“POLITICAL QUESTIONS”: AN INVASIVE SPECIES INFECTING THE COURTS

PHILIP WEINBERG†

I. INTRODUCTION

Recent court rulings have distorted the hoary “political questions” doctrine into an excuse to evade the courts’ responsibility to decide serious justiciable issues in environmental law. Unless overturned, these decisions not to decide important legal questions will carve out an unwarranted escape hatch and thwart effective judicial redress for environmental harms. And, ironically, the weightier the legal issue, the more likely these courts are to dodge it.

Last year, the federal district court in People of California v. General Motors Corp. (GMC) dismissed a public nuisance suit seeking damages from the major auto manufacturers for injuries to the state’s environment stemming from climate change. These asserted injuries included severe loss of water supply due to melting snow pack, increased risk of flooding, beach erosion, and forest fires. The court concluded that this public nuisance action, no different from hundreds of others brought by states except for the higher stakes involved, was a political question and therefore beyond the court’s jurisdiction, since it “would have an inextricable effect on interstate commerce and foreign policy—issues constitutionally committed to the political branches of government,” and because there was, in the court’s view, no “manageable method of discerning the entities that are creating and contributing to the alleged nuisance.”

† Professor of Law, St. John’s University School of Law. J.D., Columbia Law School, 1958. The author, co-author of Understanding Environmental Law (2d ed. 2007) and editor of Environmental Law: Cases and Materials (rev. 3d ed. 2006), is indebted to Delano Ladd and Craig Lutterbein (St. John’s University School of Law 2008 and 2009) for research assistance in preparing this article.

2. Id. at *2.
3. Id. at *13.
4. Id. at *15.
Two years earlier, another federal court rebuffed a suit by Connecticut, New York, and several other states seeking to enjoin, as a public nuisance, carbon dioxide (CO₂) emissions from the nation’s five largest electric utilities, again citing their impact on global warming. In *Connecticut v. American Electric Power Co. (AEP)* the court likewise found this to be a political question for similar reasons.⁵

Yet other federal courts have more sensibly rejected political question defenses. These courts have sustained actions for damages in a variety of environmental areas ranging from injuries from Hurricane Katrina⁷ to contamination of water supply caused by methyl tertiary butyl ether (MTBE), a pollutant added to gasoline to help comply with air quality standards.⁸

**II. THE POLITICAL QUESTION DOCTRINE**

The political question doctrine, or the reluctance of federal courts to decide political questions, has clear and fixed limits. Its genesis lies in Chief Justice Marshall’s observation in *Marbury v. Madison* that “where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, . . . their acts are only politically examinable.”⁹ But Marshall went on to rule for the Court that the government’s legal duty to furnish Marbury’s promised commission to serve as justice of the peace was not such a situation, that he had a “right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of this country afford him a remedy.”¹⁰ This decision, establishing the power of judicial review, of course veered off to hold the provision of the Judiciary Act of 1789 empowering the Supreme Court to issue writs of mandamus in its original jurisdiction cases to be unconstitutional.¹¹ The political question doctrine—actually grounded in the courts’ reluctance to invade the constitutionally allocated powers of the executive and

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6. *Id.* at 273.
9. 5 U.S. (1 Cranch) 137, 166 (1803).
10. *Id.* at 168.
11. *Id.* at 138.
legislative branches of government—thereafter assumed a carefully-circumscribed life of its own.\footnote{Id. at 166.}

In another salient decision closer to our own day, \textit{Baker v. Carr}, the Supreme Court ruled that claims that states’ failure to reapportion legislative districts over decades, resulting in gross inequality of representation due to the enormously varied population of districts, were not political questions.\footnote{369 U.S. 186, 209 (1962).} In so holding, Justice Brennan, writing for the Court, set forth the modern test for nonjusticiable political questions: are they issues “decided, or to be decided, by a political branch of government coequal with this Court,” or leading to “embarrassment of our government abroad,” or “policy determinations for which judicially manageable standards are lacking”?\footnote{Id. at 226.}

Illustrative of genuine political questions are the early cases seeking judicial rulings as to whether a state has the republican form of government assured by the Constitution’s Guaranty Clause.\footnote{U.S. \textsc{Const.} art. \textsc{IV}, \S 4.} In \textit{Luther v. Borden}, where the plaintiff contended that Rhode Island, in a comic-opera state of insurrection in the early 1840s, lacked a republican government, the Court found that issue to be one for which no judicial standard existed, and which, under the Constitution, must be resolved by Congress.\footnote{48 U.S. (7 How.) 1, 42 (1849).} Again, in \textit{Georgia v. Stanton}, challenging the post-Civil War military occupation of the South,\footnote{73 U.S. 50, 50–53 (1867).} and \textit{Pacific States Telephone & Telegraph Co. v. Oregon}, a claim that enacting laws by popular initiative denied a republican government,\footnote{223 U.S. 118, 133–37 (1912).} the Court rebuffed as political questions attempts to invoke the Guaranty Clause.\footnote{See \textit{Stanton}, 73 U.S. at 77–78; \textit{Pacific States Tel.}, 223 U.S. at 133.}

Similarly, some issues of foreign policy, such as whether a state of war exists between the United States and another country,\footnote{Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (Silberman, J., concurring).} or whether a treaty remains valid,\footnote{Goldwater v. Carter, 444 U.S. 996 (1979).} have been ruled political questions

\footnote{See generally Martin H. Redish, Judicial Review and the Political Question, 79 \textsc{Nw. U. L. Rev.} 1031, 1033–39 (1984) (discussing the history, scope, and rationale of the political question doctrine).}
for the reasons advanced in *Baker v. Carr*. But, significantly, claims that a treaty interferes with citizens’ rights protected under the Constitution are not political questions and will be decided by the courts, as in *Kent v. Dulles* 23 (concerning limits on the right to travel) and *Reid v. Covert* 24 (regarding whether an executive agreement with another country denies the right to jury trial to dependents of members of the Armed Forces serving overseas).

One issue the Supreme Court has wrestled with over the past few decades is whether a challenge to the gerrymandering of congressional or state legislative districts—drawing districting lines to disproportionately benefit the party in power—is a political question. The practice has been challenged as a denial of equal protection as in *Baker v. Carr*, which, as noted, dealt with state legislatures’ failure to reapportion districts to reflect population shifts. 25 The Court in subsequent decisions ruled that this practice denies equal protection, and enunciated the one person-one vote rule. 26 Then in *Davis v. Bandemer*, a divided Court found gerrymandering to be justiciable, 27 though three justices dissented, considering the issue a political question. 28 More recently, in *Vieth v. Jubelirer*, 29 four justices ruled the practice to be a political question, while five found it justiciable. 30 Claims of gerrymandering on racial rather than partisan grounds have routinely been held justiciable and decided on equal protection grounds. 31

Justice Brennan, in *Baker v. Carr*, summed up well the requirements of a nonjusticiable political question as “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . .” 32

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28. See id. at 144 (O’Connor, J., concurring in the judgment).
30. See id. at 306 (Kennedy, J., concurring); id. at 317–55 (dissents by four justices).
Shortly after that decision, the Supreme Court resoundingly rejected a political question defense in *Powell v. McCormack*. The House of Representatives refused to seat Powell, elected by his New York constituents, after a House committee concluded he had “wrongfully diverted House funds.” The defendant, Speaker of the House, claimed this was a political question since the Constitution provides that “each House [of Congress] shall be the Judge of [the] Qualifications of its own Members.” But the Court, in an opinion written by Chief Justice Warren, held that the issue was not a political question since other provisions of the Constitution list precisely which qualifications the House may consider: age, citizenship, and state residence. And, with striking applicability to the recent climate change rulings, the Court added that the nature of our “government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.”

If true as to interpreting the Constitution itself, how much more apt is this holding to litigation interpreting statutes, like the Clean Air Act, that federal courts routinely construe?

**III. ENVIRONMENTAL SUITS: POLITICAL QUESTIONS?**

In *In re MTBE Products Liability Litigation*, the court sensibly decided against dismissing as a political question a suit for damages for harm to public water supplies from methyl tertiary butyl ether (MTBE). The defendant chemical manufacturers argued that the suit involved “broad policy goals which can only be achieved by replacing MTBE with ethanol throughout the national fuel supply,” requiring the court to “balance the ‘relevant economic, environmental, energy and security interests’” at stake. But the court found that the defendants had “blurred the line between a determination of whether defendants are liable for water pollution

34. *Id.* at 492.
35. *Id.* at 513 (citing U.S. CONST. art. I, § 5, cl. 1).
36. *Id.* at 520–21 (citing U.S. CONST. art. I, § 2, cl. 2).
37. *Id.* at 549.
40. *Id.* at 300.
caused by MTBE and a policy determination regarding the composition of the country’s fuel supply.”

The court went on to distinguish Connecticut v. AEP, where it concluded that “Congress and the Executive had issued explicit statements” on climate change and “specifically refused to impose limits on carbon dioxide emissions.” That may have helped the MTBE court avoid the AEP ruling from the same district, but in the end, neither suit raises political questions under Baker v. Carr. The very failure of the other two branches of the federal government to act against climate change is precisely what frees the judiciary to do so, just as with legislative redistricting and, for that matter, public school segregation. As the MTBE court noted, as far back as Marbury the Supreme Court recognized that “[t]he very essence of civil liberty . . . [is] the right of every individual to claim the protection of the laws, whenever he receives an injury.”

Similarly, in Barasich v. Columbia Gulf Transmission Co., the court rebuffed a political question defense to a suit for damages from Hurricane Katrina, which the plaintiffs claimed were exacerbated by oil and gas exploration that reduced the protective qualities of wetlands in Louisiana. The defendants contended that since regulation of wetlands, which absorb much of the impact of coastal storms, is the province of the executive and legislative branches through enforcement of the Clean Water Act and similar state laws, there are no judicially manageable standards to weigh the coastal erosion that the destruction of these wetlands causes. The court sensibly ruled that judicially manageable standards plainly exist

41. Id.
42. Id. at 301.
45. See e.g., Barry G. Rabe et al., State Competition as a Source Driving Climate Change Mitigation, 14 N.Y.U. ENVTL. L.J. 1, 2–3, 45 (2005) (noting the development of climate change policy initiatives at the state level in response to federal inaction, and the valuable function the judicial process provides for state participation in the federal regulatory process “when there is stagnation in politics”).
46. See Baker, 369 U.S. 186.
51. See, e.g., N.Y. ENVTL. CONSERV. LAW art. 17 (McKinney 2007).
52. Barasich, 467 F. Supp. 2d at 682.
for determining the extent to which drilling in wetlands caused erosion, and to which the erosion worsened storm damage.\footnote{Id. at 684.} It relied on a Fifth Circuit ruling rejecting an identical defense to a suit seeking damages for a fish pass, an artificially-created waterway, which allegedly contributed to coastal erosion.\footnote{Gordon v. Texas, 153 F.3d 190 (5th Cir. 1998).} And, the court noted, the lack of judicially manageable standards defense is especially inappropriate in a tort action.\footnote{Barasich, 467 F. Supp. 2d at 684 (citing McKay v. United States, 703 F.2d 464, 470 (10th Cir. 1983)).}

Although the Barasich court distinguished Connecticut v. AEP as a suit for an injunction,\footnote{Id. at 685–86 (citing Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005)).} its logic applies to that case, and to GMC as well. The fact that environmentally harmful activity is potentially subject to regulation by legislative and executive action in no way transforms it into a political question or strips the courts of authority to decide it.

Again, in In Re Agent Orange Product Liability Litigation (In re Agent Orange), a suit by Vietnamese nationals seeking damages for exposure to Agent Orange, the defoliant applied by the United States military during the Vietnam War, the court, while dismissing the action on the merits, denied that it raised a political question.\footnote{373 F. Supp. 2d 7 (E.D.N.Y. 2005), aff’d, 517 F.3d 104 (2d Cir. 2008).} As the court noted, some actions involving international law issues have been dismissed as political questions, such as whether a president may abrogate a treaty\footnote{Goldwater v. Carter, 444 U.S. 996 (1979).} and the extent to which treaties preclude suits for reparations by World War II and Holocaust victims.\footnote{Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999). The German government later established a foundation specifically empowered to hear such claims. See In re Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 379 (D.N.J. 2001).} But, as In re Agent Orange pointed out, these do not apply to actions for injunctive relief or damages asserting legally recognizable injury, such as in AEP or GMC.\footnote{See In re Agent Orange, 373 F. Supp. 2d at 67; see also Kadie v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (holding that a suit brought against a Bosnian national under the Alien Tort Act by victims of atrocities committed in Bosnia was justiciable, noting that “[n]ot every case ‘touching foreign relations’ is nonjusticiable[,]” and that “cases present[ing] issues that arise in a politically charged context . . . does not transform them into cases involving nonjusticiable political questions”).}
Most notably and recently, the Supreme Court, in *Rasul v. Bush*, denied a political question defense in an Alien Tort Statute\(^61\) and habeas corpus action by Guantanamo detainees challenging the legality of their detention.\(^62\) Likewise, the Supreme Court had earlier found no political question when it heard a suit brought to direct the Secretary of Commerce to restrict trade with Japan for alleged violations of the International Whaling Convention.\(^63\) Though the Court was to deny the injunction the plaintiffs sought, it ruled that only “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch” are barred from judicial review.\(^64\)

Closer to the *AEP* and *GMC* scenarios is the Supreme Court’s decision in an early water-quality case, *Ohio v. Wyandotte Chemicals Corp.*\(^65\) Ohio invoked the Court’s original jurisdiction over suits by a state,\(^66\) seeking an injunction against a chemical manufacturer allegedly discharging pollutants into its waters.\(^67\) Just as in *AEP*, the state asserted a public nuisance.\(^68\) While ultimately declining to hear the suit as an original jurisdiction action, the Court, in an opinion by Justice Harlan, explicitly distinguished suits asserting political questions and relied on a series of cases decided by the Court which were brought to abate public nuisances with interstate consequences.\(^69\) Finding no political question, it ruled that “precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute.”\(^70\)

This clear, unequivocal rejection of the political question defense by the Supreme Court, congruent with the decisions discussed here, reveals the illogic of the *AEP* and *GMC* anomalies. The complexity,


\(^{62}\) *Id.* at 480–83.


\(^{64}\) *Id.*

\(^{65}\) 401 U.S. 493 (1971).

\(^{66}\) U.S. CONST. art. III, § 2, cl. 2 (“In all cases . . . in which a State shall be Party, the Supreme Court shall have original jurisdiction”); 28 U.S.C. § 1251(b)(3) (2000) (“The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll actions . . . by a State against the citizens of another State . . . .”).

\(^{67}\) *Wyandotte Chems. Corp.*, 401 U.S. at 494–95.

\(^{68}\) *Id.* at 495.

\(^{69}\) *Id.* at 496 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907)).

\(^{70}\) *Id.*
or the high stakes, of litigation concerning climate change\textsuperscript{71} should not bar the courts from hearing suits that are in all other respects no different from any other action to enjoin a public nuisance. The courts have long and consistently rejected assertions that the enactment of regulatory statutes like the Clean Air Act and Clean Water Act preempt states from public nuisance actions.\textsuperscript{72} The fact that Congress has failed to seriously address climate change\textsuperscript{73} reduces, not strengthens, the notion that the issue is not justiciable.

The Supreme Court had no problem ruling that the Environmental Protection Agency (EPA) should consider adopting standards to control CO\textsubscript{2} as a pollutant under the Clean Air Act. In \textit{Massachusetts v. EPA}, the Court upheld the state’s standing and went on to so direct the Agency.\textsuperscript{74} If there was no political question in that case—the Government seems not to have even advanced that argument, and the Court flatly stated that the suit did not “seek adjudication of a political question”\textsuperscript{75}—there surely is none where, as in \textit{AEP} and \textit{GMC}, states use their more traditional and time-honored powers to abate a public nuisance.

IV. THE \textit{BAKER V. CARR} CRITERIA

Justice Brennan’s cogent analysis in \textit{Baker v. Carr}, after discussing and easily distinguishing rulings holding issues involving the validity of treaties and the Guaranty Clause to be political questions,\textsuperscript{76} specified several types of suits as nonjusticiable: those raising a “question . . . to be decided, by a political branch of government coequal with this Court[,]” those posing “risk [of] embarrassment of our government abroad, or [of] grave disturbance

\begin{itemize}
\item \textsuperscript{71} See, \textit{e.g.}, \textit{Massachusetts v. EPA}, 127 S. Ct. 1438, 1462–63 (2007) (noting EPA’s arguments that regulation of carbon dioxide emissions from automobiles under the Clean Air Act might conflict with current executive branch programs aimed at voluntary emissions reductions, and that such regulation might impair the President’s ability to negotiate an international climate change agreement).
\item \textsuperscript{73} See, \textit{e.g.}, \textit{Rabe et al., supra} note 45, at 2–3 (discussing legislative and executive failures at the federal level to take action on climate change).
\item \textsuperscript{74} 127 S. Ct. at 1452–58.
\item \textsuperscript{75} Id. at 1452.
\item \textsuperscript{76} 369 U.S. 186, 209–12 (1962).
\end{itemize}
at home,” or those seeking “policy determinations for which judicially
manageable standards are lacking.”

None of these suffices to derail the climate change suits in GMC
or AEP. There is plainly no issue in these actions to be decided by
another branch of government. That could be said of any public
nuisance or similar suit seeking judicial relief where administrative
agencies such as the EPA have failed to act. The Supreme Court
explicitly rebuffed an asserted political question defense in Wyandotte
Chemicals, which raised similar issues. The greater stakes here
should not lead to an opposite result.

Nor do these suits pose any risk of embarrassing the United
States government abroad. Whatever embarrassment this country
has suffered from the climate change issue has stemmed from its
failure to act, i.e., to ratify the Kyoto Agreement, not from attempts
to remedy that failure.

Little need be said of concern over possible disturbances to the
government from concerns over climate change. And there are surely
judicially manageable standards to enjoin, or award damages for,
injuries stemming from climate change. Whether those remedies are
warranted is, of course, an issue the courts ought to decide. They
should not disqualify themselves by concluding that these concerns
are not justiciable.

V. CONCLUSION

The political question doctrine is inapplicable to suits to enjoin,
or recover damages for, environmental—and particularly climate
change—injury. Its use by courts amounts to an unwarranted
expansion of that limited doctrine into areas where, historically, the
courts have been available to render justice to aggrieved parties.

77. Id. at 226.
79. See supra note 71.
80. See Stephen Seplow, Why the U.S. Draws Fire over Kyoto Protocol While Other Nations
    summary_0286-8322358_ITM.
81. See Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976) (enjoining air pollution);