Denver Law Review

Volume 85
Issue 4 *Symposium - Global Climate Change: Integrating Environmental Justice into Policy, Regulation, and Litigation*

Article 9

December 2020

Climate Change, Constitutional Consignment, and the Political Question Doctrine

James R. May

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
James R. May, Climate Change, Constitutional Consignment, and the Political Question Doctrine, 85 Denv. U. L. Rev. 919 (2008).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

CLIMATE CHANGE, CONSTITUTIONAL CONSIGNMENT, AND THE POLITICAL QUESTION DOCTRINE

JAMES R. MAY[†]

ABSTRACT

Recently states and individuals have turned to federal common law causes of action to provide equitable and legal relief for climate change. Thus far, every federal court to consider these claims has held that they raise non-justiciable political questions consigned to the coordinate branches. These courts reason that federal courts lack jurisdiction over climate cases because climate change is textually committed elsewhere, there are no judicial standards to apply, and the elected branches have yet to render an initial policy determination about the subject. This article concludes that these courts either misapply or misapprehend the doctrine. It concedes that federal common law is not the optimal or only legal response to climate change. Yet it maintains that the political question doctrine is a false basis for dismissing climate cases that invoke these causes of action. The Constitution does not commit climate change to Congress or the executive. Federal common law provides ample and long-applied standards in cases involving disparate transboundary pollution. The elected branches have made initial policy determinations about climate change policies. Furthermore, there is good reason to question both the doctrine's jurisprudential bases and whether its framers meant it to be applied to federal common law in general, and climate cases in particular. Regardless, courts have rejected use of the doctrine to dismiss analogous claims for redress based on federal common law. The political question doctrine does not prevent courts from entering the climate change thicket.

> Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.[1]

---

† Professor of Law, Widener Law School. J.D., University of Kansas School of Law; LL.M., Pace University School of Law (Feldshuh Fellow). The author thanks Professor Randy Abate for comments to a draft of this article, and Patrick Clary, Widener Law '10, for proofreading the penultimate version.

1. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (Holmes, J.).

> The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.[2]

> [The court] ought not inject itself into the global warming thicket.[3]

INTRODUCTION

Climate change, as Chief Justice Roberts observes in his dissenting opinion in *Massachusetts v. EPA*, "may be a crisis, even the most pressing environmental problem of our time."[4] The challenge it presents may be parts insurmountable and indifferent to political boundaries. It is not, however, indivisible. Its causes and effects are not equally distributed. It is caused much more by some than by others. While a global phenomenon, its costs are distributed unevenly, borne more acutely by the poor, the elderly, the infirm, and the politically disenfranchised.

The stakes are both tremendous and unknown, and transcendentally personal. Some have nowhere to turn but in despair and desperation to the federal courts, beckoning ossified causes of action. For example, on February 27, 2008, the tiny City of Kivalena and the Alaska Native Village of Kivalena—a federally recognized tribe—brought a federal lawsuit against a dozen petroleum refining, energy producing, and coal extracting companies.[5] They claim that the greenhouse gases these industries emit contribute to global climate change, causing them real, palpable, harm. Invoking the federal common law of public nuisance and other claims, they argue that these industries should pay the estimated $400 million it will cost to relocate the community lock, stock and barrel before it melts—schools, churches, streets, businesses, hospital, police and fire stations, community center, people and permafrost—into the Arctic Ocean.

What to do. Congress could force the energy, transportation and extractive sectors to change their ways or bare the economic externalities of their climate-altering activities. It could have them shoulder their fair share of the relocation, health care, property damage and other costs of climate change. States could do this too, subject to federal preemption.

It does not seem, however, that such measures are likely soon to come to pass. Congress has not enacted technology-forcing, damages-paying legislation to address climate change. Some states have picked up the slack with their own measures to reduce emissions of greenhouse

---

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

3. California v. Gen. Motors Corp., No. 3:06-CV-05755 MJJ, 2007 WL 2726871, at *29 (N.D. Cal. Sept. 17, 2007).

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

5. *See Climate Change Threatens Existence, Eskimo Lawsuit Says*, CNN, Feb. 27, 2008, *available at* http://www.cnn.com/2008/WORLD/americas/02/26/us.warming.ap/index.html.

gases, promote conservation or alternative energy and transportation, and create markets in hopes of reducing carbon output. Yet states are left with little means either to mandate engineering responses or to be reimbursed for response costs.

The costs to states and individuals for responding to climate change, including that for health care, community relocation, property damage, shoreline loss, and technical assistance, to name a few, will likely be unlike anything we have seen in kind or degree. Whatever uncertainties about costs exist, however, one prediction seems an even bet: States and individuals will be left both with the dinner bill and the dirty dishes for the vestiges of a party-hard century of unsustainable carbon output.

Enter the common law. Public nuisance theory allows states and individuals to seek injunctive relief and/or money damages to abate activities that unreasonably interfere with a right common to the general public. Yet state public nuisance causes of action are often curtailed by limitations on liability and statutes of limitations, by requirements for individuals to show special damages, and by other obstacles.

Enter the federal common law. Since the time Justice Holmes sat on the Court, federal common law for public nuisance has served as a meaningful cause of action for states and individuals to stop harmful activities and recover the costs of transboundary pollution. So too it can with climate change. Indeed, the legal challenges of climate change seem a particularly cozy fit for federal common law. It is transboundary. Legislative enactments allowing for injunctive relief or money damages do not exist. A patchwork of state common law responses is untenable. So one is left to wonder for what federal common law can exist if not for climate change. And if current circumstances concerning climate change do not warrant its use, then when possibly could it be so.

Thus, states representing almost one-half of the nation's citizenry have brought federal common law public nuisance causes of action against the world's largest auto manufacturing[6] and fossil fuel burning energy companies.[7] Cities and tribes—as in Kivalena—have followed suit. Private litigants have also brought federal common law nuisance actions for damages caused or complicated by climate change.[8]

Enter the political question doctrine. It aims to thwart the judicial review of issues textually or prudentially consigned to Congress, the

6. *Gen. Motors*, 2007 WL 2726871, at *16. Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 598 (2008) [hereinafter *Automobile Emissions*].

7. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

8. Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2006 WL 1066645, at *2 (S.D. Miss. Aug. 30, 2007) (dismissing under the political question doctrine private common law cause of action brought by individuals to address effects of climate change), *appeal docketed*, No. 07-60756 (5th Cir. 2007).

President, or both.[9] The doctrine's political philosophy is "essentially a function of the separation of powers"[10] rooted in Jeffersonian notions of constitutional theory that democracy is best served by having coordinate elected branches resolve political questions rather than politically unaccountable federal judges.[11] To coin a phrase, the doctrine applies to disable federal courts from reviewing matters on the theory that they "ought not enter [the] political thicket."[12]

Enter the courts. Expressly declining to "enter the global warming thicket," federal courts have thus far invoked the political question doctrine to dismiss federal common law causes brought by states and individuals for climate change. This means that the cause of action is dead on arrival. There is no answer, no discovery, no standing, no proof, and no opportunity to prove damages or "unreasonable" harm. Exit the case.

Enter a preemptive clarification and concession. First, this article does not argue that federal courts in the United States are the premier forum for addressing what is arguably the world's most pressing problem. It does not aim to diminish the role of international fora, Congress, the President, agencies, the States, and citizens. The operative question here is whether the political question doctrine prevents federal courts from hearing climate cases rooted in federal common law. This article concludes it does not.

Second, this article is not an aria apologia on behalf of federal common law to address climate change. Federal common law is unwieldy and amorphous. To be sure, describing it is a little like describing what Mozart's opera *Magic Flute* tastes like. Federal common law is hardly the only or most efficient societal response to climate change.

But a vital response it is. Climate cases, if they are to fall, should fail on other ground, say, because the plaintiffs fail to prove damages are "unreasonable," or because they yield to other constitutional features. Indeed, state and private responses to climate change raise a constellation of other, arguably more substantial, constitutional questions. These include those under the Supremacy,[13] dormant Commerce[14] and Foreign

9. *See* Baker v. Carr, 369 U.S. 186, 210-27 (1962) (thoroughly discussing the political question doctrine).

10. U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 456 (quoting *Baker*, 369 U.S. at 217).

11. *See id.*

12. Colegrove v. Green, 328 U.S. 549, 556 (1946).

13. U.S. CONST. art. VI, cl. 2. For assessment of preemption and climate issues, see generally Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003); Sara A. Colangelo, Comment, *The Politics of Preemption: An Application of Preemption Jurisprudence and Policy to California Assembly Bill 1493*, 37 ENVTL. L. 175 (2007); Sarah Olinger, Comment, *Filling the Void in an Otherwise Occupied Field: Using Federal Common Law to Regulate Carbon Dioxide in the Absence of a Preemptive Statute*, 24 PACE ENVTL. L. REV. 237 (2007).

14. U.S. CONST. art. I, § 8, cl. 3. For an analysis of how the dormant Commerce Clause and dormant Foreign Relations Clause apply to California's recent climate legislation, see generally Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 37 ENVTL. L. REP.

Relations,[15] Compact[16] and Treaty[17] clauses, and standing.[18] Each provides more constitutionally legitimate application to climate cases than does the political question doctrine.

This article summarizes and evaluates the growing body of jurisprudence relating to how the political question doctrine applies to federal common law causes of action that address the causes and effects of climate change. Part I provides an overview of the effects of and policies toward climate change, and the role federal common law might play in addressing them. Part II discusses the political question doctrine's origins and legal architecture. Part III describes juridical applications of the "textual commitment" prong of the doctrine and explains why it does not apply to climate cases. Part IV examines how courts have applied the prudential component of the doctrine and explains why these too do not apply in climate cases. Part V questions whether applying the political question doctrine to climate cases is constitutionally legitimate and whether it was designed to apply to federal common law in general, and climate cases in particular.

This article concludes that federal courts have thus far incorrectly invoked the political question doctrine in climate cases under federal common law. This erroneously foreclososes consideration of any other factual, causal, constitutional, statutory, common law, or remedial issues out of undue deference to the elected branches of the federal government.

10653 (2007); Peter Carl Nordberg, Note, *Excuse Me, Sir, But Your Climate's on Fire: California's S.B. 1368 and the Dormant Commerce Clause*, 82 NOTRE DAME L. REV. 2067 (2007).

15. *See generally* Hannah Chang, *Foreign Affairs Federalism: The Legality of California's Link with the European Union Emissions Trading Scheme*, 37 ENVTL. L. REP. 10771 (2007) (discussing the dormant foreign affairs power and California's efforts to combat climate change). Some question the existence of foreign-affairs preemption. *See, e.g.*, Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 327-28 (2005) ("If the mere appearance of an issue on the international agenda would result in automatic preemption of state authority under the dormant foreign affairs preemption, a good deal of the police powers of the States would become at risk.").

16. U.S. CONST. art. I, § 10, cl. 3. For a discussion of the interplay between the Compact Clause and multi-state agreements to address the effects of climate change, see generally Katie Maxwell, Comment, *Multi-State Environmental Agreements: Constitutional Violations or Legitimate State Coordination?* 15 PENN. ST. ENVTL. L. REV. 355 (2007); Michael S. Smith, Note, *Murky Precedent Meets Hazy Air: The Compact Clause and Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387 (2007).

17. U.S. CONST. art I, § 10, cl. 1; *id.* art. II, § 2, cl. 2. *See generally* Kirk Junker, *Conventional Wisdom, De-Emption and Uncooperative Federalism in International Environmental Agreements*, 2 LOY. U. CHI. INT'L L. REV. 93 (2005) (discussing the Treaty Clauses, states' rights, and international environmental agreements). For broader commentary on international agreements and federalism, see generally Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1 (2001); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

18. For an overview of standing principles raised in climate litigation, see generally Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005); Nigel Cooney, Note, *Without a Leg to Stand On: The Merger of Article III Standing and the Merits in Environmental Cases*, 23 WASH. U. J.L. & POL'Y 175 (2007).

Thus, while conceding that federal common law causes of action do not provide an optimal democratic, economic or societal means to address the effects of climate change, this article concludes that the political question doctrine is an unworkable constitutional means for dismissing climate cases planted in federal common law. The doctrine does not prevent federal courts from entering this thicket.

I. CLIMATE CHANGE, POLICY, AND THE ROLE OF FEDERAL COMMON LAW

A lengthy discussion of the root causes and effects of climate change and attendant policies is beyond the scope of this article. It is, however, helpful to recapitulate them briefly before describing how federal common law might apply.

A. Effects of Climate Change

Climate Change is at least somewhat attributable to anthropogenic greenhouse gas (GHG) emissions from the use and combustion of fossil fuels.[19] Extracted from underground sources derived from the decomposition of plants and animals that lived and died millions of years ago, fossil fuels (e.g., coal, petroleum, natural gas) have become an indispensable component of life in the western world. We use fossil fuels to propel our cars, planes and trains; to heat our homes, hospitals, schools and businesses; to make fabrics, plastics and pharmaceuticals; and to provide the majority of the power we use to wash our clothes and dishes, keep the lights on, charge our phones and other electronics, run our computers, and live our modern lives.

The fossil fuels used to facilitate these activities produce copious amounts of GHGs. Indeed, over the time it takes for you to read this article (assuming you are an average reader with above-average patience), human activity will contribute about another three million tons of GHGs into the atmosphere, further concentrating GHG levels.[20]

---

19. A comprehensive discussion of the evidence surrounding anthropogenic-induced climate change is beyond the scope of this article. For this, the reader is referred to Chapter 1 of the Stern Review from the British government. *See generally* SIR NICHOLAS STERN, STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE (2006), *available at* http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.

20. *See* Donald A. Brown, *The U.S. Performance in Achieving Its 1992 Earth Summit Global Warming Commitments*, 32 ENVTL. L. REP. 10, 741 (2002). Many scientists and policy makers believe that a doubling of CO_2 from preindustrial levels to 560 ppm may be unavoidable in the 21st century. This is so because the world's political and economic system cannot respond rapidly enough to make faster changes in some major polluting sources such as gasoline-powered automobiles or coal fired power plants. Some environmentalists, however, believe it is still possible to stabilize GHG at 450 ppm, a level that would limit the temperature increase (in addition to that

The increase in GHGs courts calamity by contributing to global climate change.[21] Future generations will be saddled with the costs of "doing nothing."[22] As the Supreme Court recently observed, "[t]he harms associated with climate change are serious and well recognized,"[23] potentially including "a precipitate rise in sea levels by the end of the century, . . . 'irreversible changes to natural ecosystems,' a 'significant reduction in water storage in winter snowpack in mountainous regions. . . ,' and an increase in the spread of disease."[24]

The effects of climate change are distributed disproportionately. It is expected to increase precipitation in the Americas, but decrease it in southern Africa, the Mediterranean and southern Asia.[25] Relative ground temperatures are expected to rise faster in the polar regions, particularly in the Arctic Regions.[26]

The manifestations of climate change are difficult to ignore. Indeed, as former Vice President Al Gore explained when accepting the Nobel Peace Prize for his extensive work on spreading the news about the dangers of climate change:

> In the last few months, it has been harder and harder to misinterpret the signs that our world is spinning out of kilter. Major cities in North and South America, Asia and Australia are nearly out of water due to massive droughts and melting glaciers. Desperate farmers are losing their livelihoods. Peoples in the frozen Arctic and on low-lying Pacific islands are planning evacuations of places they have long called home. Unprecedented wildfires have forced a half million people from their homes in one country and caused a national emergency that almost brought down the government in another. Climate refugees have migrated into areas already inhabited by peo-

---

which has already been caused by human activities) to 1.5 to 2°F during the next 100 years. Virtually nobody believes that it is possible to stabilize atmospheric concentrations below 450 ppm and concentrations could continue growing after that if third-world countries do not implement aggressive reduction strategies, even if the most ambitious proposal currently under consideration were adopted. *Id.*

21. For a discussion of some of the impacts of climate change, see generally Richard A. Kerr, *Latest Forecast: Stand By for a Warmer, but not Scorching, World*, SCIENCE, Apr. 21, 2006, *available at* http://www.sciencemag.org/cgi/content/full/312/5772/351a; CAMILLE PARMESAN & HECTOR GALBRAITH, PEW CENTER ON GLOBAL CLIENT CHANGE, OBSERVED IMPACTS OF GLOBAL CLIMATE CHANGE IN THE U.S. (2004), *available at* http://www.pewclimate.org/docUploads/final_ObsImpact.pdf. For contemporaneous impacts, see generally Real Climate: Climate Science from Climate Scientists, http://www.realclimate.org (last visited Mar. 26, 2008).

22. Robert L. Glicksman, *Global Climate Change and the Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing*, 52 LOY. L. REV. 1127, 1127, 1179 (2006).

23. Massachusetts v. EPA, 127 S. Ct. 1438, 1455 (2007).

24. *Id.* at 1456 (quoting declaration of Michael MacCracken, former Executive Director, U.S. Global Change Research Program).

25. This harm also translates into economic costs. *See* Gateway to the United Nation's Systems on Climate Change, Climate Change at a Glance, http://www.un.org/climatechange/background/ataglance.shtml (last visited Mar. 26, 2008).

26. *See* Gateway to the United Nation's Systems on Climate Change, *supra* note 25.

> ple with different cultures, religions, and traditions, increasing the potential for conflict. Stronger storms in the Pacific and Atlantic have threatened whole cities. Millions have been displaced by massive flooding in South Asia, Mexico, and 18 countries in Africa. As temperature extremes have increased, tens of thousands have lost their lives. We are recklessly burning and clearing our forests and driving more and more species into extinction. The very web of life on which we depend is being ripped and frayed.[27]

The *status quo* will increase GHG emissions about two percent per annum, resulting in a global increase of at least two to three degrees Celsius by 2100.[28] It will also likely bring about abrupt climate change. This includes ice sheet disintegration, and regional climate disruptions.[29] Furthermore, it is likely to result in significant species loss because isotherm displacement due to climate change moves more rapidly than plants and animals can migrate.[30] The domestic effects of climate change include extreme weather events and more significant droughts, floods, and fires.[31] States in the United States have already reported rising sea levels, flooding, snowfall reductions, and coastal erosion.[32] They are also left with health care and other costs in the aftermath.[33]

B. Policy Responses

A conspicuous lack of cohesive federal action to regulate greenhouse gas emissions has invited piecemeal approaches to climate change in the U.S.[34] In 1992, the United States joined the U.N. Framework Convention on Global Climate Change (UNFCC). In 1997, it served as a signatory to the Kyoto Protocol on Global Climate Change. Yet subsequently the political branches and federal agencies have said much and done relatively little to address climate change.

---

27. Al Gore, Nobel Peace Prize Acceptance Speech (Dec. 10, 2007), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html.

28. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 340 (D. Vt. 2007); *see also* Central Valley Chrysler-Jeep, Inc. v. Witherspoon, 2007 WL 135688 (E.D. Cal. 2007), 456 F. Supp. 2d 1160 (E.D. Cal. 2006) (companion case challenging California standards); Lincoln Dodge, Inc. v. Sullivan, 1:06-cv-00070-T-LDA (filed Feb. 13, 2006) (same for Rhode Island).

29. *Crombie*, 508 F. Supp. 2d at 340.

30. *Id.* at 340-41.

31. *See, e.g., id.* at 341. Hansen Aff., Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, Nos. 2:05-CV-302, 2:05-CV-304, 2006 WL 4761053, at ¶ 65 (D. Vt. Aug. 14, 2006).

32. *See, e.g.*, GUIDO FRANCO, CALIFORNIA ENERGY COMMISSION, CLIMATE CHANGE IMPACTS AND ADAPTATION IN CALIFORNIA 7 (2005), *available at* http://www.energy.ca.gov/2005publications/CEC-500-2005-103/CEC-500-2005-103-SD.PDF; Washington State, Department of Ecology, http://www.ecy.wa.gov/climatechange/effects.htm (last visited Mar. 26, 2008).

33. *See*, Lisa Heinzerling, *Climate Change, Human Health, and the Post-Cautionary Principle*, 96 GEO. L.J. 445, 445-60 (2008).

34. Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J. L. & PUB. POL'Y 369, 372 (2006).

First, Congress. While many federal representatives lend their name to pending climate legislation, Congress has yet to enact any of it.[35] The U.S. Senate has yet to ratify the Kyoto Protocol. With Australia's late 2007 ratification of the Protocol,[36] this leaves the U.S. with the dubious distinction of being the only major industrialized country in the world that has not done so.[37] Moreover, Congress has not allocated or appropriated funds to pay for the direct effects of climate change. These include shoreline loss, property damage, crop diminution, and personal health and welfare loss and injuries.

Next, the Executive. The President has done little to enter the climate change fray other than promote volunteerism. While the Bush Administration observes that global climate change is a "complex and important issue,"[38] it regularly resists federal measures to regulate GHG emissions. When countries from around the globe met in Bali in the fall of 2007 to discuss ways to reduce GHG emissions, primarily as a means of protecting the poor and politically powerless around the globe,[39] the White House announced that it would not agree to reduce U.S. greenhouse gas emissions.[40]

The Fourth Branch has fared no better. Federal agencies have adopted a "wait and see" approach exalting voluntary community action. While the U.S. Environmental Protection Agency (EPA) allows that "human-induced warming and associated sea level rises are expected to continue through the 21st century,"[41] it has avoided opportunities to regulate GHG emissions under available legislative vehicles, such as the Clean Air Act, despite prodding by the U.S. Supreme Court.[42] It has also failed to recommend legislative action.

Furthermore, EPA has thwarted innovative state measures to address climate change. For example, on December 19, 2007, EPA Chief Administrator Johnson denied the State of California's petition[43] to regu-

---

35. *See, e.g.*, America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007), *available at* http://usclimatenetwork.org/federal/lieberman-warner-bill/ACSA.pdf; Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007).

36. *Australia Ratifies Kyoto Protocol*, N.Y. TIMES, Dec. 3, 2007, *available at* http://www.nytimes.com/2007/12/03/world/asia/03rudd-wire.html.

37. Abate, *supra* note 34, at 370-72.

38. The White House, Council on Environmental Quality, http://www.whitehouse.gov/ceq/global-change.html (last visited Mar. 26, 2008).

39. Peter Gelling, *Focus of Climate Talks Shifts to Helping Poor Countries Cope*, N.Y. TIMES, Dec. 13, 2007, at A31.

40. *See* Chemerinsky et al., *supra* note 14, at 10662.

41. ENVIRONMENTAL PROTECTION AGENCY, CHAPTER 6, IMPACTS AND ADAPTATION 1, *available at* http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/$File/ch6.pdf (last visited Mar. 26, 2008).

42. *See* Robert S. Glicksman, *Balancing Mandate and Discretion in the Institutional Design of Federal Climate Change Policy*, 102 NW. U. L. REV. 196, 201-02 (2008).

43. California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver Preemption for California's Adopted and Amended New Motor

late greenhouse gas emissions from new automobiles.[44] In a curious call,[45] EPA maintains that California has failed to demonstrate the "compelling and extraordinary circumstances" needed to enact such regulations.[46] California immediately objected[47] and has filed suit,[48] joined by fifteen other states,[49] to reverse the EPA's ruling.[50] EPA then waited another three months before formally rejecting the State of California's request to regulate GHG emissions from new motor vehicles.[51]

The vacuum left by the lack of coherent federal action has resulted in an ad-hoc "dynamic federalism."[52] Think of it as the Wild West meets political climate science, where sub global regulation runs amok.[53]

Alas, the states. States frustrated with the lack of action by the elected federal branches have turned to other mechanisms to address climate change.[54] Take your pick. State measures include gubernatorial action,[55] legislation, regulation,[56] and multistate climate change com-

---

Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, December 21, 2005.

44. Letter from Stephen L. Johnson, Administrator, EPA, to Arnold Schwarzenegger, Governor, California, denying Section 209(b) waiver preemption (Dec. 19, 2007), *available at* http://www.epa.gov/otaq/climate/20071219-slj.pdf.

45. Glicksman, *supra* note 22, at 201-02.

46. *Id.*; *see also* Johnson, *supra* note 44.

47. Letter from Arnold Schwarzenegger, Governor, California, and 13 Other Governors to Stephen L. Johnson, Adminstrator, EPA, regarding U.S. EPA's denial of California's tailpipe emissions waiver request (Jan. 23, 2008), *available at* http://gov.ca.gov/press-release/8596/ ("The federal government, with this unprecedented action, is ignoring the rights of states, as well as the will of more than one hundred million people across the U.S.").

48. *See* California v. U.S. Envtl. Prot. Agency, No. 08-70011 (9th Cir. filed Jan. 2, 2008).

49. Fifteen states have joined the suit, on the basis of § 177. Keith Richburg, *California Sues EPA Over Emissions Rules*, WASH. POST, Jan. 3, 2008, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/02/AR2008010202833.html.

50. Office of the Governor, Governor Schwarzenegger Announces EPA Suit Filed to Reverse Waiver Denial, *available at* http://gov.ca.gov/press-release/8400/ (suit filed in Ninth Circuit on January 2, 2008); California Sues EPA over Greenhouse Gas Rules, MSNBC, Jan. 2, 2008, *available at* http://www.msnbc.msn.com/id/22474944/ (arguing EPA ignored legal requirements of CAA).

51. California State Motor Vehicle Pollution Control Standards: Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 26, 2008).

52. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 177 (2006).

53. *See, e.g.*, Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOL. L.Q. 183, 194, 196-97 (2005).

54. For discussions of recent state efforts, see Daniel A. Farber, *Climate Change, Federalism, and the Constitution* 2-3 (U.C. Berkeley Public Law Research, Paper No.1081664, 2008), *available at* http://ssrn.com/abstract=1081664; Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 46 (2007).

55. Sarah Krakoff, *Essay: Arnold Schwarzenegger and Our Common Future*, 53 BUFF. L. REV. 925, 925 (2005).

56. *See* Farber, *supra* note 54, at 31. Professor Farber states:

> Courts should not be quick to invalidate state climate regulations, whether or not Congress has legislated. It is much more likely that society will be too timid in responding to climate change than that it will go too far; any fear of over-regulation by states would be largely misplaced. The courts should consequently content themselves with policing against the most obvious potential flaws in state legislation.

Id. at 4.

pacts.[57] Last, states have looked to federal courts for help, summoning the federal common law.

C. Role of Federal Common Law

Impatient with the general lack of federal action,[58] and concerned about the effects of climate change, states representing nearly one-half of the nation's population and individuals have brought a significant amount of litigation to address climate change.[59] Aiming for compensation,[60] or pushing technological responses, states, communities and individuals have turned to the federal common law of public nuisance.[61]

Public nuisance law involves an "unreasonable interference with a right common to the general public."[62] Public nuisance cases are generally brought by public entities, such as states as *parens patriae*, to protect state resources and the interests of a state's citizens.

The theory is relatively straightforward. The linchpin of a federal public nuisance cause of action is establishing that the interference is "unreasonable" to public health or welfare.[63] Causation for public nuisance can be collective. Any defendant that plays a substantial role in

---

57. Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 65 (2005); Memorandum of Understanding on the Regional Greenhouse Gas Initiative from the Governors of the States of CT, DE, ME, NH, NJ, NY, and VT (Dec. 20, 2005), *available at* http://www.rggi.org/docs/mou_final_12_20_05.pdf (capping GHGs from, and agreeing to cooperate with carbon markets for, electric utilities).

58. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 778 (2006).

59. *See* ROBERT MELTZ, CLIMATE CHANGE LITIGATION: A GROWING PHENOMENON 5, 14, 18, 22 (2007), *available at* www.ncseonline.org/NLE/CRSreports/05jan/RL32764.pdf; *see also* JUSTIN R. PIDOT, GLOBAL WARMING IN THE COURTS: A LITIGATION UPDATE 1 (2006), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GWL_Report.pdf.

60. *See* Daniel Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1613-14 (2007). In advancing ideas about how to compensate for climate change, Professor Farber writes:

> My purpose is not to offer a fully matured blueprint for compensation. It is to put some basic ideas on the table and to suggest that at least part of the compensation issue is relatively manageable. In the end, the decision of whether to compensate will be driven largely by political decision makers rather than by courts or, even less likely, by scholars. Whether a large-scale compensation plan will ever be adopted, let alone when such a step might be taken, remains unclear. Even at this early stage, however, it is useful to imagine the outlines of a compensation scheme. Doing so may help focus the debate on whether or not to compensate, and it will provide a useful head start on actual programmatic design if the decision is ultimately made to provide compensation.

Id. at 1608.

61. *See* Kaswan, *supra* note 54, at 52 ("I suggest that the courts remain a vital forum for addressing climate change, particularly in the absence of comprehensive action by the other branches of government."). For other potential remedies, see Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. 10114, 10127 (2008).

62. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

63. *See* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 328-30 (2005) (explaining how courts balance equities in public nuisance cases); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L. REV. 407, 448-49 (2005) (discussion of elements of public nuisance cause of action).

causing the nuisance can be liable.[64] A plaintiff's ability to demonstrate causation will depend upon the significance of each defendant's contributions. When the harm is indivisible, liability for public nuisance is joint and several.[65] In the climate context, it is plausible to find that a defendant is a significant contributor to an unreasonable interference with a right common to the general public and allocate responsibility for equitable or legal relief.[66]

Federal common law for public nuisance has a long and storied history of helping to fill the interstitial regulatory gaps left by diluted or dilatory federal legislative and executive responses. There is thus a rich history of cases applying federal common law to transboundary pollution in the face of insufficient federal regulation.[67] The more venerated, if not necessarily household name cases, include *Illinois v. City of Milwaukee*[68] and *Missouri v. Illinois*[69] (water pollution), *New Jersey v. New York*[70] (solid waste), and *Georgia v. Tennessee Copper Co.*[71] (air pollution).

Federal common law holds potential for addressing the effects of climate change, even if it is "second best" to other legislative and judicial responses. As Professor Kaswan notes:

> [T]he common law provides a legal remedy for a serious injury that the political branches have failed to provide. Common law actions could also create political pressure for needed congressional action. Moreover, the climate change public nuisance cases brought to date do not pose as great a risk of piecemeal and inconsistent standards as common law cases sometimes pose. The courts' relative institutional competence, from both a technical and a political perspective, is a concern, and one that suggests that a legislative approach would ultimately be preferable. Nonetheless, in the absence of a legislative response, the common law's "second best" is better than nothing.[72]

Since the nation's founding the common law has afforded the means for states and citizens to stop or curtail harmful and insufficiently-regulated activities and to recover demonstrable personal and property damages. Hence states and citizens have turned to the federal common law to address unreasonable effects of cigarettes, weapons, insurance

64. Pawa & Krass, *supra* note 63, at 450-55 (discussing liability of defendants whose contributions alone would not have created the nuisance).

65. David A. Grossman, *Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 31 (2003).

66. *See id.* at 27.

67. Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 421 (1974).

68. 406 U.S. 91 (1972).

69. 200 U.S. 496 (1906).

70. 284 U.S. 585 (1931).

71. 206 U.S. 230 (1907).

72. Kaswan, *supra* note 54, at 106.

fraud and price gouging, as well as for the transboundary effects of air emissions, water pollution and contamination of land and drinking water.

Federal common law provides a means for addressing the impacts of climate change in three ways. First, it offers the opportunity to establish compliance schedules to require the installation of technology that might be used to reduce emissions of GHGs. Second, it provides a basis for compensation for personal or property damage.[73] Third, it provides a means for paying the costs of monitoring, protecting, restoring, or providing substitutes for existing resources.[74]

Federal common law is specially suited to remedy the personal and property parade of climate change horribles. When Congress inevitably enters the fray and enacts pervasive climate legislation, it is unlikely to set aside a remedial fund to pay states, cities and citizens who will absorb the externalized costs of GHG emissions of the auto, industrial and energy sectors. The tea leaves suggest that when Congress acts it is unlikely to do so in a fashion that gives states and citizens much latitude in controlling measures or damages. Rather, it is more likely to install a "cap and trade" market in which regulated entities are allocated and can acquire and trade emission credits and perhaps enjoy partial or full immunity from private law causes of action, if not liability limits for compensatory or punitive damages. It is also likely that Congress will explicitly if not implicitly preempt federal common law causes of action for injunctive relief, and maybe for damages too. It may also preempt state common law causes of action in the same regard.

There is little doubt that federal common law is hardly the optimal option for addressing climate change. Climate change is a global issue with salient national impacts. The elected branches are well suited to weigh the tough policy choices about energy, conservation, transportation, and a host of other factors. The states no doubt have a role in implementing climate policy in a grand dance of cooperative federalism.

Yet equally doubtful is the elected branches' capability to provide the legislative and tactical relief due states and individuals for the adverse effects of climate change. The effects of climate change come with a price tag, one that is regressive for states and citizens, including those on the political and economic margins of society.[75] Adverse effects include ice-melt sea level rise that would inundate the East Coast of the

---

73. For a discussion of a possible framework for compensating the victims of climate change, see generally Farber, *supra* note 54.

74. *Id.* at 1655.

75. *See also* Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1624 (2007); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1677 (2007). *See generally* Alice Kaswan, *supra* note 54 (providing an overview of the positive and negative environmental justice implications of a variety of the most significant emerging climate change policies, including cap and trade).

U.S., including most of Florida and most urban centers heavily populated by racial and ethnic minorities.[76]

The price tag for climate change is daunting. Massachusetts alone concludes that climate change will cost its taxpayers $1.8 billion annually due to increased flooding, loss of shoreline, and water borne diseases.[77] Climate change will also place some states at a competitive disadvantage.[78] Hence states, their instruments, and individuals are left wondering why they should be left to pay for climate change.[79]

Almost as last resort then they have enlisted the federal judiciary to help fashion relief under the federal common law. These cases naturally involve a complex intersection of foreign, federal and state law and policy. They also raise myriad constitutional questions, including whether the "political question doctrine" prevents federal courts from exercising jurisdiction over climate cases, as discussed in Part II. This article concludes it does not.

II. THE POLITICAL QUESTION DOCTRINE

While the Constitution does not admit of a field of "political questions" beyond the reach of the federal judiciary, the Supreme Court has concluded that matters that are demonstrably committed to a coordinate branch of government, or otherwise imprudent for judicial service, are not justiciable.[80]

Chief Justice Marshall's observations serve as the fountainhead of the doctrine. In *Marbury v. Madison*,[81] he wrote that there are "irksome" and "delicate" questions that are inherently political and out of reach to the federal judiciary: "Questions, in their nature political or which are, by the Constitution and laws, submitted to the executive can never be made to this court."[82] Thus, he anticipated two strands of cases that engender judicial forbearance, and with them, the framework of the political question doctrine: first, those that are constitutionally or statutorily

---

76. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 340 (D. Vt. 2007).

77. *See also* Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

78. *See* Barry G. Rabe, Mikael Román & Arthur N. Dobelis, *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVT. L.J. 1, 45 (2005) (state litigation "is a flexible tool for overcoming regulatory inertia at the federal level").

79. *See* Daniel A. Farber, *Adapting to Climate Change: Who Should Pay?*, 23 J. LAND USE & ENVTL. L. 1, 2-3 (2007). Professor Farber says:

> Most importantly, we should start thinking about cost allocation now because very soon the world is going to start doing so. As the realization sinks in that climate change will cause billions of dollars of harm even if we do everything feasible to cut back on emissions, the people who are directly harmed are going to start wondering whether they alone should bear the costs.

Id. at 4.

80. Baker v. Carr, 369 U.S. 186, 198-204 (1962).

81. 5 U.S. 137 (1803).

82. *Id.* at 169-70.

committed to the executive branch and second, those that as a matter of prudence should be avoided because they are political "in their nature."[83]

Modern political question jurisprudence inquires as to "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[84] In deciding whether to apply the doctrine, courts must "analyze representative cases and . . . infer from them . . . analytical threads."[85] Such threads expose six "formulations" of cases that are not suitable for judicial identification, determination or molding:

> (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 the 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 the government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[86]

The formulations are "probably listed in descending order of both importance and certainty."[87] Yet dismissal is warranted only if one of these formulations is "inextricable" from the case.[88]

Baker v. Carr's formulations reveal the two strands of the political question doctrine. The first strand—which encompasses the first formulation—is textual, and asks whether commitment of the issue to an elected branch is "[p]rominent on the surface."[89] The second strand—which includes formulations (2) through (6)—is prudential, and applies in the absence of a textual commitment but when there are functional reasons for judicial restraint.[90]

The political question doctrine has proven one of "limited application."[91] Applying the doctrine involves "a delicate exercise in constitutional interpretation" to be conducted on a "case-by-case inquiry."[92] It is to be used sparingly in the context of demonstrable "political questions" devoted to the elected branches, not simply to cases that involve political

83. *Id.* at 170.
84. *Baker*, 369 U.S. at 198.
85. *Id.* at 211.
86. *Id.* at 217.
87. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004).
88. *Baker*, 369 U.S. at 217.
89. *Id.*
90. *Id.*
91. *See* Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 681 (E.D. La. 2006).
92. *Baker*, 369 U.S. at 211.

issues.[93] To be sure, the Court has used the doctrine only a half a dozen times in more than two centuries. Traditional questions into which courts "ought not enter the political thicket"[94] include political apportionment and gerrymandering,[95] impeachment,[96] constitutional amendments,[97] and treaty abrogation.[98]

Now to this list add climate change. Somewhat surprisingly, federal courts have recently extended the doctrine in dismissing federal common law causes of action by states and citizens to address the effects of climate change. They have done so under both the textual and prudential prongs of the doctrine. As discussed in Parts III and IV, this is a wrong turn for the doctrine.

III. WHY CLIMATE CASES ARE NOT CONSTITUTIONALLY COMMITTED

The first prong of modern political question doctrine inquires as to whether the issue involves a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[99] It is the "clearest statement of the six,"[100] and registers the "dominant consideration in any political question inquiry."[101] This Part explains why climate cases are not textually committed to a coordinate branch of government. It begins with explaining the types of issues that are subject to this prong of the doctrine, before moving on to how some courts have misapplied it in climate cases.

A. General Application

The Court has held matters "constutitionally committed" when they are expressly addressed by the Constitution. This includes federal congressional districting, foreign relations, impeachment of federal officers and constitutional amendments. Congressional districting provides perhaps the most salient use of this prong of the doctrine. For example, in *Colegrove v. Green*,[102] the plaintiffs argued that Illinois' congressional districting scheme violated the Republican Guarantee Clause because it did not apportion voting districts equally, which had the effect of accentuating the influence of rural voting districts and diluting that of urban districts inhabited predominantly by racial minorities. The Court elected to remain "aloof," finding apportionment constitutionally committed to

93. *Id.* at 217.
94. Colegrove v. Green, 328 U.S. 549 (1946).
95. *Id.*; *Baker*, 369 U.S. at 186.
96. Nixon v. United States, 506 U.S. 224 (1993).
97. Coleman v. Miller, 307 U.S. 433 (1939).
98. Goldwater v. Carter, 444 U.S. 996 (1979).
99. *Baker*, 369 U.S. at 217.
100. Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 681 (E.D. La. 2006).
101. *Id.* (quoting Saldano v. O'Connell, 322 F.3d 365, 369 (5th Cir. 2003) (citing *Nixon*, 506 U.S. at 252-53 (Souter, J., concurring))).
102. 328 U.S. 549, 550 (1946).

the House of Representatives:[103] "[T]he Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House [of Representatives]."[104] Thus, the Court reasoned that "[c]ourts ought not to enter this political thicket."[105]

Foreign relations, constitutionally committed to the elected branches, are also subject to the political question doctrine. For example, the Court has also found that presidential abrogation of existing treaties falls under the political question doctrine. In *Goldwater v. Carter*, the Court in a plurality opinion ruled that the issue of whether the President could terminate a treaty unilaterally without Senate involvement is non-justiciable because "it involves the authority of the President in the conduct of our country's foreign relations."[106] The Court reasoned it should refrain when the dispute is "between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."[107]

The Court has also concluded that the impeachment process is constitutionally committed to the elected branches. In *Nixon v. United States*,[108] a federal judge challenged his impeachment conviction by the Senate, claiming that the Constitution afforded him a trial before the full Senate instead of a committee of the Senate. Former federal judge Walter Nixon argued that while the Constitution provides an elaborate process for impeachment and conviction of federal officers for "Treason, Bribery, or other high Crimes and Misdemeanors,"[109] it is the Senate—and not a committee of the Senate—that has the "sole Power to try all Impeachments."[110]

The Court declined to engage the issues under the political question doctrine. It held that impeachment matters are constitutionally committed to the elected branches: "judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances."[111] It also found it would be imprudent to impose judicial standards on the impeachment process: "In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability."[112]

---

103. *Id.* at 552-53 ("[T]he petitioners ask of this Court what is beyond its competence to grant. . . . [T]his controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof.").
104. *Id.* at 554.
105. *Id.* at 556.
106. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).
107. *Id.* at 1004.
108. 506 U.S. 224, 226 (1993).
109. U.S. CONST. art. II, § 4.
110. *Id.* art. I, § 3, cl. 6.
111. *Nixon*, 506 U.S. at 234-35.
112. *Id.* at 236.

Finally, the Court has held that questions surrounding the constitutional amendment process are constitutionally committed. In *Coleman v. Miller*,[113] it ruled that challenges to the duration for holding open proposed amendments to the Constitution raise a non-justicable political question because the Constitution commits the amendment process to Congress.[114] It reasoned that judicial involvement in the matter would upend "[t]he respect due to coequal and independent departments."[115]

B. Application in Climate Cases

The leading case finding there to be a "textually demonstrable constitutional commitment" of climate change issues to a coordinate political department is *California v. General Motors Corp.*[116] In that case, the State of California brought a federal and state common law causes of action against General Motors, Toyota, Ford, Honda, DaimlerChrysler, and Nissan, seeking damages for "past and ongoing contributions to global warming, a public nuisance."[117] California claimed that the defendants produce more than 20 percent of CO_2 emissions in the United States, and 30 percent of all CO_2 emissions in California.[118] It complained that it has incurred substantial cost as a result of climate changes due to decreased snowfall and increased erosion, flooding and wildfires.[119] It asked that the court assess damages to defray the costs associated with these effects.

The court found the first prong of the *Baker v. Carr* test precluded judicial review. It enlisted Congress' enumerated power over interstate commerce, and the President and the Senate's complementary roles over foreign policy as evidence of a constitutional commitment of climate issues to the elected branches.[120] It observed that the Constitution gives Congress authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[121] Thus, it concluded, "concerns raised by the potential ramifications of a judicial decision on global warming in this case would sufficiently encroach upon

113. 307 U.S. 433 (1939).

114. *Id.* at 452-55; *see also* U.S. CONST. art. V.

115. Baker v. Carr, 369 U.S. 186, 214 (1962). For opposing points of view as to how the political question doctrine applies to the constitutional amendment process, compare Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 433-36 (1983), with Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387 (1983).

116. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *see also* U.S. CONST. art. I, § 8, cl. 3.

117. Second Amended Compl. at ¶ 2, California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

118. *Id.* ¶ 40.

119. *Id.* ¶ 1.

120. *Id.*; *see also* U.S. CONST. art. II, § 2, cl. 2.

121. *Gen. Motors Corp.*, 2007 WL 2726871, at *13; *see also* U.S. CONST. art. I, § 8, cl. 3.

interstate commerce, to cause the Court to pause before delving into such areas so constitutionally committed to Congress." [122]

Pause it did. The court concluded that the plaintiffs' claims involved areas textually committed to Congress under the Commerce Clause. It reasoned that a state's control over interstate markets for automobiles is "subordinate to the federal power over interstate commerce."[123]

It also expressed a concern tantamount that under the dormant Commerce Clause, insofar as states are "constrained by the need to respect the interests of other States."[124] The court was uncomfortable with the notion of fashioning a remedy that could implicate commerce in other states:

> [R]ecognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States by potentially exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those States.[125]

Next, it held climate issues constitutionally committed to the "foreign policy" roles of the coordinate branches because they have "weighed in" on the issue of climate change.[126] The court maintained that inaction by the coordinate branches is sufficient to constitute "foreign policy determinations regarding the United States' role in the international concern about global warming."[127] It concluded that congressional inaction signaled a deliberate decision "to refrain from any unilateral commitment to reducing [GHG] emissions domestically unless developing nations make a reciprocal commitment," and that the President has reached the same result because, according to EPA, unilateral domestic action "would impede that diplomatic objective."[128] Thus, the court concluded, plaintiffs' federal question common law raised a nonjusticiable political question.[129]

Another court facing similar issues declined to find any constitutional commitment of climate issues to the coordinate branches. It nonetheless used the second prong of the political question doctrine to dismiss the lawsuit, as discussed below in Part IV. In *Connecticut v. American*

---

122. *Gen. Motors Corp.*, 2007 WL 2726871, at *14.
123. *Id.* at *13.
124. *Id.* (citing Healy v. Beer Institute, 491 U.S. 324 (1989); Gibbons v. Ogden, 22 U.S. 1, 194-96 (1824)).
125. *Id.* at *14.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

Electric Power Co., Inc.,[130] a collection of states and private conservation organizations sued the nation's five largest emitters of carbon dioxide under federal common law and state public nuisance law to redress the effects of climate change.[131] The states claimed to have brought the suit for injunctive relief to address, *inter alia*, "irreparable harm" to the health, safety and well-being of their 77 million citizens.[132] Plaintiffs claimed that the power companies' annual emissions of 650 million tons of carbon dioxide—which constitute roughly "one-quarter of the U.S. [] power sector's [CO_2] emissions" and 10 percent of global emissions by humans—contribute to global climate change by trapping atmospheric heat.[133] Accordingly, plaintiffs asked the court to "enjoin[] each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade."[134] It also asked that the court "assess and measure available alternative energy resources," and reconcile its relief with U.S. foreign and domestic policy.[135]

As criticized in Part IV below, while the court held that the political question doctrine rendered the case non-justiciable, it did not do so because it found any constitutional commitment of the issue to the elected branches. Instead, it applied the prudential prong of the doctrine, finding it impossible to decide the case without an initial policy determination from the elected branches. Even though the elected branches lack a cogent climate policy, the court reasoned that "deliberate inactions"[136] is informed by issues of national security, the environment, and foreign policy, which counsel non-interference by the judicial branch.[137]

C. *Criticism of Application of* Baker*'s Textual Formulation in Climate Cases*

The court's application of the first prong of the political question doctrine to foreclose review in *California v. General Motors Corp.* is incorrect for two reasons.

First, there is no "textual commitment" of climate issues to the elected branches. Simply, for this prong to apply, the commitment must be "textual," not inferential. The Constitution must textually address the matter at hand. It does not. Thus, this prong does not apply. While cli-

130. 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The defendants are the American Electric Power Company, the Southern Company, the Tennessee Valley Authority, Xcel Energy and Cinergy Corporation.

131. *Id.* at 267. The plaintiffs included California, Connecticut, Iowa, New York, New Jersey, Rhode Island, Vermont, and Wisconsin, and the City of New York. *Id.*

132. *Id.* at 268.

133. *Id.*

134. *Id.* at 270.

135. *Id.* at 272.

136. *Id.* at 273.

137. *Id.* at 274.

mate cases have political dimensions, it bears repeating Justice Brennan's instruction from *Baker v. Carr* that "political cases" are not "political questions" cordoned off from judicial review.

Second, the precedent that informs use of this prong is inapposite to climate cases. Unlike the Constitution's specific consignment of congressional districting to Congress under the Guaranty Clause in *Colegrove*, the process for Presidential negotiation and Senate ratification of treaties under the Treaty Clause in *Goldwater v. Carter*, the process for Senate conviction of impeachable offenses under the Impeachment Clauses in *U.S. v. Nixon*, and the process for amending the U.S. Constitution under Article V in *Coleman v. Miller*, the Constitution does not assign climate issues to either political branch.

To be sure, a federal court applied this reasoning in concluding there is a lack of a textual constitutional commitment to the coordinate branches for addressing a related, complex environmental concern with political dimensions. In *Barasich v. Columbia Gulf Transmission Co.*,[138] the plaintiffs alleged that defendants' network of nearly 10,000 miles of petroleum pipelines in south Louisiana so altered the hydrology and physiology of more than one million acres of marshlands that it deprived inland communities "of their natural protection from hurricane winds and accompanying storm surge," thereby exacerbating the adverse affects of Hurricane Katrina and resulting in personal injury, death, and property damage.[139] Defendants argued that the political question doctrine deprived the court of jurisdiction to hear the claims.[140]

The court rejected the idea that there might be a commitment of the claims to the elected branches in the text of the Constitution: "Here, the defendants do not contend, and the Court does not find, that there is a textually demonstrable commitment of coastal erosion questions to a coordinate political department."[141]

IV. WHY CLIMATE CASES ARE NOT PRUDENTIALLY COMMITTED

The second prong of the *Baker v. Carr* formulation inquires as to whether, in the absence of a constitutional commitment of an issue to an elected branch, federal courts ought to exercise restraint as a matter of political comity and prudence. In particular, the second prong holds that a matter is not justiciable if it engenders (1) a "lack of judicially discoverable and manageable standards," (2) an "impossibility of deciding the case without an initial policy determination of the kind clearly for nonjudicial discretion," (3) an impossibility of a court's undertaking independ-

138. 467 F. Supp. 2d 676 (2006).
139. *Id.* at 679-80.
140. *Id.* at 680.
141. *Id.* at 682.

ent resolution without expressing lack of the respect due coordinate branches of the government," (4) an "unusual need for unquestioning adherence" to a political decision made by the elected branches, or (5) "the potentiality of embarrassment from multifarious pronouncements" by the coordinate branches.[142] Judicial treatment in the climate context has focused on the first two of these, that is, the existence of standards and the need for antecedent policy determination by the elected branches.

A. Existence of Judicially Discoverable/Manageable Standards

1. Standard

The lack of constitutionally judicially discoverable and manageable standards has served to thwart judicial involvement in other contexts in which neither the Constitution nor the courts have developed standards, including political gerrymandering, naturalization and military policies.

For example, the Court has held that claims of malapportionment of state legislative districts are justiciable due to the existence of judicially-established standards construing the Equal Protection Clause. In the fountainhead case of *Baker v. Carr*, voters in Tennessee complained that the malapportionment of the Tennessee General Assembly violated the Equal Protection Clause "by virtue of the debasement of their votes."[143] Even though the Tennessee Constitution allocated representation in the General Assembly on the basis of population, the assembly had not re-apportioned its districts since 1901, despite a dramatic population shift from rural to urban centers amply populated by racial and ethnic minorities. The plaintiffs asked the Court to enjoin further elections until districts could be reapportioned "by mathematical application of the Tennessee constitutional formulae" to match U.S. Census figures.[144] Following *Colegrove*, the lower court declined to enter the political thicket.[145]

In reversing, the Supreme Court distinguished *Colegrove*, noting that the Republican Guarantee Clause applies to apportionment of federal—not state—legislative districts: "this challenge to an apportionment presents no nonjusticiable 'political question.'"[146] That the matter involves a political process is immaterial: "[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'"[147] In considering the "contours" of the doctrine, the court observed that "it is the relationship between the judiciary and the coordinate branches of

142. *Id.* at 680.
143. Baker v. Carr, 369 U.S. 186, 188 (1962).
144. *Id.* at 195.
145. *Id.* at 196-97.
146. *Id.* at 209.
147. *Id.*

the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[148]

The Court has held that challenges to disproportionate apportioning of federal congressional districts under the Guaranty Clause are judicially unmanageable.[149] In *Luther v. Borden*,[150] two competing groups laid claim to being the rightful government of the State of Rhode Island following a disputed statewide election. In finding the challenge to the election results non-justiciable, the Court held that the "Guaranty Clause is not a repository of judicially manageable standards . . . to identify a State's lawful government."[151] In *Vieth v. Jubelirer*,[152] a plurality of the Court rejected a claim of political gerrymandering due to the lack of any "judicially discernible and manageable standards" to determine what would constitute constitutionally equitable voting districts.

Furthermore, lower courts have also relied on the lack of "any" judicial standards in dismissing cases under the political question doctrine. Some circuit courts have concluded that state challenges under the Naturalization Clause[153] to federal immigration programs are non-justiciable due to the lack of standards for assessing the constitutionality of immigration policies.[154] Others have held that the lack of judicially discoverable standards renders challenges to military policies unreviewable, including those involving military aid[155] and action,[156] and deployment of weapons.[157]

2. Application in Climate Cases

The court in *California v. General Motors Corp.* incorrectly invoked the first component of the prudential prong of the political question to dismisss plaintiffs' federal public nuisance claims, holding that there is a lack of applicable judicially discoverable or manageable standards. Plaintiffs argued that a long lineage of federal common law causes of action in environmental pollution cases well supplied judicially discoverable standards.[158] The plaintiffs portrayed the case as one of

148. *Id.* at 210.

149. The Guaranty Clause reads: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

150. 48 U.S. 1 (1849).

151. *Baker*, 369 U.S. at 223.

152. 541 U.S. 267, 281 (2005).

153. The Clause gives Congress the authority "to establish [a] uniform rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

154. *See, e.g.*, Texas v. United States, 106 F.3d 661 (5th Cir. 1997).

155. *See, e.g.*, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983).

156. *See, e.g.*, DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).

157. *See, e.g.*, Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984).

158. California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *2 (N.D. Cal. Sep. 17, 2007).

"simple nuisance" well suited for traditional principles of tort law.[159] Thus, plaintiffs contended that courts, rather than legislative bodies, are better equipped to decide whether defendants' actions constitute an "unreasonable interference with a right common to the general public."[160] Moreover, plaintiffs argued that the court is better equipped to reach the merits and mete relief than the elected branches.[161]

The court was unconvinced. It found inapposite a line of cases dating back 170 years based on differences in remedy, legal framework and circumstances. First, the court found the cases inherently distinguishable because the remedy requested in each was for "equitable remedies to enjoin or abate the nuisance," and not legal relief.[162] Second, it found a "legal framework" lacking, insofar as the court "is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide . . . or in determining who should bear the costs . . . ."[163] Third, it found the prior cases inapplicable "because none of the pollution-as-public-nuisance cases implicates a comparable number of national and international policy issues."[164] Fourth, it found the "multiple worldwide sources of atmospheric warming across myriad industries and multiple countries" made the prior cases distinguishable.[165] Instead, it determined that the prior cases "involve primarily issues of local concern involving a state or public entity seeking equitable relief from a source-certain nuisance in a neighboring state."[166] Thus the court concluded that it "is left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance."[167] Last, it seemed resigned that the issue of allocating responsibility is simply beyond judicial competence "given the myriad sources of global [GHGs] and the '[s]ubstantial scientific uncertainties [that] limit [the] ability to . . . separate out those changes resulting from natural variability from those that are directly the result of increases'" in human emissions of GHGs.[168]

Central to the court's application of the political question doctrine in *Connecticut v. American Electric Power Co.* is that plaintiffs sought an *abatement* order to have the court determine how, when and by whom CO_2 emissions would be reduced. The court felt these tough choices involving whose ox to gore is best left to the political branches. Left

159. *Id.*
160. *Id.* at *8 (quoting *In re* Oswego Barge Corp., 664 F.2d 327, 332 n.5 (2d Cir. 1981)).
161. *Id.*
162. *Id.* at *15.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at *14 (alteration in original) (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922-02 (Sept. 8, 2003)).

open was the extent to which federal courts may calculate monetary damages attributable to CO_2 emissions in a public nuisance action.

Would the result have been any different had the states in *Connecticut v. American Electric Power Co.* sought monetary damages instead of injuctive relief, thereby not raising the same social choice issues that so concerned the court?

The court in *California v. General Motors Corp.*[169] answered no. In *General Motors*, the State of California asked the court "to create a quotient or standard in order to quantify any potential damages that flow from Defendants' alleged act of contributing thirty percent of California's carbon dioxide emissions."[170] The court dismissed the action, concluding that the political question doctrine precludes the judicial branch from determining the representative portion of monetary damages for which defendants are liable for causing and contributing to global climate change.

The court determined it could not reach a ruling that is "principled, rational, and based upon reasoned distinctions."[171] Thus it held judicial review would be "inconsistent with the Framers' insistence that our system be one of checks and balances,"[172] and because each factor is "inextricable" from plaintiffs' claims, they presented non-justiciable political questions.[173]

3. Criticism of Application of *Baker*'s "Judicial Standards" Formulation to Climate Cases

General Motors' application of the "judicial standards" aspect of the prudential component of the political question doctrine is incorrect for two reasons. First, it seems to ignore that two centuries of common law amply supply judicial standards for deciding whether there is an "unreasonable [use or] interference with a right common to the general public."[174] As the court noted in *Barasich v. Columbia Gulf Transmission Co.*,[175] that the courts—and not the Constitution or Congress—supply the standard is immaterial.

Second, whether judicially discoverable and manageable standards already exist is not dispositive of whether such standards are available. For example, in *Vieth*, in which a plurality held that courts cannot fash-

169. *Id.* at *1.
170. *Id.* at *8.
171. *Id.* at *15 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).
172. *Id.* at *16 (internal quotation marks omitted) (quoting Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (internal quotation marks omitted)).
173. *Id.*
174. *Id.* at *8 (internal quotation marks omitted) (quoting United States v. Oswego Barge Corp., 654 F.2d 327, 333 n.5 (2d Cir. 1981)).
175. 467 F. Supp. 2d 676 (2006).

ion standards for deciding whether voting districts are unconstitutionally apportioned, four Justices believed such standards already exist,[176] while a fifth refused to agree that all future political gerrymandering cases are nonjusticiable.[177] Thus, even if no court has yet "fashioned" standards for deciding how to apportion responsibility for climate, this does not mean that it cannot and should not be done.

B. Need for Initial Policy Determination

1. Standard

Outside the climate context, the case law is devoid of meaningful juridical application of this formulation from *Baker v. Carr.*

2. Application in Climate Cases

Some federal courts have declined to hear climate cases, incorrectly citing the need for an initial policy determination by the elected branches. For example, in *Connecticut v. American Electric Power Co.*, the defendants contended that having the court "resolve an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security, . . . put[s] the cart before the horse."[178] It maintained that federal courts should exercise judicial restraint in "resolving questions of high policy, which are for the political branches."[179]

The court agreed, holding that that plaintiffs' climate claims raised "non-justiciable" political questions because they require the court to make "initial policy determinations" best left to the other political branches of government.[180] The court found itself paralyzed to address climate claims due to the "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[181]

It distinguished the "typical" air pollution case under federal common law. These include *Georgia v. Tennessee Copper Co.*,[182] which involved balancing between environmental protection and economic development, factors that drive decisions about the type and timeframe of pollution control equipment.[183] At bottom, the court concluded that

---

176. *See Vieth*, 541 U.S. at 317 (Stevens, J., dissenting).
177. *Id.* (Kennedy, J., concurring).
178. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271.
179. *Id.*
180. *Id.* at 272.
181. *Id.* (quoting *Vieth*, 541 U.S. at 278).
182. 206 U.S. 230, 239 (1907).
183. *See id.* at 239; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272.

the case was sufficiently dissimilar from most air pollution cases as to render it non-justiciable.[184]

The court in *American Electric Power Co.* wanted no part of this hot potato. It found plaintiffs' allegations "extraordinary," and "patently political."[185] It noted that the "scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."[186] It believed the claims would require the court to balance environmental, economic, and "other" foreign policy and national security interests, without direction from the elected coordinate branches of government.[187] The court also agreed with defendants that CO_2 reduction required coordinated domestic and international action.[188]

Thus, the court concluded that it was impossible for it to hear the claims without an "initial policy determination" by the elected branches "before a non-elected court can properly adjudicate a global warming nuisance claim."[189]

Curiously, under "elected branches," the court included the EPA, which it noted "has been grappling with the proper approach to the issue of global climate change for years."[190] As "grappling" proof that the court should refrain from making an "initial policy determination," it endorsed the following from EPA:[191]

> It is hard to imagine any issue in the environmental area having greater "economic and political significance" than regulation of activities that might lead to global climate change. The issue of global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue. Unilateral [regulation of carbon dioxide emissions in the United States] could also weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies. Unavoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them. Virtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change.

184. *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 272.
185. *Id.* at 271 n.6.
186. *Id.* at 272.
187. *Id.* at 274.
188. *Id.* at 273.
189. *Id.*
190. *Id.*
191. *Id.* (citations omitted).

The court also interpreted congressional silence as tacit acceptance that the courts ought not get involved:

> The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the "initial policy determinations" addressing global climate change is an undertaking for the political branches.[192]

Thus, the court concluded that the mélange of environmental, economic, foreign policy and national security implications of the case "present non-justiciable political questions that are consigned to the political branches, not the Judiciary."[193]

The court in *General Motors* reached the same result for different reasons. It believed that the CAA's scheme for regulating emissions, when fused with other federal schemes concerning fuel efficiency, suggests climate cases require an initial policy determination from the elected branches.

The court started with emissions. Title II of the Clean Air Amendments Act of 1970 (CAA) required that new "light duty vehicles" (essentially passenger cars[194]) reduce hydrocarbon and carbon monoxide emissions, and then nitrogen oxides, by 90 percent within five and six years, respectively.[195] After initially objecting strenuously to the imposition of emission standards, automobile manufacturers were achieving them by the 1980s, largely due to the installation of advanced catalytic converters.[196]

The EPA has a preeminent role in establishing tailpipe emission standards. The EPA may establish tailpipe emission standards for additional pollutants than those mentioned above for "any air pollutant . . . which in [its] judgment cause[s], or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare."[197]

Title II does not leave the business of emission standards solely with EPA. Unlike most environmental laws, the CAA not only allows states to implement standards and ensure their achievement, but provides

---

192. *Id.* at 274.
193. *Id.*
194. *See* Natural Res. Def. Council v. EPA, 655 F.2d 318, 322 n.3 (D.C. Cir. 1981).
195. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1690, 1692 (1970).
196. For a helpful discussion of this period, see Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 345-46 (2003); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 492 (2001) (Breyer, J., concurring) (noting role of catalytic converter technology in helping to achieve national air quality standards).
197. 84 Stat. 1676.

them the capacity to establish standards as well, in a kind of microcosmic reflection of dual federalism.[198]

Following a statutory scheme that evolved from the advent of the original Clean Air Act,[199] the CAA both precludes and invites state tailpipe emission standards. Section 209(a) explicitly preempts states from adopting "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."[200] Yet section 209(b) allows California to achieve a "waiver" from federal standards provided it finds that its own standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards," and that EPA determines that they are (1) not "arbitrary and capricious" considering feasibility and costs, (2) not inconsistent with federal tailpipe emission standards under section 202, and (3) that California needs its own more stringent standards to meet a local "compelling . . . condition[]."[201]

Other states may adopt their own tailpipe emission standards, so long as they are identical to California's standards. Section 177 allows other states to adopt and enforce standards "identical to" any for which EPA has granted a waiver to California, as long as the standards are adopted at least two years prior to the applicable model year.[202] This overlapping regulatory scheme is a compromise "between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements."[203]

In 1999 a group of watchdog and public interest groups petitioned EPA to engage in rulemaking to set emission standards for GHGs under Title II of the CAA.[204] EPA denied the petition in 2003, maintaining that

---

198. This happened incrementally. Congress's initial foray into regulating vehicle emissions, Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965), explicitly recognized the need for, but did little to unseat state primacy concerning motor vehicle licensing and operation, and did not preempt state efforts respecting emissions. *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. N.Y. State Dep't of Envtl. Conservation (*MVMA III*), 17 F.3d 521, 524-25 (2d Cir. 1994); Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A. (*MEMA I*), 627 F.2d 1095, 1101 (D.C. Cir. 1979).

199. The Air Quality Act of 1967 set forth the framework for establishing national standards. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967). Yet it also preserved state authority, such as California had already exercised, to establish more stringent standards, provided it could show a compelling need and that its standards were consistent with the Act. *Id.* at 501.

200. 42 U.S.C.A. § 7543(a) (West 2008).

201. § 7543(b).

202. 42 U.S.C.A. § 7507 (West 2008). Fourteen states have adopted California's emission limitations. *See generally* CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, FREQUENTLY ASKED QUESTIONS: CLIMATE CHANGE EMISSION REDUCTION STANDARDS FOR VEHICLES (2007), *available at* http://www.arb.ca.gov/cc/factsheets/ccfaq.pdf.

203. *MEMA I*, 627 F.2d at 1109.

204. Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emission from New Motor Vehicles under Section 202 of the Clean Air Act, Control of Emissions

the Clean Air Act does not authorize it to regulate emissions to address global climate change and that it has discretion not to regulate based on policy considerations, including foreign policy.[205]

This prompted the State of Massachusetts and a litany of mostly downwind "blue" states and environmental organizations to challenge EPA's inaction, contending that it improperly exercised its discretion in denying petition by several states calling for rulemaking to regulate carbon dioxide and three other greenhouse gas emissions—methane, nitrous oxide, and hydrofluorocarbons—from new motor vehicles under Title II of the Clean Air Act.[206]

In *Massachusetts v. EPA*,[207] the Court disagreed with EPA's bases for denying the rulemaking petition. The Court decided three issues. First, that petitioners (namely, Massachusetts) demonstrated standing under Article III of the U.S. Constitution to challenge EPA's inaction.[208] The Court held that states enjoy "special solicitude" in demonstrating standing.[209] Second, the Court held that greenhouse gas emissions constitute an "air pollutant" under the Clean Air Act's "capacious definition of 'air pollutant.'"[210] Last, it held that EPA "offered no reasoned explanation" and that it was arbitrary and capricious for the agency to refuse to decide if these emissions "endanger public health or welfare" due to policy considerations not listed in the Clean Air Act, mainly foreign policy.[211] Justice Scalia thought the Court should have deferred to EPA in what he said was a "straightforward administrative law case," and that it had "no business substituting its own desired outcome for the reasoned judgment of the [EPA]."[212]

The court in *General Motors* then turned to efficiency. Efficiency standards for automobiles, known as "corporate average fuel economy" or "CAFE" standards,[213] are set under the auspices of the Energy Policy

---

From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922-23 (Sept. 8, 2003), *available at* http://www.icta.org/doc/ghgpet2.pdf.

> The International Center for Technology Assessment (CTA) is a non-profit, bi-partisan organization committed to providing the public with full assessments and analyses of technological impacts on society. CTA is devoted to fully exploring the economic, ethical, social, environmental and political impacts that can result from the applications of technology or technological systems.

International Center for Technology Assessment, About Us, http://www.icta.org/about/index.cfm (last visited Mar. 26, 2008).

205. 68 Fed. Reg. 52,922, 59,933.

206. Massachusetts v. EPA, 127 S. Ct. 1438, 1446 (2007).

207. *Id.* at 1438. For a captivating account of her role in this case, see Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. REV. (forthcoming 2008).

208. *Massachusetts*, 127 S. Ct. at 1453.

209. *Id.* at 1454-55.

210. *Id.* at 1462 (majority opinion).

211. *Id.* at 1462-63.

212. *Id.* at 1478 (Scalia, J., dissenting).

213. Gen. Motors Corp. v. Nat'l Highway Traffic Safety Admin., 898 F.2d 165, 167 (D.C. Cir. 1990). *See generally* Amendment to Motor Vehicle Information and Cost Savings Act, Pub. L. No. 94-163, § 301, §§ 501-12, 89 Stat. 901, 901-16 (1975).

and Conservation Act (EPCA), which Congress enacted in response to the energy crisis of the 1970s.[214] EPCA's aim is to "provide for improved energy efficiency of motor vehicles."[215] When Congress enacted EPCA in 1975, CAFE standards stood at roughly 14 miles per gallon of gasoline (mpg). The EPCA required CAFE standards achieve 18 mpg by 1978, and further improve to 27.5 mpg by 1985, roughly doubling fuel efficiency fleet-wide.[216] EPCA authorizes the Secretary of Transportation, and its designee the National Highway Traffic Safety Administration (NHTSA),[217] to adopt different standards thereafter.[218] Section 32902(f) provides that when "deciding maximum feasible average fuel economy under this section, [NHTSA] shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[219]

The average fuel economy standard for passenger automobiles remains at 27.5 mpg, the standard enacted in 1975 and in place since model year 1985.[220] It was not until 2006 that NHTSA set CAFE standards for light trucks, which run from 2008 to 2010.[221] Basically, the emission standards for light trucks are 22.5, 23.1 and 23.5 for model years 2008, 2009 and 2010, respectively.[222] The NHTSA's standards for light duty trucks are due to expire with the 2010 model year. Unlike the CAA and emissions, EPCA specifically preempts state fuel efficiency standards.[223]

The court in *General Motors* held that the Clean Air Act's "comprehensive state and federal scheme to control air pollution in the United States," coupled with the Energy Policy and Conservation Act's "comprehensive response to the energy crisis of the 1970's," when "read in conjunction with the prevalence of the international and national debate, and the resulting policy actions and inactions . . . would require an initial

---

214. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975); *see also Gen. Motors*, 898 F.2d at 167 (discussing EPCA's legislative history).

215. § 2(5), 89 Stat. 871.

216. § 301, § 502(a)(1), 89 Stat. 901; *Gen. Motors*, 898 F.2d at 167.

217. Delegation to the National Highway Traffic Safety Administrator, 49 C.F.R. § 1.50 (2008).

218. *See* S. REP. NO. 94-516, at 119, 153-54 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1959-60, 1994-95.

219. 49 U.S.C.A. § 32902(f) (West 2008).

220. § 32902(b)(4)(A).

221. Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566 (Apr. 6, 2006) (codified at 49 C.F.R. pts. 523, 533, and 537).

222. *Id.* at 17568. "Reformed" standards, which take into account a light truck's wheelbase and track width, are 22.7, 23.4 and 23.7 mpg for model years 2008, 2009 and 2010, respectively. *Id.* at 17624.

223. 49 U.S.C.A. § 32919(a) (West 2008). Section 32919(a) provides that

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

policy determination of the type reserved for the political branches of government."[224] Considering this "legislative landscape," the court mused that it should not "inject[] itself into the global warming thicket."[225]

The court also found support for its holding from the Supreme Court's standing analysis in *Massachusetts v. EPA*.[226] EPA argued that Massachusetts lacked standing, given the relatively dissipated effect of requiring EPA to act—reducing greenhouse gas emissions by less than five percent annually at best—and the tenuous connection between climate change and Massachusetts' costs due to shoreline loss and health care.[227]

On behalf of the Court, Justice Stevens upheld Massachusetts' standing, finding that states enjoy "special solicitude" in the standing analysis.[228] The majority emphasized the fact "[t]hat these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation,"[229] suggesting a more commodious interpretation of the "injury in fact" component of constitutional standing.

In addition, the majority accorded a similarly capacious treatment of the causation and redressability components of standing. It concluded that incremental increases in carbon dioxide emissions as a result of the EPA's failure to regulate fulfilled the causation element,[230] and with respect to redressability, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[231]

The majority's "special solicitude" veneer for state standing drew a rebuke from Chief Justice Roberts, who questioned Stevens' "state solicitude" standard as an "implicit concession that petitioners cannot establish standing on traditional terms."[232]

The court in *General Motors* found support from all corners of the majority's opinion in *Massachusetts v. EPA* for its determination that the lack of initial policy precludes climate cases. First, it decided that the Supreme Court's reasoning that state plaintiffs are entitled to "special solicitude" in standing analysis supported its political question analysis: "[*Massachusetts v. EPA*] further underscores the conclusion that policy

224. California v. Gen. Motors Corp., No. 3:06-CV-05755 MJJ, 2007 WL 2726871, at *24, *27, *29 (N.D. Cal. Sept. 17, 2007).
225. *Gen. Motors Corp.*, 2007 WL 2726871, at *24, *29.
226. 127 S. Ct. 1438 (2007).
227. *Id.* at 1453, 1456-57.
228. *Id.* at 1455.
229. *Id.* at 1456.
230. *Id.* at 1457.
231. *Id.* at 1458.
232. *Id.* at 1466.

decisions concerning the authority and standards for carbon dioxide emissions lie with the political branches of government."[233] The court concluded that *Massachusetts v. EPA*'s "special solicitude" for state standing supports the idea that policymaking about climate ought to be left to the federally elected branches.[234]

Next, the court concluded that the Supreme Court's interpretation of the Clean Air Act in *Massachusetts v. EPA* shows states have "surrendered" federal common law claims to EPA and the federal government, including policy.[235]

Finally, it determined that *Massachusetts v. EPA* does "not sanction the justiciability of the interstate global warming damages tort claim now before this Court."[236] Instead, the court construed the Supreme Court's recognition of California's right to sue EPA for action to be a tacit rejection of the same state's ability to sue private parties for damages unrelated to EPA action.

3. Criticism of Application of *Baker*'s "Initial Policy Determination" Prong

The courts in *American Electric Power* and *General Motors* misapplied this prong in at least three respects. First, the most salient criticism of using this aspect of *Baker* to avoid the "global warming thicket" is that it is patently wrong to conclude that the elected branches have yet to make an *initial* policy determination.

---

233. California v. Gen. Motors Corp., No. 3:06-CV-05755 MJJ, 2007 WL 2726871, at *30 (N.D. Cal. Sept. 17, 2007).

234. *Id.* at *33-34 (internal citations omitted). The court wrote:

> Underpinning the Supreme Court's standing analysis is the concept that the authority to regulate carbon dioxide lies with the federal government, and more specifically with the EPA as set forth in the CAA. Also inherent in the Supreme Court's reasoning is the principle that any State that is dissatisfied with the federal government's global warming policy determinations may exercise its "procedural right" to advance its interests through administrative channels and, if necessary, to "challenge the rejection of its rulemaking petition as arbitrary and capricious." Thus, such an approach emphasizes that initial policy determinations are made by the political branches while preserving a framework for judicial review of those determinations.

Id.

235. *Id.* at *35-36 (internal citations omitted). The court wrote:

> The underpinnings of the Supreme Court's rationale in *Massachusetts* only reinforce this Court's conclusion that Plaintiff's current tort claim would require this Court to make the precise initial carbon dioxide policy determinations that should be made by the political branches, and to the extent that such determination falls under the CAA, by the EPA. Because the States have "surrendered" to the federal government their right to engage in certain forms of regulations and therefore may have standing in certain circumstances to challenge those regulations, and because new automobile carbon dioxide emissions are such a regulation expressly left to the federal government, a resolution of this case would thrust this Court beyond the bounds of justiciability. Plaintiff has failed to offer an adequate explanation of how this Court would possibly endeavor to make the initial policy determinations that would be both necessary and antecedent to a resolution of this case.

Id.

236. *Id.* at *36.

To the contrary, there is direct evidence that the elected branches have adopted a policy to reduce GHGs. *Black's Law Dictionary* defines "policy" to include "[t]he general principles by which a government is guided in its management of public affairs."[237] As evidenced by averments from the White House,[238] the State Department,[239] and the EPA, [240] the United States has clearly adopted and currently adheres to a "general principle" to reduce emissions of GHGs.[241] Legislative acquiescence to this policy is evidenced by the Senate's ratification of the UNFCCC, and by the numerous enactments to study climate change.[242] Indeed, in his dissent in *Massachusetts v. EPA,* Chief Justice Roberts perhaps put it best: "[Global warming] is not a problem that has escaped the attention of policymakers in the Executive and Legislative branches of our Government, who continue to consider regulatory, legislative and treaty-based means of addressing global climate change."[243]

Second, allowing states and individuals to pursue federal common law causes of action is consistent with the policy of reducing GHG emissions. Injuctive and legal relief constitutes not an establishment of initial policy but instead an implementation of existing policy.[244]

Third, deciding whether the "political question doctrine" applies has little to do with whether the underlying policy issue is "complex," invites social inefficiency, or is "political" in nature. Most people would agree that issues of climate change are controversial, complex, and invite action by the elected political branches. They might recognize that there

---

237. BLACK'S LAW DICTIONARY 1196 (8th ed. 2004). Furthermore, *Black's Law Dictionary* directs the reader to the term "public policy," which means "[b]roadly, principles and standards regarded by the legislature or by the courts as being fundamental concern to the state and the whole of society." *Id.* at 1267.

238. The White House, News & Policy, Policies in Focus, Energy, http://www.whitehouse.gov/infocus/energy/ (last visited Mar. 26, 2008) (addressing U.S. policy in "confronting climate change" and energy security).

239. U.S. DEPARTMENT OF STATE, USA ACTIONS TO ADDRESS, ENERGY SECURITY, CLEAN DEVELOPMENT AND CLIMATE CHANGE, *available at* http://www.state.gov/documents/organization/96165.pdf (addressing domestic and international U.S. policy on climate change) (last visited Mar. 26, 2008).

240. EPA, Council on Environmental Quality, http://www.whitehouse.gov/ceq/global-change.html#2 (last visited Mar. 26, 2008) (addressing domestic U.S. climate change policy); *see also* Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003). In explaining why it should not regulate automobile emissions, the EPA stated that President Bush has "established a comprehensive global climate change policy designed to . . . take sensible steps in the interim to reduce the risk of global climate change." *Id.*

241. Pawa & Krass, *supra* note 63, at 461.

242. The fact that the United States does not agree with the proposals made under the Kyoto Protocol does not inveigh the premise that the Unites States has an overall emissions reduction policy. Federal policies can be inferred. *See* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Administrazione Straordinaria, 937 F.2d 44, 50 (2d Cir. 1991) ("given the Executive Branch's repeated condemnation of international terrorism, we believe that any initial policy that might conceivably be required has already been made.").

243. 127 S. Ct. 1464 (2007) (Roberts, C.J., dissenting).

244. Alice Kaswan, *Climate Change and the Courts*, 28 NO. 5 ANDREWS ENVTL. LITIG. REP. *12 (2007). Professor Kaswan explains that our country has a "long tradition of relying on the courts to make important policy determinations" when courts are faced with common law claims.

should be more socially efficient means of assigning and allocating CO_2 caps, imposing timelines for the development of pollution control equipment, and reconciling both with U.S. policy, rather than through litigation. Furthermore, they might feel that the elected political branches should take action, and that party politics informs climate change policy.

Yet acknowledging that climate policy is "political" in nature does not counsel in favor of using the political question doctrine to subvert climate cases due to some perceived lack of initial policymaking by the elected branches. A "political" issue and a "political question" are two different things. The former allows judicial oversight; the latter suggests that overriding separation of powers concerns warrant judicial restraint. Because climate change claims involve public, domestic and foreign policy and political matters, "it is tempting to jump to the conclusion that such claims are barred by the political question doctrine."[245] Yet as the Supreme Court observed when it adopted the modern test for identifying non-justiciable political questions, "'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'"[246]

V. GENERAL CRITICISMS OF APPLYING THE POLITICAL QUESTION DOCTRINE TO CLIMATE CASES

Applying the political question to climate cases warrants additional criticism surrounding whether the doctrine is constitutionally legitimate, consistent with the role of the courts, and consonant with regular rejection of the doctrine in other contexts.

A. Basic Illegitimacy of the Political Question Doctrine

While extensive critical exegesis of the doctrine's origins and justifications is beyond the scope of this article, it is important to appreciate that it has invited wide criticism. First, the doctrine itself is not tethered to any language in the Constitution. Inherently a matter of constitutional theory and interpretation, the political question doctrine seems at war with the text of the Constitution, which grants federal courts "judicial authority" to resolve "cases and controversies" without any mention of limitation as to "political questions."[247] Hence, the political question is a gloss on judicial authority in a separation of powers rubric; the Constitu-

245. *Id.* at *15 (internal quotations and citations omitted).
246. *Id.* at *15-16 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).
247. U.S. CONST. art. III, § 2, cl. 1.

tion does not admit of any jurisdictional bar to prevent federal courts from ruling on "political questions" or the like.[248]

Second, the doctrine seems to be inconsistent with an originalist's view of a tripartite constitutional system with coordinate legislative, executive and judicial branches "checking" each other's power.[249] To be sure, 200 years ago in the nation's quintessential "political" case, Chief Justice John Marshall famously wrote that "[i]t is emphatically the province and duty of the [courts] to say what the law is."[250]

Third, the doctrine is unnecessary. There is no constitutionally-founded reason for federal courts to duck controversial issues so as to protect the legitimacy of the court's decisions: "[T]he federal courts' legitimacy is quite robust, [] there is no evidence that particular rulings have any effect on the judiciary's legitimacy, and [] in any event, the courts' mission should be to uphold the Constitution and not worry about political capital."[251]

Fourth, the doctrine is incongruous with political theory that extols judicial restraint in the face of action by the elected branches. It instead "confuses deference with abdication."[252] Thus, despite marking what most consider is the nation's quintessential "political" case, the Court in *Marbury v. Madison* did not evoke the political question doctrine in reaching the issue of whether Mr. Marbury was entitled to the commission awarded him by President Adams that James Madison, President Jefferson's Secretary of State, refused to serve.[253]

Fifth, at least applied to stop state action, it seems to work a rent in the fabric of federalism. States have long turned to federal courts to help resolve disputes with other states, with industry and with individuals. The political question doctrine denies states the constitutional access to federal venues to address matters left unattended by the federal government. In such instances, the doctrine seems to starve the states of the ability to protect the very sovereignty and dignity the Tenth Amendment "reserved."[254]

Sixth, it fails to recognize the public/private law dichotomy in our political system. Public laws generally cannot and are not intended to provide rights and remedies for private harm. Likewise, private common

---

248. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 624-25 (1976).

249. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 131-32 (Aspen Law & Business 2d ed. 2002); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW viii (2d ed. 1988) ("The highest mission of the Supreme Court . . . is not to conserve judicial credibility.").

250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

251. CHEMERINSKY, *supra* note 249, at 132.

252. *Id.*

253. *Marbury*, 5 U.S. (1 Cranch) at 146-47.

254. U.S. CONST. amend. X.

law is not foreclosed when the elected branches have failed sufficiently to provide private redress.

B. Inconsistency with Federal Judicial Functions

The reasoning exhibited in the *American Electric Power* and *General Motors* cases seems unduly solicitous of the elected branches. It leaves little, if any, judicial role in resolving complex tort actions based on transboundary pollution problems in the absence of action by the elected branches—even though such circumstances are those in which judicial involvement is most apropos. The negative manifestations of this undue deference to the political branches in climate cases are six-fold.

First, it endorses judicial abdication as a legitimate response to legislative and executive impotency. Responses to climate change invite responses by "virtually every sector of the U.S. economy," and they are not limited solely to congressional and executive responses.[255] As Professor Kaswan notes:

> The courts' use of the political-question doctrine not only creates the threat of a legal vacuum when the political branches are paralyzed, it also ignores the common law's critical role in the evolution of the law. As victims respond to serious environmental problems by going directly to the courts, they create political pressure for more comprehensive and appropriate legislative solutions. Historically, the threat of common law liability gave affected industries an incentive to support, rather than resist, more comprehensive environmental regulation by the political branches.[256]

Second, it assumes too much by deciding that inaction in the political branches equates to a policy decision.[257] This reasoning strips the courts of jurisdiction in all matters in which Congress and the Executive are at a standstill. On the contrary, lack of action in the elective branches may just as readily suggest the opposite result, that is, it is for the courts, and not Congress and the President, to fulfill their traditional interstitial role of providing common law relief in those instances where statutory or regulatory relief is not available.

This reasoning also seems inherently inconsistent. While the court in *American Electric Power* found inaction in the political branches to be indicative of a need for initial policy by the elected branches, the court in *General Motors* seemed to conclude that inaction suggests that the politi-

255. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005).

256. Kaswan, *Climate Change and the Courts*, *supra* note 244 at *12 ("The very complexity of the issues at stake, and the power of the affected interest groups, could hobble political responses for some time. Courts do not have the luxury of delay.").

257. *Id.*

cal branches have already made an initial policy determination to which the courts should defer: "The political branches' actions and deliberate inactions in the area of global warming further highlight this case as one for nonjudicial discretion."[258] Moreover, the court seemed to conclude that once the elected branches "addressed the issues" of global climate change—no matter how—the courts are rendered powerless:

> An examination of the political branches' consideration of the issues surrounding global climate change counsels against an initial policy determination to be made by the courts. As early as 1978, and as recent as the current administration, the elected branches of government have addressed the issues of climate change and global warming. . . . [R]eductions in carbon dioxide emissions is an issue still under active consideration by those branches of government.[259]

Third, it reflects a false presumption that a problem that vexes the other branches is indicative of one in which the court should avoid the political thicket: "Looking at the past and current actions (and deliberate inactions) of Congress and the Executive within the United States and globally in response to the issue of climate change merely reinforces my opinion that the questions raised . . . are non-judiciable political questions."[260]

Fourth, it incorrectly assumes that political paralysis in the elected branches is due deference. Yet courts are not only permitted to adjudicate a dispute involving a matter already subject to public law. On the contrary, private law causes of action are an important element in our federal and state adjudicative machinery.

Fifth, reliance on *Massachusetts v. EPA* to support the doctrine's application to climate seems dubious at best. If anything, *Massachusetts v. EPA* reinforces rather than reduces state authority to address climate change. For example, rather than interpreting the "special solicitude" analysis in *Massachusetts v. EPA* to support climate cases, the court in *General Motors* held that it provides "convincing force" in support of just the opposite.[261] Furthermore, rather than reading *Massachusetts v.*

---

258. California v. Gen. Motors Corp., No. 3:06-CV-05755 MJJ, 2007 WL 2726871, at *24 (N.D. Cal. Sept. 17, 2007).

259. *Id.*

260. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 273.

261. *Gen. Motors Corp.*, 2007 WL 2726871, at *36-37 (internal citations omitted). The court observed:

> [T]he Supreme Court's analysis on the issue of standing counsels with convincing force to the contrary. As noted above, a State has standing to pursue its "procedural right" through administrative channels, and if necessary, to "challenge the rejection of its rule-making petition as arbitrary and capricious" as did the plaintiffs in *Massachusetts*. Unlike the procedural posture of *Massachusetts*, the current case is not before the Court by way an administrative challenge to an EPA's decision, but rather as an interstate global warming damages tort claim. Plaintiff's argument essentially ignores this procedural distinction.

EPA to suggest that the elected branches have made "initial policy determinations" about global climate change, it reached the opposite result,[262] utterly ignoring the first paragraph of Chief Justice Roberts' dissenting opinion.

Last, it improperly concludes that federal courts should steer clear of factually complex cases involving transboundary pollution. In *American Electric Power*, for example, the court was unwilling to impose pollution control requirements for what would have been hundreds of coal, oil and gas fired facilities of various ages and geographic distribution. Yet this seems to run counter to a rich history of cases in which federal courts have imposed injunctions in cases involving transboundary pollution,[263] even those subject to international negotiations and treaties[264] described above. This point is especially poignant insofar as the Supreme Court found that the tradition of federal courts hearing state common law causes of action for public nuisance supports its decision that states are entitled to "special solicitude" for standing purposes. Such solicitude seems to evaporate, however, when the common law cause is one in public nuisance for climate change.

C. Inconsistency with Reasoning in Other Contexts

Using the political question doctrine to hinder federal common law causes of action to address climate change is also inconsistent with applied jurisprudence in other contexts, particularly involving transboundary pollution for which Congress has not provided equitable or legal relief authority.[265] For example, in In Re *Methyl Tertiary Butyl Ether Products Liability Litigation*,[266] the plaintiffs brought a public nuisance claim due to groundwater contamination from Methyl Tertiary Butyl Ether (MTBE) and Tertiary Butyl Alcohol (TBA). The defendants claimed the political question doctrine barred the action, based on the

---

Id.

262. *Id.* at *37 (internal citations omitted). Here, the court says:

> Similarly, the Court finds Plaintiff's attempt to equate this Court's decision on justiciability with the EPA's decision on whether to regulate carbon dioxide emissions to be problematic. The EPA's global warming carbon dioxide policymaking determinations are statutorily governed by the CAA, and are therefore not analogous the justiciability principles which govern the issues now before the Court.

Id.

263. Brenner, *supra* note 67, at 421.

264. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 273 n.9.

265. *See, e.g.*, McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1364-65 (11th Cir. 2007) ("As the case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.") (internal quotations omitted); Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria, 937 F.2d 44, 49 (2d Cir. 1991) ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a nonjusticiable political question.").

266. 438 F. Supp. 2d 291 (S.D.N.Y. 2006).

"'relevant economic, environmental, energy and security interests implicated by plaintiffs' effort to ban MTBE.'"[267]

The court rejected this argument. As with GHGs, it noted that Congress had studied but did not regulate the use of MTBE and TBA.[268] It drew a distinction between judicial policymaking and judicial review of cases and controversies: "[d]efendants have blurred the line between a determination of whether defendants are liable for water pollution . . . and a policy determination regarding the composition of the country's fuel supply."[269]

Similarly, in *McKay v. United States*[270] landowners brought a suit against a nuclear weapons facility. In reversing the lower court's dismissal on political question grounds, the Tenth Circuit explained that "political aspects present in . . . the decision to manufacture nuclear components [does not] rule out all the possible remedies which are available to people who are physically hurt or materially hurt."[271] Succinctly, the court concluded, "the political question theory . . . [does] not [] prevent individual tort recoveries."[272]

This is especially true for cases, like *General Motors*, where the plaintiffs seek money damages. For example, in *Koohi v. United States*,[273] the Ninth Circuit determined that the political question doctrine is not implicated in tort claims where the "plaintiff[] seek[s] only damages for [its] injuries."[274] Instead of turning the case away under the political question doctrine, it held that "[d]amage actions are particularly manageable."[275]

All of this suggests that the political question doctrine is not well suited to disable the use of federal common law causes of action for climate change.

CONCLUSION

The effects of climate change are disproportionately absorbed by states, individuals, and discrete, insular minorities and others who are compromised in the democratic bazaar. Federal common law causes of action for public nuisance provide a potential means for addressing these effects. Nonetheless, electing not to "enter the global warming thicket," some federal courts have incorrectly invoked the political question doc-

267. *Id.* at 300 (citation omitted).
268. *Id.* at 301.
269. *Id.* at 300; *see also Klinghoffer*, 937 F.2d at 49 (distinguishing between political assessment of terrorism and allocation of liability).
270. 703 F.2d 464, 465 (10th Cir. 1983).
271. *Id.*
272. *Id.* at 470.
273. 976 F.2d 1328 (9th Cir. 1992).
274. *Id.* at 1332.
275. *Id.*

trine in declining to entertain common law causes of action for public nuisance seeking abatement or damages for the effects of climate change. This article concludes that these courts have been too quick to embrace the idea that the doctrine serves as a bar to such actions. There is no constitutional or prudential justification for relegating climate change entirely to the political branches. The political question doctrine does not prevent courts from entering this thicket.