

# Gordon v. Texas and the Prudential Approach to Political Questions

Scott Birkey†

*Many scholars recognize both prudential and constitutional aspects of the political question doctrine. This Casenote uses that distinction to analyze the district court and Fifth Circuit Court of Appeals decisions in Gordon v. Texas. It argues that the district court adopted the prudential view of the political question doctrine, while the Fifth Circuit adopted the constitutional view. The district court in Gordon I found that the issues in the case were subject to practical limitations and judicial unmanageability, and thus held that the case presented a nonjusticiable political question. Emphasizing that the issues did not clearly violate the constitutional separation of powers mandate, the Fifth Circuit in Gordon II held that the case was justiciable and did not present a political question. This Casenote argues that the district court chose the correct approach to the political question doctrine, and, by extension, that the prudential approach is superior to the constitutional approach. Because the prudential approach helps conserve judicial resources and restrains the court from asserting a contrived expertise, prudential considerations principally should guide a court's analysis when confronted with a putative political question. Accordingly, this Casenote argues that only after a court has addressed the prudential limitations associated with a putative political question should that court then address the highly abstract and pragmatically inefficacious constitutional limitations informing the doctrine.*

## INTRODUCTION

Justiciability doctrines are often viewed as placing either a prudential limitation or a constitutional limitation on judicial review.<sup>1</sup> The political

---

Copyright © 1999 California Law Review, Inc.

† J.D. Candidate 2000, School of Law, University of California, Berkeley (Boalt Hall); M.S., University of Idaho, 1997; B.A., Southwest Texas State University, 1994. I wish to thank Gillian N. Brown for her helpful comments on earlier drafts of this Casenote.

1. See, e.g., Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863 (1996).

question doctrine represents one such justiciability threshold. To the extent scholars agree that the doctrine serves as a legitimate justiciability device,<sup>2</sup> they identify both a prudential and a constitutional analysis within the political question doctrine. While the constitutional analysis couches the doctrine's rationale strictly in the separation of powers maxim, the prudential analysis seeks to recognize practical limits on a court's ability to adjudicate. Accordingly, the doctrine in its entirety dictates that courts should refrain from adjudicating nonjusticiable political questions from *both* a prudential and a constitutional perspective. This distinction aptly frames the conflicting results reached by the district court and the Court of Appeals for the Fifth Circuit in *Gordon v. Texas*.<sup>3</sup>

The Fifth Circuit in *Gordon v. Texas* reversed the district court's holding that issues relating to the erosion of beachfront property presented a nonjusticiable political question.<sup>4</sup> Emphasizing the practical problems the case posed, the district court saw the case as judicially unmanageable as presented by the plaintiffs.<sup>5</sup> The Fifth Circuit held that the district court erroneously concluded that the case presented a political question, and that the court could have capably rendered a decision. Emphasizing the separation of powers aspect of the doctrine, the Fifth Circuit held that a political question did not exist absent any actual or potential conflict between a federal court and a coordinate federal branch of the government.<sup>6</sup>

This Casenote uses the distinction between the prudential and constitutional rationales to analyze the contrary results reached by the district court and the Fifth Circuit. It observes that, in contrast to the constitutional aspect of the doctrine, prudential considerations reflect a court's recognition of the practical limitations associated with adjudicating issues such as those raised in *Gordon v. Texas*. This Casenote argues that the prudential approach to the political question doctrine is functionally superior to the constitutional approach and that prudential considerations therefore should be the principal guide for a court's analysis of a putative political question. This Casenote further argues that a court should address the highly abstract and pragmatically inefficacious constitutional limitations informing the political question doctrine only after a court has confronted the possibility of prudential limitations.

---

2. Some scholars argue that the political question restraint to judicial review either does not exist or is subsumed within other justiciability doctrines such as standing. Most notably, Professor Louis Henkin argues that the "authentic components" of the doctrine fit within other justiciability doctrines. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Thus, he argues that the doctrine is not necessary. *See id.*; *see also* Redish, *supra* note 1; Simard, *supra* note 1.

3. 965 F. Supp. 913, 916-18 (S.D. Tex. 1997) (*Gordon I*), *rev'd*, *Gordon v. Texas*, 153 F.3d 190 (5th Cir. 1998) (*Gordon II*).

4. *See Gordon II*, 153 F.3d at 196.

5. *See Gordon I*, 965 F. Supp. at 916-18.

6. *See Gordon II*, 153 F.3d at 194.

Part I of this Casenote discusses the district court's and the Fifth Circuit's decisions in *Gordon v. Texas*. Part II reviews the political question doctrine's prudential and constitutional aspects and argues that the district court in *Gordon v. Texas* emphasized prudential considerations, while the Fifth Circuit emphasized constitutional considerations. In Part III, this Casenote argues that the prudential political question rationale is the more efficacious of the doctrine's two aspects, and that the district court appropriately applied the prudential approach. This Part further argues that the prudential emphasis is generally superior to the constitutional emphasis because it reveals the inherent practical limitations associated with many issues, allowing the courts to conserve judicial resources by dispensing with judicially unmanageable issues prior to engaging in any needless constitutional dialogue.

## I

### STATEMENT OF THE CASE

In 1954, a sportsmen's club known as the Gulf Coast Rod, Reel and Gun Club, located on Bolivar Peninsula in Galveston County, Texas, granted a permanent easement over a portion of its land to the State of Texas.<sup>7</sup> The easement provided for the construction and maintenance of a "fish pass," a cut through the land that allows fish to pass from one body of water to another. After obtaining a permit from the Army Corps of Engineers, the Texas Game and Fish Commission dredged the cut and has since maintained it.<sup>8</sup> The pass, known as the "Rollover Fish Pass," has been operational since 1959. In the late 1980s, the Club leased the land adjacent to the Pass to Galveston County for use as a public park.<sup>9</sup>

Like much of the Texas Gulf Coast, the coastline at issue has suffered a great deal of erosion in recent times, a problem that is particularly significant near the Rollover Fish Pass.<sup>10</sup> The plaintiffs in *Gordon v. Texas*, a group of beachfront property owners with property along the coast of the Bolivar Peninsula, alleged losses to their property due to this erosion. In particular, the plaintiffs alleged that the Rollover Fish Pass contributed substantially to the loss of coastline and, as a result, to the loss of the plaintiffs' properties.<sup>11</sup>

---

7. See *Gordon II*, 153 F.3d at 192; *Gordon I*, 965 F. Supp. at 915.

8. See *Gordon II*, 153 F.3d at 192; *Gordon I*, 965 F. Supp. at 915.

9. See *Gordon II*, 153 F.3d at 192; *Gordon I*, 965 F. Supp. at 915.

10. See *Gordon II*, 153 F.3d at 192.

11. See *Gordon II*, 153 F.3d at 192; *Gordon I*, 965 F. Supp. at 915. Neither opinion specifically addresses how the Pass contributed to the coastline erosion, except to note that "[the plaintiffs] claim that a 1995 report by the Army Corps of Engineers concluded that the recent severe erosion west of the Pass was attributable mainly to the 1995 structural improvements made to the Pass." *Gordon II*, 153 F.3d at 192.

The plaintiffs filed suit in federal district court against the Gulf Coast Rod, Reel and Gun Club, the State of Texas, and various state agencies, alleging that defendants negligently constructed, dredged, and maintained the Pass. The plaintiffs also alleged that the resultant loss of land constituted a "taking" of their property. The plaintiffs requested an injunction ordering the state to fill in the Pass and to pay damages in the amount of \$730 million, a figure they arrived at by totaling "one dollar a day for every day of geological time that it took to create Bolivar Peninsula."<sup>12</sup> The defendants responded by filing a motion to dismiss these claims based on the political question doctrine, among other defenses.<sup>13</sup>

The United States District Court for the Southern District of Texas decided the case on May 27, 1997.<sup>14</sup> The case was appealed to the United States Court of Appeals for the Fifth Circuit and decided on August 25, 1998.<sup>15</sup> According to counsel, defendants have not petitioned the United States Supreme Court for certiorari.<sup>16</sup>

#### A. *The District Court Decision*

The District Court for the Southern District of Texas held that *Gordon* presented a nonjusticiable political question, and that the issues were "far more appropriate for resolution by Congress or agencies within the Executive Branch."<sup>17</sup> The court concluded that the issues presented by the case fit many of the political question factors listed by the United States Supreme Court in the landmark case *Baker v. Carr*.<sup>18</sup> Significantly, the district court noted that resolution of the case presented policy decisions far afield of the court's practical capacities. The court noted that "[t]his decision is not one for the Court to make because it involves scientific,

---

12. *Gordon I*, 965 F. Supp. at 915.

13. *See Gordon II*, 153 F.3d at 192-93.

14. *See Gordon I*, 965 F. Supp. at 913.

15. *See Gordon II*, 153 F.3d at 190.

16. *See* Telephone Interview with Liz Bills, Office of Attorney General, Natural Resources Div., State of Texas (Dec. 15, 1998).

17. *Gordon I*, 965 F. Supp. at 916.

18. 369 U.S. 186, 217 (1962). The Court in *Baker* enumerated six factors useful in determining whether an issue presents a nonjusticiable political question:

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

*Id.* at 217. Of these factors, the district court in *Gordon I* found relevant the second, third, and fourth. *See Gordon I*, 965 F. Supp. at 916-17.

ecological, economic, and social issues that are wholly beyond the purview of the judiciary.”<sup>19</sup>

In dismissing the plaintiffs’ requests for injunctive relief and monetary damages, the court relied on the *Baker* criterion of a “lack of judicially discoverable and manageable standards for resolving [the question].”<sup>20</sup> In particular, the court responded to the plaintiffs’ request for injunctive relief, specifically that the defendants fill in the fish pass and ensure that the coast is “wholly restored,”<sup>21</sup> by concluding that this request simply asked too much of the court. As the court wrote, “this decision would require serious scientific and economic study in addition to intense and judicially unmanageable physical work. The Federal Courts are simply not in the business of directing and overseeing massive geological construction projects.”<sup>22</sup> As to the plaintiffs’ request for monetary damages, the court recognized that while damages are generally judicially manageable, the damages at issue here were unmanageable because they were calculated under the assumption that the defendants were liable for the coastal erosion over all geological time.<sup>23</sup> Because the court concluded that the injunctive relief claim presented a political question, and the damages sought by the plaintiffs were “inextricably intertwined with their request for injunctive relief,”<sup>24</sup> it determined that the plaintiffs’ entire suit was nonjusticiable under the political question doctrine.<sup>25</sup> Accordingly, the district court dismissed the plaintiffs’ complaint with prejudice.

### B. *The Fifth Circuit Decision*

The Court of Appeals for the Fifth Circuit reversed the district court, holding that the claims did not raise nonjusticiable political questions, and that the lower court was capable of evaluating “the decisionmaking of Congress and various federal agencies.”<sup>26</sup> The court concluded that the district court erroneously analyzed the political question issue, impliedly recognizing a constitutionally significant defect in the district court’s analysis: “[T]he potential for a clash between a federal court and other branches of the federal government is fundamental to the existence of a political question; a simple conflict between a federal court and state agencies does not implicate the doctrine.”<sup>27</sup> Thus, the Fifth Circuit found

---

19. *Gordon I*, 965 F. Supp. at 916.

20. 369 U.S. at 217.

21. *Gordon I*, 965 F. Supp. at 917.

22. *Id.*

23. As noted above, the plaintiffs calculated monetary damages at one dollar per day for each day of geologic time it took to create the coastline of Texas. See *supra* note 12 and accompanying text.

24. *Gordon I*, 965 F. Supp. at 917.

25. See *id.* at 917-18.

26. *Gordon II*, 153 F.3d at 193.

27. *Id.* at 194 (emphasis deleted).

dispositive both the fact that *Gordon I* involved a federal district court's review of state administrative decisions, and the fact that no confrontation existed between the federal judiciary and the other coordinate branches of the federal government. Observing these federalism and separation of powers implications, the Fifth Circuit held that the issues in *Gordon I* raised no political questions based on these factors—factors squarely rooted in constitutional principles.

In addition to these constitutional concerns, the Fifth Circuit found that the district court prematurely dismissed the plaintiffs' claim for injunctive relief because the litigation had not developed enough to demonstrate the need for "massive federal intervention."<sup>28</sup> The Fifth Circuit also found that although the plaintiffs' claim for damages far exceeded the actual property damages the plaintiffs might have suffered, the claim reflected a problem with their complaint rather than with the merits of the case.<sup>29</sup> Therefore, the court concluded that instead of dismissing the case with prejudice, the district court should have granted the plaintiffs leave to amend their complaint to state more appropriate damages.

The Fifth Circuit concluded that the district court was mistaken in avoiding the merits of the case by invoking the political question doctrine.<sup>30</sup> The Fifth Circuit thus held that the district court erred in dismissing the plaintiffs' claims as nonjusticiable political questions.<sup>31</sup> Accordingly, the appellate court reversed the district court's dismissal and remanded for further proceedings.<sup>32</sup>

## II

### PRUDENTIAL AND CONSTITUTIONAL RATIONALES BEHIND THE POLITICAL QUESTION DOCTRINE

Political question doctrine scholarship often frames the debate regarding the doctrine's scope as informed by either prudential or constitutional limitations.<sup>33</sup> Although both approaches are rooted in the separation

---

28. *Id.* at 195. Presumably the Fifth Circuit was referring to assistance from federal agencies.

29. For example, the Fifth Circuit noted, "[r]egardless, the defect in the plaintiffs' claim for damages is a substantive defect in their case; it has nothing to do with the political question doctrine." *Gordon II*, 153 F.3d at 196. The district court also observed that the plaintiffs' complaint was deficient in many ways: "The Court is vague in its restatement of Plaintiffs' claims because Plaintiffs are vague in their own assertion of them despite a Court Order to clarify their Complaint." *Gordon I*, 965 F. Supp. at 915 n.3. Despite these rather ignoble beginnings, this case nonetheless fortuitously helps shape the contours of the political question doctrine.

30. See *Gordon II*, 153 F.3d at 195-96.

31. See *id.* at 196.

32. See *id.*

33. See, e.g., Redish, *supra* note 1 (discussing the distinction between "prudential" and "classical" forms of the doctrine); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966) (discussing "constitutional" and "prudential" theories of the doctrine); Guilds, *supra* note 1 (discussing the distinction between "prudential" and "constitutional" requirements).

of powers principle, the constitutional rationale draws more heavily from this maxim of constitutional law.<sup>34</sup> On the other end of the spectrum is the more pragmatic rationale, grounded in prudential concerns of practical judicial limitations. Judicial abstinence is more in keeping with the inherent practical limitations of the judiciary. This Part begins by arguing that while the *Gordon II* court approached the doctrine from the constitutional perspective, the *Gordon I* court approached the doctrine from the prudential perspective. Further, this Part argues that this shift in overriding rationales from *Gordon I* to *Gordon II* explains the district court's holding that the case presented a nonjusticiable political question and the Fifth Circuit's holding that it did not.

### A. *The Constitutional Rationale for the Political Question Doctrine*

Because the Fifth Circuit approached the political question doctrine from a constitutional perspective, the court found that the district court erroneously concluded that the case presented a nonjusticiable political question. The constitutional rationale behind the political question doctrine emphasizes the separation of powers principle. As early as *Marbury v. Madison*,<sup>35</sup> Justice Marshall cast the definition of a political question in terms of a tension between the executive and the judicial branches:

The province of this court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>36</sup>

Indeed, the case law since *Marbury* has continued to associate the political question doctrine with the constitutional principle of separation of powers. The case of *Baker v. Carr*<sup>37</sup> is an example. The *Baker* Court held that a state apportionment statute presented a justiciable cause of action, and thus did not present a nonjusticiable political question.<sup>38</sup> Writing for the majority, Justice Brennan began his analysis by noting that political questions possess clearly identifiable elements, each of which is "essentially a function of the separation of powers."<sup>39</sup> Because the

---

34. For example, constitutional considerations regarding the political question doctrine often guide the analysis of foreign relations issues. See, e.g., Michael E. Tigar, *Judicial Power, the "Political Question Doctrine" and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

35. 5 U.S. (1 Cranch) 137 (1803). For later development of this rationale, see *Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849) ("Much of the argnment on the part of the plaintiffs turned upon . . . political questions, upon which the court has been urged to express an opinion. We decline doing so.").

36. *Marbury*, 5 U.S. at 170.

37. 369 U.S. 186 (1962).

38. See *id.* at 237.

39. *Id.* at 217. Justice Brennan's review of the doctrine in *Baker* begins much earlier in the opinion, but even there he writes that "it is the relationship between the judiciary and the coordinate

separation of powers principle concerns each governing branch's duties as explicated by the Constitution,<sup>40</sup> political question analyses derived *solely* from this principle are driven by a constitutional, as opposed to a prudential, rationale.

Other courts confronted with issues that suggest a political question have also recognized that the doctrine is derived from the separation of powers axiom. For example, the United States Supreme Court in *Powell v. McCormack*<sup>41</sup> considered whether the Court can review determinations of the House of Representatives regarding the qualifications of House members. Addressing the issue of whether the case presented a political question, the Court relied almost exclusively on the "textually demonstrable constitutional commitment" language of *Baker* to find that the case did not present a political question.<sup>42</sup> Considered in light of the full text in *Baker*, this criterion invokes the constitutional rationale of the doctrine because it rests squarely upon the separation of powers principle: "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>43</sup> Indeed, the *Powell* Court noted that "political questions are not justiciable primarily because of the *separation of powers* within the Federal Government."<sup>44</sup>

Emphasis on this presupposition drives courts such as the *Powell* Court to analyze the political question issue against the backdrop of the constitutional rationale.<sup>45</sup> Consistent with this perspective, the court in *Gordon II* made a similar observation: "[T]he potential for a clash between a federal court and other branches of the federal government is fundamental to the existence of a political question . . . ."<sup>46</sup> By emphasizing this separation of powers principle, the Fifth Circuit concluded that a political question existed only if a conflict existed between a federal court and a federal agency.<sup>47</sup> Accordingly, the Fifth Circuit's decision in *Gordon II* was driven by the constitutional rationale behind the political question doctrine.

---

branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Id.* at 210.

40. See U.S. CONST. art. I (defining the power of the legislature); U.S. CONST. art. II (defining the power of the executive); U.S. CONST. art. III (defining the power of the judiciary).

41. 395 U.S. 486 (1969).

42. *Id.* at 518-49; see also *supra* note 18.

43. 369 U.S. at 217 (emphasis added).

44. 395 U.S. at 518 (emphasis added).

45. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 351 (1976) ("A question presented to this Court for decision is properly deemed political when its resolution is committed by the Constitution to a branch of the Federal Government other than this Court.") (citations omitted); *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 165 (5th Cir. 1985) ("A question is properly deemed political when resolution is committed by the Constitution to a branch of the federal government other than the judiciary.").

46. 153 F.3d at 194.

47. See *id.*



The Fifth Circuit's analysis of the political question doctrine in *Gordon II*, however, considered only one of the six criteria listed by the *Baker* Court, namely the criterion requiring that a case involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>48</sup> The fact that Justice Brennan enumerated five other factors<sup>49</sup> bearing on the existence of a political question suggests that although the doctrine rests on the constitutional separation of powers mandate, nonjusticiable political questions may derive from more practical matters such as judicial manageability and social value determinations. Federal courts choosing to adopt the constitutional emphasis of the doctrine will likely downplay, if not reject outright, prudential arguments seeking to distinguish an issue as nonjusticiable on political question grounds. For these courts, "profound" constitutional considerations far outweigh "mundane" practicalities such as judicial manageability. Accordingly, because the Fifth Circuit embraced the constitutional emphasis in *Gordon II*, the court refused to consider seriously the district court's prudential concerns that it was incapable of addressing the claims as they were presented by the plaintiffs.<sup>50</sup>

#### B. *The Prudential Rationale Behind the Political Question Doctrine*

The view of the political question doctrine as more prudentially limiting than constitutionally limiting justiciability received the earliest and perhaps most extensive treatment from Alexander Bickel.<sup>51</sup> Professor Bickel's analysis of the doctrine emphasizes the judiciary's practical capacities and inherent limitations:

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.<sup>52</sup>

---

48. 369 U.S. at 217.

49. See *supra* note 18.

50. Consider the following passage in *Gordon II*:

The political question doctrine erects a barrier to justiciability to those matters which are inappropriate for judicial determination. *The foundation of the political question doctrine is the constitutional principle of separation of powers among the branches of government.* The doctrine prohibits courts from adjudicating those questions whose resolution is committed by the Constitution to a branch of government other than the judiciary.

153 F.3d at 193 (emphasis added) (citations omitted).

51. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

52. *Id.*

As Professor Bickel notes, the overriding rationale for the political question doctrine is "the Court's sense of lack of capacity."<sup>53</sup> Professor Bickel does not suggest, in either this overarching formulation or the four descriptive "parts" listed, that the constitutional concern of separation of powers takes priority or even plays a significant role. Indeed, Professor Bickel's understanding represents a shift in emphasis, if not a clear departure, from the doctrine in its constitutionally restrictive capacity to the doctrine in its prudentially restrictive capacity.

As a result of this emphasis, Professor Bickel's analysis views the political question doctrine through the eyes of a court confronted not with an issue laden with constitutional implication, but rather with an issue that smacks of adjudicative impracticality. Cases prudential in nature may require, for example, either esoteric expertise and highly technical understandings or unmanageable and ambiguous remedies. Cases of this sort present decisions that should not be made by "an institution which is electorally irresponsible and has no earth to draw strength from."<sup>54</sup>

Case law supports the prudential rationale as applied in *Gordon I*. Indeed, as Justice Frankfurter noted in his dissenting opinion in *Baker v. Carr*, judges are not "omnicompeten[t]," and "[t]he Framers of the Constitution persistently rejected a proposal that embodied this assumption . . . ."<sup>55</sup> Even earlier decisions often refer to "question[s] . . . deemed political"<sup>56</sup> as those in which the judiciary finds itself prudentially, as distinct from constitutionally, incapable of adjudicating an issue. As the United States Supreme Court noted in *Coleman v. Miller*, "[i]n determining whether a question falls within [the political question] category, the appropriateness . . . of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations."<sup>57</sup>

In *Japan Whaling Ass'n v. American Cetacean Society*,<sup>58</sup> the Court confronted a putative political question because of the foreign relations issues in the case. After concluding that the political question doctrine was not meant to preclude the Court from deciding any matter "touching upon

---

53. *Id.*

54. *Id.*

55. 369 U.S. at 268 (Frankfurter, J., dissenting); see also *Occidental of Umm al Qaywayn, Inc. v. Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) (holding that as a territorial dispute the case presented a nonjusticiable political question, noting also that the judiciary was limited "as a decisional body"). In *Occidental of Umm*, the Fifth Circuit cited *Coleman v. Miller*, 307 U.S. 433 (1939), noting that the *Coleman* Court "admitt[ed] that they were not tribal wisemen dispensing divinely or theoretically inspired judgments, but were a court limited to the application of predetermined law." *Occidental of Umm*, 577 F.2d at 1203.

56. *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 165 (5th Cir. 1985).

57. 307 U.S. 433, 454-55 (1939) (citations omitted).

58. 478 U.S. 221 (1986).

foreign relations," the Court held that this case did not present a political question and thus was justiciable.<sup>59</sup> Nevertheless, in its exposition of the doctrine the Court noted that "[t]he Judiciary is particularly ill suited to make [policy choices and value determinations], as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'"<sup>60</sup> Further, in *Occidental of Umm al Qaywayn, Inc. v. Cargo of Petroleum*,<sup>61</sup> the Fifth Circuit considered a case in which the court dismissed the question presented under the political question doctrine because it was both "constitutionally devolving on the executive and judicially unmanageable . . ."<sup>62</sup> In holding that this case presented a nonjusticiable political question, the Fifth Circuit cited *Coleman v. Miller*<sup>63</sup> and wrote, "the Supreme Court clearly recognized that the political question doctrine partakes not only of the existence of separation of powers, but also of the *limitation of the judiciary as a decisional body*."<sup>64</sup>

Prudential concerns are exactly what troubled the district court in *Gordon I*; these concerns were made explicit throughout the court's opinion. At one point, the court noted that "[t]he issues in this case are simply beyond the expertise and the power of the Court and are better handled by the Legislative and Executive Branches."<sup>65</sup> This concession aptly reveals the prudential political question rationale. The court was aware of the inherent limitations requiring it to exercise prudential discretion.<sup>66</sup>

The district court in *Gordon I*, like other courts addressing apparent political questions, began its analysis with the often repeated *Baker* incantation listing the various characteristics of a political question, preceded by the obligatory nod to the separation of powers principle: "The political question doctrine functions as a protector of the concept of the separation of powers."<sup>67</sup> However, the court did not complete its analysis by turning to this constitutional touchstone; instead, the court cited the *Baker* criteria that speak of the practical ability of the judiciary to adjudicate complexities such as those posed by *Gordon v. Texas*.<sup>68</sup> Thus, instead of discussing the

---

59. *Id.* at 230.

60. *Id.* (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

61. 577 F.2d 1196 (5th Cir. 1978).

62. *Id.* at 1198.

63. 307 U.S. 433 (1939).

64. *Occidental of Umm*, 577 F.2d at 1203 (emphasis added).

65. *Gordon I*, 965 F. Supp. at 918.

66. Consider also the following quotation from the opinion:

While the Court presides over a District by the sea, it is not endowed with the powers of Poseidon. It cannot control the tides, nor can it, on its own accord, order a major geologic change in the coastline of the state of Texas. The Court does not have the inclination, the capabilities, nor the power to discover, develop, and implement procedures for filling in Rollover Fish Pass.

*Id.* at 917.

67. *Id.* at 916.

68. 965 F. Supp. at 913.

first criterion, "a textually demonstrable constitutional commitment of the issue to a coordinate political department,"<sup>69</sup> the court chose to emphasize the criteria addressing concerns of judicial capacity: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," "a lack of judicially discoverable and manageable standards for resolving [the question]," and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."<sup>70</sup> While this last criterion arguably may speak to the separation of powers principle,<sup>71</sup> the court's choice of these three factors and its subsequent prudential analysis of the issue demonstrate its recognition of the judicially intractable nature of the claim as presented by the plaintiffs. At issue in the case were complex decisions that "could have innumerable impacts on various concerns on Bolivar Peninsula, such as wildlife protection, transportation, commerce, and recreation."<sup>72</sup> Moreover, the Court noted that "[s]ignificant scientific and economic studies would likely need to be conducted to determine the feasibility of closing Rollover Fish Pass,"<sup>73</sup> studies that the court could not do on its own. Accordingly, the court concluded that the issues as presented by the plaintiffs posed a nonjusticiable political question.

The prudential rationale helping to guide cases such as *Coleman*, *Japan Whaling Ass'n*, and *Occidental of Umm*, as well as *Gordon I*, is grounded in a conception of the political question doctrine that bears little similarity to the rigid constitutional conception of the doctrine. While both approaches share the separation of powers mandate, they diverge in their emphases: One is constitutional while the other is pragmatic. Accordingly, a court that chooses to emphasize the constitutional underpinnings of the doctrine will tend to focus its attention on whether a conflict exists between the federal judiciary and other branches of the federal government. A court that emphasizes this constitutional approach will therefore choose for its political question litmus test a clear violation or disruption of the separation of powers principle. This is the approach adopted by the Fifth Circuit in *Gordon II*.

---

69. *Id.* at 916 (quoting *Baker*, 369 U.S. at 217).

70. *Id.* (quoting *Baker*, 369 U.S. at 217).

71. Even then, this particular criterion does not refer as much to a violation of the separation of powers principle as to the practical effects on the perceived efficacy of other branches to capably manage issues within their own province. The *Gordon I* court seems to adopt this interpretation of the criterion in its analysis:

The Court's reevaluation of this decision now, over forty years later, would express a lack of respect for this Executive Branch agency and its expertise. . . . This Court is not inclined to second-guess the decision of the [Army Corps of Engineers] and express a lack of respect for a coordinate branch of the Federal Government.

965 F. Supp. at 917.

72. *Id.* at 916.

73. *Id.*

In contrast to this approach, a court that chooses to emphasize the prudential aspect of the doctrine will tend to examine the issue presented with an eye toward judicial manageability. The test for a political question then becomes whether judicial resources are such that the matter can be capably managed by the court. If the matter cannot be adequately addressed with the judicial resources at hand, then the court emphasizing this approach will deem the matter a political question and thus nonjusticiable. This is the approach adopted by the district court in *Gordon I*, and, as argued below, this is the more useful approach to understanding the value of the political question doctrine.

### III

#### THE EFFICACY OF THE PRUDENTIAL POLITICAL QUESTION RATIONALE

The district court in *Gordon I* determined that the plaintiffs presented a suit that no court could capably adjudicate. The court thus determined that the suit presented a nonjusticiable political question, spending most of its opinion surveying the reasons why the judiciary was practically, rather than constitutionally, unable to decide the matter. This prudential approach reflects the utility of the political question doctrine. When presented with a putative political question, a court should first recognize and be guided by its inherent practical limitations before considering the extent to which the question presents constitutional implications. In sum, only after recognizing its inherent prudential limitations should constitutional limitations become crucial to the court.

This Part argues that *Gordon v. Texas* demonstrates the utility of the prudential theory, contending that the political question doctrine is an effective justiciability device to conserve judicial resources and avoid unnecessary constitutional dialogue. Accordingly, this Part argues that a court presented with a putative political question should begin its analysis with practical considerations and the *Baker* criteria that address judicial manageability before considering weighty constitutional matters such as the separation of powers principle.

#### A. Prudential Limitations and Conserving Judicial Resources

Although not made explicit in *Gordon I*, the court's refusal to adjudicate the issue as presented by the plaintiffs reflected concerns grounded in the justifiable assumption that scarce judicial resources are likely incapable of fleshing out such complex and technical issues to effectively adjudicate those issues on their merits. As the court noted, "[t]he issues in this case are simply beyond the expertise and the power of the Court and are better handled by the Legislative and Executive Branches."<sup>74</sup> The court in *Gordon*

---

74. *Gordon I*, 965 F. Supp. at 918.

I abstained from adjudicating the case due to prudential concerns that the issues as presented were far too complex and technical.

This initial threshold of judicial capacity is found in both *Baker v. Carr* and Professor Bickel's account of the political question doctrine.<sup>75</sup> In *Baker*, Justice Brennan identified five factors supporting a judicial capacity threshold,<sup>76</sup> while Professor Bickel exclusively endorsed the same threshold.<sup>77</sup> Once it becomes clear to a court that issues such as those presented in *Gordon v. Texas* are better served by a specialized governmental agency with both expertise and political accountability, this threshold alone justifies a court's finding of a political question that must then be turned over to a coordinate political branch for resolution. No further purpose is served by then considering whether constitutionally grounded principles exist in the case; for regardless of whether such principles are implicated, if a court is simply incapable of judicially managing either the merits of the case or the relief requested, then that court should not embark on such a fool's errand. A court that begins its analysis of a putative political question by initially reviewing its practical capacity to adjudicate the question may not need to discuss such weighty constitutional principles as separation of powers or federalism. In addition to avoiding this inconsequential constitutional dialogue, the judicial capacity threshold helps to conserve judicial resources by sparing the court from deciding complex and technically prohibitive issues. As the district court noted in *Gordon I*, these are issues that "[t]he Federal Courts are simply not in the business of directing and overseeing."<sup>78</sup> Accordingly, when a court is confronted with a putative political question, prudential considerations should precede constitutional considerations.

In sum, a court's political question analysis should first ask the practical query: Are the issues as presented within the capacity of the judiciary? Only after that question should the court address the constitutional query: Are the issues as presented pre-assigned to coordinate branches of government? When faced with prohibitive complexity, this two-part analysis removes the court from both having to decide the constitutional question of whether a federal court has reached too deeply into the province of a coordinate branch, and committing itself to adjudicating highly complex and technical issues requiring large amounts of judicial energy and time.

---

75. 369 U.S. 186 (1962); BICKEL, *supra* note 51.

76. See *supra* note 49 and accompanying text.

77. See *supra* notes 51-54 and accompanying text.

78. *Gordon I*, 965 F. Supp. at 917.

B. *Prudential Limitations and Gordon v. Texas*

*Gordon I* exemplifies the cogency of judicial abstention in light of such judicially unmanageable issues as second-guessing "Mother Nature" and assessing damages over all geological time.<sup>79</sup> The district court began by noting that the plaintiffs' request would require the court to make policy decisions that are clearly within the province of a nonjudicial body. In particular, these policy questions would have required the court to determine whether or not the fish pass should be filled in. According to the court, "[t]his decision is not one for the Court to make because it involves scientific, ecological, economic, and social issues that are wholly beyond the purview of the judiciary. . . . Significant scientific and economic studies would likely need to be conducted to determine the feasibility of closing Rollover Fish Pass . . . ."<sup>80</sup> To make such a decision, let alone frame the issue leading up to the decision, the court would have been required to commit substantial judicial resources to study the feasibility of closing the Pass. The prudent alternative, however, would have been to defer to the judgment and expertise of the specialized agencies.

Further, the court observed that the case required a level of manageability lacking in the judiciary. As the court noted, "[t]his decision would require serious scientific and economic study in addition to intense and judicially unmanageable physical work. The Federal Courts are simply not in the business of directing and overseeing massive geological construction projects."<sup>81</sup> For all intents and purposes, a task such as this would have required the court to throw off its mantle of adjudicator and instead assume the role of construction foreman. This requirement is clearly not the mandate of the judiciary.

Additionally, the remedies the plaintiffs sought were far beyond the practical abilities of the court. As presented by the plaintiffs, their requests for damages were beyond the capabilities of the judiciary: Asking for compensation measured by "geologic time"<sup>82</sup> is a peculiar request for damages and perhaps best captures Justice Brennan's intention in declaring that certain issues simply lack "judicially discoverable . . . standards" for resolution.<sup>83</sup>

---

79. See *id.* at 914-16. At one point, the court noted,

[i]n this case, Plaintiffs quite literally ask this Court to find Defendants liable for and further prevent them from interfering with Mother Nature. By this request, however, Plaintiffs ask this Court itself to fool with Mother Nature, an act which the Court is neither inclined nor empowered to undertake.

*Id.* at 914-15.

80. *Id.* at 916.

81. *Id.* at 917.

82. *Id.*

83. *Baker*, 369 U.S. at 217.

Finally, the court noted that it could not independently resolve the case "without expressing a lack of the respect due the other branches of the Federal Government."<sup>84</sup> At first blush, this argument relying on the fourth *Baker* criterion may appear to invoke the constitutional theory behind the political question doctrine because of its separation of powers intimations. However, the effect of this *Baker* criterion does not highlight the constitutional difficulties associated with judicial overreaching into the other governmental branches, but rather the prudential concerns of essentially "second-guessing" the expertise and qualifications of administrative agencies.<sup>85</sup> Accordingly, the practical effect of this criterion is to restrain the judiciary from heaping a second layer of "administrative" review upon an agency's informed and expert decision. Deferring to the abilities of these "coordinate branch[es] of the Federal Government,"<sup>86</sup> the *Gordon I* court effectively conserved its judicial resources while at the same time avoiding the obfuscation of administrative policy that may result from nonexpert review.

By exercising the prudential limitation approach to the political question doctrine, the *Gordon I* court implicitly recognized its inherent limitations as "an institution which is electorally irresponsible and has no earth to draw strength from."<sup>87</sup> Having found that the question presented in this case suffered from many prudential defects, the court considered the matter a nonjusticiable political question. Therefore, the court did not need to inquire into any constitutional aspects of the case such as separation of powers or federalism. The Fifth Circuit, however, found that the case did not present a political question because no infringement of constitutional separation of powers appeared to exist. As argued above, the observations of the Fifth Circuit demonstrated that the court adopted the constitutional perspective of the political question doctrine. In this case, however, any constitutional difficulties were greatly outweighed by the prudential difficulties. By recognizing this and determining first that the issue was nonjusticiable due to prudential concerns, the district court did not need to reach the constitutional question of whether the court's review of the state agency actions violated separation of powers or federalism principles. Therefore, the district court correctly adopted the prudential approach in concluding that *Gordon v. Texas* presented a nonjusticiable political question.

---

84. *Gordon I*, 965 F. Supp at 917.

85. See *supra* note 71.

86. *Gordon I*, 965 F. Supp at 917.

87. BICKEL, *supra* note 51, at 184.



## CONCLUSION

In its analysis of *Gordon I*, the district court applied the prudential limitation approach to the political question doctrine, while the Fifth Circuit applied the constitutional limitation approach. The district court found that the plaintiffs' suit was nonjusticiable because it invoked issues and required remedies far afield of its judicial capacities. Without having to address the constitutional question of whether the case did in fact present a political question, the court simply reflected on its own practical and inherent limitations to determine that the issues as framed by the plaintiffs presented a prudentially nonjusticiable political question. This prudential approach to the doctrine allowed the district court to avoid expending judicial resources while abstaining from needless constitutional analysis. Therein lies the strength of the political question doctrine. By turning first to the prudential rationale, a court can dispense with unmanageable issues without having to confront abstract constitutional concerns. Thus, in analyzing a putative political question, a court should consider constitutional aspects such as principles of separation of powers and federalism only after recognizing its own inherent prudential limitations. To proceed otherwise leads a court either to squander scarce judicial resources or to assert a contrived and disingenuous expertise.

