

2001

## The Presidential Election Dispute, the Political Questions Doctrine, and the Fourteenth Amendment: A Reply to Professors Kent and Shane

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### Recommended Citation

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# FLORIDA STATE UNIVERSITY LAW REVIEW



THE PRESIDENTIAL ELECTION DISPUTE, THE POLITICAL  
QUESTIONS DOCTRINE, AND THE FOURTEENTH AMENDMENT:  
A REPLY TO PROFESSORS KENT AND SHANE

*Robert J. Pushaw, Jr.*

VOLUME 29

WINTER 2001

NUMBER 2

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Recommended citation: Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Questions Doctrine, and the Fourteenth Amendment: A Reply to Professors Kent and Shane*, 29 FLA. ST. U. L. REV. 603 (2001).

THE PRESIDENTIAL ELECTION DISPUTE,  
THE POLITICAL QUESTION DOCTRINE,  
AND THE FOURTEENTH AMENDMENT:  
A REPLY TO PROFESSORS KRENT AND SHANE

ROBERT J. PUSHAW, JR.\*

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Like millions of Americans, my wife Trish and I remained glued to our televisions throughout the 2000 presidential election crisis in Florida. Because Trish is not an attorney, she frequently asked for my legal opinion on the various judicial proceedings. For instance, she believed that the United States Supreme Court was so "peevish at the shenanigans" that it would intervene.<sup>1</sup> I assured her, based upon my extensive study of justiciability,<sup>2</sup> that the Justices would decline jurisdiction.<sup>3</sup> I also confidently predicted that, in the unlikely event

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1. Trish grew up in East Africa and Ireland, and she often uses phrases that sound like they belong in an English drawing-room comedy.

2. See, e.g., Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1998) [hereinafter Pushaw, *Advisory*]; Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 864-73 [hereinafter Pushaw, *Congressional Power*]; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) [hereinafter Pushaw, *Case/Controversy*].

3. First, Bush did not seem to have third-party standing to allege that Florida's nonuniform standards for counting votes violated the Equal Protection rights of state voters. Second, the case did not appear to be ripe because the Constitution and federal statutes provided that presidential election disputes must be resolved, at least initially, in the states and then Congress. Third, success in those political institutions would have mooted

the Court reached the merits, it could not possibly hold that the Equal Protection Clause required states to administer their elections without discrepancies, because such inconsistencies are one price we pay for our federal system.<sup>4</sup>

As usual, I was wrong, and my wife was right. I was focusing on legal abstractions, whereas she was attuned to political realities. A rather obvious point dawned on me: How could judicial decisions on elections, the very focus of politics, not be politicized? And yet there are established, seemingly neutral principles of constitutional “law” that govern judicial review of elections. Peter Shane and Harold Krent are surprised (as I initially was) by the Court’s failure to apply that law in *Bush v. Gore*.<sup>5</sup>

Upon further reflection, however, I concluded that the Rehnquist Court was following the law—specifically, the landmark precedent in this area, *Baker v. Carr*.<sup>6</sup> As in *Baker*, the majority in *Bush* (1) determined that the political process would not remedy a perceived electoral crisis in a Southern state; (2) ignored principles of justiciability and federalism that generally prevented Article III courts from interfering with state electoral matters; and (3) made up new “standards” under the Equal Protection Clause and held that the state had violated them.<sup>7</sup> In each case, dissenting Justices asserted that the majority’s entanglement in the political thicket would erode respect for the Court as the impartial guardian of the rule of law.<sup>8</sup> Understanding this connection between *Bush v. Gore* and *Baker v. Carr* helps to explain my reaction to the two main arguments presented by my fellow panelists.

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Bush’s claim. Fourth, the flexible political question doctrine enabled the Court to interpret the Constitution as granting Congress final authority to decide the matter.

In short, the Court could have declined to review the case on several justiciability grounds. Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMM. (forthcoming 2001) [hereinafter Pushaw, *Conservative Mirror*] (describing the potential application of the justiciability doctrines in *Bush*).

4. See *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting) (arguing that the Equal Protection Clause did not authorize the Court to question the states’ power either to fix standards for determining whether a vote has been legally cast or to allow counties to design their own balloting systems).

5. See Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 535, 579, 584 (2001) (characterizing the majority’s opinion as “extraordinary,” “stunning,” and “astonishing”); Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges’ Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493, 493, 497 (2001) (deeming the Court’s decision “surprising,” “astonishing,” and “startling”).

6. 369 U.S. 186 (1962). I have compared these two cases in exhaustive detail in Pushaw, *Conservative Mirror*, *supra* note 3.

7. See *infra* notes 20-50 and accompanying text (fleshing out this analogy between *Baker* and *Bush*).

8. See *infra* notes 31, 49 and accompanying text (summarizing and comparing these dissenting opinions).

First, I agree with Professor Krent that the political question doctrine did not preclude the Court from deciding the presidential election dispute.<sup>9</sup> *Baker* turned this doctrine into a prudential case-by-case judgment call, and ever since the Court has almost always exercised this unbridled discretion in favor of intervening in heavily politicized disputes—including several that involved state decisions affecting federal elections.<sup>10</sup> Professor Shane is undoubtedly right that the Court could have avoided decision on political question grounds,<sup>11</sup> but that is always true, because *Baker* leaves this determination entirely to the Justices' discretion. Although I am sympathetic to Shane's position that the Court should have declined to decide the case, that is really an argument for a pre-*Baker* regime of judicial restraint, not against the Court's application of the current political question doctrine in *Bush*.

Second, Professor Shane is correct that, contrary to the opinion of seven Justices in *Bush*, the Equal Protection Clause does not grant candidates a right to uniform standards in counting votes.<sup>12</sup> But neither does that Clause require legislative representation to be based solely on population, as *Baker* held and Shane assumes.<sup>13</sup> In any event, *Baker* provides a "precedent" for the Court to ignore that Clause's text, drafting and ratification history, implementation by Congress and the states, and cases interpreting it. Therefore, although I believe that both *Baker* and *Bush* were wrongly decided, the latter is more defensible simply because it departed less radically from the Court's existing practice.

I will begin by outlining my comparison of these two cases. Against this backdrop, I will evaluate the main themes of Professors Krent and Shane.

#### I. *BUSH V. GORE: BAKER V. CARR* WITH A CONSERVATIVE TWIST

The Court employed the same decisionmaking process in *Bush* as it did in *Baker*, albeit to reach a conservative rather than liberal result.

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9. See Krent, *supra* note 5, at 511.

10. See *infra* notes 23-26, 32-44, 52-59 and accompanying text (discussing the relevant passages from *Baker* and subsequent cases).

11. See Shane, *supra* note 5, at 580-82.

12. See *id.* at 552.

13. *Baker v. Carr*, 369 U.S. 186, 226 (1962); see also Shane, *supra* note 5, at 548 (citing the apportionment cases approvingly as part of the "democratic trajectory" of constitutional law since 1868).

### A. *The Prelude to Baker*

*Baker* reversed, *sub silentio*, an unbroken line of precedent dating back to 1849.<sup>14</sup> In *Luther v. Borden*,<sup>15</sup> the Court accepted the judgment of Congress and the President that Rhode Island satisfied Article IV, Section 4, which provides that “the United States shall guarantee to every State in this Union a republican form of Government.”<sup>16</sup> Although *Luther* did not hold that all claims under the Guarantee Clause raised political questions,<sup>17</sup> the Court created such an absolute prohibition in 1912.<sup>18</sup> Most pertinently, beginning in 1916, it rejected nearly all constitutional attacks on state legislative apportionment schemes based upon either nonjusticiability or equitable discretion to decline jurisdiction because of federalism concerns.<sup>19</sup>

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14. For an extensive analysis of these decisions, see Pushaw, *Conservative Mirror*, *supra* note 3.

15. 48 U.S. (7 How.) 1 (1849).

16. *Id.* at 42-45.

17. For instance, the Court acknowledged that a state could declare martial law temporarily to meet threats to its very existence (as Rhode Island had done), and thus declined “to inquire to what extent, nor under what circumstances, that power may be exercised by a State” before a Guarantee Clause violation would occur. *Id.* at 45. By negative implication, the Court could hear complaints that a state did allegedly violate that Clause, such as by declaring permanent martial law.

Indeed, numerous cases after *Luther* did exactly that. See *New York v. United States*, 505 U.S. 144, 184-85 (1992) (citing these decisions and acknowledging that the Court had, over the previous eighty years, misconstrued *Luther* as barring all claims under the Republican Form of Government Clause). At the time *Baker* was decided, however, all of the Justices assumed that such allegations raised political questions.

18. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142-51 (1912) (holding nonjusticiable a complaint that a state government had become unrepresentative by enacting a law through the initiative rather than the legislative process). Subsequent cases that deemed Guarantee Clause cases to involve political questions include *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 79 (1930); and *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234-35 (1917).

19. The seminal case is *Ohio ex rel. Davis v. Hildebrand*, 241 U.S. 565 (1916) (refusing to decide the political question of whether the invalidation of a state reapportionment statute by referendum violated the Republican Form of Government Clause). In *Colegrove v. Green*, 328 U.S. 549 (1946), the Court dismissed a claim that a state law had violated the Constitution by creating congressional districts that did not account for population shifts to metropolitan areas. Justice Frankfurter and two colleagues found a political question. *Id.* at 552-56. Justice Rutledge assumed justiciability, but invoked equitable discretion to refrain from intervening because of the sensitive political issues involved in drawing congressional districts. *Id.* at 564-66 (Rutledge, J., concurring). Three dissenters maintained that the statute violated the Equal Protection Clause. *Id.* at 566-74 (Black, J., dissenting). Two Justices did not participate. The Court swiftly applied *Colegrove* in a pair of brief per curiam opinions and declined to entertain constitutional challenges to state electoral laws. See *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Turman v. Duckworth*, 329 U.S. 829 (1946).

In *MacDougall v. Green*, 335 U.S. 281 (1948), however, a five-man majority held, on the merits, that the Equal Protection Clause did not deprive states of their authority to give rural areas disproportionate influence in the nomination process. *Id.* at 283-84. Nonetheless, two years later the Court reverted back to the *Colegrove* approach by dismissing, on “political question” and “equitable discretion” grounds, a Fourteenth Amendment claim

### B. *The Baker Breakthrough*

*Baker v. Carr*<sup>20</sup> addressed a critical electoral problem that could not readily be solved by the ordinary political process.<sup>21</sup> Like most states, Tennessee apportioned legislative districts to account for a host of demographic, geographical, political, economic, and historical interests, often with the special goal of preserving the electoral power of conservative agricultural communities against the burgeoning (and more liberal) metropolitan areas.<sup>22</sup> The Court refashioned the political question doctrine as based exclusively upon separation of powers (not federalism)<sup>23</sup> and as necessitating a “case-by-case inquiry”<sup>24</sup> weighing several factors, most importantly whether there was “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>25</sup> The Court concluded that the plaintiffs’ claim, although nonjusticiable under the Guarantee Clause, could be reviewed under the Equal Protection Clause.<sup>26</sup> Instead of setting forth specific legal principles to govern cases involving apportionment controversies, however, the Court merely declared:

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that Georgia’s voting scheme discriminated against urban dwellers. *See South v. Peters*, 339 U.S. 276, 277 (1950). Thereafter, the Court applied a similar analysis in refusing to hear all constitutional challenges to state apportionment laws in a series of terse per curiam orders that usually rested on a bare citation to *Colegrove*. *See, e.g.*, *Matthews v. Handley*, 361 U.S. 127 (1959); *Radford v. Gary*, 352 U.S. 991 (1957); *Kidd v. McCannless*, 352 U.S. 920 (1956); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Remmey v. Smith*, 342 U.S. 916 (1952); *Tedesco v. Bd. of Supervisors*, 339 U.S. 940 (1950).

Thus, although in *Colegrove* only three of seven Justices found the constitutional complaint to be a political question, the case came to stand for the proposition that federal judges should not decide such claims. *See Baker v. Carr*, 369 U.S. 186, 252 (1962) (Clark, J., concurring) (arguing that the Court had read *Colegrove* as based upon nonjusticiability and a rejection of any possible Fourteenth Amendment issue). Indeed, the only time the Court exercised jurisdiction was to protect blacks from discriminatory state electoral laws, which violated the Fifteenth (not the Fourteenth) Amendment. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

20. 369 U.S. 186 (1962).

21. For a more thorough explanation of the various opinions in *Baker* and its progeny, see Pushaw, *Conservative Mirror*, *supra* note 3.

22. *Baker*, 369 U.S. at 187-95 (stressing that Tennessee had failed to amend its 1901 apportionment law, despite the huge subsequent population shift to urban areas); *id.* at 268-69, 301-24 (Frankfurter, J., dissenting) (emphasizing the multiplicity of interests involved in apportioning legislatures); *see also* Gus Tyler, *Court Versus Legislature*, 27 LAW & CONTEMP. PROBS. 390, 395-98 (1962) (arguing that rural overrepresentation maintained the political power of conservatives against more liberal urban and suburban citizens, whose numbers had exploded).

23. *Baker*, 369 U.S. at 210, 226. The majority attempted to distinguish numerous cases holding that, to preserve federalism, the Court would not interfere with state apportionment schemes. *Id.* at 231-37.

24. *Id.* at 210.

25. *Id.* at 211, 217.

26. *Id.* at 208-37.

Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.<sup>27</sup>

In separate dissents, Justices Frankfurter and Harlan made three related points.<sup>28</sup> First, the majority had repudiated uniform precedent treating apportionment as a political question under the Republican Form of Government Clause, which had reflected the Court's former respect for state government autonomy in balancing the myriad policy considerations involved.<sup>29</sup> Second, neither the Equal Protection Clause nor any other constitutional provision indicated that representation must be based on population alone.<sup>30</sup> Third, the majority's radical intrusion into internal state affairs would compromise public confidence in the Court's independence and authority, which rested largely upon its detachment from wholly political disputes.<sup>31</sup>

### C. *Baker Consolidated*

The Court quickly translated *Baker's* jurisdictional holding into substantive law. Most importantly, *Reynolds v. Sims*<sup>32</sup> established that the Equal Protection Clause requires state legislatures to be apportioned according to equality of population "as nearly as is practicable."<sup>33</sup> In the earlier case of *Gray v. Sanders*,<sup>34</sup> the Court had applied this "one person, one vote" rule to invalidate a state districting framework for elections to statewide executive offices and the federal Senate.<sup>35</sup> In *Wesberry v. Sanders*,<sup>36</sup> the Justices found the same prin-

27. *Id.* at 226.

28. *Id.* at 266-330 (Frankfurter, J., dissenting); *id.* at 330-49 (Harlan, J., dissenting).

29. *Id.* at 266-69, 277-324 (Frankfurter, J., dissenting); *id.* at 332-34, 338-39 (Harlan, J., dissenting).

30. *Id.* at 300-23 (Frankfurter, J., dissenting); *id.* at 332-36, 338-39 (Harlan, J., dissenting).

31. *Id.* at 267-69, 324 (Frankfurter, J., dissenting); *id.* at 339-40 (Harlan, J., dissenting). They also deplored the Court's refusal to mention any Equal Protection principles and its suggestion that the mere prospect of reapportionment by federal judges under amorphous Equal Protection standards might spur state legislatures to take action without the need for further judicial supervision. *See id.* at 267-69, 327-28 (Frankfurter, J., dissenting); *id.* at 339 (Harlan, J., dissenting).

*Baker*, then, is an odd form of advisory opinion. *See* Pushaw, *Advisory*, *supra* note 2, at 477-91 (discussing the historical arguments for and against such opinions). The Court advised state legislatures that they were unconstitutional, failed to tell them exactly why, and threatened them with dire consequences if they did not reapportion.

32. 377 U.S. 533 (1964).

33. *Id.* at 559. The Court formulated that standard in the course of a lengthy analysis. *See id.* at 554-87.

34. 372 U.S. 368 (1963).

35. *Id.* at 370-80.

36. 376 U.S. 1 (1964).



ciple lurking in Article I, Section 2, Clause 1, which addresses districting for the House of Representatives.<sup>37</sup> Finally, the Court extended the principle of these apportionment decisions—that all voters must have an equal opportunity to participate in elections—to voter qualifications (for example, by striking down wealth-based classifications such as poll taxes).<sup>38</sup>

In all of these cases, Justice Harlan dissented because these holdings (1) lacked any foundation in the Constitution's text, history, or precedent, which recognized the states' independence in apportioning legislative districts and setting voter qualifications, and (2) abandoned the Court's appropriately limited role in our federal system.<sup>39</sup>

Whatever its constitutional provenance, the "one person, one vote" maxim resonated with Americans, who had become predominantly urban and suburban and thus disliked state laws that magnified rural electoral power.<sup>40</sup> Despite some criticism of *Baker* immediately after its release,<sup>41</sup> scholars swiftly embraced it.<sup>42</sup> Moreover, the Court has never wavered from its position that electoral disputes are justiciable and that the "one person, one vote" standard should be applied to resolve them.<sup>43</sup> Today both Justices and law professors tend to un-

37. *Id.* at 7-18.

38. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665-70 (1966).

39. Reynolds v. Sims, 377 U.S. 533, 615-24 (1964) (Harlan, J., dissenting); Gray, 372 U.S. at 382-90 (Harlan, J., dissenting); Wesberry, 376 U.S. at 20-50 (Harlan, J., dissenting); Harper, 383 U.S. at 680-86 (Harlan, J., dissenting).

40. *See, e.g.*, Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 804 (1963) (conceding *Baker's* popularity but decrying its lawlessness). Although the Court in *Baker* and its progeny espoused democratic ideals, in one sense these cases are the antithesis of democracy: Seven men sitting at the apex of the most unrepresentative branch of government imposed their personal theory of democracy upon every state in the union.

41. *See, e.g.*, Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 43-45 (1962) (urging the Court to abstain because of the impossibility of developing principled legal standards to determine the validity of apportionment laws); Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

42. *See, e.g.*, Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13 (1962) (applauding the Court for remedying injustices in apportionment by recognizing a new fundamental right to equal treatment in voting). Within a few years the legal academy generally had come around to the view of Professor Black and many others. *See* Pushaw, *Conservative Mirror*, *supra* note 3 (summarizing the scholarly reaction to the reapportionment cases).

Moreover, Professor Ely bolstered the intellectual credibility of *Baker* and its progeny by arguing that judicial review should be exercised only in situations where representative government cannot be trusted because of breakdowns in the political process, as occurred when entrenched state legislators refused to reapportion. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-183 (1980).

43. Indeed, the Court has reiterated these principles so often that they no longer generate much dissent. *See, e.g.*, Dep't of Commerce v. Montana, 503 U.S. 442, 456-59 (1992) (unanimously allowing a challenge to Congress's choice of a method for apportioning congressional districts among states under Article I, Section 2, but concluding that the statute passed constitutional muster).

questioningly accept *Baker* as a landmark Warren Court decision that established principles of constitutional “law,” not a mere liberal political coup.<sup>44</sup>

#### D. Bush v. Gore

Instead of rehashing *Bush* in Gore-y detail, I will highlight five critical aspects of its similarity to *Baker*. First, a majority of the Justices saw a national electoral emergency—the 2000 presidential election impasse in Florida—that seemed to defy a clean political solution.<sup>45</sup> Second, the Court flicked away justiciability concerns, even though the Constitution appears to entrust the resolution of presidential election disputes to the states and Congress, at least in the first instance.<sup>46</sup> Third, the majority concluded that principles of federalism did not require strong deference to state officials (including judges) in interpreting and implementing their election laws.<sup>47</sup> Fourth, all but two Justices discovered an unprecedented Equal Protection Clause “right” to uniform standards in counting ballots.<sup>48</sup> Fifth, the dissenting Justices accused the majority of abandoning judicial restraint by failing to dismiss on political question grounds and by ignoring precedent concerning judicial federalism and Equal Protection.<sup>49</sup>

Despite all these similarities to *Baker*, law professors (including Shane and Krent) have overwhelmingly expressed surprise and out-

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44. See, e.g., ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 127, 141 (1987); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 93, 98, 260 (1993); see also J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 997-1002 (1998) (noting that liberal scholars have canonized *Baker* and other “beloved” Warren Court precedents and have not tolerated any suggestion that these cases might be incorrect). A few scholars have challenged this orthodoxy. See, e.g., Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639-40 (2001) (arguing that the *Baker* Court failed to explain coherently its Equal Protection holding, its abandonment of the political question doctrine, and its notion that federal judges could avoid getting sullied in adjudicating electoral disputes).

45. See *Bush v. Gore*, 531 U.S. 98, 100-03 (2000) (detailing the relevant facts and procedural history). The Court, of course, said that it was intervening to uphold the law, not to break a political deadlock. See *id.* at 111.

46. See *id.* at 111.

47. See *id.* at 103-11; see also *id.* at 111-22 (Rehnquist, C.J., concurring) (charging the Florida Supreme Court with amending, not merely construing, its legislature’s directives regarding the appointment of electors).

48. See *id.* at 102-08 (per curiam opinion joined by Rehnquist, C.J., and O’Connor, Scalia, Kennedy, and Thomas, JJ.). Justices Souter and Breyer agreed with the Equal Protection holding, but they would have dismissed the case as nonjusticiable. *Id.* at 133-34 (Souter, J., dissenting); *id.* at 143-46 (Breyer, J., dissenting).

49. See *id.* at 123-29 (Stevens, J., dissenting); *id.* at 135-44 (Ginsburg, J., dissenting). Of course, I recognize certain distinctions between *Baker* and *Bush*, but I find them to be largely irrelevant for reasons outlined in Pushaw, *Conservative Mirror*, *supra* note 3.

rage at *Bush*.<sup>50</sup> This reaction reminds me of the scene in *Casablanca* where Louis proclaims that he is “shocked” to discover that people are gambling in Rick’s Cafe and then pockets a payoff. The most plausible explanation for this response is that *Bush* reached a politically conservative result that most of the legal academy finds distasteful, whereas *Baker* produced a politically liberal result that they favor. But the process of decisionmaking in both cases was nearly identical. With this background in mind, I will analyze the two major issues explored by my co-panelists.

## II. THE PRESIDENTIAL ELECTION DISPUTE: “POLITICAL” OR “LEGAL”?

Although *Bush* potentially implicated every category of justiciability,<sup>51</sup> I will follow the lead of Professors Shane and Krent by focusing on one—the political question doctrine.

### A. *The “Law” Governing Political Questions*

In *Baker v. Carr*,<sup>52</sup> the Court declared:

Prominent on the surface of any case held to involve a political question is found 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; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>53</sup>

Unfortunately, these six criteria provide little concrete guidance in distinguishing “political” from “justiciable” questions. Most significantly, Articles I and II contain “a textually demonstrable commitment” of all legislative and executive powers to Congress and the President, but that surely does not immunize their exercise from judicial review. Rather, the pivotal consideration must be whether the Constitution leaves an issue to a political branch for final decision. That determination, however, cannot be made by consulting the Constitution’s text, which nowhere explicitly mentions judicial re-

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50. To take the most publicized example, well over 500 legal academics signed an advertisement in *The New York Times* on January 13, 2001, asserting that the Court “used its power to act as political partisans, not judges of a court of law. . . . By taking power from the voters, the Supreme Court has tarnished its own legitimacy.”

51. See *supra* note 3 and accompanying text.

52. 369 U.S. 186 (1962). The following discussion of *Baker* incorporates the conclusions I presented in Pushaw, *Justiciability*, *supra* note 2, at 498-501.

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

view—much less exceptions to this power. The other five *Baker* factors are also infinitely elastic.<sup>54</sup>

In its “case-by-case inquiry”<sup>55</sup> weighing these six criteria in sixteen situations, the Court routinely has found even the most politically laden matters to be justiciable<sup>56</sup>—including *every* constitutional challenge to electoral decisions.<sup>57</sup> Only two questions have been deemed “political”: military training and procedures (*Gilligan v. Morgan*)<sup>58</sup> and impeachment (*Walter Nixon v. United States*).<sup>59</sup> With rare exceptions, then, application of the *Baker* test results in judicial intervention. Moreover, these decisions are merely the tip of the iceberg, because often the Court summarily asserts jurisdiction over a case that arguably raises political questions without even mentioning *Baker*.

### B. *Did Bush v. Gore Present Nonjusticiable Issues?*

#### 1. *The Justices’ Cryptic Opinions*

Interestingly, no Justice in *Bush* cited *Baker* or used the term “political question doctrine.” Nonetheless, the various opinions reveal an understanding of its potential applicability, especially in

54. For instance, many constitutional provisions appear to “lack . . . judicially discoverable and manageable standards” and to require “an initial policy determination of a kind clearly for nonjudicial discretion,” *id.* at 217, but that has not stopped the Court from interpreting and applying them. Indeed, *Baker* and its progeny provide a perfect example: The Court discovered in the Equal Protection Clause sufficiently manageable “judicial” standards to measure the validity of apportionment laws that reflected exceptionally complicated “policy determinations.” *See supra* notes 26-38 and accompanying text (describing these cases). Likewise, any exercise of judicial review potentially will reverse “a political decision already made,” cause the political departments “embarrassment,” and display a “lack of respect.” *Baker*, 369 U.S. at 217.

55. *Id.* at 210.

56. Perhaps the most famous example is *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Court reviewed (and invalidated) the House of Representatives’ exercise of its Article I, Section 5, Clause 1 power to “be the Judge of the qualifications of its own Members.” *Id.* at 512-50. *See* Pushaw, *Justiciability*, *supra* note 2, at 498-99 (describing *Powell* and other decisions).

57. Most pertinent are cases involving state government actions that affected federal elections. *See* Dep’t of Commerce v. Montana, 503 U.S. 442, 456-59 (1992); *Wesberry v. Sanders*, 376 U.S. 1, 5-7 (1964); *Gray v. Sanders*, 372 U.S. 368, 370-76 (1963), discussed *supra* notes 34-37, 43 and accompanying text; *see also* *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986) (upholding the justiciability of a claim of illegal state gerrymandering); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (reaffirming *Baker*’s ruling that state apportionments were not political questions), discussed *supra* notes 32-33, 39 and accompanying text (analyzing *Reynolds*).

58. 413 U.S. 1, 3-10 (1973) (dismissing a complaint that the government’s negligent training of the National Guard had caused the deaths of antiwar protestors at Kent State University).

59. 506 U.S. 224 (1993) (declining to reach the merits of a federal judge’s allegation that Article I, Section 3, Clause 6, which grants the Senate “sole Power to try all Impeachments,” requires a trial before the full Senate—not merely a hearing before a committee).

discussing two key constitutional provisions. First, Article II, Section 1, Clause 2 provides that “[e]ach State shall appoint [presidential electors] in such [m]anner as the Legislature thereof may direct.”<sup>60</sup> Second, the Twelfth Amendment entrusts the counting of electoral votes to Congress, which has made laws necessary and proper to implement that power—specifically including statutes setting forth procedures for presidential election contests.<sup>61</sup>

Justice Breyer concluded that these provisions granted the states and Congress exclusive authority to resolve such disputes, with Congress’s judgment final and judicially unreviewable.<sup>62</sup> Justice Souter apparently agreed.<sup>63</sup> The majority, however, dispatched such concerns in two sentences:

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.<sup>64</sup>

## 2. *Justiciability With Deferential Review*

It is impossible to say definitively which side is legally correct, because *Baker* made political question “law” almost entirely dependent on judicial discretion.<sup>65</sup> For that reason, the *Bush* dissenters and Pro-

60. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (interpreting this provision as granting state legislatures plenary power in choosing electors); *id.* at 111-22 (Rehnquist, C.J., concurring) (arguing that the Florida Supreme Court violated Article II by altering its legislature’s directions concerning the appointment of presidential electors).

Conversely, the dissenters contended that the Florida court had merely interpreted (not changed) its state’s statutes and that, in any event, Article II did not contemplate review of such decisions by the United States Supreme Court. *Id.* at 123-29 (Stevens, J., dissenting); *id.* at 129-35 (Souter, J., dissenting); *id.* at 135-44 (Ginsburg, J., dissenting); *id.* at 144-58 (Breyer, J., dissenting).

61. See *id.* at 153-58 (Breyer, J., dissenting); see also James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Electors*, 27 LAW & CONTEMP. PROBS. 495, 498-500 (1962) (citing all relevant constitutional and statutory provisions).

62. See *Bush*, 531 U.S. at 153-58 (Breyer, J., dissenting).

63. See *id.* at 129 (Souter, J., dissenting) (beginning his opinion by asserting that “[t]he Court should not have reviewed” the case and suggesting that any political problems might have been resolved by Congress). An essay written long before *Bush*, and thus not politically biased, argued that the Court would likely apply *Baker* to rule that the Twelfth Amendment grants to Congress final power to resolve disputes concerning presidential electoral voting. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 26-30 (1968).

64. *Bush*, 531 U.S. at 111.

65. See *supra* Parts I.B and I.C. For example, the Twelfth Amendment contains “a textually demonstrable constitutional commitment of the issue [presidential electoral voting] to a coordinate political department [Congress].” *Baker v. Carr*, 369 U.S. 186, 217

fessor Shane can legitimately criticize the Court only for unwisely exercising this discretion and not (as they charge) for failing to obey the law.<sup>66</sup> And, to the extent that the content of this law consists of post-*Baker* decisions, they uniformly support the *Bush* majority.<sup>67</sup>

Professor Krent provides two further, and persuasive, justifications for federal judicial intervention in the particular situation presented in *Bush*. First, he cites abundant precedent demonstrating that the Justices, to protect federal rights, have often reviewed state tribunals' interpretation of state law—including their alleged alteration of that law to defeat federal constitutional rights.<sup>68</sup> Second, Krent defends the Court's exercise of jurisdiction to examine the Florida judiciary's construction of its state's statutes governing the appointment of presidential electors.<sup>69</sup> He shows that the Framers of Article II deliberately vested this appointment power not in Congress but in state legislatures, on the basis that the latter were less likely to form a coalition to extract promises from presidential candidates, were more receptive to state concerns, and were more directly accountable.<sup>70</sup> Accordingly, Krent argues that Congress, state executives, or state judges could circumvent a state legislature's instructions regarding the selection of electors unless the Supreme Court could oversee their actions.<sup>71</sup> Krent further contends, however, that

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(1962). As with all constitutional provisions, however, the Twelfth Amendment is silent as to whether courts may review the exercise of this power.

Moreover, the *Baker* Court made the unprecedented assertion that the political question doctrine concerned only separation of powers, not federalism (apparently for the purpose of justifying its intrusion into a core state political power, the composition of its legislature). *Id.* at 210, 226. If so, then Article II's grant to state legislatures of power to appoint electors is simply irrelevant in determining justiciability.

66. *See Bush*, 531 U.S. at 144 (Breyer, J., dissenting) ("The Court was wrong to take this case."); *id.* at 156 ("[F]ederal law [n]either foresees [n]or requires resolution of such a political issue by this Court."); *id.* at 157 (characterizing the Court's intervention as "legally wrong").

Professor Shane claims that the Justices in the majority abandoned their heretofore resolute commitment to the political question doctrine, as exemplified by *Nixon*. *See* Shane, *supra* note 5, at 580-83. But *Nixon* is the lone exception to the Rehnquist Court's otherwise perfect record of finding electoral disputes (and many other political matters) to be justiciable. *See supra* notes 55-59 and accompanying text.

Therefore, a more accurate way of expressing this criticism would be to say that conservative champions of judicial restraint should have exercised their virtually boundless discretion afforded by the political question doctrine to decline jurisdiction over the election controversy.

67. *See supra* notes 55-59 and accompanying text.

68. Krent, *supra* note 5, at 495 (citing cases).

69. *Id.* at 507-11.

70. *Id.* at 509. Professor Shane endorses Justice Breyer's suggestion that Article II disputes should be left to Congress's sole and unreviewable discretion under the Twelfth Amendment. *See* Shane, *supra* note 5, at 581-82. This scheme, however, would frustrate the Framers' deliberate decision to vest the power to appoint electors in state legislatures, not Congress. *See* Krent, *supra* note 5, at 509.

71. Krent, *supra* note 5, at 511.

this precedent obliged the *Bush* majority to accept the Florida high court's interpretation.<sup>72</sup>

I agree with Professor Krent that the presidential election dispute presented a justiciable issue but that the Court should have been more deferential. I reach this conclusion, however, through somewhat different reasoning.

My general approach builds upon Hamilton's insight that judicial review reflects the "natural presumption" that political officials cannot be "the constitutional judges of their own powers," but that this presumption can be rebutted by "particular provisions in the [C]onstitution"<sup>73</sup> examined in light of their drafting and ratification history, purpose, and place in the Constitution's political design.<sup>74</sup> An example of provisions that overcome the strong presumption favoring judicial review are those establishing "checks" that confer on one branch a limited share of another's power.<sup>75</sup> For instance, Article I grants Congress exclusive and unreviewable authority over impeachments by giving the House of Representatives the "executive" power of prosecuting them and the Senate the "judicial" power of judging them.<sup>76</sup>

Thus, the Court in *Nixon* correctly held impeachment to be a political question, as Professor Shane argues.<sup>77</sup> But I disagree with Shane that *Nixon* dictated a similar ruling in *Bush*,<sup>78</sup> because neither

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72. *Id.* at 512.

73. THE FEDERALIST NO. 78, at 524-25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Marshall Court adumbrated a similar approach. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166-67, 176-79 (1803) (holding that the judiciary alone can independently determine whether the political departments have obeyed the constitutional restrictions on their power, but recognizing exceptions to judicial review such as the President's conduct of foreign affairs and his nomination of executive and judicial officials). As *Marbury* illustrates, the presumption can be overcome only by certain constitutional clauses dealing with the government's structure and operation, where their interpretation by the political branches does not violate individual rights. I have detailed the foregoing analysis in Pushaw, *Justiciability*, *supra* note 2, at 497-511.

74. *See* Pushaw, *Justiciability*, *supra* note 2, at 501, 504-11.

75. *See id.* at 428-30, 505-07.

76. *See* U.S. CONST. art. I, § 2, cl. 5, and § 3, cls. 6-7. Overwhelming historical evidence demonstrates that the Framers intended for Congress to have sole authority in this area. *See* Pushaw, *Justiciability*, *supra* note 2, at 429-30, 505-07 (citing historical sources). Moreover, a key purpose of impeachment—to enable Congress to remove federal judges—would be compromised if those judges had the final word on the constitutional processes designed to control them. *Id.* at 505-06 n.556. Finally, the Constitution's underlying political theory of checks and balances requires that impeachment be committed exclusively to legislative discretion. *Id.* at 429-30, 505-07.

A similar analysis applies to the Constitution's other classic check, the executive veto, which enables the President to share in (and thus curb) the "legislative power." *See id.* at 428-29, 505-06 (arguing that the President's exercise of his veto power cannot be challenged in court).

77. *See* *Walter Nixon v. United States*, 506 U.S. 224 (1993); *see also* Shane, *supra* note 5, at 581.

78. Shane, *supra* note 5, at 581-83.

Article II nor the Twelfth Amendment contains a pure check. Rather, these two structural constitutional provisions (like many others) are justiciable yet should be interpreted by according the highest respect to the judgments of the government officials primarily entrusted with administering them.<sup>79</sup>

### 3. *Application of the Proper Standard of Review in Bush v. Gore*

Article II bestows on state legislatures vast power to direct the appointment of presidential electors.<sup>80</sup> The Court appropriately reviewed the Florida Supreme Court's order because doing so was necessary to ensure that the latter tribunal did not alter its legislature's statutory requirements for selecting presidential electors.<sup>81</sup> Because

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79. An example of such a provision is Article IV's Republican Form of Government Clause. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court erroneously assumed that all complaints under this Clause were political questions. *Id.* at 209-10, 217-29. Rather, federal courts presumptively can review such claims, but should yield to Congress and the President when they have determined that a state government is republican, absent an extraordinary situation such as a declaration of permanent martial law. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-45 (1849); see also *supra* note 17 (noting that the Court adjudicated many Guarantee Clause cases between 1849 and 1912).

Applying this analysis to the facts of *Baker*, the Court should have accepted the judgment of the federal political branches that Tennessee's apportionment scheme was sufficiently republican, because neither the Guarantee Clause nor any other constitutional provision suggests that representation based on factors other than population (e.g., geography and economic interests) is "unrepublican." Indeed, the Senate and the Electoral College refute that argument. See *supra* notes 28-31 and accompanying text.

The *Baker* Court's relabeling of this "Republican Form of Government" action as an "Equal Protection" one is unconvincing. The Court did not even attempt to explain how Tennessee's apportionment statute violated the Equal Protection Clause as written and as always understood—that is, as protecting the civil rights of individuals and minorities, not political rights. See *Baker*, 369 U.S. at 226 (asserting that the Tennessee voters had stated a justiciable Equal Protection claim but setting forth no applicable legal standards). Although the Court later established a "one person, one vote" standard, Justice Harlan demonstrated that this principle had no constitutional foundation, and he lambasted the majority for recklessly interfering in the politics of state apportionment and voter-qualification decisions. See *supra* note 39 and accompanying text.

80. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (deeming this power "plenary").

81. The Chief Justice made precisely this point. *Id.* at 111-16 (Rehnquist, C.J., concurring). Article II clearly authorizes each state legislature, before the election, to set forth procedures governing the manner of appointing presidential electors. Arguably, Article II implicitly allows a legislature to protect this power by selecting electors according to these preexisting statutory standards and to disregard state judicial decisions that, in its independent judgment, have altered this law. Indeed, Florida's legislature seemed prepared to do just that, and the Court suggested that such action would be valid. See *id.* at 104 ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

By contrast, Professor Krent would limit a state legislature to the initial enactment of statutes to govern the appointment of electors. If the state governor, state judges, or Congress attempted to change that law after the election, the United States Supreme Court would be available to review and thwart such attempted amendments. See Krent, *supra* note 5, at 511.

Krent's approach seems more sensible, for two reasons. First, the Florida Legislature itself delegated power to the executive branch to administer its election laws and to the judi-



the Florida Legislature had delegated to its judiciary the power to adjudicate any disputes arising under its election laws, however, the Florida Supreme Court's interpretation of those laws was entitled to the customary extraordinary deference that the U.S. Supreme Court gives such judgments.<sup>82</sup>

As Professor Krent has shown, the Court has become exceedingly reluctant to second-guess state judges' constructions of state law and invariably rejects claims that they "changed" that law,<sup>83</sup> except in very rare cases where the state court's interpretation was demonstrably arbitrary, biased, or totally unforeseeable.<sup>84</sup> I share Krent's opinion that this precedent required affirmance of the Florida Supreme Court, whose reading of its state's election statutes was at least plausible—even if (as I believe) the concurring Justices' interpretation was far more persuasive.<sup>85</sup>

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ciary to decide cases arising under them. Having "tied itself to the mast," the legislature cannot untie itself when its courts issue a displeasing judgment. Second, a basic principle of the constitutional rule of law is that the legislature which makes a law cannot interpret and apply it in specific cases. See Shane, *supra* note 5, at 536.

Furthermore, it seems anachronistic for the Court to declare that Article II grants state legislatures "plenary power" over the selection of electors—including the right to name them directly, without any popular vote. See *Bush*, 531 U.S. at 102-03 (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). *Baker* and its progeny created a meta-constitutional principle (located principally in the Fourteenth Amendment and Article I, Section 2 but also in the Fifteenth, Seventeenth, and Nineteenth Amendments) that representation must reflect the equally weighted vote of each citizen. The Warren Court applied this principle to curtail the state legislatures' power over apportionment that the Constitution seemed to make as absolute as their authority over presidential elections. See Pushaw, *Conservative Mirror*, *supra* note 3.

Hence, although I do not share Professor Shane's enthusiasm for the apportionment cases, I agree that these decisions, as well as the whole post-Civil War "democratic trajectory" of the Constitution's amendments, make the Court's embrace of *McPherson* very odd. See Shane, *supra* note 5, at 548. Of course, this debate is really academic, because neither the Florida Legislature nor any other state legislature has unilaterally named a slate of electors for over a century.

82. See *infra* notes 83-85 and accompanying text.

83. Krent, *supra* note 5, at 511-26. The reasons are both theoretical (e.g., concerns for federalism) and practical (e.g., the difficulty of determining which judicial applications of the law to new circumstances unreasonably "change" it). *Id.* at 524-26.

84. For example, the Court reversed a South Carolina tribunal's creative interpretation of its state's trespass law that was designed to deprive blacks of their federal Due Process rights. See *Bouie v. City of Columbia*, 378 U.S. 347, 348-349 (1964); see also Krent, *supra* note 5, at 512-21 (discussing *Bouie* and the few other cases overruling state judicial constructions of state law, and establishing that the Court has ceased questioning any state decisions that may affect federal Contracts Clause rights).

85. See Krent, *supra* note 5, at 497 ("The Florida Supreme Court's construction of Florida law, while in no way dictated by precedent or the plain language of the statutory scheme, was at a minimum, plausible. The U.S. Supreme Court has consistently failed to disturb far more questionable state court decisions . . ."). Indeed, the very fact that the four dissenting Justices would have deferred to the Florida court's interpretation indicates that it was at least reasonable. See *id.* at 501-02.

Nonetheless, the concurring Justices concluded that *Bush* was an exceptional case in which a state court had actually changed its state's laws so as to frustrate federal interests. See *Bush*, 531 U.S. at 111-22 (Rehnquist, C.J., concurring). Specifically, they argued

The second crucial provision, the Twelfth Amendment, gives Congress broad discretion in counting—and hence determining the validity of—electoral votes.<sup>86</sup> The Court should always affirm Congress's decisions, absent some plain and egregious violation of the Twelfth Amendment<sup>87</sup> or some other constitutional provision.<sup>88</sup>

Unfortunately, the Court did not wait for Florida to complete the process of appointing electors or for Congress to review the validity of Florida's electoral votes. Thus, the critical justiciability issue in *Bush* was ripeness, not the political question doctrine. Here I concur with

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that the Florida Supreme Court had violated Article II by overturning the Secretary of State's reasonable exercise of her delegated statutory discretion to (1) enforce the legislature's deadline for certification and ignore untimely ballots, and (2) construe "legal vote" as not requiring the counting of improperly marked ballots. *Id.* at 118-20 (Rehnquist, C.J., concurring).

However, the Chief Justice acknowledged that the provisions of Florida's election code "may well admit of more than one interpretation." *Id.* at 114 (Rehnquist, C.J., concurring). Yet if other constructions (presumably including that of the Florida court) were possible, then under longstanding precedent the U.S. Supreme Court should have deferred to them. *See id.* at 135-44 (Ginsburg, J., dissenting); Krent, *supra* note 5, at 530-33.

Like Professor Krent, I find it ironic that the concurring Justices charged a state court with "altering" rather than "interpreting" existing law in a case in which they were making up new Equal Protection law. *See* Krent, *supra* note 5, at 497.

Significantly, three distinguished conservative legal thinkers have concluded that, although the Court's Equal Protection analysis was dubious, it nonetheless properly intervened to thwart the Florida Supreme Court's nakedly political decisions and thus to preserve the state legislature's Article II power to direct the selection of presidential electors. *See* Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION 4, 8-11 (2001); Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1. Professor McConnell echoed these arguments but also asserted that the majority had correctly applied Equal Protection law, which prohibited the Florida Supreme Court from authorizing wholly arbitrary vote-counting standards developed for partisan political advantage. *See* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001).

86. *See supra* notes 61-63.

87. For instance, assume the following four facts. First, Congress effectuates its Twelfth Amendment power by enacting a statute providing that, absent evidence of criminal or fraudulent misconduct, it will count the electoral votes certified by each state. Second, the Republican Party controls Congress. Third, the Republican candidate for President would have won a very close election but for a third-party candidate who beat him in Utah (with the Democratic candidate finishing a distant third there). Fourth, in counting the electoral votes, Congress determines that the votes for third-party candidates are not valid and thus awards Utah's electoral votes to the Republican candidate.

In that situation, the Supreme Court could reverse Congress's decision. Admittedly, this scenario is farfetched, but that is exactly the point: In all other circumstances the Court must defer to Congress's judgments about validity where the question is open to differing views (e.g., whether certain electoral votes were procured fraudulently, whether they were received by the deadline, etc.).

88. An example of such a palpable and extreme violation would be Congress's refusal to count electoral votes because they were cast by women or Hispanics.

Professor Shane and Justice Souter that the Court's intervention was premature.<sup>89</sup>

### III. FOURTEENTH AMENDMENT ISSUES

#### A. Equal Protection

Seven Justices held that the Florida Supreme Court had violated the Equal Protection Clause by failing to set forth specific standards to ensure uniform application of the general statutory "intent of the voter" touchstone.<sup>90</sup> Professor Shane correctly deplores "the shallowness of the majority's analysis."<sup>91</sup> The Equal Protection Clause does not require states to be rigorously consistent in administering elections and counting votes, and it certainly does not prohibit the "intent of the voter" standard for determining ballot validity that many states use.<sup>92</sup>

Indeed, our constitutional system of federal elections virtually guarantees some unequal treatment of voters in order to promote the competing goals of federalism and decentralization. As explained above, Article II authorizes each state legislature to regulate the procedures for selecting presidential electors.<sup>93</sup> The states, in turn, have

89. See *Bush*, 531 U.S. at 129 (Souter, J., dissenting) (speculating that, if the Court had not intervened, the state and Congress may have worked out the problem and "there would ultimately have been no issue requiring our review"). Professor Shane also argues that the Court intervened too soon and adds that Congress probably would have done no worse than the Court in sorting out this mess—and would have been held directly accountable for any mistakes. Shane, *supra* note 5, at 537.

In the *Bush* majority's defense, however, the Warren Court made ripeness a discretionary determination. It directed judges to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The *Bush* majority might reasonably have concluded that (1) the Article II and Equal Protection questions presented needed no further development, and (2) postponement may have caused hardship by permitting the recount to continue and the victor to be announced, only to have the Court invalidate the outcome—or perhaps not to have had enough time to issue a judgment, given the tight deadlines for selecting presidential electors. See Pushaw, *Conservative Mirror*, *supra* note 3.

90. See *Bush*, 531 U.S. at 103-08 (per curiam opinion joined by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Thomas, JJ.); *id.* at 134 (Souter, J., dissenting); *id.* at 145-46 (Breyer, J., dissenting).

91. Shane, *supra* note 5, at 584.

92. See *Bush*, 531 U.S. at 124-26 (Stevens, J., dissenting); see also *id.* (maintaining that the Florida Supreme Court, by ordering a manual recount pursuant to an "intent of the voter" standard subject to review by a judge to reconcile any discrepancies, did not run afoul of the Equal Protection Clause).

93. See *supra* notes 80-81 and accompanying text. Professor Shane argues that Section 2 of the Fourteenth Amendment gave individual citizens the right to vote in presidential elections, thereby limiting Article II's absolute grant to state legislatures of the power to select electors however they pleased (including by direct appointment). See Shane, *supra* note 5 at 572-73.

Although Shane's claim is supportable, I think that if the Amendment's drafters had intended such a radical change, they would have done so far more directly. Moreover, such textual vagueness is important because the historical evidence is conflicting. See, e.g., Rey-

allowed each county considerable autonomy over the details, such as ballot design and voting machinery.<sup>94</sup> As Professor Shane points out, such disparities will likely have a greater impact on election results than allowing each county to use different standards in determining “intent of voter.”<sup>95</sup> Thus, applying searching Equal Protection scrutiny to state election laws would cause massive instability.<sup>96</sup>

Nonetheless, *Bush*’s “shallow” reasoning is an improvement over *Baker*’s, which was nonexistent. The Warren Court deliberately declined to set forth *any* substantive legal standards under the Equal Protection Clause, but rather simply held the voters’ unprecedented claim to be justiciable.<sup>97</sup> Only later did the Court fabricate the “one person, one vote” maxim, itself a simplistic slogan that ignored the many nonpopulation interests involved in legislative representation.<sup>98</sup> These cases effectively put federal judges in charge of restructuring state legislatures, thereby dealing a devastating blow to federalism.<sup>99</sup>

Indeed, the very fact that *Baker* and its progeny had already been decided makes *Bush* more acceptable.<sup>100</sup> Generally speaking, the apportionment cases created a “precedent” for the Justices to interpret the Equal Protection Clause very creatively to solve perceived nationwide electoral crises, even if doing so interferes with state auton-

nolds v. Sims, 377 U.S. 533, 589-614 (1964) (Harlan, J., dissenting) (contending that the Fourteenth Amendment did not affect the states’ preexisting power over their citizens’ voting qualifications, and noting that Section 2 expressly recognized each state’s authority to “deny” or “abridge” the right to vote and attached a penalty for doing so—suffering a proportional reduction in the basis of its representation).

94. See *Bush*, 531 U.S. at 126 (Stevens, J., dissenting).

95. Shane, *supra* note 5, at 572-74.

96. The Court, however, was careful not to question statutory discrepancies in voting systems among and within the states, and indeed it acknowledged that local entities “may develop different systems for implementing elections.” *Bush*, 531 U.S. at 109. Rather, the majority stressed that “a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.” *Id.*

The Court underscored this point by limiting its holding “to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” *Id.* Presumably, “the present circumstances” refers to *court-ordered* recounts in contested elections, not to all state *statutory* disparities in voting matters. If by “the present circumstances” the majority meant the facts of *Bush* only, then the Court engaged in fiat rather than adjudication, which requires the consistent application of legal principles in successive cases. See Pushaw, *Conservative Mirror*, *supra* note 3; see also Shane, *supra* note 5, at 580 (deeming “suspect” the “self-declaration that the Justices may be writing a ticket for one ride only”).

By contrast, even though the Warren Court made up the “one person, one vote” rule, it intended to (and did) apply it in all later decisions. See *supra* notes 32-38 and accompanying text; see also Shane, *supra* note 5, at 583 (contending that judicial activism can be constructive but only if the new constitutional values can be articulated in “adequately neutral principles to be persuasively applicable to foreseeable future cases”).

97. See *supra* notes 26-27 and accompanying text.

98. See *supra* notes 32-39 and accompanying text.

99. See *id.*

100. See Pushaw, *Conservative Mirror*, *supra* note 3.

omy in administering elections.<sup>101</sup> More specifically, the Rehnquist Court, unlike the Warren Court, actually had some precedent that at least colorably justified its ruling.

First, the majority found that, because the Florida Legislature had exercised its electoral appointment power by authorizing its citizens to vote, *Reynolds* gave them a fundamental right which could not be infringed by arbitrary treatment that valued one person's vote over another's.<sup>102</sup> Second, *Gray* barred states from disparately treating voters in different counties.<sup>103</sup> The majority held that, contrary to these cases, the Florida Supreme Court had authorized "standardless manual recounts,"<sup>104</sup> with the result that two voter ballots marked exactly the same way would not necessarily be counted identically.<sup>105</sup> In fact, "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."<sup>106</sup>

It is this last discrepancy, I suspect, that the Court found particularly galling. Canvassing boards and counting teams in heavily Democratic counties switched from their established (and thus politically neutral) written guidelines for determining the legal validity of ballots to progressively more lenient standards (for example, from completely detached to partially detached to merely indented chads).<sup>107</sup> Millions of Americans watching on television, and virtually all Republicans, concluded that these constant changes were made to help Al Gore get more votes.<sup>108</sup> Moreover, the majority apparently found it more than a mere coincidence that the solidly Democratic Florida Supreme Court happened to decide every major issue in favor of the Democratic candidate.<sup>109</sup> These Justices would find disingenuous Professor Shane's comment that "it is hard to predict who [would

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101. See *supra* notes 20-38 and accompanying text.

102. *Bush*, 531 U.S. at 104-05 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); see *supra* notes 32-33 and accompanying text.

103. *Bush*, 531 U.S. at 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)); see *supra* notes 34-35, 57 and accompanying text.

104. *Bush*, 531 U.S. at 103.

105. *Id.* at 104-09.

106. *Id.* at 106. For instance, in Miami-Dade County, three canvassing board members used three separate standards in defining a legal vote. *Id.* Similarly, Palm Beach County "changed its evaluative standards during the counting process": It "began . . . with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal." *Id.* at 106-07.

107. See *supra* note 106.

108. The Justices simply noted the changes and did not mention the partisanship that motivated them, but it is not too hard to connect the dots.

109. Again, the majority did not make any direct accusations, but Justice Stevens found them implicit. See *Bush*, 531 U.S. at 128 (Stevens, J., dissenting) (criticizing the Court for an "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed").

have been] hurt by” the Florida Supreme Court’s order allowing different standards for evaluating contested ballots, limiting recounts to “undervotes” in some counties but counting all ballots in others, and permitting partial recounts from some counties but complete totals from others.<sup>110</sup>

In short, this evidence suggests that the *Bush* majority genuinely believed they were upholding the integrity of the votes cast and thus promoting democratic ideals. Consequently, I reject Professor Shane’s charge that the Court sought to thwart the right to suffrage and thereby “betrayed” democracy.<sup>111</sup> I also have no basis for doubting that the Warren Court Justices sincerely felt that they were furthering democracy by crafting a “one person, one vote” standard.<sup>112</sup>

The crucial point is that *Baker* and its progeny repose trust in a majority of Justices to subjectively determine what is “democratic.” Under the “law” of *Baker*, that gut call will sometimes produce a liberal political outcome, and sometimes a conservative one.<sup>113</sup>

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110. Shane, *supra* note 5, at 552. On the contrary, it is pretty easy to predict that Bush would have been harmed. First, permitting different standards to determine a legal vote appeared to help Gore, especially in light of the seemingly partisan changing of standards. See *supra* notes 104-06 and accompanying text. Second, the Florida Supreme Court’s order selectively confining recounts in heavily Democratic Miami-Dade County to 9000 undervotes, *Bush*, 531 U.S. at 102-03, would likely have injured Bush because the majority of those votes were presumably Democratic, and the canvassing board members there were using multiple standards. See *supra* notes 106-08 and accompanying text. Third, moving beyond the realm of educated guesses, the Florida court’s decision to accept partial recounts from Miami-Dade actually yielded 168 Gore votes. *Bush*, 531 U.S. at 102-03. So did its addition of 215 Gore votes from Palm Beach County, even though they were submitted after the Florida Supreme Court’s own November 26 deadline. *Id.*

111. See Shane, *supra* note 5, at 583. Of course, I do not deny that the perceptions of some of the Republican Justices may have been influenced by their own political biases. But neither Professor Shane nor anyone else has presented any evidence that those Justices deliberately decided *Bush* according to their political predilections in order to deprive people of their right to vote and undermine democracy.

112. See *supra* notes 32-38 and accompanying text.

113. Thus, commentators like Professor Shane cannot consistently laud *Baker* and its progeny while condemning *Bush*. Conversely, conservatives cannot fairly criticize *Baker* as a symbol of Warren Court political excess while cheering *Bush* as “valiant” and “legitimate in law.” See Bork, *supra* note 85, at 8-11. Rather, legal consistency requires either accepting both decisions or (as I do) rejecting both.

Although some regard consistency as “the hobgoblin of little minds,” I think it is essential to the legitimacy of adjudication and hence the rule of law. I cling to the quaint view that the Court should apply principles of “law” rooted in the Constitution’s clauses as illuminated by (1) the history of their drafting, ratification, and early implementation, (2) underlying structural principles such as separation of powers and federalism, (3) Federalist political theory, and (4) precedent based on these materials and gradually adapted over the years. See, e.g., Pushaw, *Case/Controversy*, *supra* note 2, at 448, 468-517. Accordingly, I reject the modern Court’s assertion of untethered discretion in many critical areas of constitutional law. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (setting forth historically based legal standards to govern federal judges’ exercise of “inherent authority,” which is currently invoked to rationalize virtually any action related to managing litigation or imposing sanctions); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Apply-*

*B. Due Process and Related Concerns*

Professor Shane develops an elaborate, and defensible, argument that the Due Process Clause required hand recounts in the four challenged counties.<sup>114</sup> I am not persuaded, however, that this Clause mandates such a specific remedy. Indeed, to the extent that the Florida Supreme Court ordered manual recounts but did not ensure fair and consistent standards, that failure may have violated the Due Process Clause.<sup>115</sup>

More specifically, Shane characterizes *Bush* as a type of mass administrative adjudication of individual claims, like Social Security.<sup>116</sup> Although there are certain similarities, I do not think that *Bush* was primarily about vindicating individual rights. Rather, the case really concerned the interest of all Americans in ensuring the integrity of the electoral process in selecting their only single national leader.

CONCLUSION

The panelists have made several persuasive arguments. For instance, Professor Krent correctly contends that precedent authorized the Court to exercise jurisdiction but obliged it to defer to the Florida Supreme Court's decision. Likewise, Professor Shane properly exposes the shortcomings of *Bush v. Gore's* Equal Protection analysis. Nonetheless, I cannot agree with either of them that the Court's decision in *Bush* is wholly unprecedented. Rather, *Baker* is directly on point, even if none of the Justices mentioned it.

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*ing First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (developing a legal test for the Commerce Clause that is faithful to history yet workable in resolving modern disputes).

114. Shane, *supra* note 5, at 553-68.

115. *Bush v. Gore*, 531 U.S. 98, 103, 110 (2000) (alluding to this alternative basis for its holding of unconstitutionality).

116. Shane, *supra* note 5, at 562-63.