment the most important element in finding a political question, but Judge Dennis found it to be a required element, and the textual commitment must be exclusive to that branch.

Moreover, Judge Dennis highlighted Justice Marshall's idea that claims where individual rights are at stake are never political questions, and therefore, always justiciable.<sup>40</sup> The deductive reasoning supporting this notion is as follows: The purpose of the political question doctrine is to forbid the judiciary from interfering with the political branches. As a countervailing principle, the judiciary is empowered to resolve cases where individual rights have been infringed. Therefore, they should be free to exercise that power free from interference subject only to the checks and balances of the other two branches. But a strict adherence to this principle would render the political question doctrine superfluous, the practical effect of boiling down to a straightforward constitutional analysis.<sup>41</sup> Therefore, if the political question doctrine is to serve any independent role at all, there must be some set of cases where individual rights are at stake, but still outside of judicial jurisdiction.<sup>42</sup> It seems the more appropriate approach to cases involving individual rights would be to apply a strong presumption in favor of jurisdiction, rather than automatically grant it.

The prudential formulations of *Baker* exist to delineate this rigidity by expanding the scope of the doctrine, thereby rendering some claims nonjusticiable, even when there might be an individual right hanging in the balance. It sought to find this class of cases that may implicate individual rights but were nonetheless outside of judicial jurisdiction. Justice Brennan recognized that courts have a duty to provide

38. *Comer* was decided by a two-judge majority on a three-judge panel. The majority opinion was delivered by Judge Dennis, and Judge W. Eugene Davis delivered an opinion concurring in the holding of the political question issue. *Comer*, 585 F.3d at 859.

39. *Id.* at 869. (emphasis added).

40. *Id.* at 870.

41. Indeed, the independent existence of the political question doctrine has been questioned, and especially where there is a required textual commitment, this doctrine requires only a straightforward constitutional interpretation. See Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. MERCY L. REV. 793, 798 (1993).

42. For further support, see Firmage, *supra* note 12, at 66, noting this is a self-imposed limitation by the courts, and not constitutionally required in the sense there is no textual requirement in the Constitution to dismiss them.

Oil USA, 585 F.3d 855, 879, 39 ELR 20237 (5th Cir. 2009) ("Rather, they were actions brought by state attorneys general for their state governments based partly on federal common law.")

a forum to adjudicate controversies involving individual rights, but pointed out this duty was not absolute when a case fulfilling the political question doctrine was presented. Shortly after his statement of the test in *Baker*, Justice Brennan included, “the courts cannot reject as ‘no law suit’ a bona fide controversy.”<sup>43</sup> However, it was in combination with his additional five formulations that Justice Brennan expected the provision-of-forum requirement to apply, thereby rejecting the strict test set forth by Justice Marshall in *Marbury*. The *Baker* test essentially narrowed the jurisdiction of the courts to exclude those cases at the fringes of judicial authority that do implicate individual rights, but are still nonjusticiable. It appears as though Judge Dennis in *Comer* attempts to synthesize or reconcile Justice Brennan’s position with Justice Marshall’s, by promoting a hybrid of the two views. This reasoning functions under the assumption that because the *Baker* test does not provide the precise formula for finding a political question,<sup>44</sup> the test must be *used together* with support in either the Constitution or federal statutes.<sup>45</sup> But it is unclear where he draws the support for this assumption other than modernizing Justice Marshall’s original conception of the doctrine.

However, this new test does not recognize the prudential application by Justice Brennan, and narrows the existing political question application significantly from what Justice Brennan had intended in *Baker*. Instead, Judge Dennis has taken the position that the *Baker* formulations were not each distinct in their own right. In Judge Dennis’ view, the remaining factors were something of an afterthought, as he explains in dicta that none of them would have been satisfied in *Comer* anyway.

It is curious why he would take this opportunity to reshape the political question test and revert to a classical approach. If the claim would supposedly fail under each of the factors, what purpose does disposing of the last five of them serve? One would expect this type of refining of the test in a case where the outcome on one of the remaining factors would be different, i.e., passing one of the tests—thereafter disposing of those formulations pursuant to a results-oriented judicial reasoning.

The most apparent defect in this new design of the test is that it does not facially consider recent precedent of the Supreme Court. Not surprisingly, this is the leading argument presented by the defense in the petition for rehearing en banc.<sup>46</sup> In the determination that the textual commitment to a separate branch was not only the most important factor but a required factor, Judge Dennis relied on only two cases having been dismissed since *Baker*. In each of these cases the basis for dismissal did, in fact, rest almost entirely on this first factor of the test. But Judge Dennis did not refer to the most recent Supreme Court application of the *Baker* test in dismissing a suit. In 2004, Justice Scalia, in his plurality

opinion, dismissed a third suit in *Vieth*<sup>47</sup> under the second factor of the *Baker* test. Justice Scalia found that there were no judicially manageable standards applicable to the case at bar.<sup>48</sup> Nowhere in this opinion did Justice Scalia mention a textual commitment from the Constitution as part of the Court’s decision. His analysis focused entirely and exclusively on the second prong.<sup>49</sup> Giving further support to the prudential application, he explicitly referred to the Court in *Baker* as having “set [sic] forth six *independent* tests.”<sup>50</sup> Even though this was not a majority opinion, the disagreement between the plurality and dissenters was over the application of the formulation, with the dissenters believing the issues presented by the case were inadequate to satisfy the second prong of the test, and their concern was not that the plurality rested solely on the second prong in the absence of the first.<sup>51</sup>

While the Supreme Court has suggested that the second formulation of *Baker* strengthens and supports the first,<sup>52</sup> this should not be interpreted to mean that the second prong exists only as an extension of the first. Justice Brennan stated that each of the factors were intended to be independent considerations, even though it is possible that several of them may fail under the same critical reason or fact, or there is some measure of interdependency in their investigation. Each one must ultimately be resolved under its own terms. The defendant-petitioners in this case should prevail on this point if the court is to be faithful to the Supreme Court ruling and opinion. On the other hand, it is possible that the Supreme Court itself could adopt this view, departing from the prudential application of the doctrine in favor of the classical approach. Justice Scalia’s use of the second formulation was not supported by a majority of the Justices. Even though the dissent did not expressly disapprove of the prudential doctrine, the dissenting Justices may have favored a return to the classical approach.

## B. Applying the Formulations

### I. The Critical Third Formulation—Requiring an Initial Policy Decision

The district court had relied primarily on this formulation in dismissing the suit in *AEP*, resting on the need to balance economic and environmental interests as necessitating

47. 541 U.S. 267 (2004).

48. Curiously, the opinion later cites this case in borrowing Justice Scalia’s reasoning that the judicial action must be governed by standards and not imitate the legislative process. *Comer*, 585 F.3d at 876 (quoting *Vieth*, 541 U.S. at 278). Clearly, this language was in reference to the second formulation of *Baker*, which was the decisive factor in deciding that case. Justice Scalia stated “the second [formulation] is at issue here.” *Vieth*, 541 U.S. at 277 (Scalia, J. plurality).

49. *Vieth*, 541 U.S. at 290 (Scalia, J. plurality) (“For these reasons, we find appellants’ proposed standards neither discernible nor manageable.”).

50. *Id.* at 277 (emphasis added).

51. *Vieth*, 541 U.S. at 317 (Stevens, J. dissent).

52. *Nixon v. United States*, 506 U.S. 224, 228-29 (1993):

[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

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

44. *Comer*, 585 F.3d at 872 (citing *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir. 2008)).

45. *Id.*

46. See *supra* note 23 and accompanying text; Petition at Section I.A., *Comer*, No. 07-60756, 2009 WL 4571556 (5th Cir. 2009).

a policy choice appraising their relative values and stating a preference toward one.<sup>53</sup> Moreover, the lower court found that the U.S. Congress' decision not to regulate emissions thus far was preemptive of the common-law actions.

The treatment by the two courts causes some confusion in that they seem to blur the line between preemption and the initial policy decision formulation. It is possible that the Second Circuit has misconstrued what was intended by the district court. The district court seems to imply that congressional and executive statements on emissions pronounce the intrinsically and overwhelmingly political nature of the issue.<sup>54</sup> But the circuit court has characterized the district court's findings as preempting the action in that the district court found a preemption by "supplant[ing] the existing common law in that area" through Congress' refusal to legislate.<sup>55</sup>

The circuit court could have more easily refuted this finding as overstating the importance of the political nature of an issue in the political question analytic context, which *Baker* specifically advises against.<sup>56</sup> The political nature of a case alone is not sufficient to warrant dismissal as nonjusticiable, even if it may be a highly politicized issue.<sup>57</sup> But it seems as though the circuit court departed from the political question analysis and injected the issue of preemption. Preemption may not have been the issue that the lower court had originally intended to address.

The point made by the district court may instead have been directed toward a finding that U.S. national policy was (at that time) against regulating emissions. As discussed below, the court may have believed it was acting in accordance with that policy.<sup>58</sup> Support for this rationalization can be found in the appellate opinion where the circuit court referred to the differing emissions policies of the United States during the

Administrations of George W. Bush and Barack Obama.<sup>59</sup> The dismissal by the lower court occurred during the former's administration, where the policy was decidedly less favorable to reducing domestic emissions.<sup>60</sup> However, under the current Obama Administration, this unified executive policy against emissions, if it ever actually existed, is no longer evident.

Looking past the Second Circuit's opinion, it is important to look at other climate change nuisance actions that have applied this critical third formulation in a different fashion and reached different outcomes. Two other major recent decisions that have come out the other way on this factor include *California v. General Motors*,<sup>61</sup> and *Kivalina*.<sup>62</sup> *California* was a suit filed by the state against several automotive manufacturing companies for damages from past and future harms<sup>63</sup> caused by the level of emissions released by automobiles under federal, and alternatively, state common-law nuisance. The district court relied heavily on the analysis by the *AEP* district court in reaching its conclusion, but did make some distinctions in the auto-manufacturing context. The court in *California* referred to the Energy Policy and Conservation Act (EPCA),<sup>64</sup> where Congress established mandatory corporate average fuel economy (CAFE) standards.<sup>65</sup> In developing these standards, the U.S. Department of Transportation balances several competing public policy concerns, including "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."<sup>66</sup> Furthermore, the court referenced *Massachusetts v. Environmental Protection Agency*<sup>67</sup> as "underscore[ing] the conclusion that policy decisions concerning the authority and standards for carbon dioxide emissions lie with the political branches of government . . . and because new automobile carbon dioxide emissions are such a regulation expressly left to the federal government."<sup>68</sup> The plaintiffs originally appealed the decision, but have since

53. More specifically, the questions, as phrased by the district court, are as follows:

Given 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?

*AEP*, 406 F. Supp. 2d 265, 273, 35 ELR 20186 (S.D.N.Y. 2005) (quoting Def. Memo. at 7-8). *But see* Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L. 79 (2008) (analogizing this balancing to the tobacco litigation cases, where ultimately, the judiciary has been deemed competent to adjudicate such complicated, politically-charged issues, awarding significant damages as well as future earnings to plaintiffs).

54. *AEP*, 406 F. Supp. 2d at 273 ("Looking at the past and current actions (and deliberate inactions) of Congress and the Executive within the United States and globally in response to the issue of climate change merely reinforces my opinion that the questions raised by Plaintiffs' complaints are non-justiciable political questions.").

55. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 330, 39 ELR 20215 (2d Cir. 2009).

56. *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("[T]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"). *See supra* note 12.

57. *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229, 16 ELR 20742 (1986) ("[W]e cannot shirk this responsibility merely because our decision may have significant political overtones.").

58. *See infra* note 96 and accompanying text.

59. *AEP*, 582 F.3d at 332 n.9 ("When Defendants briefed this argument, they were focusing on the GHG emissions policy of the former administration. Now that a new administration is in office, the emissions policy is changing."); *see also AEP*, 406 F. Supp. 2d 265, 270, 35 ELR 20186 (S.D.N.Y. 2005) ("President George W. Bush opposes the [Kyoto] Protocol because it exempts developing nations who are major emitters, fails to address two major pollutants, and would have a negative economic impact on the United States.").

60. *Id.*

61. *California v. General Motors Corp.*, 2007 WL 2726871, 1-2, 37 ELR 20239 (N.D. Cal. 2007).

62. *See supra* note 11.

63. Curiously, the state requested damages for future harms without requesting any injunctive cap setting a standard for reasonable emissions. Morgan M. Sport, *An Inconvenient Suit: California v. General Motors Corporation and a Look at Whether Global Warming Constitutes an Actionable Public Nuisance or a Nonjusticiable Political Question*, 38 CUMB. L. REV. 583, 612 (2008) (suggesting this may have been a fatal flaw for the claims).

64. 49 U.S.C. §§3901 et seq.

65. *California*, 2007 WL 2726871 at 9.

66. *Id.*

67. 127 S. Ct. 1438, 37 ELR 20075 (2007) (ruling that carbon dioxide qualifies as a pollutant under the Clean Air Act, and EPA has a responsibility to regulate it).

68. *California v. General Motors Corp.*, 2007 WL 2726871, 11-12, 37 ELR 20239 (N.D. Cal. 2007).

withdrawn, citing President Obama's promising new policies in automobile emissions as the motivation for this decision.<sup>69</sup>

Under the reasoning set forth by the Second Circuit, however, the U.S. Court of Appeals for the Ninth Circuit may have found differently than the lower court. *AEP* involved similar arguments regarding the Clean Air Act (CAA)<sup>70</sup> as regulating air pollutants, but not as foreclosing suits alleging harm by pollutants where the statute provides no remedy.<sup>71</sup> The EPCA could be considered in this same vein, by not providing a remedy for harms attributed to climate change resulting from vehicle emissions. However, the Ninth Circuit may have had a stronger basis for finding a preemptive relationship with the EPCA because it explicitly governs fuel economy, and fuel economy directly corresponds to the volume of emissions. Unless it can be shown somehow that these two considerations are somehow independent of one another through technological instruments that might reduce emissions without affecting fuel consumption, there is a greater degree of control already demonstrated by federal statute over automobile manufacturing standards. But *Comer* casts doubt on this reasoning by finding there would be no need for the court to balance "social and economic interests like a legislative body" in developing judicial remedies to climate change nuisance actions.<sup>72</sup> As support for this finding, the opinion states that such a requirement misconstrues *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*,<sup>73</sup> where the court's historic and traditional function of adjudicating controversies must be "principled, rational, and based upon reasoned distinctions,"<sup>74</sup> but does not imitate such a legislative function. Under this reasoning, it would seem that under the *Comer* analysis, it is more a matter of means over ends that determines the boundaries of judicial jurisdiction. But is this concern not already expressed in the second formulation of *Baker*—requiring judicially manageable standards? If the six formulations are to remain discrete, where a case of controversy is found to demand only a framework of judicially manageable standards for its adjudication, this finding should not excuse the suit's need for an initial policy decision under the third formulation.

However, it seems the decision in *AEP* has not been embraced by lower courts of all districts. *Kivalina*, interestingly enough, was dismissed on political question grounds even after the opinion in *AEP* was delivered, the hearing held only a month after the *AEP* opinion was delivered. This is an action brought by an Inuit Alaskan Eskimo tribe against

24 energy and oil companies.<sup>75</sup> Their claims seek damages for the destruction of their village, allegedly through erosion due to increasingly destructive storms and the diminishing sea ice that protects their village, all caused by anthropogenic climate change, and request anywhere from \$95 million to \$400 million in relocation costs.<sup>76</sup> These nuisance suits follow the *AEP* format, requesting relief under both federal and state common law. Additionally, unique to this case, the claims allege conspiracy and concert of action in the defendant's attempt to misrepresent the effects of climate change for their own benefit without public resistance.<sup>77</sup>

The court in *Kivalina* dismissed the action under primarily the third prong of *Baker*. However, the court only recognized the *AEP* analysis in investigating the second prong, and omitted it later when investigating the third. The *Kivalina* court further found no difference between a request for injunctive relief and damages in applying this third prong of the test, finding that, either way, the court would be required to set a standard of reasonable emissions, whether it be to fashion a limitation on future emissions, or to develop a baseline for past damages.<sup>78</sup> In the process of setting this standard, the court would be required to balance the social utility of providing energy, with the harm inflicted on the plaintiffs. Furthermore, the court would have to make a determination as to who should bear the cost of climate change, finding that the plaintiffs "arbitrarily" selected these defendants in a world where nearly everyone is responsible for some portion of emissions.<sup>79</sup>

In analyzing the third formulation, this opinion bears a strong resemblance to the rationales provided by the district courts in both *AEP* and *Comer*, and, consequently, appears to have not endorsed the reasoning behind the reversal by the Second Circuit. Notably, the *Comer* opinion was not delivered until shortly after *Kivalina* was dismissed, so it is unclear whether the reversal of two circuits would have had any greater significance in the court's decision. Regardless, the case is now on appeal, and so the Ninth Circuit is poised for another opportunity to weigh in on the political question doctrine in this climate change context.<sup>80</sup> With the possible reversal of *Comer* in the Fifth Circuit on rehearing en banc, there is certainly potential for a two-to-one circuit split in either direction.

69. See Joanne Lichtman, *California v. General Motors: State Moves to Voluntarily Dismiss Climate Change Lawsuit Against Major Automakers*, GLOBAL CLIMATE LAW BLOG, June 23, 2009, available at <http://www.globalclimatelaw.com/2009/06/articles/climate-change-litigation/california-v-general-motors-state-moves-to-voluntarily-dismiss-climate-change-lawsuit-against-major-automakers/> (last visited Apr. 1, 2010).

70. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

71. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 331, 39 ELR 20215 (2d Cir. 2009).

72. *Comer v. Murphy Oil USA*, 585 F.3d 855, 876, 39 ELR 20237 (5th Cir. 2009).

73. 467 U.S. 837, 847, 14 ELR 20507 (1984).

74. *Comer*, 585 F.3d at 876 n.16.

75. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868, 39 ELR 20236 (N.D. Cal. 2009).

76. *Id.* at 869.

77. *Id.* at 870; see also Thomas Joo, *Global Warming and the Management-Centered Corporation*, 44 WAKE FOREST L. REV. 671, 697-98 (2009) (speaking on the additional "moral condemnation" attributed to these types of claims and that adding these claims illustrates the intention of raising public awareness about the efforts they have taken to conceal their knowledge on the dangers of climate change, noting that tobacco litigation followed a similar course once documents were revealed showing that these companies had known and suppressed information on the dangers of smoking, quickly turning juries against them).

78. *Kivalina*, 663 F. Supp. 2d at 876.

79. *Id.* at 877 n.4.

80. See Native American Rights Fund, *NARF to Appeal Kivalina Environmental Case Dismissal*, NATIVE AMERICAN RIGHTS FUND, Nov. 3, 2009, available at <http://narfnews.blogspot.com/2009/11/narf-to-appeal-kivalina-environmental.html> (last visited Apr. 10, 2010).



## 2. The First, Second, and Remaining Three Formulations

1. Textually Demonstrable Constitutional Commitment—As discussed earlier, the most substantial portion of Judge Dennis' opinion in *Comer* explains why this is the critical formulation. However, Judge Dennis dedicated only a few sentences in applying it. The opinion stated common-law claims are within the power of the judiciary<sup>81</sup> and implies that tort actions are never exclusively committed to a coordinate political branch, because there is no textual basis for such a commitment. The assumption seems to be that tort claims inevitably involve harm to individuals and individual rights. Moreover, under this apparent endorsement of the classical approach, the judiciary always has jurisdiction over cases involving individual harm.<sup>82</sup>

In *AEP*, the defendants primarily argued that court-regulated emissions would impact and interfere with international relations, and, therefore, that regulation should be left within the power of the executive branch as affecting foreign policy decisions.<sup>83</sup> However, the opinion authored by Judge Peter W. Hall, joined by Judge Joseph M. McLaughlin,<sup>84</sup> viewed this case as an isolated, domestic claim where limiting emissions from only these domestic companies would not constitute a globalized solution to climate change,<sup>85</sup> and only “indirect[ly]” challenges foreign policy determinations.<sup>86</sup>

It is this differentiation between indirect and direct challenges to decisions by the other branches of government, in this case, the executive branch, that the Second Circuit distinguished this case from nonjusticiable foreign policy cases. Judge Hall illustrates this point in projecting that a hypothetical suit against the president to compel the signing of a treaty would likely be a political question.<sup>87</sup> But it seems that even though this may not directly challenge an executive policy on its face, the actions by the court would have significant effects on the crafting of international negotiation

policies regarding climate change. As a matter of scale, the court does not seem concerned with the practical effects its decisions may have in restricting the choices available to the executive branch, so long as they do not interfere with the executive's actual use of discretion in making foreign policy choices. For instance, forcing emissions reductions certainly may affect the president's ability to barter these reductions in return for promises by foreign nations to reduce their own emissions.<sup>88</sup> However, it would seem that where states have begun using this authority themselves without interfering with this foreign affairs power, there is less of an issue with the courts taking up such efforts as well. Moreover, these reductions, court-imposed or not, may aid in these types of bargaining arrangements with other countries by giving a basis for the United States to pledge a certain level of reductions, pressuring these other countries to make pledges as well.<sup>89</sup> Alternatively, the court may justify its decision as not challenging the executive's foreign policy at all by acting pursuant to the president's strategy in achieving reductions in emissions under the Obama Administration's stated goal.<sup>90</sup>

2. Lack of Judicially Discoverable and Manageable Standards—In both cases, the courts believe that the common-law public nuisance doctrine provides the only necessary judicial standard for adjudication.<sup>91</sup> In refuting the defendants' argument that the complexity of the issues coupled with scientific uncertainty surpasses the reach of the somewhat vague public nuisance standard,<sup>92</sup> the *AEP* court presumes complexity alone, even in the face of uncertainty, will not be sufficient to remove a case outside of the court's jurisdiction.<sup>93</sup> Even in cases as complicated and enormous in scale as this, the common law is expected to adapt and conform to confront issues

81. *Comer v. Murphy Oil USA*, 585 F.3d 855, 875, 39 ELR 20237 (5th Cir. 2009).

82. Judge Dennis' analysis into the remaining formulations is largely conclusory, and without much analytical support offered in the opinion:

Nor have they shown the absence of judicially discoverable or manageable standards with which to decide this case. Mississippi and other states' common law tort rules provide long-established standards for adjudicating the nuisance, trespass and negligence claims at issue. The policy determinations underlying those common law tort rules present no need for nonjudicial policy determinations to adjudicate this case. Nor would the district court's adjudication of this case express or imply any lack of the respect due coordinate branches of the federal government. Even when a court finds that Congress has passed an unconstitutional law, there is no “lack of respect” for Congress's judgment. There is no unusual need for unquestioning adherence to a federal political branch decision already made, and no potentiality of embarrassment from multifarious pronouncements by various federal departments on one question.

*Comer*, 585 F.3d at 875-76.

83. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 324, 39 ELR 20215 (2d Cir. 2009).

84. Notably, Supreme Court Justice Sonia Sotomayor was originally a member of the panel before her elevation to the Supreme Court a little over a month before this opinion was delivered. *Id.* at 314.

85. *AEP*, 582 F.3d at 325.

86. *Id.* at 325 n.3.

87. *Id.* n.5.

88. Such a concern is expressly raised in *California*, 2007 WL 2726871, 10 (N.D. Cal. 2007), believing such decisions may undermine “political branches' strategic choices by ‘weaken[ing] U.S. efforts to persuade key developing countries to reduce the [GHG] intensity of their economies.’” *Id.* (quoting 68 Fed. Reg. at 52927, 52931).

89. One of the primary difficulties in reaching international agreement on climate change policy is finding incentives for developing countries with large populations such as China and India to reduce emissions. The idea is somewhat analogous to a charity sponsor who agrees to match contributions as a way of mustering donations. By pressuring these other countries to match reductions, there is additional incentive for them to make such pledges when the United States contributes its share to reducing domestic emissions. See David B. Hunter, *International Climate Negotiations: Opportunities and Challenges for the Obama Administration*, 19 DUKE ENVTL. L. & POL'Y F. 247 (2009) (noting the difficulties in reaching an international consensus where these developing countries will make adequate pledges of reductions to a degree that will significantly reduce the impacts of climate change); Daniel Abebe, Jonathan S. Masur, *International Agreements, Internal Heterogeneity, and Climate Change: The “Two Chinas” Problem*, 50 VA. J. INT'L L. 325 (2010) (describing the disincentives for China to willingly enter into an international agreement due to the loss of economic growth it would endure amongst other internal losses).

90. See *infra* Part II.B.2.3.

91. *Comer v. Murphy Oil USA*, 585 F.3d 855, 875, 39 ELR 20237 (5th Cir. 2009) (“Mississippi and other states' common law tort rules provide long-established standards for adjudicating the nuisance, trespass and negligence claims at issue.”); *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 352, 39 ELR 20215 (2d Cir. 2009) (“We believe the Restatement definition provides a workable standard for assessing whether the parties have stated a claim under the federal common law of nuisance.”).

92. RESTATEMENT (SECOND) OF TORTS §§821B and 821C (2005).

93. *AEP*, 582 F.3d at 326 (“[C]ourts have successfully adjudicated complex common law public nuisance cases for over a century.”) (citing *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907)).

not previously envisioned by its creation,<sup>94</sup> and the burden is on the complaining party to establish successful application of the doctrine. If they fail to do so, the defending party wins. In this sense, there is no reason to invoke the political question doctrine. While this argument will probably carry significant weight in undermining the plaintiff's causation and harm arguments, it is not relevant in whether the court should be permitted to entertain the suit.<sup>95</sup>

3. The Remaining Three Formulations<sup>96</sup>—The fourth, fifth, and sixth formulations receive only a cursory review and hold little weight in the outcomes of these nuisance decisions, which appears to be the trend in applying the *Baker* test to these climate change nuisance actions. However, Judge Hall's opinion in *AEP* gave some insight into the apparent confluence of these factors as they tend to be the points of collapse of the prudential test. It is here where Judge Hall noted the significance of interference with a "political decision already made,"<sup>97</sup> and supported the proposition that political hesitation does not constitute a political position or a policy determination.<sup>98</sup>

Indeed, congressional and executive statements in the absence of formal regulation are still to be weighed by the court in a deferential manner directing toward a finding of nonjusticiability where these official statements imply a preference to how a case should unfold (if the case were, in fact, addressed by one of these branches).<sup>99</sup> Where these statements have specifically articulated a view that is more than merely speculation, courts must accept this view at their word due to the judiciary's limited fact-finding capabilities.<sup>100</sup> So far,

the statements put forth by Congress confirm the problem of anthropogenic climate change, and that continuing research will be promoted with the goal of one day stabilizing emissions GHGs.<sup>101</sup> The argument by the defendants, however, seemed to sever this message further into three distinct policy decisions: (1) climate change is a problem; (2) U.S. policy is to one day stabilize GHGs; but (3) the United States refuses to regulate contributing domestic emissions.<sup>102</sup> It was this third message that the court in *AEP* refused to accept as implied in Congress' present inactions. Instead, Judge Hall acted in furtherance of the first and second policy decisions by addressing the consequent harm caused by climate change, inferring that the U.S. policy of stabilizing GHGs includes reduction of emissions. Therefore, the likelihood of disrespecting the other branches or embarrassing the nation was not of particular concern, and would not upset the separation of powers.

### III. Regulation Through Litigation Before Legislation

Because this topic commands a great deal of attention and has engendered thorough scholarly debate, this Article focuses on the primary concerns raised by public nuisance actions of this strain, and the material covered in the opinions in *AEP* and *Comer*.<sup>103</sup> There is ample evidence in the opinions by Judges Dennis and Hall that their hope is for forthcoming federal legislation governing emissions.

Judge Hall in *AEP* rejected the lower court's conclusion, where the court interpreted Congress' inaction as a "refusal"<sup>104</sup> to legislate, and even if it did, such a refusal would be unlikely to "supplant the existing common law in that area"<sup>105</sup> Judge Hall's opinion then provided a substantial commentary on prior environmental nuisance cases escaping preemption by existing federal statutes and the common law's role in filling the regulatory gaps.<sup>106</sup> But more importantly, the opinion stated that courts are the appropriate fora to seek remedy in the absence of comprehensive legislation.<sup>107</sup>

oughness of the statement and of the representations made therein, including whether the Executive supports dismissal of the suit and on what grounds.").

94. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 290 (2007) ("[J]udicial rulemaking takes account of the 'practical problems' that can result from ill-designed legal rules."); *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) ("[It is] not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'"); see also Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1094 (2009) (alleging the district courts feared the magnitude and scope of climate change, and so they grasped for an answer in the political question doctrine justifying dismissal).

95. *But see* *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875-76, 39 ELR 20236 (N.D. Cal. 2009) (rejecting this analysis and determining that the scale of climate change is so large that prior environmental lawsuits "do not provide any guidance that would enable the court to reach a resolution of this case in any 'reasoned' manner").

96. See *supra* Part I.A., for the complete list of these formulations.

97. *AEP*, 582 F.3d at 332 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

98. See *Barisch v. Columbia Gulf Transportation Co.*, 467 F. Supp. 2d 676, 687-88 (E.D. La. 2006) ("[T]he mere fact that the government has studied the issue of coastal wetlands loss in Louisiana creates no conflict with judicial involvement in this lawsuit, such that it merits application of the political question doctrine."); Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5 (2008) (making a strong case against preemption by inaction against state regulation, though this focuses on issues of federalism, the rationale is not entirely divorced from preemption of litigation).

99. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.D.C. 2007). See generally Seth Korman, *The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable Fixes*, 9 RICH. J. GLOBAL L. & BUS. 85, 103-06 (2010).

100. *Beaty v. Iraq*, 480 F. Supp. 2d 60, 79 (D.D.C. 2007) ("[T]he deference due a statement filed by the Executive Branch does hinge in large part on the thor-

101. *AEP*, 582 F.3d at 332 ("U.S. emissions policy seeks to eventually achieve the 'stabilization and eventual reduction in the generation of greenhouse gases,' . . . and to 'limit mankind's adverse effect on the global climate . . . .") (quoting Energy Policy Act of 1992, 42 U.S.C. §§13382(a)(2), (g); the Global Climate Protection Act of 1987, §1103(a)(3)).

102. *Id.* at 331:

Defendants acknowledge that this country's official policy and Congress's strategy is to reduce the generation of greenhouse gases. Elsewhere, they point to a policy of research as a prelude to formulating a coordinated, national policy. They also assert that U.S. policy is "not to engage in unilateral reduction of domestic emissions."

(Citation omitted.)

103. See, e.g., *supra* Thorpe, note 52, at 93-94, for a more detailed discussion on the polycentricity of regulation and litigation, illustrating the false dichotomy between the two as the judiciary inevitably makes policy decisions and interprets legal rules, fills gaps, and resolves conflicts or ambiguities.

104. *AEP*, 582 F.3d at 330 (emphasis omitted).

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

106. *Id.* at 330-31 (discussing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)).

107. *Id.* ("[A] plaintiff is not obliged to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an action to invoke the remedy it seeks.").

He drew support in the current political trends where Congress has called for further study into climate change and has set future goals to limit the prevalence of GHGs in the atmosphere.<sup>108</sup> Finally, he proposed that the “legislative branch is free to amend the CAA to regulate CO<sub>2</sub> emissions and that the executive branch, by way of the EPA, is also free to regulate emissions.”<sup>109</sup> As it appears, Judge Hall has given explicit instructions to the other branches of government in how to preempt judicial authority in determining these nuisance actions, implying that this may be the more desirable course. Presumably, it is in this period of political stagnation where the door is opened for the judiciary to act.<sup>110</sup>

In contrast, Judge Dennis approached the preemption debate from a different angle. This is where the distinguishing feature of *Comer* as a state common-law claim, as opposed to *AEP*, which includes federal common-law claims, becomes relevant because preemption would foreseeably affect these two classes of suits differently. The tone of this opinion suggests there may be a preference for state common law to stand, rather than become preempted by federal legislation.<sup>111</sup> The court prominently mentions providing “due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.”<sup>112</sup> This seems to envision future preemption through a lens of federalist values, and the conflict between federal and state governments will become a concern when state common-law actions arise, rather than between the judiciary and legislature. Distinguishing between these two claims as state and federal and the effect preemption will have upon each of them illustrates the various roles at multiple levels of government that will become necessary in regulating against climate change.<sup>113</sup> For instance, states could still fulfill an enforcement role

through continuing litigation, even after federal legislation goes into effect.

While there is controversy amongst commentators over whether courts serve as the appropriate fora to resolve these issues, even in the absence of legislation,<sup>114</sup> one of the prominent arguments against them is that they are not politically accountable to the public.<sup>115</sup> Applied here, this argument holds more theoretical prestige than practical accuracy, because in our democratic system of government, it is the people that should ultimately control decisions of policy through their power in the electorate. But in the climate change context, there seems to be a choice between the lesser of two evils between policymakers and the judiciary. The judiciary needs some mechanism of enforcement when an industry seeks to take advantage of scientifically complex issues by spreading misinformation to the public and promoting political bias. As witnessed by the frequent frustration of proposed legislation and combative advertising, legislators are prone to political bias and easily succumb to the persuasive force of lobbyist efforts.<sup>116</sup> Where private interest groups once created coalitions to undermine scientific studies over whether climate change exists, they now seek to stall less-favorable emissions policies. Comparatively, judges enjoy a position somewhat removed from these influences. The question is more aptly phrased: do we wish for regulation that favors lawyers or lobbyists?<sup>117</sup> The answer to this is a matter of preference, but the point of this discourse is to give effect to the idea that courts may not be ideal, but in a problem as multidimensional as climate change with murky political affiliations and polarized public opinion, they may be the most effective, especially where the legislature has accepted the ramifica-

108. *Id.* at 332 (quoting the Energy Policy Act of 1992, 42 U.S.C. §§13382(a)(2), (g); the Global Climate Protection Act of 1987, §1103(a)(3)).

109. *Id.*

110. See Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1, 45 (2005) (appraising the value of the judiciary in welcoming state participation in the regulatory process when politically stagnant); see also Philip Weinberg, “Political Questions”: *An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL’Y F. 155, 161 (2008) (commenting on *Barisch v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006), and the court’s finding that “environmentally harmful activity is potentially subject to regulation by legislative and executive action in no way transforms it into a political question”).

111. Interestingly, in the petition for rehearing en banc in *AEP*, the Petitioner-Defendants alleged that the Fifth Circuit vitiated the political question doctrine by stating it is unnecessary when Congress could legislate against the decision. Petition at 9, *AEP*, No. 05-5104-cv, 2009 WL 3756471 (2d Cir. 2009). This argument seems to confuse the political question doctrine with preemption. See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1395 (1999) (noting the political question doctrine implicates a horizontal relationship between the federal courts and other branches, whereas preemption implicates a vertical one between the federal government and the states).

112. *Comer v. Murphy Oil USA*, 585 F.3d 855, 878, 39 ELR 20237 (5th Cir. 2009) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)).

113. See generally Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005) (proposing an interdisciplinary, diagonal regulatory approach to climate change cutting across international, national, state, and local levels of governance).

114. Compare Hari M. Osofsky, *Is Climate Change “International”? Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009). Prof. Hari Osofsky addresses the multi-scalar aspects of climate change regulation and describes the need for each level of government to fulfill a role in regulating emissions, be it local, state, national, or international government. Courts serve a vital role by continuing the dialogue on climate change as well as providing a rescaling mechanism, and thus, transferring duties at multiple levels of government, with Jim Gitzlaff, *Getting Back to Basics: Why Nuisance Claims Are of Limited Value in Shifting the Costs of Climate Change*, 39 ELR 10218 (Mar. 2009) (pointing out several issues with the nuisance doctrine in addressing the impacts and harms of climate change given the magnitude of the problem, without suggesting there is a more suitable standard for the courts to apply to climate change litigation).

115. See, e.g., Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (1988) (“[T]he ability of an elite corps of judges to wield enormous power that is unchecked by popular opinion and criticism seems to contradict liberal democracy’s fundamental premise.”).

116. See, e.g., Matthew Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ELR 10230, 10234-35 (Mar. 2009). Matthew Pawa, one of the attorneys involved in the plaintiffs’ side of the *AEP* case, discusses the deceptive practices employed by industries in denying the existence of climate change, including the formation of organizations such as “The Cooler Heads Coalition,” the “Global Climate Coalition,” and the “Science and Environmental Policy Project.” They later converted membership into trade associations once members began dropping out due to public image concerns. Presently, industry continues to fund pseudo-scientific “skeptics” to frustrate the scientific findings of climate change and host public relations campaigns against the body of scientists in consensus on the effects of climate change.

117. See W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575 (1999) (arguing that when the judiciary usurps what he perceives to be the legislature’s role in the tobacco litigation cases, this favors lawyers and interest groups, because it is primarily their voices that are heard in the proceedings of a lawsuit as the parties and representatives).

tions of climate change, but political stagnation has slowed any movement toward a legislative solution.

#### IV. Options for Energy Utilities in the Face of Litigation

The message in these two opinions will reach a far wider audience than the other two branches, however. Heavy emitters should become well aware of the consequences of these decisions with due haste. Subjecting emitters to litigation will likely pressure these corporations and interest groups into lobbying for some type of federal standard, and stimulate policymakers to act.<sup>118</sup> Where they once fought these regulations, the threat of litigation setting a stricter regulation threshold will encourage these interest groups to push for preemptive legislation. It is more likely that federal regulation would afford lenient mandatory reductions at the front-end of implementation and incrementally restrict emissions periodically thereafter, giving emitters some leeway to gradually reduce their emissions over an extended period.<sup>119</sup> In states adopting their own regulations, double-regulation by the courts and states would add further incentive for companies in those states to press for federal legislation.<sup>120</sup> Seeking the greatest protection, they would likely prefer federal ceiling preemption, which would comprehensively preempt state regulation, and likely the courts' jurisdiction as well. But even floor preemption, setting only a baseline standard while allowing state regulations and judicial jurisdiction to persist, would at least mitigate the reasonableness component in their defense of nuisance actions by reducing mental culpability for emitting at levels in compliance with the regulations, even though they may violate more strict state

regulations.<sup>121</sup> Moreover, floor preemption would be less likely to preempt state nuisance actions, such as are present in *Comer*, because courts may interpret such action as the intent to maintain states' police powers when they are imposing more strict standards than the federal floor threshold, preserving both legislative and judicial authority.

However, there is always the possibility that regulatory action by the executive or legislative branch will not completely preempt nuisance claims.<sup>122</sup> In the wake of *Comer*, where the plaintiffs have sued for past damages, sources could still be subject to litigation if these former emissions are not given the effect of a pardon through preemption. But even in this case, emitters should seek partial preemption, because it would cut off the hemorrhaging of liability by setting a standard for them that would negate liability in the future. Making this option less appealing, litigation itself would still be permissible, and these companies would have to absorb the burdensome costs of defending these actions.

One can only speculate on other measures emitters can take to shield themselves from liability in the period before preemptive legislation. It is possible that installing cleaner technology or investing in alternative energy production may make companies less appealing targets for plaintiff environmental interest groups. Of course, this would not provide any legal protection if a suit is brought against them seeking compensation for past emissions, but it may render suits seeking injunctive relief moot, because they may have already adopted the types of technologies that the courts would impose on them in fashioning appropriate injunctive relief. However, if the injunctive relief takes the form of caps on emissions, again, unless the technology or alternative energy would reduce emissions below that line, they would not provide any legal protection.

#### V. Conclusion

The Second and Fifth Circuits have taken a bold step forward in granting a forum for climate change nuisance litigation. It remains to be seen whether and how the Ninth Circuit will respond, or if the Fifth Circuit's decision will endure. The current state of affairs between the circuits might make this issue attractive for a grant of certiorari by the Supreme Court. But even with uncertainty on the horizon, these two recent decisions in *AEP* and *Comer* symbolize a dramatic turn of the tide.

The third *Baker* formulation continues to dominate the test when applied to these climate change nuisance suits, and

118. See *Where Leading Plaintiffs' Lawyers Are Leading Now*, 28 No. 12 OF COUNSEL 10 (Dec. 2009) (interviewing Gerald Maples, the leading plaintiff attorney in *Comer*, as he advises corporations to participate in the regulatory process in the hope of achieving preemption); Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1576 (2007) (predicting climate change litigation will only be viable in the period leading up to federal regulatory action based on Supreme Court precedent that suggests a likelihood of preemption).

119. Assuming the chosen regulatory regime is modeled after previous emission reduction programs such as the Acid Rain Deposition Program, and the schematics of the Montreal Protocol, which utilized "quantified emissions limitation and reduction objectives" (QELRO). Under these QELRO schemes, restrictions on emissions would increase over time, forcing only small reductions at first, but over a period of years and decades the allowable level of emissions would steadily decline until a stated goal is achieved. See Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1552-53, and CAA Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§7401-7700 (1994)).

120. To date, state governments have moved more aggressively in climate change efforts than the federal government. California, Massachusetts, New Hampshire, and New Jersey are at the forefront and have all implemented climate change legislation with the intent of dramatically reducing emissions in the short-term future. See Robert B. McKinstry, *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 33-54 (2004) (surveying these several regulatory regimes and the forms of integration and requirements they have placed on emitters). California, the most ambitious of these efforts, seeks to reduce emissions to 1990 levels by 2020, in the California Global Warming Solutions Act of 2006. See CAL. HEALTH & SAFETY CODE Div. 25.5 (West Supp. 2007).

121. For a comparative analysis of the preemptive effects of ceiling and floor preemption through federal legislation, see Brian Burgess, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493*, 84 N.Y.U. L. REV. 258 (2009) (advocating for greater environmental protections through floor preemption that would grant the states authority to develop regulations of a stricter nature than the threshold of the federal regulation).

122. After all, it is within the province of the judiciary to determine whether their power has been usurped through legislative preemption. See *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 438 F. Supp. 2d 291, 300 (S.D.N.Y. 2006) ("[T]he Court can then assess the impact of that decision on cases.").

there is no indication that this is subject to change in the near future. While the second formulation has carried some weight, it has not yet served as the determining consideration in any dismissals. Furthermore, the courts have not found the foreign policy implications of these suits to create a significant enough constraint on the executive branch's discretion in this area.

As it stands, heavy emitters appear to have lost an ironclad defense to litigation. Where claims were once summarily dismissed by district courts, there is now a much greater probability that these suits will at least make it to the discovery phase. Therefore, it is becoming more apparent that emitters

will need to adopt a new strategy, lest they face a bombardment of regulation and potential liability for past emissions. Seeking comprehensive legislation would likely serve as the most favorable source of regulation for these emitters, because it would provide a uniform standard that would reach across state boundaries. Though the political question doctrine is still uncertain, it would still be advisable for these companies to seek preemptive legislation sooner rather than later. Legislation takes time, and even with a strong lobbying effort from these groups, it will take time to shape a policy that will be more favorable to their interests, and to have that policy passed in both houses of Congress.