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2011]

RISING TEMPERATURES, POLITICAL QUESTIONS, AND
PUBLIC NUISANCES: THE SECOND CIRCUIT WEIGHS IN ON
THE CLIMATE CHANGE DEBATE IN *CONNECTICUT*
V. *AMERICAN ELECTRIC POWER CO.*

I. INTRODUCTION

The United States House of Representatives' passage of the Waxman-Markey Act, which sought to limit the nation's overall greenhouse gas (GHG) emissions through a cap-and-trade system, led many environmentalists to hope the federal government would finally address the threat posed by climate change.¹ Those hopes were shattered less than a year later when Senate Majority Leader Harry Reid stopped pursuing the cap-and-trade legislation upon realizing he could not muster the filibuster-proof majority needed for passage.² Due to Congress's failure to substantively address global warming and the bleak prospects of any comprehensive legislation, concerned citizens have begun searching for alternate routes to reduce the nation's GHG emissions.³ Recently, some states and environmental groups have initiated litigation against large GHG

1. See John M. Broder, *House Backs Bill, 219-212, to Curb Global Warming*, N.Y. TIMES, June 27, 2009, at A1 (documenting House's passage of Waxman-Markey Act). The objective of the bill was to reduce greenhouse gases in the United States by 17 % from their 2005 levels by the year 2020, and 83 % by the year 2050. *Id.* While some environmentalists had problems with the bill's concessions to the coal industry and other special interests, prominent environmental groups, including the Sierra Club, Environmental Defense Fund, and World Wildlife Fund, supported it. *The Cap-and-Trade Bill: Waiting for the Other Shoe to Drop*, ECONOMIST, Sept. 12, 2009, at 83, available at <http://www.economist.com/node/14419395> (noting compromises that environmentalists were willing to make). In response to the House's passage of Waxman-Markey, the American Petroleum Institute (an oil industry trade group) funded a campaign by an organization called Energy Citizens. *Id.* This organization sponsored rallies to protest the climate change bill in a handful of American cities. *Id.*

2. See *America's Climate Policy: Capped*, ECONOMIST, July 31, 2010, at 50, available at <http://www.economist.com/node/16693293> (explaining Senator Reid's decision to remove GHG cap-and-trade bill from Senate agenda due to insufficient support from members). "With the mid-term elections sure to swing heavily away from Mr. Reid's Democrats, there is now no possibility of comprehensive climate-change legislation in America for years." *Id.*

3. See *Climate-Change Policy: Let it Be*, ECONOMIST, July 31, 2010, at 69, available at <http://www.economist.com/node/16693691> (observing that after cap-and-trade legislation died in Senate, groups desiring to reduce emissions have identified alternate strategies). In lieu of federal legislation, some of the methods environmental groups plan on using to reduce GHG emissions include lobbying the U.S. Environmental Protection Agency to regulate greenhouse gases under the Clean Air Act and encouraging individual states to implement their own cap-and-trade schemes. *Id.*

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emitters under the tort theory of public nuisance.⁴ Given the widely perceived lack of meaningful political action regarding global warming, such litigation may be one of the best available tools for addressing climate change for the foreseeable future.⁵

Nevertheless, climate change litigation is very controversial.⁶ Considering the partisan debate surrounding the issue and the problem's truly global scope, it should come as no surprise that the political question doctrine has emerged as an obstacle for climate change litigants.⁷ All four global warming cases filed to date against industry defendants—car manufacturers, oil and gas producers, and electrical utilities—were initially dismissed as nonjusticiable political questions.⁸

In *Connecticut v. American Electric Power Co. (American Electric)*,⁹ the Second Circuit rejected the application of the political question doctrine, opening a path for climate change actions to be adjudicated on their merits.¹⁰ In *American Electric*, eight states, New York City, and three land trusts sued six of the nation's largest electric power companies that operated fossil fuel-fired plants in twenty different states.¹¹ The plaintiffs sought an abatement of the companies' alleged ongoing contributions to the public nuisance of global

4. See, e.g., *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 266-68 (S.D.N.Y. 2005) (asserting public nuisance claim against power plant emissions); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *1-2 (N.D. Cal. Sept. 17, 2007) (filing claim against automakers for contributing to public nuisance of global warming); *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (pursuing tort-based climate change litigation).

5. See David A. Grossman, *Warming Up to a Not-so-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 6 (2003) (explaining how public nuisance actions could provide viable method for reducing GHG emissions in current political environment where climate change legislation is unlikely in foreseeable future).

6. See Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L. 79, 85 (2008) (observing controversy surrounding tort-based climate change litigation).

7. See Maria V. Gillen, *The Rebirth of the Political Question Doctrine*, 23 NAT. RESOURCES & ENV'T 23 (2008) (discussing how political question doctrine has obstructed climate change litigation).

8. See *id.* (noting that climate change lawsuits based on public nuisance were dismissed by district courts as presenting nonjusticiable political questions).

9. 582 F.3d 309 (2d Cir. 2009).

10. See Tom Munteer, *Returning the Common Law to its Rightful Place*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10361, 10361 (2010) (commenting that *American Electric* reopened possibility of utilizing public nuisance actions to address climate change).

11. See *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 316-17 (2d Cir. 2009) (discussing facts and procedural posture of case).

warming.¹² The District Court for the Southern District of New York dismissed the claim as a nonjusticiable political question, but the Second Circuit reversed on appeal.¹³ After an extensive analysis, the court held that the plaintiffs' action did not implicate the political question doctrine and permitted the case to proceed to the merits stage.¹⁴

This Note will analyze the Second Circuit's treatment of the political question doctrine in *American Electric*, along with the decision's implications for future climate change litigation.¹⁵ Part II of this Note provides the case's factual background, the parties' primary arguments regarding the political question issue, and the court's holding.¹⁶ In Part III, this Note explains the legal background of the Second Circuit's resolution of this issue by discussing the political question doctrine test and how courts have applied it in various factual contexts.¹⁷ Part IV outlines the reasoning the Second Circuit utilized to arrive at its holding on the political question issue.¹⁸ Part V critically examines the court's analysis and conclusions.¹⁹ Finally, Part VI discusses the potential impact of *American Electric* on the ability of future climate change litigants to overcome the justiciability barrier that has previously derailed such lawsuits.²⁰

II. FACTS

The Second Circuit's decision in *American Electric* arose out of a lawsuit filed in July 2004 by eight states—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin—the city of New York, and three private land trusts against six utility and service companies in the electric power industry.²¹ The

12. *See id.* at 318 (explaining relief sought by plaintiffs).

13. *See id.* at 315 (holding that political question doctrine does not apply to plaintiffs' claims and vacating judgment of district court).

14. *See id.* at 314-15 (providing brief overview of case's factual background and major issues).

15. For a description of the Second Circuit's application of the political question doctrine, see *infra* notes 110-53 and accompanying text.

16. For a further discussion of the facts of *American Electric*, see *infra* notes 21-39 and accompanying text.

17. For an explanation of the applicable legal background surrounding *American Electric*, see *infra* notes 40-109 and accompanying text.

18. For a narrative analysis of the Second Circuit's decision, see *infra* notes 110-53 and accompanying text.

19. For a critical analysis of the court's holding in *American Electric* on the political question issue, see *infra* notes 154-208 and accompanying text.

20. For a further discussion of the potential impact of *American Electric*, see *infra* notes 209-48 and accompanying text.

21. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 316 (2d Cir. 2009) (providing description of litigants). The six defendants named in the complaint

complaint sought to abate the “defendants’ ongoing contribution to a public nuisance,” stemming from their “substantial contribut[ion] to elevated levels of carbon dioxide and global warming.”²²

According to the plaintiffs, the defendants’ contributions to the atmospheric carbon level were quite significant.²³ The defendants’ annual emissions comprised approximately one quarter of the U.S. electric power sector’s carbon dioxide emissions and about ten percent of all carbon dioxide emissions from human activities nationwide.²⁴ Furthermore, the plaintiffs’ complaint cited reports from the Intergovernmental Panel on Climate Change and the U.S. National Academy of Sciences as evidence of the strong scientific consensus that heightened GHG concentrations cause global warming.²⁵

While the climate change threat may be global in scope, the plaintiffs’ complaint alleged climate change was imposing acutely local, harmful effects on their states’ environments, residents, and property.²⁶ According to the states, climate change was reducing California’s mountain snowpack, “the single largest freshwater source, critical to sustaining water to the State’s 34 million residents during the half of each year when there is minimal precipitation.”²⁷ The states also alleged they were experiencing other harmful ef-

included: American Electric Power Company, Inc.; American Electric Power Service Corporation; Southern Company; Tennessee Valley Authority; Xcel Energy; and Cinergy Corporation. *Id.* Five of the defendants directly generated GHG emissions as utility companies, whereas American Electric Power Service Corporation merely provided management and professional services on behalf of American Electric Power Company. *Id.* at 316 n.1.

22. *Id.* at 316 (describing allegations made in states’ complaint).

23. *See id.* (noting plaintiffs’ allegations as to magnitude of defendants’ annual GHG emissions).

24. *Id.* (outlining plaintiffs’ claims regarding defendants’ contribution to atmospheric GHG levels and global warming). The plaintiffs claimed the defendants’ GHG emission levels were particularly unacceptable given how the companies have “practical, feasible and economically viable options for reducing emissions.” *Id.* at 317. Furthermore, according to the plaintiffs, the implementation of such GHG-reducing alternatives by the defendants would not require a material rise in consumers’ electricity costs. *See id.*

25. *See id.* at 316-17 (noting plaintiffs’ evidence that elevated GHG emissions cause global warming). The plaintiffs also stated that a proportional relationship exists between GHG emissions and the harm posed by global warming: “The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries.” *Id.* Conversely, the “lower the level of emissions, the smaller and slower total temperature change will be, with lesser injuries.” *Id.*

26. *See Am. Elec.*, 582 F.3d at 317 (noting harmful effects of climate change that states alleged were both already occurring and likely to occur or accelerate in future).

27. *Id.* (discussing details alleged in plaintiffs’ complaint).

fects of climate change, including warmer average temperatures; later freezes and earlier spring thaws; and a decrease in average snowfall and the duration of snow cover in New England and California.²⁸ The plaintiffs predicted that if carbon emissions are not reduced to a sustainable level, a catalogue of injuries would befall upon them within ten to one hundred years.²⁹ The impact of these injuries on property, ecology, and public health, according to the plaintiffs, would cause them extensive economic harm.³⁰

The plaintiffs sought equitable relief in the U.S. District Court for the Southern District of New York.³¹ Specifically, they requested that the court permanently enjoin each defendant to abate the public nuisance of excessive emissions, first by capping their emissions, and second by ordering an emissions reduction of a specified percentage each year for at least ten years.³² The defendants, however, contended that the plaintiffs failed to state a claim upon which relief could be granted because, *inter alia*: (1) there is no recognized federal common law cause of action to reduce GHG emissions; (2) separation of powers principles, specifically the political question doctrine, precluded the court from adjudicating these actions; and (3) congressional legislation has displaced any federal common law cause of action addressing global warming.³³

The district court refused to allow the case to proceed to the merits stage, dismissing it as a nonjusticiable political question.³⁴

28. *See id.* (discussing states' allegations of harm they suffered from climate change).

29. *See id.* at 318 (detailing future injuries state litigants claim they will incur if global warming is not mitigated through reduction in GHG emissions). Specifically, the states claimed they would suffer the following future injuries:

[I]ncreased illnesses and deaths caused by intensified and prolonged heat waves; increased smog, with a concomitant increase in residents' respiratory problems; significant beach erosion; accelerated sea level rise and the subsequent inundation of coastal land and damage to coastal infrastructure; salinization of marshes and water supplies; lowered Great Lakes water levels, and impaired shipping, recreational use, and hydro-power generation; more droughts and floods, resulting in property damage; increased wildfires, particularly in California; and the widespread disruption of ecosystems, which would seriously harm hardwood forests and reduce biodiversity.

Id.

30. *Id.* (describing economic injuries states allege they will incur upon manifestation of predicted future harms).

31. *Am. Elec.*, 582 F.3d at 317 (noting venue where *American Electric* plaintiffs filed suit).

32. *Id.* (explaining equitable relief sought by plaintiffs).

33. *Id.* at 319 (illustrating grounds defendants asserted during motion to dismiss plaintiffs' complaint before district court).

34. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (dismissing case as nonjusticiable under political question doctrine).

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The court reasoned that the political question doctrine applied because resolution of the plaintiffs' "transcendently legislative" lawsuit required initial policy determinations that must first be made by the elected branches.³⁵ According to the district court, the required initial policy determinations included the "identification and balancing of economic, environmental, foreign policy, and national security interests."³⁶ Accordingly, the court rejected the plaintiffs' argument that their lawsuit presented a "simple nuisance claim of the kind courts have adjudicated in the past."³⁷ Rather, the district court agreed with the defendants that "none of the pollution-as-public-nuisance cases cited by [p]laintiffs has touched on so many areas of national and international policy."³⁸ On appeal, the Second Circuit reversed, holding that the district court erred in dismissing the complaint on political question grounds.³⁹

III. BACKGROUND

The political question doctrine is a justiciability doctrine articulated by the U.S. Supreme Court which operates essentially as a function of the separation of powers principle.⁴⁰ When the political question doctrine applies, a court is prevented from adjudicating the case.⁴¹ The genesis of the doctrine can be traced back to the celebrated case of *Marbury v. Madison*,⁴² where Chief Justice

35. *See id.* at 272 (commenting on what court perceived to be legislative nature of plaintiffs' lawsuit and requested relief).

36. *Id.* at 274 (observing initial policy decisions court would have to make if it decided plaintiffs' case on its merits).

37. *Id.* at 272 (rejecting plaintiffs' argument that their case was ordinary nuisance action).

38. *Id.* (distinguishing plaintiffs' lawsuit from previous environmental public nuisance cases). The plaintiffs cited *Missouri v. Illinois*, *Georgia v. Tennessee Copper Co.*, and *Illinois v. City of Milwaukee* as evidence that courts had previously handled important and wide-reaching pollution cases under this tort doctrine. *See id.*

39. *See Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 315 (2d Cir. 2009) (summarizing Second Circuit's holding on political question issue). The court also ruled in the plaintiffs' favor on a number of collateral issues, clearing the way for a federal court to decide the plaintiffs' action on the merits on remand. *See id.* Specifically, the court also held that all of the plaintiffs had standing to sue; the federal common law of nuisance governed their claims; the plaintiffs had successfully stated claims under the federal common law of nuisance; and their claims under federal common law were not displaced by Congressional or EPA action. *Id.*

40. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (noting relationship between judiciary and coordinate branches of government provides rationale for political question doctrine).

41. *See* Shawn M. LaTourette, Note, *Global Climate Change: A Political Question?*, 40 RUTGERS L.J. 219, 225 (2008) (summarizing political question doctrine and its effect on court's ability to adjudicate case).

42. 5 U.S. (1 Cranch) 137, 166 (1803) (discussing nature of political question).

Marshall remarked, “where the heads of departments are the political or confidential agents of the executive,. . . act[ing] in cases in which the executive possesses a constitutional or legal discretion,. . . their acts are only politically examinable.”⁴³

Despite its historical pedigree, the doctrine is quite controversial and has been severely criticized by scholars who favor robust judicial review.⁴⁴ These scholars view a doctrine that excludes constitutional issues from the judiciary’s reach with “strict and skeptical scrutiny.”⁴⁵ The political question doctrine contains two strands: one is constitutionally-based, arising from the text and structure of the document,⁴⁶ while the other is prudential and not constitutionally required.⁴⁷

The Supreme Court delivered its most comprehensive, and often cited, articulation of the political question doctrine in *Baker v. Carr* (*Baker*).⁴⁸ The Court identified six factors in *Baker*, any one of which, if deemed “inextricable from the case at bar,” indicate the presence of a political question:

- [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards 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 adher-

43. *Id.* (explaining that issues or actions constitutionally committed to political branches are not judicially reviewable).

44. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 133 (3d ed. 2006) (relating how some critics of political question doctrine contend “that it is inappropriate to leave constitutional questions to the political branches of government” because “the judicial role is to enforce the Constitution”).

45. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597, 600 (1976) (observing that because judicial review is now “firmly established as a keystone of our constitutional jurisprudence,” any doctrine that exempts cases from judicial review should be viewed critically).

46. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *COLUM. L. REV.* 237, 247-48 (2002) (describing constitutionally-based strand of political question doctrine). This strand states that the “Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion.” *Id.* at 247.

47. See *id.* at 253 (explaining how prudential strand of political question doctrine is not anchored in constitutional interpretation, but rather was created by courts to protect their legitimacy and avoid conflict with political branches).

48. 369 U.S. 186, 210-11 (1962) (discussing need and Court’s intention to clarify political question doctrine).

ence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁴⁹

These six elements are “probably listed in descending order of both importance and certainty”⁵⁰ and contain both the constitutionally mandated and prudential strands of the political question doctrine.⁵¹

The first *Baker* factor represents the “classical” or constitutionally anchored strand, while the last five factors comprise the prudential strand of the doctrine.⁵² The *Baker* test and its role in the political question doctrine analysis can best be understood by examining the specific areas where the Supreme Court and lower federal courts have either invoked or refused to invoke the doctrine.⁵³ Accordingly, the next section will briefly review how federal courts have applied the *Baker* factors in the following two contexts where the political question doctrine has most commonly been utilized: domestic constitutional issues and disputes implicating foreign policy issues.

A. Domestic Constitutional Issues

Certain recurring domestic political issues have frequently raised political questions.⁵⁴ The Supreme Court has consistently held that controversies arising over the interpretation of the Guarantee Clause, which states that the U.S. guarantees those living in each state a republican form of government, are nonjusticiable.⁵⁵ In *Luther v. Borden*,⁵⁶ for example, the Court held that the text of

49. *Id.* at 217 (providing six-factor test for political question doctrine).

50. See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (indicating order in which *Baker* criteria should be considered).

51. See Barkow, *supra* note 46, at 265 (observing that Court in *Baker* recognized not only classical theory of political question doctrine, but prudential strand as well).

52. See *id.* (identifying which *Baker* factors comprise constitutional and prudential strands of political question doctrine and noting uncertainty regarding second factor’s classification).

53. See CHEMERINSKY, *supra* note 44, at 131 (explaining that to understand how courts are likely to apply political question doctrine, it is necessary to review scenarios where political questions have been found).

54. For a discussion of the domestic issues that tend to raise political questions, see *infra* notes 55-68 and accompanying text.

55. See CHEMERINSKY, *supra* note 44, at 134 (explaining how Court “consistently has held” that cases alleging Guarantee Clause violations are nonjusticiable).

56. 48 U.S. (7 How.) 1, 35-36 (1849) (establishing Guarantee Clause precedent). This seminal Guarantee Clause case involved a trespass claim against a sheriff who claimed he acted under the lawful authority of the Rhode Island government. See *id.* at 34-39. The trespass occurred during a period of political

the Constitution's Guarantee Clause commits to Congress the determination of what government a state establishes.⁵⁷ The Supreme Court has also held that certain congressional decisions concerning the Legislative Branch's processes and members are not judicially reviewable because their interpretation is constitutionally committed to that branch.⁵⁸ This deferential approach was demonstrated in *Field v. Clark*,⁵⁹ where the Court dismissed as nonjusticiable a claim that a tariff law was invalid because a section of the statute passed by Congress was omitted from the final version signed by the President.⁶⁰

Federal courts have often found issues concerning the ratification of constitutional amendments to present nonjusticiable political questions.⁶¹ For example, the Supreme Court held in *Coleman*

turmoil in the state, where two factions claimed to constitute its rightful government. *See id.* at 34. The Supreme Court refused to decide on its merits the issue of which faction constituted the legal government of Rhode Island at the time of the trespass. *See id.*

57. *See id.* at 42 (explaining that issue of which group was rightful government of Rhode Island was constitutionally committed to Congress). The Court explained that the Guarantee Clause commits this decision to Congress because, in order for "the United States to guarantee each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." *Id.*

58. *See* CHEMERINSKY, *supra* note 44, at 143 (noting that Court often finds congressional self-governance nonjusticiable).

59. 143 U.S. 649, 672-73 (1892) (finding tariff law's validity nonjusticiable).

60. *See id.* at 673-75 (explaining why process by which House and Senate pass and certify bills is not justiciable). The Supreme Court, basing its decision largely on what would later become the first *Baker* factor, held that the Constitution committed the issue to the political branches. *See id.* at 670-71. The Court has been unwilling to cede to Congress all constitutional oversight of its decisions pertaining to processes and members, however, particularly when congressional action exceeds the scope of a textual commitment. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 494-505 (1969) (deciding case based on House's passage of resolution to prevent member elected to Ninetieth Congress from taking his seat). In *Powell*, the plaintiff alleged that the House's resolution, excluding him from taking his seat as Congressman, violated the Constitution. *Id.* He argued that Article I, Section Five of the Constitution allows those in Congress, when acting as "the Judge of the Qualifications of its own Members," to base their judgment on only the qualifications explicitly stated in the text. *See id.* at 521-24. The Court agreed and held that no political question was present because Congress's decision to exclude the plaintiff was based on factors beyond those explicitly required in the text. *See id.* at 548. The Court explained that Article I, Section Five is "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." *Id.* Therefore, the political question doctrine did not bar the Court from adjudicating the plaintiff's claim. *Id.*

61. *See* CHEMERINSKY, *supra* note 44, at 145-46 (observing that, while Supreme Court has invoked political question doctrine in disputes over ratification procedures, it has done so inconsistently).

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*v. Miller*⁶² that the Constitution consigned to Congress the exclusive authority to determine the efficacy of ratifications by state legislatures, in light of previous rejection or withdrawal.⁶³ The Court has also suggested that particular aspects of the impeachment process textually committed to Congress are not judicially reviewable.⁶⁴ In *Nixon v. United States*,⁶⁵ the Court held that the Constitution's assertion "[t]he Senate shall have the sole Power to try all impeachments," made the Senate responsible for interpreting the meaning of the word "try."⁶⁶ Finally, a plurality of the Court in *Vieth v. Jubelirer*⁶⁷ recently held that political gerrymandering claims are nonjusticiable because "no judicially discernible and manageable standards. . . have emerged" for adjudicating them.⁶⁸

B. Foreign Policy

The political question doctrine is raised more often in the foreign affairs context than in any other area.⁶⁹ Cases that directly implicate foreign affairs issues are sometimes deemed nonjusticiable because their resolution "frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion de-

62. 307 U.S. 433, 450 (1939) (finding Constitution committed power to Congress to determine effectiveness of state legislature's ratification of constitutional amendments).

63. *See id.* at 446-51 (noting that historical precedent of Fourteenth Amendment's passage—where Congress decided certain states had ratified amendment despite previous rejection or attempted withdrawal—supports Court's finding that this matter was political question). The Court also determined that only Congress had the authority to decide the duration of the "reasonable time" by which an amendment must be ratified because no standard or criteria existed with which a court could reach an appropriate decision. *See id.* at 453-55.

64. *See* CHEMERINSKY, *supra* note 44, at 148-49 (discussing how Court first recognized impeachment as implicating political question doctrine).

65. 506 U.S. 224, 225 (1993) (finding plaintiff's claim that Senate impeachment procedures violated Impeachment Trial Clause nonjusticiable).

66. *See id.* (observing that Impeachment Trial Clause met *Baker's* textual commitment factor because Clause's language and structure reflect "a grant of authority to the Senate, and the word 'sole' indicates that the authority is reposed in the Senate and nowhere else"). Additionally, the court observed that judicial review of congressional impeachment proceedings would "be inconsistent with the Framers' insistence that our system be one of checks and balances . . . [because] impeachment was designed to be the *only* check on the Judicial Branch by the Legislature." *Id.* at 235.

67. 541 U.S. 267 (2004).

68. *See id.* at 279 (finding that political gerrymandering claims present political question).

69. *See* LaTourette, *supra* note 41, at 935 (observing that foreign relations issues constitutionally committed to elected branches are subject to political question doctrine).

monstratively committed to the Executive or Legislature.”⁷⁰ While some foreign affairs cases may inextricably implicate these first two *Baker* factors, the Court cautioned in *Baker* that “it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”⁷¹

Because the Constitution commits responsibility for setting the nation’s foreign policy to the political branches, as a general matter, cases are only deemed nonjusticiable if their adjudication would require a court to: (1) make direct foreign policy decisions; (2) directly challenge the merits or wisdom of a foreign policy decision already made; or (3) impermissibly interfere with the political branches’ conduct of foreign affairs.⁷² Conversely, the lawsuit is likely to be justiciable when a case has a more indirect or attenuated connection to U.S. foreign policy and states a cause of action in tort or another substantive doctrine that courts have experience applying.⁷³

When deciding a case on its merits requires a significant foreign policy decision, courts will find a political question.⁷⁴ The Supreme Court has held, for example, that the political branches of the government have the power to determine when a war has commenced and ended.⁷⁵ The issue of “who is the sovereign of a territory” was found by the Court to be reserved to the political

70. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (clarifying why some foreign relations issues implicate political question doctrine).

71. See *id.* (explaining how “sweeping statements” that all cases touching foreign affairs are political questions are incorrect and that justiciability determination requires “a discriminating analysis of the particular question posed”). The Court also stated that an analysis of the justiciability of a foreign affairs case should include consideration of the litigated issue’s history of management by the political branches, “its susceptibility to judicial handling in light of the nature and posture of the specific case,” and the potential consequences of deciding the case. *Id.*

72. See LaTourette, *supra* note 41, at 231-35 (providing overview of scenarios where cases touching foreign affairs are most likely to be deemed nonjusticiable). While these nonjusticiable cases almost invariably implicate the first prong of the *Baker* test (constitutional commitment of issue to coequal branch), courts often also find the presence of the second prong (lack of judicial standard or legal rule to apply). See *id.*

73. See *id.* at 230 (explaining that litigation centering on tort or property claims attenuated from foreign affairs issue is less likely to raise political question).

74. See CHEMERINSKY, *supra* note 44, at 140-41 (noting various factual scenarios where adjudication would require foreign policy decision and courts have thus invoked political question doctrine).

75. See *Martin v. Mott*, 25 U.S. 19, 19 (1827) (holding that authority to determine commencement of hostilities is vested in political branches and therefore nonjusticiable).

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branches whose determination “conclusively binds the courts.”⁷⁶ The Supreme Court also held that, because Article II of the Constitution gives the Executive Branch the power to send and receive ambassadors, courts should defer to the Secretary of State regarding a person’s diplomatic status.⁷⁷ Finally, federal courts will follow the political branches’ judgment of whether a treaty is still in force.⁷⁸

Additionally, courts invoke the political question doctrine when a litigant directly challenges the wisdom or legality of a congressional or presidential foreign policy decision.⁷⁹ In *Dickson v. Ford*,⁸⁰ a taxpayer brought an Establishment Clause challenge against a congressional enactment authorizing emergency military aid to Israel.⁸¹ The Fifth Circuit found the claim posed a nonjusticiable political question by directly challenging the President and Congress’s policy decision to “maintain Israel’s self-defense capacity.”⁸² The court explained that judicial review of the aid policy would implicate the first (constitutional commitment of issue to co-equal branch), second (lack of applicable judicial standard), and fifth (need for government to speak with single voice) *Baker* factors.⁸³

76. See *United States v. Belmont*, 301 U.S. 324, 326-28 (1939) (finding that President’s recognition of foreign governments was not reviewable because “conduct of foreign relations was committed by the Constitution to the political departments”).

77. In *Re Baiz*, 135 U.S. 403, 430 (1890) (observing that courts must accept certification of State Department as dispositive on issue of diplomatic status because such determinations are left to Executive Branch discretion).

78. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1888) (explaining how treaty status is political question and power to determine these matters was not confided in Judiciary); see also *N.Y. Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 954 F.2d 847, 852 (2d Cir. 1992) (holding that treaty between U.S. and Taiwan remained in effect, despite former no longer recognizing latter, because American political branches clearly wanted to preserve treaty).

79. See, e.g., *DaCosta v. Laird*, 471 F.2d 1146, 1146 (2d Cir. 1973) (finding direct challenge to President’s foreign policy decision nonjusticiable). In *DaCosta*, the Second Circuit invoked the political question doctrine in response to the plaintiff’s claim that President Nixon’s temporary escalation of the Vietnam War was illegal. See *id.* at 1147. Besides noting “the Constitution’s specific textual commitment of decision-making responsibility . . . in a theatre of war to the President,” the court also emphasized that it lacked discoverable and manageable standards for deciding “whether a specific military operation constitutes an ‘escalation’ of the war.” *Id.* at 1154-55.

80. 521 F.2d 234 (5th Cir. 1975).

81. See *id.* at 235 (describing plaintiffs’ Establishment Clause challenge to congressional act giving emergency military aid to Israel).

82. See *id.* at 236 (observing that plaintiffs’ claim directly challenged foreign policy decision of political branches).

83. See *id.* (explaining how political question doctrine barred lawsuit because adjudicating it would implicate first, second, and fifth *Baker* factors).

The political question doctrine is unlikely to be implicated when a case touches on foreign policy in a more attenuated manner; involves the violation of an individual right; and requires the application of a legal standard or rule that the judiciary has an extensive history of utilizing.⁸⁴ In *Klinghoffer v. S.N.C. Achille Lauro* (*Klinghoffer*),⁸⁵ the Second Circuit refused to invoke the doctrine to dismiss the plaintiffs' tort claims against the Palestinian Liberation Organization (PLO) for its seizure of an Italian cruise ship and the killing of one of the ship's passengers.⁸⁶ While the plaintiffs' claims touched on foreign policy issues and arose in a politically charged context, the court explained that this "does not convert what is essentially an ordinary tort suit into a non-justiciable political question."⁸⁷ The court observed that the crucial first *Baker* factor did not apply because deciding ordinary tort suits has been constitutionally committed to "none other than. . . the Judiciary."⁸⁸

In *Kadic v. Karadžić* (*Kadic*),⁸⁹ the Second Circuit again refused to find a political question when presented with a claim for human rights violations against the commander of the Bosnian-Serb military forces during the Bosnian Civil War.⁹⁰ The court explained

84. See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 562 (9th Cir. 2005) (finding no political question where property claims touched on international relations issues). In *Alperin*, the Ninth Circuit held that conversion and unjust enrichment claims filed by Holocaust survivors against the Vatican Bank, regarding treasure it allegedly obtained from a Nazi puppet regime during World War II, were not political questions. See *id.* at 539-44. The court explained that, because "the Property Claims simply seek restitution for looted assets" and do not encroach on the foreign policy prerogatives of the political branches, "[d]eciding this sort of controversy is exactly what courts do." *Id.* at 551. Additionally, the court observed that property law provided "concrete legal bases for courts to reach a reasoned decision." See *id.* at 554-55. The Ninth Circuit also stated that the presence of clear standards for adjudication obviated the need for it to make an initial policy decision (the third *Baker* factor). *Id.*

85. 937 F.2d 44 (2d Cir. 1991).

86. See *id.* at 46-47 (summarizing plaintiff's claims arising from PLO's hijacking of cruise ship, during which American passenger was killed).

87. *Id.* at 49 (emphasizing that international and politically charged context of case is insufficient for demonstrating nonjusticiability).

88. *Id.* (stating resolution of torts cases is constitutionally committed to Judiciary and "[t]his factor alone . . . strongly suggests that the political question doctrine does not apply"). The court also observed that the district court would not be required to render a decision without "judicially discoverable and manageable standards" because the common law of torts provides clear and well-settled rules. *Id.*

89. 70 F.3d 232 (2d Cir. 1995).

90. See *id.* at 236-37 (finding claims brought by Croat and Muslim citizens of Bosnia-Herzegovina under Alien Tort Claims Act justiciable and not barred by political question doctrine). The claims at issue alleged human rights violations stemming from orders by the President of the self-proclaimed, break-away Bosnia-Serb republic of Srpska. *Id.*

that “universally recognized norms of international law provide judicially discoverable and manageable standards.”⁹¹ The Second Circuit also found that the existence of judicial standards for deciding the case “obviates any need to make initial policy decisions” and “undermines the claim that such suits relate to matters that are constitutionally committed to another branch.”⁹²

C. The Political Question Doctrine and Environmental Public Nuisance Actions

Outside the context of climate change litigation, federal courts have not invoked the political question doctrine in public nuisance-based pollution cases, even when the ruling was likely to have substantial interstate environmental and economic effects.⁹³ In *Missouri v. Illinois (Missouri)*,⁹⁴ the Supreme Court heard a public nuisance action brought by Missouri that sought to restrain Chicago from discharging its sewage into a tributary of the Mississippi River.⁹⁵ The Court did not deem this case nonjusticiable despite the “international importance” of the alleged nuisance.⁹⁶ One year later, in *Georgia v. Tennessee Copper Co. (Tennessee Copper)*,⁹⁷ Georgia filed a suit against a Tennessee company whose noxious gas emissions were destroying its forests, orchards, and crops.⁹⁸ Despite the significant environmental and economic interests implicated in the case, the Court did not find a political question and instead granted

91. *Id.* at 249 (explaining how second *Baker* factor—absence of judicially discoverable and manageable standards—is inapplicable because universally recognized norms of international law are available for adjudicating plaintiffs’ claims).

92. *Id.* (stating that presence of judicially discoverable and manageable standards for adjudicating case rendered third *Baker* factor—whether deciding case requires initial policy decision—inapplicable). The court also asserted that the existence of judicially manageable standards significantly undermines any argument that the first *Baker* factor—textual constitutional commitment of issue to co-equal political branch—is present. *Id.*

93. See Thorpe, *supra* note 6, at 101 (observing that courts have decided many toxic tort and nuisance-based pollution cases).

94. 200 U.S. 496 (1906).

95. *Id.* at 517 (describing case’s factual background). Missouri also alleged that if Chicago’s proposed discharge were to occur, “1,500 tons of poisonous filth” would be sent daily into the Mississippi River. *Id.* According to Missouri, this sewage would so pollute the river water that it would be “unfit for drinking, agriculture, or manufacturing purposes.” *Id.*

96. *Id.* at 518 (describing claim’s potential international significance). Writing for the Court, Justice Holmes remarked that Missouri’s claim would be of international importance if proven because it regarded “a visible change of a great river from a pure stream into a polluted and poisoned ditch.” *Id.*

97. 206 U.S. 230 (1907).

98. See *id.* at 236 (explaining factual basis of injunction Georgia sought against Tennessee copper companies).

Georgia's proposed injunction.⁹⁹ Sixty-five years later, the Supreme Court allowed another complicated pollution-based public nuisance claim to proceed on the merits in *Illinois v. City of Milwaukee (Milwaukee)*.¹⁰⁰ There, Illinois sought an injunction to prevent the city of Milwaukee from continuing its practice of dumping "some 200 million gallons of raw or inadequately treated sewage" into Lake Michigan.¹⁰¹

Prior to the Second Circuit's ruling in *American Electric*, district courts decided and dismissed three climate change-public nuisance cases (including the lower court's decision in *American Electric*) on political question grounds.¹⁰² In *Comer v. Murphy Oil USA*,¹⁰³ Gulf Coast property owners brought public nuisance, trespass, and civil conspiracy claims against oil, coal, and chemical companies for their GHG emissions.¹⁰⁴ The U.S. District Court for the Southern District of Mississippi held the case was nonjusticiable because it raised a political question.¹⁰⁵ Likewise, in *California v. General Motors Corp.*,¹⁰⁶ the U.S. District Court for the Northern District of California invoked the doctrine to dismiss an action by California against various automakers for contributing to the public nuisance of global warming.¹⁰⁷ The court relied heavily on the district court's reasoning from *American Electric* and, accordingly, held that the third *Baker* factor (need for initial policy decision) rendered the lawsuit nonjusticiable.¹⁰⁸ The court reasoned that deciding the

99. *See id.* at 239 (granting Georgia's injunction).

100. 406 U.S. 91 (1972).

101. *Id.* at 93 (describing Illinois's allegation and desired injunctive relief). Illinois brought its complaint under the Supreme Court's original jurisdiction and the Court exercised its discretion to remit the parties to an appropriate district court. *Id.* at 108. Before doing so, however, the Court for the first time recognized the tort of public nuisance as part of the federal common law. *Id.*

102. *See Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (finding climate change nuisance action to raise nonjusticiable political question); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *12 (N.D. Cal. Sept. 17, 2007) (holding global warming tort claim nonjusticiable because it impermissibly implicates policy issues consigned solely to political branches); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007) (holding plaintiff's claims non-justiciable under political question doctrine).

103. No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007).

104. *See id.* at *1 (describing plaintiffs' claims).

105. *See id.* (granting defendants' motion to dismiss).

106. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

107. *Id.* at *1 (providing factual background of California's claim).

108. *See id.* at *6 (stating that third *Baker* factor "largely controls the analysis in the current case due to the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of the Plaintiff's federal common law nuisance claim").

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case would require the judge to balance competing environmental, economic, foreign relations, and national security interests, which the elected branches must speak on first.¹⁰⁹

IV. NARRATIVE ANALYSIS

In *American Electric*, the Second Circuit provided a detailed analysis of the political question doctrine, the issue upon which the lower court dismissed the plaintiffs' claim.¹¹⁰ The court first provided a brief background of the doctrine along with the constellations of facts that prompted its application.¹¹¹ The court then analyzed the plaintiffs' complaint under each *Baker* factor and ultimately determined that none were applicable.¹¹² This finding prompted the Second Circuit to conclude that the district court erroneously applied the political question doctrine to bar the plaintiffs' claim.¹¹³

A. Second Circuit's Overview of the Political Question Doctrine

After noting that the political question doctrine is "primarily a function of the separation of powers," the court briefly discussed the doctrine's historical origins.¹¹⁴ The Second Circuit then identified the Supreme Court's *Baker* decision as providing the modern framework for resolving political question issues.¹¹⁵ After laying out the six *Baker* factors, the Second Circuit cautioned that "*Baker* set a high bar for nonjusticiability" by requiring at least one of the factors to be "inextricable" from the case.¹¹⁶ In support of this inference, the Second Circuit observed that "the Supreme Court has

109. See *id.* at *7 (discussing interests that court would need to balance in adjudicating case). The court concluded that it was impossible and improper for it to determine the relative weight to assign each of those interests without an initial policy decision by the elected branches. *Id.*

110. See *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 321-32 (2d Cir. 2009) (discussing political question issue).

111. See *id.* at 321-23 (providing overview of political question doctrine).

112. See *id.* at 324-32 (applying *Baker* factors to facts of case and deeming all inapplicable).

113. See *id.* at 332 (holding that political question doctrine did not bar case from reaching merits stage).

114. See *id.* at 321 (discussing political question doctrine's primary purpose as preserving separation of powers, along with doctrine's historical roots).

115. See *Am. Elec.*, 582 F.3d at 321 (observing how *Baker* Court attempted to identify and describe attributes of doctrine).

116. See *id.* (quoting six *Baker* factors and noting how *Baker* indicated that these factors should be difficult to invoke).

only rarely found that a political question bars its adjudication of an issue.”¹¹⁷

The court next stated that the defendants’ arguments “touch[ed] upon” the two most frequently litigated areas of the political question doctrine: “domestic controversies implicating constitutional issues and the conduct of foreign policy.”¹¹⁸ When resolving political question issues surrounding domestic controversies, the Second Circuit explained, courts usually analyze the language of the Constitution to look for a textual commitment to another governmental branch.¹¹⁹ The court noted, however, that “not all cases touching [domestic] constitutional issues” raise political questions, even where they also raise issues of great importance to the political branches and have motivated partisan debate.¹²⁰ In cases implicating foreign policy issues, the court stated that a political question is sometimes found where adjudication would require the review of legislative and executive policy choices and value determinations.¹²¹ The Second Circuit concluded its overview of the political question doctrine by quoting *Baker’s* cautionary statement that “it is an error to suppose that every case or controversy that touches foreign relations lies beyond judicial cognizance.”¹²²

B. Application of the First *Baker* Factor: Is There a Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department?

The court began its analysis by observing that the first *Baker* factor was “the dominant consideration in any political question inquiry.”¹²³ It then proceeded to waive the defendants’ argument that the issue of climate change regulation was textually committed

117. *See id.* at 321-22 (commenting on how Supreme Court has invoked political question doctrine only twice in last forty-plus years).

118. *See id.* at 322 (expressing that defendants’ political question arguments touched upon domestic controversies, which implicate constitutional issues and foreign affairs).

119. *Id.* (describing how courts determine whether political question doctrine should be invoked in domestic constitutional controversies).

120. *Am. Elec.*, 582 F.3d at 322 (observing that not every issue implicating Constitution and motivating partisan debate raises political question).

121. *See id.* (describing cases where doctrine was invoked because courts would have had to review foreign policy decision of political branches).

122. *Id.* at 323 (quoting *Baker’s* cautionary statement regarding breadth of doctrine in foreign affairs context).

123. *Id.* at 324 (quoting *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991)) (relating that first *Baker* factor is most important of all six factors).

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to Congress by way of the Commerce Clause.¹²⁴ The court next addressed the defendants' contention that allowing the plaintiffs to use a federal nuisance action to reduce domestic GHG emissions "will impermissibly interfere with the President's authority to manage foreign relations."¹²⁵ The Second Circuit replied that the defendants' arguments vastly overstated the scope of the plaintiffs' claim and all but ignored the "discrete domestic nuisance issues actually presented."¹²⁶ The plaintiffs' complaint, according to the court, did not "ask the court to fashion a comprehensive and far-reaching solution to global climate change."¹²⁷ Furthermore, the court maintained that the defendants' foreign affairs interference argument was misguided because a victory by the plaintiffs on the merits "[would] not establish a national or international emissions policy."¹²⁸

The relationship between the foreign policy concerns raised by the defendants and the relief requested by the plaintiffs, the court concluded, was too "tangential and attenuated" to invoke the political question doctrine.¹²⁹ In concluding its analysis of the first *Baker* factor, the court quoted *Klinghoffer's* assertion that "[t]he department to whom [the] issue has been 'constitutionally committed' is

124. *See id.* (finding defendants' Commerce Clause textual commitment argument waived). Because the defendants' briefs failed to explain how the issue was textually committed to Congress by the Commerce Clause, the court found that this assertion had been insufficiently argued. *Id.* Pursuant to an earlier Second Circuit case, "[i]ssues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Id.* (quoting *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d. Cir. 1998)).

125. *See Am. Elec.*, 582 F.3d at 322 (describing defendants' argument that plaintiffs' claim implicated first *Baker* factor by impermissibly interfering with President's foreign affairs powers). The defendants claimed adjudication would produce this interference because three Presidents, with the approval of Congress, have employed a multilateral strategy for addressing global warming. *Id.* As part of this strategy, the U.S. refuses to commit to unilateral, mandatory emissions reductions. *See id.* The defendants argued that because the plaintiffs' claims demanded "unilateral reductions in U.S. carbon dioxide emissions," they threatened to undermine this international strategy by leaving the President with less American emissions cuts to offer in exchange for reductions by other nations. *Id.*

126. *Id.* at 325 (rejecting defendants' characterization of lawsuit as magnifying and distorting real issues at stake).

127. *Id.* (articulating appropriate scope of plaintiffs' claims). The court observed that fashioning a comprehensive solution to climate change is a task that "arguably falls within the purview of the political branches." *Id.*

128. *See id.* (stating that plaintiff victory would not establish national or international GHG emissions policy). Such a ruling, the court continued, would also not require mandatory, unilateral emissions reductions for entities not party to the lawsuit. *Id.*

129. *Id.* (explaining why defendants' foreign policy concerns are insufficient to invoke political question doctrine).

none other than our own—the Judiciary.”¹³⁰ Accordingly, the court found no textual commitment in the Constitution conferring to the political branches exclusive authority over disputes arising from GHG emissions or other forms of alleged nuisance.¹³¹

C. Application of the Second *Baker* Factor: Is There a Lack of Judicially Discoverable and Manageable Standards for Resolving the Case?

The court began its analysis of the second *Baker* factor by outlining the defendants’ arguments.¹³² The utility companies maintained that, given the uncertainty surrounding the precise effect of GHGs on the climate and the myriad of public policy questions a court would confront while adjudicating the plaintiffs’ claim, “vague and indeterminate nuisance concepts” derived from the Restatement (Second) of Torts were a woefully inadequate standard for decision.¹³³ The Second Circuit found this argument unpersuasive for several reasons.¹³⁴ First, the court noted that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”¹³⁵ The court cited the Supreme Court decisions in *Missouri*, *Tennessee Copper*, and *Milwaukee* as supporting the proposition that courts have long “employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented.”¹³⁶

130. *Am. Elec.*, 582 F.3d at 325 (quoting *Klinghoffer’s* assertion that issue is constitutionally committed to Judiciary).

131. *See id.* (concluding that disputes arising from GHG emissions are not textually committed by Constitution to political branches).

132. *See id.* at 326 (setting up analysis of second *Baker* factor by describing defendants’ arguments).

133. *See id.* (providing defendants’ primary argument for why second *Baker* factor—lack of judicially manageable standards—applies). According to the defendants, some policy questions a court deciding the plaintiffs’ claims would have to answer included: “How fast should emissions be reduced?; Should power plants or automobiles be required to reduce emissions?; Who should bear the cost of reduction?; and How are the impacts on jobs, the economy, and the nation’s security to be balanced against the risks of future harms?” *Id.*

134. *See id.* at 329 (expressing disagreement with the defendants that there are no judicially discoverable and manageable standards for resolving this case).

135. *Am. Elec.*, 582 F.3d at 326 (observing that courts have extensive experience adjudicating complex public nuisance cases).

136. *Id.* at 326-27 (providing facts and holdings from cases that Second Circuit deemed evidence of “a long line of federal common law of nuisance cases”). The court’s discussion of *Missouri v. Illinois* and *Georgia v. Tenn. Copper Co.* focused on the complex scientific and expert evidence the Supreme Court was required to analyze. *Id.* The Second Circuit’s analysis of these two cases also emphasized how the Supreme Court had to balance the plaintiffs’ need for a clean environment with the economic harm of too stringent pollution restrictions. *Id.*

Next, the Second Circuit determined that the Restatement (Second) of Torts' definition of public nuisance ("an unreasonable interference with a right common to the general public")¹³⁷ provided a workable standard from which a district court could resolve this case.¹³⁸ Furthermore, the court cited *Klinghoffer* as demonstrative of the federal courts' willingness and capacity to apply well-settled tort rules to a variety of new and complex problems.¹³⁹ After quoting *Klinghoffer's* reasoning that the applicability of tort law's "clear and well settled rules" to the dispute meant judicially discoverable standards were present, the Second Circuit held that the defendants were not entitled to dismissal based on the second *Baker* factor.¹⁴⁰

D. Application of the Third *Baker* Factor: Is It Impossible to Decide this Case Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion?

After acknowledging that the district court relied on the third *Baker* factor for its nonjusticiability holding, the Second Circuit attacked the lower court's reasoning and conclusion.¹⁴¹ Specifically, the Second Circuit rejected the district court's assertions that: (1) the plaintiffs' nuisance claims cannot be adjudicated until Congress has supplied an initial policy decision on climate change and (2) any judicial actions having the effect of regulating GHG emissions

137. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) (defining public nuisance).

138. *Am. Elec.*, 582 F.3d at 328 (stating that Restatement's definition "provides a workable standard"). The Second Circuit acknowledged that the Restatement's public nuisance definition was broad. *Id.* Nevertheless, the court believed the definition could be applied by the district court in a principled manner to resolve the dispute at hand. *Id.* In support of this conclusion, the court cited *United States v. Ira S. Bushy & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973). *Id.* There, a district court applied the Restatement's public nuisance standard in a lawsuit brought by the U.S. to reduce pollution in Lake Champlain against an entity that owned and leased vessels used to transport oil across the lake. *Id.* at 120-21.

139. *See id.* at 328-29 (describing facts and holding of Second Circuit's decision in *Klinghoffer* while emphasizing court's rejection of PLO's argument that wrongful death claim was nonjusticiable because it arose in politically volatile context of international terrorism).

140. *Id.* at 329-30 (agreeing with *Klinghoffer's* statement that "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does require the court to render a decision in the absence of judicially discoverable and manageable standards").

141. *See id.* at 330 (observing that district court relied on third *Baker* factor—impossibility of deciding case without initial policy determination—in dismissing plaintiffs' complaint as political question).

would be “counter[] [to] the political branches’ refusal to act.”¹⁴² According to the Second Circuit, legislative inaction toward GHG emissions “falls far short” of what is needed to demonstrate a congressional intent to supplant the common law.¹⁴³ The court explained that the plaintiffs need not “wait for the political branches to craft a ‘comprehensive’ global solution to global warming.”¹⁴⁴

In rejecting the district court’s assertion that a court-ordered reduction in the defendants’ GHG emissions would be contrary to Congress’s will, the Second Circuit contended that “the political branches are at the very least concerned about global warming.”¹⁴⁵ Finally, the court observed that, because the plaintiffs’ action is “an ordinary tort suit” governed by “recognized judicial standards under the federal common law of nuisance,” this “obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.”¹⁴⁶ Accordingly, the third *Baker* factor did not apply.¹⁴⁷

142. *Id.* (summarizing district court’s reasoning for finding third *Baker* factor to bar adjudication).

143. *Am. Elec.*, 582 F.3d at 330 (explaining how district court’s emphasis on Congress’s purported refusal to act was erroneous and “result[ed] in a decision resting on a particularly unstable ground”). To support this assertion, the court cited *Illinois v. City of Milwaukee* as standing for the proposition that “if the extant statutes governing water pollution do not cover a plaintiffs claims and provide a remedy, a plaintiff is free to bring its claim in under the federal common law of nuisance” and need not “await the fashioning of a comprehensive approach to domestic water pollution.” *Id.*

144. *Id.* at 331 (expressing that just because CAA and other pollution statutes currently “do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a ‘comprehensive’ global solution to global warming”).

145. *Id.* (rejecting district court’s assertion that Congress’s failure to regulate GHGs reflected policy determination that global warming should not be addressed through American GHG reductions). The Second Circuit also stated that the Executive Branch and Congress have given no indication they wish U.S. carbon emissions to increase. *Id.* As evidence of the political branches’ concern about climate change and GHGs, the court observed that “Congress has passed laws that call for the study of climate change and research into technologies that will reduce emissions.” *Id.*

146. *See id.* at 329, 331 (expressing how existence of well-recognized judicial standard provided by common law of public nuisance eliminated need for initial policy decision).

147. *See id.* at 331 (holding third *Baker* factor inapplicable).

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- E. Application of the Fourth, Fifth, and Sixth *Baker* Factors: Will Adjudication of This Case Demonstrate “Lack of Respect” for the Political Branches; Contravene “An Unusual Need for Unquestioning Adherence to a Political Decision Already Made;” or “Embarrass” the Nation as a Result of “Multifarious Pronouncements by Various Departments”?

The Second Circuit began by quoting from its opinion in *Kadic* that the fourth through sixth *Baker* factors are only applicable when adjudication “would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.”¹⁴⁸ The court noted that, according to the defendants, the plaintiffs’ claims met that standard because they contradicted “‘U.S. policy [which] is manifestly not to engage in unilateral reductions of domestic emissions.’”¹⁴⁹ The Second Circuit, however, was not persuaded that there was, in fact, a unified U.S. policy on GHG emissions.¹⁵⁰ Citing *Alperin v. Vatican Bank (Alperin)*¹⁵¹ and *Klinghoffer*, the Second Circuit then stated that when there is no unified national policy on a foreign affairs issue, adjudication does not implicate the fourth through sixth *Baker* factors.¹⁵² Finally, the court observed that the prerogatives of the political branches did not need to be protected by the political question doctrine in this case because Congress or the Executive Branch were free to displace any common law standards the decision set by choosing to regulate emissions.¹⁵³

148. *Am. Elec.*, 582 F.3d at 331 (quoting *Kadic v. Karadžić*’s explanation of when *Baker* factors four through six are relevant).

149. *See id.* (conveying defendants’ assertion that plaintiffs’ lawsuit directly implicated fourth, fifth, and sixth *Baker* factors because suit contradicted deliberate policy set by political branches).

150. *Id.* at 331-32 (rejecting premise of defendants’ argument by asserting no clear U.S. policy toward GHG emissions exists). The court observed that the “variegated” assertions made in the defendants’ own briefs as to what constituted American GHG emissions policy “underscore[d] that there really is no unified policy.” *Id.* At various points in their briefs, the defendants asserted: (1) this country’s official policy is to reduce its generation of carbon emissions; (2) the political branches have pursued a policy of research into climate change “as a prelude to forming a coordinated, national policy[;]” and (3) in the international arena, U.S. policy is to not engage in a unilateral reduction of domestic greenhouse gas emissions. *See id.*

151. 410 F.3d 532 (9th Cir. 2005).

152. *See id.* at 332 (stating that fourth through sixth *Baker* factors are not applicable where no national policy exists).

153. *Id.* (making separation of powers argument against applying political question doctrine on grounds that political branches may displace any common law standards by enacting statutory or regulatory standards).

V. CRITICAL ANALYSIS

The Second Circuit's decision and reasoning on the political question issue in *American Electric* were, in large part, justified.¹⁵⁴ By carefully applying the political question doctrine's legal principles to the novel issue of climate change litigation, the Second Circuit provided the plaintiffs with a path to relief on the merits without straying from the doctrine's precedential past.¹⁵⁵ The Second Circuit's opinion in *American Electric*, unlike the district court's decision, was true to the substance and spirit of *Baker's* six-factor political question test.¹⁵⁶ The opinion was also based on a proper understanding of the political question doctrine precedents from federal court decisions.¹⁵⁷

A. The Second Circuit's Opinion was Consistent with the Principles Articulated in Political Question Precedents

The Second Circuit's *American Electric* decision demonstrated an understanding of the major principles underlying federal courts' political question precedents.¹⁵⁸ The first of these principles reflected in the court's opinion is that the doctrine "is one of 'political questions,' not one of 'political cases.'"¹⁵⁹ As a result, courts cannot reject a bona fide controversy merely because it is

154. See James R. May, *New and Emerging Constitutional Theories and the Future of Environmental Protection*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10989, 10991 (2010) (observing that some federal courts "have incorrectly invoked the political question doctrine" when declining to adjudicate climate change-based public nuisance actions, while implying that Second Circuit's outcome in *American Electric* was correct).

155. See Nathan Howe, *The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?*, 40 ENVTL. L. REP. NEWS AND ANALYSIS 11229, 11230 (2010) (arguing *American Electric* court was correct in not applying political question doctrine to climate change lawsuit because plaintiffs did not "directly challeng[e] decisions by the [political] branches related to the military or foreign affairs").

156. See *id.* at 11233 (noting that Second Circuit's political question analysis in *American Electric* conforms with historic approach to *Baker* test).

157. See May, *supra* note 154, at 10993 (asserting that *American Electric* was correctly decided because political question doctrine "should not serve as a bar to climate cases due to a lack of both a demonstrable constitutional commitment to an elected branch and countervailing prudential concerns").

158. For a discussion of how *American Electric* was consistent with the legal principles underpinning federal courts' political question precedents, see *infra* notes 159 and accompanying text.

159. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting distinction between "political cases" and issues raising nonjusticiable "political questions").

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“denominated ‘political.’”¹⁶⁰ Rather, the term “political” appearing in the doctrine’s name refers to the Constitution’s entrustment of the litigated issue to the Legislative, or Executive Branch, the “political” branches.¹⁶¹ Its meaning does not “broadly relate to government, government policy, partisan or party politics, or the political system.”¹⁶²

Climate change has certainly become a partisan and divisive issue in American politics, with Republicans substantially less likely than Democrats to believe in the science behind it.¹⁶³ Just because climate change has become a partisan issue does not convert it into a nonjusticiable political question, however.¹⁶⁴ The district court erred by implicitly making this assumption.¹⁶⁵ The Second Circuit correctly distinguished a political case from a political question by holding that “the judiciary. . . can [not] decline to decide matters within its jurisdiction simply because such matters may have political ramifications.”¹⁶⁶

The Second Circuit’s decision also correctly focused on the plaintiffs’ specific claim instead of the broader political and foreign affairs context in which the claim arose.¹⁶⁷ Using this analytical framework was the proper approach because copious precedent es-

160. See *id.* (explaining how presence of term “political” in political question doctrine does not render nonjusticiable cases “semantic[ally] catalogued” as “political”).

161. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 869-70 (5th Cir. 2009) (discussing meaning of political in political question doctrine).

162. *Id.* (distinguishing colloquial meaning of political with its meaning in political question doctrine context).

163. See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 952 (2008) (describing how most people would agree that “issues of climate change are controversial, complex, and invite action by the elected branches”); see also Lexington, *A Refreshing Dose of Honesty: Maria Cantwell and the Politics of Global Warming*, ECONOMIST, Feb. 6, 2010, at 69, available at <http://www.economist.com/node/15453166> (reporting that disbelief in climate change is norm among Republicans, with only 35% believing solid evidence of warming exists according to Pew poll).

164. See May, *supra* note 163, at 952 (observing that it is largely irrelevant whether issue is complex or political when determining if political question doctrine applies).

165. See *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 270-73 (S.D.N.Y. 2005) (appearing to base determination that initial policy decision regarding climate change must be made by elected branches on politicized nature of issue).

166. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 332 (2d Cir. 2009) (rejecting district court’s reasoning and explaining proper application of political question doctrine).

167. See LaTourette, *supra* note 41, at 248 (describing how precedents overwhelmingly indicate that specific claim, and not broader context of claim, controls political question analysis).

establishes that “the political question doctrine bars judicial review only when the precise matter to be decided has been constitutionally committed” to one of the political branches.¹⁶⁸ The district court, therefore, was incorrect in virtually ignoring the plaintiffs’ precise public nuisance claim. That court mistakenly focused on the purported “legislative nature of [the] litigation,” and the potential “economic, environmental, foreign policy, and national security interests” it “touched on.”¹⁶⁹ The Second Circuit, in contrast, performed the proper political question analysis by concentrating on the “discrete domestic nuisance” claim presented, and by refusing to characterize the lawsuit as implicating “complex, inter-related and far-reaching policy questions.”¹⁷⁰

B. The Court Properly Applied the *Baker* Factors to the Nuisance-based Climate Change Action

The manner in which the Second Circuit applied each of the *Baker* factors to the plaintiffs’ claim was consistent with precedent and reflected a nuanced understanding of the political question doctrine.¹⁷¹ As discussed in the subsection above, when the court applied the first *Baker* factor (textual commitment of issue to a political branch), it correctly focused on the plaintiffs’ specific claim and not the peripheral issues the lawsuit touched upon.¹⁷² In the context of the first *Baker* prong analysis, the Second Circuit addressed whether the issue of climate change-causing emissions was constitutionally committed to the political branches as part of their foreign affairs power.¹⁷³ In determining that it was not, the court

168. *Comer v. Murphy Oil USA*, 585 F.3d 855, 874 (5th Cir. 2009) (quoting *Zivotosky v. Secretary of State*, 571 F.3d 1227, 1238 (D.C. Cir. 2009) (Edwards, J., concurring)) (explaining how political question inquiry should focus on specific claim).

169. See *Am. Elec.*, 406 F. Supp. 2d at 272-74 (characterizing plaintiffs’ claim by focusing on its context and background); see also LaTourette, *supra* note 41, at 249-50 (arguing that dismissals of climate change cases by district courts on political question grounds, including *American Electric* decision, were based on misconstruction of doctrine).

170. See *Am. Elec.*, 582 F.3d at 325 (characterizing plaintiffs’ claim and rejecting defendants’ proposed characterization).

171. See Howe, *supra* note 155, at 11233 (observing that Second Circuit discussed *Baker* factors in detail and assessed them independently, while also giving consideration to doctrine’s classical and prudential strands).

172. For an explanation of how the *American Electric* court properly identified the scope of plaintiffs’ lawsuit, see *supra* notes 167 and accompanying text.

173. See Howe, *supra* note 155, at 11237 (describing how Second Circuit found political question doctrine inapplicable after it determined that adjudicating case would not directly interfere with Executive Branch’s international climate change policy).

accurately based its conclusion on factors articulated in prior political question cases implicating foreign policy issues.¹⁷⁴ Specifically, the court observed that the plaintiffs' claims were not a direct challenge to any foreign policy set by Congress or the President, and would not impermissibly interfere with the political branches' conduct of foreign relations.¹⁷⁵

The Second Circuit should have addressed the defendants' argument that the Constitution commits the interpretation of the Commerce Clause to the political branches, however.¹⁷⁶ Two years before the *American Electric* decision, the U.S. District Court for the District of Northern California held that the political question doctrine barred a global warming nuisance action, in part because adjudication "would have an inextricable effect on interstate commerce. . . [an] issue[] constitutionally committed to the political branches of government."¹⁷⁷ Prior to that decision, the Commerce Clause had never been invoked by a court to find a constitutional commitment to Congress in the political question context.¹⁷⁸ Allowing the Commerce Clause, which serves as the constitutional basis for much of Congress's legislation, to play such a role in the justiciability analysis would vastly expand the reach of the political question doctrine.¹⁷⁹

Other factors beyond the absence of precedent indicate that such an application is erroneous.¹⁸⁰ For example, in *Nixon v. United States*,¹⁸¹ the D.C. Circuit stated that, in the context of analyzing the first *Baker* factor, "no one reasonably would suggest that it is beyond

174. See LaTourette, *supra* note 41, at 229-30 (explaining how courts have applied first *Baker* factor in foreign affairs context by citing numerous cases that would later be relied on by Second Circuit in *American Electric*).

175. See *Am. Elec.*, 582 F.3d at 325 n.3 (observing that in many cases where courts have found nonjusticiable political questions, plaintiffs sued U.S. government or officials and thereby directly challenged political branches' foreign policy). The court explained that the plaintiffs' case, however, "presents at best an indirect challenge." *Id.*

176. For a discussion of the Second Circuit's dismissal of the defendants' Commerce Clause argument, see *supra* note 124 and accompanying text.

177. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *13 (N.D. Cal. Sept. 17, 2007)

178. See *Nixon v. United States*, 506 U.S. 224, 251 n.4 (1993) (White, J., concurring) (implying that congressional legislation under Commerce Clause is not subject to political question doctrine).

179. See CHEMERINSKY, *supra* note 44, at 242 (discussing how Commerce Clause has been used to justify broad range of federal legislation).

180. For a discussion of other reasons why the use of the Commerce Clause in *California v. Gen. Motors Corp.* as a ground for invoking the political question doctrine was legally erroneous, see *supra* notes 177 and accompanying text.

181. 938 F.2d 239 (D.C. Cir. 1991).

the authority of the courts to review congressional enactments regulating interstate commerce.”¹⁸² Despite the weakness of the defendants’ argument in *American Electric*, the Second Circuit should have addressed (and rejected) it.¹⁸³ Doing so could have helped prevent another district court from erroneously finding that the Commerce Clause precludes adjudication of climate change nuisance claims.¹⁸⁴

The *American Electric* court’s analysis of the second *Baker* factor, which asks whether a manageable standard exists by which the judiciary can resolve the case, was also well-reasoned.¹⁸⁵ By consulting other Second Circuit precedents, such as *Klinghoffer*, the court concluded that a claim based in tort is inherently judicially discoverable and manageable.¹⁸⁶ A long line of political question cases further demonstrate that the unique, complex, or highly politicized nature of the litigated issue should not control a court’s application of the second *Baker* factor.¹⁸⁷

By referencing intricate environmental cases including *Missouri* and *Tennessee Copper*, the Second Circuit supported its finding in *American Electric* that the tort of public nuisance provides a manageable standard for confronting the scientific and political complexities of climate change.¹⁸⁸ In those cases, the Supreme Court successfully applied the public nuisance standard to resolve vexing disputes over interstate water and air pollution involving invisible pollutants.¹⁸⁹ By implication, these cases established the principle

182. *Id.* at 254 (explaining that court unequivocally has power to review congressional action under Commerce Clause).

183. For a discussion of why there is no basis in law or policy for applying the political question doctrine to Commerce Clause cases, see *supra* notes 176 and accompanying text.

184. For an example of how the district court misapplied the Commerce Clause as a basis for finding a political question, see *supra* note 177 and accompanying text.

185. For a description of why the author believes the Second Circuit’s approach to the second *Baker* factor was well-reasoned, see *infra* notes 186 and accompanying text.

186. See *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 328-29 (2d Cir. 2009) (describing facts and holding of *Klinghoffer* and quoting opinion regarding how tort law provides clear and well-settled rules for adjudication).

187. LaTourette, *supra* note 41, at 254 (expressing that second *Baker* prong analysis is not based on claim’s complexity).

188. See *Am. Elec.*, 582 F.3d at 326-27 (describing facts and holdings of *Missouri* and *Tennessee Copper* while emphasizing scientific complexity of cases).

189. For further discussion of the facts and holdings of *Missouri* and *Tennessee Copper*, see *supra* notes 94-99 and accompanying text.

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that a complex factual background does not render a time-tested judicial standard unmanageable.¹⁹⁰

Given the causal complexities and global scope of climate change, a reasonable person might question whether the facts of the interstate air and water pollution cases relied upon by the court were sufficiently similar to the public nuisance action it was deciding.¹⁹¹ This concern is misplaced because the Second Circuit's determination that GHG emissions are legally indistinguishable from other air pollutants draws strong support from the Supreme Court's decision in *Massachusetts v. EPA (Massachusetts)*.¹⁹² In this seminal case, the Court held that GHGs are air pollutants under the Clean Air Act (CAA) and consequently must be regulated by the U.S. Environmental Protection Agency (EPA) like any other air pollutant.¹⁹³ The Second Circuit, therefore, was justified in finding a manageable standard for adjudication of the plaintiffs' claim based on a tort standard with a rich history of application in interstate pollution litigation.¹⁹⁴

The Second Circuit's analysis of the third *Baker* factor, the need for the court to make an initial policy decision unsuitable for the judiciary, is particularly important because it was the factor the

190. See May, *supra* note 163, at 957 (relating rich history of cases in which federal courts have imposed injunctions against interstate polluters).

191. See, e.g., Matthew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 CHAP. L. REV. 265, 284 (2010) (contending that "climate change occupies different realm than direct pollution cases"); John Gray, *The Use of Public Nuisance Suits to Address Climate Change: Are These Really "Ordinary Tort Cases"?*, in THE LEGAL IMPACT OF CLIMATE CHANGE, 2010 ED.: LEADING LAWYERS ON NAVIGATING NEW LAWS, AVOIDING LIABILITY, AND ANTICIPATING FUTURE CHANGES FOR CLIENTS (INSIDE THE MINDS) 4 (Aspatore 2010) (arguing that "Second Circuit trivialized climate change suits as 'ordinary tort cases' and saw little distinction between the geographically discrete air and water pollution cases of yesteryear and today's planet-wide climate claims").

192. 549 U.S. 497 (2007); see Joy C. Fuhr, *Connecticut v. EPA: The New Normal?*, 24 NAT. RESOURCES & ENV'T 58, 59 (2010) (explaining how Second Circuit's analogy between climate change-causing GHG and traditional air and water pollution is supported by *Massachusetts v. EPA*).

193. See Fuhr, *supra* note 192, at 59 (describing Supreme Court's holding in *Massachusetts* and how it relates to Second Circuit's *American Electric* decision).

194. See *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 326 (2d Cir. 2009) (arguing that public nuisance tort provides courts with manageable standard to resolve climate change cases because it has been used by federal courts for nearly two centuries). Conversely, the district court, in its manageability analysis, allowed the complexity of the claim's subject matter to obscure the traditional public nuisance theory upon which it was based. See LaTourette, *supra* note 41, at 262-63.

district court relied on in finding a political question.¹⁹⁵ Strong precedent exists regarding the application of this *Baker* factor, including the Second Circuit's decision in *Kadic*.¹⁹⁶ The *Kadic* court focused on the underlying claims asserted by the plaintiffs, rather than the case's geopolitical context, and concluded that the presence of judicially manageable standards "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion."¹⁹⁷ Likewise, in *Alperin*, the Ninth Circuit held that the court need not make an initial policy decision to resolve the plaintiffs' conversion and unjust enrichment claims because property law provided a "concrete legal basis for courts to reach a reasoned decision."¹⁹⁸ Accordingly, the Second Circuit's finding in *American Electric* that the presence of the judicially manageable and well-defined public nuisance tort obviated the need to make an initial policy decision properly reflected courts' traditional application of the third *Baker* factor.¹⁹⁹

Finally, the Second Circuit correctly applied *Baker* factors four through six, which collectively ask whether deciding a case would contradict a political branch's prior decisions and seriously interfere with important governmental interests.²⁰⁰ In accordance with these factors, the Second Circuit ascertained whether a ruling restricting the defendants' GHG emissions would conflict with any existing U.S. global warming policy.²⁰¹ While Congress enacted some legislation regarding climate change prior to the court's decision, these laws merely called for studies, monitoring, and reports on global warming.²⁰² As for the U.S.'s international response to cli-

195. See *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (stating that third *Baker* factor is "particularly pertinent to this case").

196. See *Kadic v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995) (noting that existence of judicially discoverable and manageable standards for adjudicating case can render third *Baker* factor—whether deciding case requires initial policy decision—inapplicable).

197. *Id.* (applying third *Baker* factor to plaintiffs' claims).

198. *Alperin v. Vatican Bank*, 410 F.3d 532, 554-55 (9th Cir. 2005) (observing how property law provides sufficiently manageable standards so third *Baker* factor is inapplicable to plaintiffs' claims).

199. See LaTourette, *supra* note 41, at 266 (describing that when claim is based on judicially manageable legal theory, courts need not wait for a policy decision from political branches).

200. *Kadic*, 70 F.3d at 249 (relating when *Baker* factors four through six would apply).

201. For a discussion of the court's decision regarding whether adjudication of a climate change action would directly interfere with U.S. foreign policy, see *supra* notes 125-29 and accompanying text.

202. See LaTourette, *supra* note 41, at 279 (summarizing congressional enactments touching on climate change as "predominately exploratory in nature").

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mate change, the district court quoted an EPA statement issued during George W. Bush's administration.²⁰³ At that time, the EPA said that a unilateral reduction of domestic GHG emissions could "weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies."²⁰⁴

Because these statutes and executive branch policies do not directly address the regulation of carbon emissions, the Second Circuit correctly observed that "there really is no unified policy on greenhouse gas emissions."²⁰⁵ Furthermore, even if it were U.S. policy not to engage in unilateral emissions reductions without concurrent reductions by developing nations, that has no bearing on the outcome of the analysis.²⁰⁶ A decision by a federal district court on a public nuisance claim brought by domestic plaintiffs for domestic conduct does not establish a *national* or *international* emissions policy.²⁰⁷ The Second Circuit, therefore, had a solid basis for determining that adjudication on the merits of the plaintiffs' climate change action will not directly conflict with any existing U.S. foreign policy.²⁰⁸

VI. IMPACT

By allowing the plaintiffs' claims to proceed on the merits, the Second Circuit's *American Electric* decision has the potential to greatly enhance the viability of climate change-based public nui-

There has been no prescriptive legislation regulating GHG emissions, nor has a law been passed stating that mandatory emissions constraints are unnecessary. *See id.*

203. *See Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (providing EPA's position during George W. Bush's administration on international affairs impact of regulating domestic GHG).

204. *Id.* (quoting EPA statement regarding political, economic, and foreign relations implications of climate change). That court also observed that the U.S. Senate refused to ratify the Kyoto Protocol after it was signed by President Bill Clinton on the grounds that the treaty forced developed nations to shoulder the entire cost of emissions reductions. *See id.* at 269.

205. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 331-32 (2d Cir. 2009) (asserting that U.S. lacks GHG emissions policy).

206. *See id.* at 325 (concluding that court decision in plaintiffs' favor would not impact U.S. foreign policy).

207. *See id.* (stating that district court decision on plaintiffs' claim would not result in unilateral reduction in domestic emissions, even assuming emissions caps were placed on defendants).

208. For an explanation of the *American Electric* court's analysis and conclusion that the fourth and sixth *Baker* factors were well-reasoned and consistent with precedent, see *supra* notes 200-08 and accompanying text.

sance actions.²⁰⁹ Prior to this decision, courts dismissed similar claims at the pleadings stage by invoking the political question doctrine.²¹⁰ By finding the doctrine inapplicable, the Second Circuit removed a previously insurmountable barrier from the path of climate change plaintiffs within that circuit and perhaps nationally.²¹¹

A. *American Electric's* Likely Effect on Future Climate Change Actions

The impact of the Second Circuit's decision on public nuisance-based climate change actions will depend largely on how widely *its* political question doctrine reasoning is adopted by federal courts.²¹² As of the date of publication, the evidence regarding this issue is somewhat mixed, but nevertheless indicates that many courts may find *American Electric's* analysis persuasive.²¹³ In *Native Village of Kivalina v. ExxonMobil Corp.*,²¹⁴ the U.S. District Court for the Northern District of California rejected the Second Circuit's reasoning and held that the political question doctrine barred a climate change-based public nuisance action.²¹⁵ The *Kivalina* plaintiffs filed an appeal, which is presently before the Ninth Circuit.²¹⁶ Conversely, a Fifth Circuit panel in *Comer v. Murphy Oil USA*²¹⁷ adopted substantial aspects of the Second Circuit's political question reasoning and held that climate change plaintiffs were not

209. See Gray, *supra* note 191, at 2 (observing that, because of Second Circuit's decision in *American Electric*, "prospects for successful climate change litigation have improved dramatically").

210. See Nancy G. Milburn, *Connecticut v. AEP Decision*, COLUMBIA J. OF ENVTL. L. FIELD REPS., (Apr. 12, 2010), <http://www.columbiaenvironmentallaw.org/articles/connecticut-v-aep-decision> (describing how courts traditionally dismissed climate change actions at pleading stage prior to *American Electric* decision).

211. See May, *supra* note 163, at 922 (discussing how district courts often invoked political question doctrine against climate change plaintiffs, rendering cause of action "dead on arrival").

212. See generally Evin A. Gaynor et al., *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10845, 10847-48 (2010) (discussing implications of Second Circuit's *American Electric* opinion on other federal courts' approach to climate change litigation).

213. See generally *id.* at 10850 (describing application of *American Electric's* reasoning by Fifth Circuit in *Comer v. Murphy Oil USA*).

214. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

215. See *id.* at 875-77 (refusing to follow political question doctrine analysis of Second Circuit in *American Electric*). In *Kivalina*, an Alaskan native village brought an action against oil, energy, and utility companies under the federal common law of public nuisance. *Id.* at 868-70. The plaintiffs alleged that the defendants' GHG emissions contributed to global warming, which was causing erosion of Arctic sea ice. *Id.*

216. See Gaynor, *supra* note 212, at 10849 (describing Ninth Circuit's current review of *Kivalina*).

217. 585 F.3d 855 (5th Cir. 2009).

barred by the doctrine.²¹⁸ While *American Electric* has already had an important impact on the direction of climate change litigation, this trend will intensify if the Ninth Circuit elects to reverse the district court's decision in *Kivalina* and adopt *American Electric*'s political question reasoning.²¹⁹

The influence of *American Electric* will be most directly determined by the Supreme Court's disposition of the case.²²⁰ On December 6, 2010, the Court granted the *American Electric* defendants' petition for certiorari.²²¹ The Court also announced Justice Sonia Sotomayor has recused herself from the case.²²² Justice Sotomayor was a member of the Second Circuit panel when it heard oral arguments in *American Electric*.²²³ As in *Massachusetts*, the vote of Justice Kennedy will likely determine whether *American Electric*'s political question analysis survives the high court's review.²²⁴ Given the recusal of Justice Sotomayor, a four-to-four split, with Justice Kennedy joining the court's three other more liberal justices, may be the best outcome the plaintiffs and environmental community can realistically hope for.²²⁵

Also, it must be remembered that the Second Circuit did not actually rule on the merits of the plaintiffs' public nuisance claim in

218. *Id.* at 875-79 (following Second Circuit's reasoning in *American Electric* by holding political question doctrine did not bar adjudication of plaintiffs' claim). The *Comer* defendants filed a petition for rehearing en banc in the Fifth Circuit and rehearing was granted on February 26, 2010. See Gaynor, *supra* note 212, at 10849. On the date the Fifth Circuit was to hear the appeal, the court lacked a quorum and determined that under its own precedent, it could not hear the *Comer* appeal en banc. *Id.* at 10849-50. As a result, the court determined that its only option was to dismiss the appeal altogether and permit the district court's dismissal of the case to stand. *Id.* at 10850.

219. See Gaynor, *supra* note 212, at 10849 (discussing implications of Ninth Circuit's forthcoming review of *Kivalina* on future of climate change litigation).

220. See *id.* at 10850 (observing that if Supreme Court refuses to grant petition for certiorari, "industry can anticipate an avalanche of climate change-related federal nuisance actions").

221. Steven D. Cook, *Climate Change: U.S. Supreme Court to Hear Utility Challenge to Greenhouse Gas Nuisance Suit*, BNA'S TOXICS LAW REPORTER: TOXIC TORTS, Dec. 9, 2010, available at 2010 WL 4925992. (reporting that Court granted certiorari to defendants in *American Electric*).

222. See *id.* (observing that Justice Sotomayor took no part in decision to grant certiorari).

223. See *id.* (explaining Justice Sotomayor's role in *American Electric* prior to her nomination to Supreme Court).

224. See Gaynor, *supra* note 212, at 10850 (asserting that Supreme Court will likely be divided as in *Massachusetts v. EPA*, "with all eyes once again turned to Justice Anthony Kennedy").

225. For a discussion of Justice Sotomayor's recusal and the resulting expectation that the Court will be divided, with Justice Kennedy playing the decisive role, see *supra* notes 222 and accompanying text.

American Electric.²²⁶ Therefore, in order for the plaintiffs to obtain the relief they requested, they must still prove the defendants' GHG emissions constitute an unreasonable interference with a right common to the general public.²²⁷ This feat will not be easily accomplished given the difficulty of proving causation in the context of a global problem caused by manifold, diffuse emitters.²²⁸ There is nevertheless reason to believe it may be possible for the *American Electric* plaintiffs, and similarly situated future plaintiffs, to prevail on the merits of their public nuisance claim.²²⁹

B. Possible Displacement of Federal Common Law by Recent EPA Actions

In response to the Supreme Court's holding in *Massachusetts* that the EPA essentially must regulate GHGs under the CAA, the agency has recently issued two important rules.²³⁰ These EPA actions may ultimately affect the outcome of *American Electric* on appeal, as well as the status of future climate change lawsuits based on federal nuisance law.²³¹ The two new rules are the endangerment finding under section 202(a) of the CAA and the Tailoring Rule for the Prevention of Significant Deterioration (PSD) and Title V permit programs.²³²

In the EPA's December 15, 2009 endangerment finding, a precursor to regulation under the mobile sources provisions of the CAA, Administrator Lisa Jackson concluded that GHGs endanger both public health and welfare by contributing to global warming.²³³ On May 7, 2010, the EPA published its first regulation of

226. See *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 332 (2d Cir. 2009) (holding that district court erred in dismissing plaintiffs' claim on political question grounds).

227. See *id.* at 315-16 (summarizing court's holding).

228. See Christopher R. Reeves, *Climate Change on Trial: Making the Case for Causation*, 32 AM. J. TRIAL ADVOC. 495, 503-07 (2009) (discussing difficulty of proving causation for plaintiffs in climate change tort actions).

229. See generally *id.* at 508-23 (discussing various theories plaintiffs could potentially use to prove causation in climate change actions).

230. For a discussion of recent EPA regulations and their potential impact on climate change litigation, see *infra* notes 231 and accompanying text.

231. See Gaynor, *supra* note 212, at 10853 (noting that EPA recently issued two important rules regarding regulation of GHGs under Clean Air Act).

232. See *id.* (stating names of two rules recently promulgated by EPA).

233. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497 (Dec. 15, 2009) (summarizing EPA Administrator's finding that GHGs endanger public health and welfare).

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mobile source GHG emissions.²³⁴ Due to the CAA's structure, once the EPA issues and makes effective a regulation of GHG emissions under any section of the Act, the requirements of the CAA's PSD and Title V programs automatically become applicable to the GHG emissions of stationary sources.²³⁵ These programs are particularly important to the issue of whether federal nuisance actions against large GHGs emitters will be displaced because they require any stationary source emitting more than a certain threshold of a regulated pollutant to obtain a permit.²³⁶ On May 13, 2010, the EPA explained it would implement the PSD and Title V programs by issuing a final "tailoring" rule.²³⁷ The rule states that, beginning on January 2, 2011, the EPA will apply the CAA's stationary source permitting requirements to the largest GHG emitters such as power plants, cement production facilities, and refineries.²³⁸

Now that the Tailoring Rule has gone into effect, some courts may find that its permitting requirements displace federal nuisance litigation against large stationary sources of GHG emissions.²³⁹ Further implementation, however, could be delayed or precluded depending on the results of lawsuits filed by industry groups and certain states challenging the legality of the EPA's recent GHG reg-

234. Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010) (increasing CAFE standards and imposing GHG emissions limitations on passenger cars and light-duty trucks); see also *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, EPA, 94 (Mar. 29, 2010) http://www.epa.gov/nsr/documents/psd_memo_recon_032910.pdf (noting that vehicle emissions requirements will go into effect on January 2, 2011).

235. See Gaynor, *supra* note 212, at 10853 (explaining how regulation of new pollutant under any provision of CAA triggers requirement that EPA begin to regulate stationary sources of pollutant under PSD and Title V programs).

236. See Franz T. Litz & Nicholas M. Bianco, *What to Expect from EPA: Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10480, 10481 (2010) (describing role of PSD and Title V permitting requirements in regulation of large stationary sources under CAA).

237. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 1, 2010).

238. See *id.* at 31516 (providing details regarding implementation schedule by which PSD and Title V permit programs will be applied to stationary source GHG emitters); see also *EPA's Final Tailoring Rule: Its Future and Implications*, COVINGTON & BURLING LLP, 1 (May 20, 2010), <http://www.cov.com/files/Publication/56a039bc-6ac7-40c5-b7a2-9f1317d2b9b4/Presentation/PublicationAttachment/743db5fe-731d-46b3-8eef-ab907cf13db0/EPA%20Final%20Tailoring%20Rule%20-%20Its%20Future%20and%20Implications.pdf> (explaining types of business entities that will be subject to the PSD and Title V permitting programs under Tailoring Rule).

239. See Gaynor, *supra* note 212, at 10854 (noting that Tailoring Rule's application of PSD and Title V permit programs to large stationary sources could preempt future climate change litigation).

ulations.²⁴⁰ Furthermore, even if the regulations are upheld, their effect on climate change litigation will probably be modest because courts are unlikely to interpret them as preempting nuisance actions brought under state law.²⁴¹ Nevertheless, when the Supreme Court reviews *American Electric*, it may well find that the EPA's regulatory activity has sufficiently displaced the federal nuisance action presented in this case.²⁴²

C. Impact of Decision on the United States' Regulation of Carbon Emissions

Public nuisance litigation is hardly an optimal method for the U.S. to regulate and reduce its GHG emissions.²⁴³ Comprehensive legislation establishing a framework for regulating emissions would achieve larger GHG reductions at a lower social cost than would a series of multifarious court decisions.²⁴⁴ Due to the politically polarizing debate surrounding climate change and the quasi-legislative relief sought by the plaintiffs in *American Electric*, the Second Circuit's decision will be criticized by some as stepping beyond the proper role of the Judiciary.²⁴⁵

Nevertheless, *American Electric* could provide a significant spur to comprehensive federal legislation regulating GHGs, particularly if more circuits choose to adopt the Second Circuit's political ques-

240. *See id.* (observing that Tailoring Rule and vehicle GHG emissions standards have been challenged on several fronts and may not go into effect for years); *see also Industrial Groups Target EPA Over Clean Air Act Rule*, 30 No. 20 WESTLAW J. ENVTL. 1 (Apr. 29, 2010) (describing *Coalition for Responsible Regulation v. EPA* lawsuit filed by agricultural and mining groups challenging EPA's Tailoring Rule). The Tailoring Rule's greatest legal vulnerability is that the explicit statutory language of the CAA sets clear PSD and Title V permitting thresholds at a level substantially lower than the 75,000 tons of emission-per-year level selected by the EPA for regulating GHGs. *See COVINGTON & BURLING LLP, supra* note 238, at 3.

241. *See Gaynor, supra* note 212, at 10857 (observing that in past years, "even in areas where the EPA has been deemed to occupy the field with CAA regulations, states have [successfully] brought common-law nuisance challenges for the impacts of interstate pollution").

242. For a discussion of the EPA's recent regulatory actions under the Clean Air Act toward GHG emissions from mobile and stationary sources, *see supra* note 231 and accompanying text.

243. *See May, supra* note 163, at 952-53 (noting that few consider public nuisance-based climate change litigation to be more socially efficient means of regulating GHG emissions than legislation).

244. *See Hall, supra* note 191, at 293-95 (suggesting regulating GHG emissions through "piecemeal litigation against specific contributing entities" would be far less efficient and desirable than comprehensive climate change legislation enacted by Congress).

245. *See Lexington: A Refreshing Dose of Honesty, supra* note 163, at 69 (discussing how climate change issue is politically divisive and partisan).

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tion analysis.²⁴⁶ The threat of liability for carbon emissions through adverse federal district court decisions could provide power and energy companies with a strong incentive to lobby Congress to enact a more uniform and predictable statute regulating GHG emissions.²⁴⁷ These industries have been instrumental in obstructing the passage of climate change legislation through an intensive lobbying and public relations campaign. A change in their cost-benefit analysis regarding carbon emissions regulation could substantially improve the chances that such legislation will be enacted.²⁴⁸

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246. *See* Hall, *supra* note 191, at 294 (noting that Second Circuit's decision may spur long-awaited action by the Executive and Legislative Branches regarding regulation of GHG emissions).

247. *See id.* at 294-96 (discussing how threat of litigation may lead energy companies and trade groups to lobby Congress for comprehensive legislation).

248. *See id.* (explaining how energy companies have played influential role in obstructing passage of climate change legislation).

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