BUSH v. GORE: LOOKING AT *BAKER v. CARR* IN A CONSERVATIVE MIRROR

*Robert J. Pushaw, Jr.**

A Southern state engages in electoral shenanigans, thereby precipitating a national crisis. Most United States Supreme Court Justices conclude that the ordinary political process will not remedy the problem. Unfortunately for them, the justiciability doctrines and federalism generally prohibit federal judicial intervention in state electoral matters, absent a clear and egregious violation of the Constitution (such as racial discrimination). Although the state's action strikes these Justices as unfair, it does not run afoul of any federal constitutional provision. Undaunted, they make up new equal protection law and hold that the state has failed to comply with it. Several Justices bitterly dissent that the majority's blatant political interference will erode respect for the Court as the impartial guardian of the rule of law.

Why bother with yet another recap of *Bush v. Gore*?[1] Because the exact same summary applies to *Baker v. Carr*.[2] There the Warren Court perceived a crisis that defied a political solution: Tennessee and many other states had always apportioned legislative districts to reflect various interests (*e.g.*, geographic, political, economic, and demographic), often with the aim of maintaining the electoral strength of conservative rural areas vis-a-vis the rapidly growing (and predominantly liberal) cities and suburbs.[3] The Court found justiciable a claim that the Equal

* Earl F. Nelson Professor, University of Missouri School of Law; Visiting Professor, Pepperdine University School of Law. J.D., Yale, 1988. Thanks to Tracey George, Chris Guthrie, Grant Nelson, Jim Pfander, and the editors of Constitutional Commentary for their help in shaping the ideas in this Essay.

1. 531 U.S. 98 (2000) (*per curiam*).

2. 369 U.S. 186 (1962).

3. See id. at 187-95 (describing this allocation of legislative seats); see also id. at 268-69, 301-24 (Frankfurter, J., dissenting). Although the Justices did not mention the ideological implications of apportionment, rural overrepresentation entrenched the political power of conservatives against more liberal urbanites, whose voting numbers had skyrocketed as Americans migrated to cities and as property qualifications for voting

Protection Clause required apportionment to be based solely on population, despite the dissenters' arguments that (1) nothing in that Clause, or any other constitutional provision, authorized this result, and (2) the majority had abandoned the principles of judicial restraint embedded in the ideas of *stare decisis*, justiciability, and federalism.

For the past four decades, the Court has steadfastly adhered to *Baker* and the "one person, one vote" standard it spawned. Moreover, although some legal scholars initially criticized *Baker*, within a few years they had generally accepted its validity, and today the opinion meets with near-universal acclaim.[4] In short, *Baker* is an unassailable twentieth-century landmark.

Therefore, it should hardly be surprising that the Court decided *Bush* precisely the way it decided *Baker*. Once again, an electoral emergency arose—the 2000 presidential candidates' deadlock in Florida—that struck the majority as insoluble through normal political channels. Once again, over acrimonious dissents, the Court created an unprecedented equal protection "right" (to state government consistency in counting votes) and ignored concerns for both federalism (which counseled deference to Florida officials as they tried to work out the ballot disputes) and justiciability (which militated against judicial review, at least until the state and Congress had completed their constitutional roles in selecting the presidential electors).

What should raise eyebrows, however, is that *Bush v. Gore* has caused law professors who have canonized *Baker* to wail and gnash their collective teeth.[5] If *Baker* was right, how can *Bush* be wrong? Because the former reached a liberal result, and the latter a conservative one? Such a nakedly political argument simply will not do, especially if made by mainstream scholars, who have steadfastly justified Warren Court decisions like *Baker* as grounded in constitutional "law," not "politics."[6] For such intellectuals, consistency demands accepting the correctness of both *Baker* and *Bush*. Conversely, those few conservative theoreticians who have condemned *Baker* as exemplifying Warren Court activism cannot, in fairness, applaud *Bush*. Rather, they must either swallow *Baker* or spit out *Bush*.

---

were abolished. See Gus Tyler, *Court Versus Legislature*, 27 L. & Contemp. Probs. 390, 395-98 (1962).

4. See infra notes 120-132 and accompanying text.

5. See infra Part II.B (discussing this response).

6. See infra notes 51-71, 121-130 and accompanying text.

For those of us who cling to the quaint notion that the Justices should apply rules of law rather than impose their political preferences, however, the only coherent conclusion is that both decisions were wrong. I will develop this thesis by examining *Baker* and *Bush* in turn, then explaining why these two opinions rested upon similarly faulty reasoning and cannot be materially distinguished.

I. THE *BAKER* EARTHQUAKE AND ITS AFTERSHOCKS

A. LEGAL BACKGROUND

Baker broke sharply with over a century of precedent. In *Luther v. Borden*,[7] the Court deferred to the previous determination of Congress and the President that Rhode Island's government satisfied Article IV, Section 4, which provides that "the United States shall guarantee to every State in the Union a republican form of government."[8] *Luther* did not hold that all complaints under this "Guarantee Clause" were nonjusticiable. Most pertinently, the Court recognized the validity of Rhode Island's temporary declaration of martial law to meet threats to its very existence, but declined "to inquire to what extent, [n]or under what circumstances, that power may be exercised by a State"

---

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

8. Id. at 42-45. The Rhode Island charter government, which had existed from colonial times, declared martial law in the early 1840s to defeat a rebellious new government. Borden, a sheriff of the charter government, broke into the home of Luther, an official of the new one. Luther claimed that Borden had lacked legal authority to act because the charter government violated the Republican Form of Government Clause. Id. at 34-38.

The Court held that this Clause did not empower it to decide this question, but rather required deference to Congress's judgment that the charter government was the legitimate one and hence "republican." Id. at 42. Moreover, as Congress had granted the President sole discretion to decide when the militia was needed to quell an insurrection, and as he had exercised this power by recognizing the charter government, the Court should yield to him. Id. at 43-45.

In short, *Luther*'s finding of nonjusticiability was limited to the situation where the federal political branches had determined that one of two rival state governments was valid. Id. at 42-45. The Court thus acknowledged the significant, but not exclusive, power of Congress and the President in ensuring each state a republican government.

Other cases treating claims under this Clause as political questions include *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71-77 (1867) (refusing to second-guess Congress's abolition of Georgia's government during Reconstruction); *Taylor & Marshall v. Beckham*, 178 U.S. 548 (1899) (holding nonjusticiable a complaint that Kentucky's resolution of a contested election for governor deprived voters of a republican government); *Downes v. Bidwell*, 182 U.S. 244, 278-79 (1900) (avoiding the question of whether Congress must establish republican governments in the territories before they become states).

before a Guarantee Clause violation would occur.[9] This qualifier would make no sense if the Justices thought they never could consider whether a state's actions ran afoul of that Clause.

Nonetheless, the Court imposed such an absolute political-question bar in *Pacific States Tel. Co. v. Oregon*,[10] which dismissed a corporation's claim that a state law passed by initiative rather than statute rendered its government non-republican.[11] Moreover, the Court rejected the corporation's attempt to avoid this result by asserting a separate cause of action under the Fourteenth Amendment, calling this ploy a "superficial" elevation of "form" over "substance."[12] Subsequent cases held all Republican Form of Government issues to be nonjusticiable.[13]

Applying this precedent, the Court routinely rejected challenges to state apportionment schemes.[14] For instance, in *Cole-*

---

9. *Luther*, 48 U.S. (7 How.) at 45.

10. 223 U.S. 118 (1912). The Court ignored numerous cases after *Luther* adjudicating Guarantee Clause claims. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874) (evaluating, but rejecting, the argument that a state's failure to grant its female citizens the right to vote violated the Republican Form of Government Clause); *In re Duncan*, 139 U.S. 449, 461-62 (1891) (ruling that a state court's interpretation of a state statute to ascertain whether it had been duly enacted did not violate this Clause); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897) (holding that a state could, consistent with Section 4 of Article IV, leave the determination of the territorial boundaries of municipalities to its courts rather than its legislature); *Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (concluding that a state legislature did not render its government non-republican by creating, altering, and dividing the property of school districts); *South Carolina v. United States*, 199 U.S. 437, 454 (1905) (finding no violation under this Clause). The justiciability ban established in *Pacific States* lasted eighty years. See *New York v. United States*, 505 U.S. 144, 184-85 (1992) (conceding that the Court had, since 1912, misinterpreted *Luther* and its progeny as prohibiting all Guarantee Clause claims).

For present purposes, the key point is that when *Baker* was decided in 1962, all the Justices assumed that the Republican Form of Government Clause raised political rather than judicial questions.

11. *Pacific States*, 223 U.S. at 142-51.

12. Id. at 137, 139-40. A similar attempt to repackage a Guarantee Clause claim as a Fourteenth Amendment one succeeded in *Baker v. Carr*, 369 U.S. 186 (1962), as explained infra Part I.B.

13. See, e.g., *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 609-12 (1937) (involving a state legislative delegation to an agency of the power to set milk prices); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79 (1930) (dealing with a rule requiring that state statutes could not be invalidated absent the agreement of all but one state court justice); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234-35 (1916) (concerning a worker's compensation law); *O'Neill v. Leamer*, 239 U.S. 244, 247-48 (1915) (involving a statutory delegation to the courts of the power to establish drainage districts); *Marshall v. Dye*, 231 U.S. 250, 256-57 (1913) (pertaining to Indiana's constitutional amendment procedure).

14. See, e.g., *South v. Peters*, 339 U.S. 276, 277 (1950) ("Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916) (holding nonjusticiable the claim that the invalidation of a state reapportionment statute by referendum violated the Republi-

grove v. Green,[15] four of the seven participating Justices affirmed the dismissal of a complaint alleging that an Illinois statute had unconstitutionally established districts for congressional representatives that did not reflect population changes. In the principal opinion, Justice Frankfurter and two colleagues ruled that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts."[16] Justice Rutledge assumed the case to be justiciable, but concluded that the district court had equitable discretion to decline to exercise jurisdiction in light of the delicate relationship between Congress and the states in determining congressional districts.[17]

Many cases followed *Colegrove* in repelling constitutional attacks on state electoral laws, usually based upon Justice Frankfurter's reasoning.[18] The lone exception to this political question analysis arose when states racially discriminated in electoral matters, thereby violating individual and minority-group rights under the Fifteenth Amendment.[19]

---

can Form of Government Clause).

15. 328 U.S. 549 (1946).

16. Id. at 556.

17. Id. at 564-66. Three dissenters saw no political question obstacle and would have struck down the statute on equal protection grounds. Id. at 566-74 (Black, J., dissenting).

18. Although in *Colegrove* four of seven Justices found the matter justiciable, in almost all the following cases the Court apparently assumed the opposite and issued one-line opinions that typically referenced *Colegrove*. See, e.g., *Kidd v. McCanless*, 352 U.S. 920 (1956) (*per curiam*) (involving the same Tennessee statute that would be disputed in *Baker*); see also *Matthews v. Handley*, 361 U.S. 127 (1959) (*per curiam*); *Radford v. Gary*, 352 U.S. 991 (1957) (*per curiam*); *Anderson v. Jordan*, 343 U.S. 912 (1952) (*per curiam*); *Remmey v. Smith*, 342 U.S. 916 (1952) (*per curiam*); *Tedesco v. Bd. of Supervisors*, 339 U.S. 940 (1950) (*per curiam*); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (*per curiam*); *Turman v. Duckworth*, 329 U.S. 675 (1946) (*per curiam*); cf. *South*, 339 U.S. at 277 (combining this "political question" approach with Justice Rutledge's "equitable discretion" framework). In the single instance in which the Court exercised discretion to reach the merits, it rejected the argument that the Fourteenth Amendment forbids states from appropriately diffusing political initiative between its sparsely and densely populated counties. *MacDougall v. Green*, 335 U.S. 281, 284 (1948) (*per curiam*). See generally *Baker v. Carr*, 369 U.S. 186, 252 (1962) (Clark, J., concurring) (noting that, regardless of *Colegrove*'s actual holding, the Court had interpreted the decision as based upon the political question doctrine and a refusal to countenance any possible Fourteenth Amendment claim).

19. For example, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), struck down an Alabama statute which had redistricted a city in order to deprive blacks of their right to vote. Id. at 340-45. The Court distinguished this "singl[ing] out [of] a readily isolated segment of a racial minority for special discriminatory treatment" from the political question presented in *Colegrove*, where the plaintiffs "complained only of a dilution of the strength of their votes." Id. at 346. Other cases finding similar Fifteenth Amendment violations included *Terry v. Adams*, 345 U.S. 461 (1953) and *Smith v. Allwright*, 321 U.S. 649 (1944). The seminal case is *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (invalidating a state law that facially discriminated on the basis of race).

B. THE BAKER DECISION

In *Baker v. Carr*,[20] urban Tennessee voters claimed that a 1901 statute apportioning legislative districts, which had not been amended to account for the large population shift away from rural areas, had unconstitutionally debased their votes.[21] Writing for the majority, Justice Brennan reinvented the political question doctrine in two significant ways.

First, he asserted that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[22] Hence, Justice Brennan deemed this doctrine inapplicable because the Court was not considering a question decided by a coequal government department, but rather "the consistency of state action with the Federal Constitution."[23] He distinguished numerous cases holding to the contrary (such as *Colegrove* and its progeny, which emphasized federalism concerns) as grounded upon limits on the federal judiciary's equity power, not justiciability.[24]

Second, Justice Brennan declared that the presence of a political question could be determined only through a multi-factor "case-by-case inquiry."[25] The most important considerations were "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it."[26]

Applying this new analysis, the Court conceded that the voters' challenge, if made under the Guarantee Clause, would have raised a political question.[27] Nonetheless, it held justiciable the identical claim brought under the Equal Protection Clause.[28] Justice Brennan's entire substantive analysis of this provision consisted of one sentence: "Judicial standards under the Equal

---

20. 369 U.S. 186 (1962).
21. Id. at 187-95.
22. Id. at 210.
23. Id. at 226.
24. Id. at 231-37.
25. Id. at 211.
26. Id. at 217.
27. Id. at 209-10, 217-29.
28. Id. at 208-37; see also id. at 227-29 (concluding that the equal protection complaint was not so enmeshed with the Republican Form of Government claim as to make the question presented "political"). Although couched in jurisdictional language, the majority's opinion clearly indicates its belief that the Tennessee apportionment statute was unconstitutional, as subsequent decisions would confirm.

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."[29]

In his concurrence, Justice Clark lamented the majority's decision to rest its ruling on jurisdictional grounds and its "fail[ure] to give the District Court any guidance whatever."[30] Instead, he would have held on the merits that the apportionment statute violated equal protection because Tennessee did not offer any "rational basis" for it.[31] Justice Clark stressed that federal court adjudication was the only practical remedy because other political channels were unavailable.[32] Finally, he argued that the Court should have fashioned a specific remedy with a rational districting plan, because otherwise the district judge might simply declare a constitutional violation in the hope of "blackjacking" the state legislature into acting.[33]

In dissent, Justice Frankfurter assailed the majority for reversing the uniform precedent holding apportionment to be a political question, like all Republican Form of Government claims.[34] He emphasized the Court's traditional unwillingness to interfere with state governments, absent violation of an explicit, judicially enforceable constitutional command (such as the prohibition against racial discrimination).[35]

Justice Frankfurter asserted that plaintiffs had tendered a Guarantee Clause claim "masquerading under [the] different label"[36] of an individual equal protection complaint that their "right to vote and to have their votes counted" had been in-

29. Id. at 226.
30. Id. at 251 (Clark, J., concurring).
31. Id. at 253-59.
32. As the entrenched rural legislators would not voluntarily change a districting scheme that maximized their power by diluting the electoral strength of urban areas, the ordinary political remedy of voting was ineffective. See id. at 259. Similarly, since only the Assembly could initiate an amendment to the state Constitution, that route was closed. Id. Moreover, Tennessee had no initiative or referendum procedure, and its courts refused to consider the voters' claims. Id. Finally, Congress had not stepped in to rectify the problem. Id.; see also id. at 248-49 (Douglas, J., concurring) (deeming relief through the political process "illusory").
33. Id. at 260 (Clark, J., concurring); see also id. at 250-51 n.5 (Douglas, J., concurring) (agreeing that federal court rulings might induce legislatures to reapportion, but viewing this prospect as beneficial).
34. Id. at 266-67, 277-80, 289-97 (Frankfurter, J., dissenting).
35. Id. at 267, 284-86.
36. Id. at 297.

fringed.[37] Regardless of label, however, apportionment involved multiple policy factors—such as geography, demographics, socioeconomics, convenience, traditions, and mathematical formulas—which could properly be weighed only by state officials.[38] In Frankfurter's view, the Equal Protection Clause provided no more judicial guidance to review such decisions than did the Republican Form of Government Clause.[39] Nothing in the Equal Protection Clause (or any other constitutional provision) required states to base representation solely on population; indeed, no such principle was applied at the time of the Framing, the adoption of the Fourteenth Amendment, or thereafter.[40]

Justice Frankfurter predicted that *Baker* would "add a virulent source of friction and tension in federal-state relations"[41] by empowering federal judges "to devise what should constitute the proper composition of the legislatures of the fifty States."[42] He warned:

> Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[43]

---

37. Id. at 299. This "right to have their votes counted" language, which appears in almost all the later apportionment cases, uncannily foreshadows Vice President Gore's slogan in *Bush v. Gore*, 531 U.S. 98 (2000), discussed infra notes 133-166 and accompanying text.

38. See *Baker*, 369 U.S. at 268-69, 323-24 (Frankfurter, J., dissenting).

39. Id. at 300-01, 322-23.

40. Id. at 301-21; see also id. at 300 ("To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution.").

41. Id. at 324.

42. Id. at 269.

43. Id. at 267; see also id. at 270 (urging "a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power").

Finally, Justice Frankfurter criticized the majority for failing to provide lower courts with any specific guidance for devising appropriate relief for alleged constitutional violations by states in their apportionment statutes.[44]

In a separate dissent, Justice Harlan argued that the Equal Protection Clause (1) had never before been interpreted as requiring each vote to be given equal weight in choosing state legislatures,[45] and (2) did not empower federal courts "to judge whether this resolution of the State's internal political conflict (distributing electoral units geographically rather than demographically) is desirable or undesirable, wise or unwise."[46] He denied the applicability of the equal protection bar against "arbitrary and capricious" classifications, noting that it might well be reasonable for a state to promote agricultural interests by giving them more electoral strength.[47] Justice Harlan further pointed out that the only pertinent constitutional limit on states—the Guarantee Clause—did not fix any immutable representation principle.[48] Finally, he rejected the argument that the voters' inability to obtain political redress justified "the Court to stretch to find some basis for judicial intervention:"[49]

> Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication will view the decision with deep concern.[50]

---

44. Id. at 267-68, 327-28. He especially deplored the contention that federal judicial remedies might be obviated "once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition." Id. at 269; see also id. at 339 (Harlan, J., dissenting) (condemning, as an illegitimate use of Article III power, the notion that the mere assertion of jurisdiction would induce malapportioned states to "quickly respond with appropriate political action").

45. Id. at 332, 338-39 (Harlan, J., dissenting); see also id. at 333 (stressing that the Senate belied any broader claim that the Constitution requires representation to be based exclusively on population).

46. Id. at 333; see also id. at 332 (counseling deference to "the judgment of state legislatures and courts on matters of basically local concern").

47. Id. at 334-36.

48. Id. at 333-34.

49. Id. at 339.

50. Id. at 339-40.

C. THE AFTERMATH OF *BAKER*

1. The Immediate Scholarly Reaction

As Justice Harlan predicted, *Baker* produced a mixed response.[51] On one side, Thomas Emerson, Charles Black, Robert McKay, Louis Pollak and others praised the Court for intervening because it represented the only realistic hope for remedying injustices in apportionment.[52] These scholars deemed population equality in electoral districts a fundamental constitutional value, even if it had never before been recognized.[53] They denied the need for any "precise or absolute" standards under the Equal Protection Clause and instead urged case-by-case doctrinal development.[54] To them, *Baker* "mark[ed] a momentous

---

51. In this Article, I focus on the long-ignored essays published shortly after *Baker* and related apportionment decisions had been rendered, because that work is most relevant in drawing comparisons with the commentary that has been written in the immediate wake of *Bush*, described infra Part II.B. I do not purport to analyze all of the literature dealing with the constitutional law governing elections.

52. See Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 79-80 (1962) (maintaining that federal courts alone possessed the independence to resolve this problem rationally, because malapportionment had blocked the majority's ability to change the law through ordinary democratic processes). For similar arguments, see Charles L. Black, *Inequities in Districting for Congress:* Baker v. Carr *and* Colegrove v. Green, 72 Yale L.J. 13, 14 (1962); Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 647, 678-80 (1963); Louis H. Pollak, *Judicial Power and "The Politics of the People,"* 72 Yale L.J. 81, 88 (1962); see also Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 S. Ct. Rev. 1, 2 ("[I]t is . . . paradoxical for the advocates of judicial self-limitation to criticize the Court for helping to make majority rule effective, because the case for self-restraint rests on the assumption that the Court is reviewing the legislative acts of representatives who are put in office and can be turned out of office by a majority of the people.").

53. See, e.g., Auerbach, 1964 S. Ct. Rev. at 22-23 (cited in note 52); see also Black, 72 Yale L.J. at 14-18 (cited in note 52) (decrying the notion that judicial wisdom in constitutional adjudication always requires self-restraint, especially where the critical right to equal treatment in voting was at stake); Emerson, 72 Yale L.J. at 79 (cited in note 52) (lauding the majority for "abruptly reversing the whole position of the Court on a vital and fundamental issue," electoral fairness); McKay, 61 Mich. L. Rev. at 650-51, 654, 677-78, 681-82, 690-91, 694-95, 705-06 (cited in note 52) (emphasizing that the Court's failure to decide important constitutional issues may also weaken its prestige, and claiming that apportionment clearly implicates the basic civil right of the franchise); Pollak, 72 Yale L.J. at 82-83, 87-88 (cited in note 52) (asserting that the Court correctly rejected the idea of judicial restraint embraced in *Colegrove* and its progeny, which had tolerated gross inequities in apportionment).

54. See Black, 72 Yale L.J. at 17 (cited in note 52) (making this point and suggesting that federal courts determine the reasonableness of various departures from the ideal of equality based on population, such as geographical considerations); id. at 18 (characterizing constitutional law as "not merely a set of static principles but a process, even a quest"); Emerson, 72 Yale L.J. at 65, 70-74 (cited in note 52) (arguing that equal protection standards could only be worked out with great difficulty in common-law fashion, and recommending that the Court treat as "invidious discrimination" any factors unrelated to

step forward in utilizing law . . . for the maintenance and invigoration of the democratic structure of our society and in the assumption of a positive role by the Supreme Court in that task."[55]

On the other side, Alexander Bickel,[56] Stanley Friedelbaum,[57] Jerold Israel,[58] Jo Desha Lucas,[59] Robert McCloskey,[60] Phil Neal,[61] and Allan Sindler[62] decried the *Baker* majority's fail-

---

population that unduly subordinate the basic right to vote, such as wealth-based classifications); McKay, 61 Mich. L. Rev. at 650-51, 659-60, 664-65, 681-700 (cited in note 52) (deeming case-by-case development both prudent and routine in constitutional law, and endorsing an approach similar to that of Professors Black and Emerson).

55. Emerson, 72 Yale L.J. at 79 (cited in note 52); see also id. at 64, 68, 79-80 (exalting the Court for promoting democratic ideals and procedures in election laws). For similar sentiments, see Black, 72 Yale L.J. at 14-15 (cited in note 52); McKay, 61 Mich. L. Rev. at 645-46, 650-51 (cited in note 52); Pollak, 72 Yale L.J. at 82-83, 87-89 (cited in note 52).

56. Alexander M. Bickel, *The Durability of* Colegrove v. Green, 72 Yale L.J. 39 (1962). Bickel conceded the legal validity of two aspects of *Baker*. First, the Constitution's grant to Congress of power to regulate elections, both federal (under Article I, Section 4) and state (under the Fourteenth and Fifteenth Amendments), should not be interpreted as foreclosing the exercise of Article III authority to review constitutional challenges to the electoral process. Id. at 39-40, 44 (illustrating this point by citing the Court's intervention in electoral decisions based upon race, and noting that *Colegrove* did not hold to the contrary); see also Black, 72 Yale L.J. at 21-22 (cited in note 52); Pollak, 72 Yale L.J. at 83-84 (cited in note 52). Second, Bickel admitted that possible difficulties in enforcing decrees did not justify declining jurisdiction. Bickel, 72 Yale L.J. at 40 (invoking *Brown* to support this proposition). Nonetheless, he concluded that a different problem warranted such abstention: The Court could not devise principled legal standards to determine the validity of apportionment statutes. Id. at 40-45.

57. Stanley H. Friedelbaum, Baker v. Carr: *The New Doctrine of Judicial Intervention and its Implications for American Federalism*, 29 U. Chi. L. Rev. 673 (1962) (recommending that federal courts, to preserve federalism, should abstain until states had the opportunity to change their apportionment statutes through democratic processes (if available) and state courts had reviewed their constitutionality).

58. Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 Mich. L. Rev. 107 (1962) (questioning the Court's ability to develop and apply workable equal protection principles).

59. Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of* Baker v. Carr, 61 Mich. L. Rev. 711 (1963) (charging the majority with imposing their political and moral views by twisting the Constitution's language, history, and precedent).

60. Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54 (1962) (arguing that the Court should limit judicial review of state apportionment laws to the *procedural* inquiry of whether they had been passed through open channels for expressing popular consent, rather than trying to develop and apply practical and apolitical *substantive* constitutional standards). This idea received full development in John Hart Ely, *Democracy and Distrust* (Harvard U. Press, 1980), discussed infra notes 120, 123-124 and accompanying text.

61. Phil C. Neal, Baker v. Carr: *Politics in Search of Law*, 1962 S. Ct. Rev. 252, 253 (*Baker* featured "an abrupt reversal of position, unexplored and debatable substantive principles, and the contemplation of remedies as novel as they are drastic.").

62. Allan P. Sindler, Baker v. Carr: *How to "Sear the Conscience" of Legislators*, 72 Yale L.J. 23, 28-38 (1962) (contending that *Baker*'s suggestion that the Equal Protection Clause required voting equality based exclusively upon population had no basis in law or history).

ure to specify any governing *legal* principles—and argued that attempting to do so would be futile because every apportionment law had evolved through a complex *political* process that balanced many factors.[63] Thus, state governments represented not only individuals but also competing interest groups through mechanisms like bicameralism and geographical districting (often via existing subdivisions such as counties), which reflected considerations both socioeconomic (*e.g.*, a desire to ensure representation for minority groups) and political (*e.g.*, the wish to maintain a viable two-party system).[64] Accordingly, these critics argued that neither our general constitutional traditions nor the specific language, history, or precedent of the Equal Protection Clause justified a simplistic apportionment standard of "rationality" based upon numerical equality of population.[65] Indeed, they noted that it was precisely this inability to formulate and apply workable constitutional principles, as well as federalism concerns, that had always led the Court to refuse to interfere with state electoral matters based on general allegations of unfairness or unreasonableness.[66]

---

63. See Bickel, 72 Yale L.J. at 42-45 (cited in note 56); Friedelbaum, 29 U. Chi. L. Rev. at 692-93, 698 (cited in note 57); Israel, 61 Mich. L. Rev. at 108-13 (cited in note 58); Lucas, 61 Mich. L. Rev. at 750-51, 756, 764-73 (cited in note 59); McCloskey, 76 Harv. L. Rev. at 55, 63, 71-73 (cited in note 60); Neal, 1962 S. Ct. Rev. at 253, 267, 274, 284-86, 289-90 (cited in note 61); Sindler, 72 Yale L.J. at 30 (cited in note 62).

64. For elaborations of this theme, see Bickel, 72 Yale L.J. at 40-43 (cited in note 56); Israel, 61 Mich. L. Rev. at 124, 130-34 (cited in note 58); Lucas, 61 Mich. L. Rev. at 764-76 (cited in note 59); McCloskey, 76 Harv. L. Rev. at 71-73 (cited in note 60); Neal, 1962 S. Ct. Rev. at 275-83 (cited in note 61); Sindler, 72 Yale L.J. at 29-30, 38 (cited in note 62).

65. "[J]udicial adherence to the single standard of equal-population representation would constitute an arbitrary choice justified neither by law, nor history, nor logic." Sindler, 72 Yale L.J. at 33 (cited in note 62). For similar conclusions, see Bickel, 72 Yale L.J. at 40-41 (cited in note 56); Israel, 61 Mich. L. Rev. at 130-34 (cited in note 58); Lucas, 61 Mich. L. Rev. at 769-75, 802-04 (cited in note 59); McCloskey, 76 Harv. L. Rev. at 71-73 (cited in note 60); Neal, 1962 S. Ct. Rev. at 275, 279-80, 284-86, 326 (cited in note 61).

66. See, e.g., Friedelbaum, 29 U. Chi. L. Rev. at 673-88, 691 (cited in note 57) (arguing that *Baker* should have been controlled by the fifteen apportionment decisions over the previous thirty years, all of which had dismissed constitutional challenges). Professor Lucas demonstrated that Justice Brennan's attempt to distinguish these cases was inaccurate and misleading. Lucas, 61 Mich. L. Rev. at 711-48, 751-52, 803 (cited in note 59). Recognizing that the Court had reached the merits in a few of these decisions, however, he conceded that legislative districting did not necessarily fall outside federal jurisdiction or raise political questions. Id. at 713-14. Nonetheless, Lucas concluded that prior judicial rulings that apportionment raised "nonjusticiable" issues under the Guarantee Clause and the Fourteenth Amendment actually reflected substantive determinations that those constitutional provisions did not confer individual legal rights. Id. at 754-55; see also Israel, 61 Mich. L. Rev. at 136-37, 143 (cited in note 58) (asserting that any claims of unfairness in apportionment really implicated whether the state had a republican form of government and therefore were political questions); cf. Arthur Earl Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Govern-*

These scholars acknowledged that *Baker* had proved very popular, especially because Americans had become overwhelmingly non-rural.[67] Nonetheless, they warned that the majority's refusal to adhere to legal rules and precedent, and their imposition of their personal notions of fairness and their political agenda of reform, would eventually weaken the Court's authority and independence.[68] For instance, Robert McCloskey characterized *Baker* as political fiat and admonished federal judges to exercise a recognizably "judicial" function—formulating and consistently applying principles rooted in the Constitution's language, history, and precedent.[69] He argued that public confidence in the Court

> depends heavily on the idea that what judicial review adds to the governmental process is significantly different from what the political branches contribute. We need not pause now to inquire whether or to what degree this idea may be delusion; delusion or not, the idea is vital to the Court's position as "the ultimate organ of 'the supreme Law of the Land.'" If the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt. . . . [A] price is paid for each judicial venture into uncharted and unchartable seas. . . . Each such venture tarnishes a little more the idea that the judicial process and the legisla-

---

ment, 50 Cal. L. Rev. 245 (1962) (arguing that this Clause was justiciable and required, at a minimum, that legislatures have at least one chamber selected according to population equality, with the other house permitted to reflect factors such as geography but not wealth distinctions).

67. See, e.g., Lucas, 61 Mich. L. Rev. at 803-04 (cited in note 59); but see Auerbach, 1964 S. Ct. Rev. at 70-71 (cited in note 52) (suggesting that voting interests did not divide neatly into "rural" and "urban" blocs). Others attributed the spirit of compliance with *Baker* as reflecting the Court's articulation of a widely shared ideal. See, e.g., McCloskey, 76 Harv. L. Rev. at 58-59 (cited in note 60); Emerson, 72 Yale L.J. at 76, 78 (cited in note 52); McKay, 61 Mich. L. Rev. at 645-46 (cited in note 52).

68. See, e.g., Lucas, 61 Mich. L. Rev. at 801-04 (cited in note 59); Neal, 1962 S. Ct. Rev. at 252-53, 274, 326-27 (cited in note 61). In urging the Court to stay out of partisan political struggles such as apportionment, Professor Lucas asked: "When courts undertake to manipulate and control the processes for selection of the politician, what is more natural than for the politician to marshal his resources for controlling the selection of the judge?" Lucas, 61 Mich. L. Rev. at 802 (cited in note 59). *Bush v. Gore* raises that same question.

69. McCloskey, 76 Harv. L. Rev. at 67-73 (cited in note 60); see also Neal, 1962 S. Ct. Rev. at 327 (cited in note 61) (concluding that *Baker* exemplifies "the role of fiat in the exercise of judicial power" because the Court refused to explain its authority to act, the propriety of its involvement in the political arena of apportionment, or its governing legal principles).

> tive process are distinguishable. . . . [which] is indispensable to judicial review.[70]

Interestingly, commentators of all political and ideological stripes predicted that the Court could not possibly mandate equal population as the representation standard.[71] The Justices, of course, took precisely that tack.

2. *Baker* Entrenched

The Court swiftly transformed *Baker*'s jurisdictional ruling into new substantive constitutional law. In 1963, *Gray v. Sanders*[72] struck down Georgia's county-unit method of weighing votes in Democratic primary elections for United States Senator and statewide offices, which gave rural areas disproportionate influence.[73] After quickly dismissing justiciability concerns,[74] the Court held that the Equal Protection Clause required that, once a geographical unit for representation had been designated, all those who participated in the election must have an equal vote.[75] Indeed, this principle assertedly resonated throughout American history: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[76]

---

70. McCloskey, 76 Harv. L. Rev. at 67 (cited in note 60).

71. See, e.g., id. at 73 (arguing that the Court should not "undertake a *Lochner*-esque responsibility for defining the substantive constitutional norm (*e.g.*, 'one man, one vote') and for determining whether each departure from the norm is 'rational' or 'capricious'"). For similar concerns about the infeasability of such a rigid standard, see Bickel, 72 Yale L.J. at 40-42 (cited in note 56); Black, 72 Yale L.J. at 17 (cited in note 52); Emerson, 72 Yale L.J. at 71-73 (cited in note 52); Israel, 61 Mich. L. Rev. at 130-34 (cited in note 58); Lucas, 61 Mich. L. Rev. at 769-75, 802-04 (cited in note 59); Sindler, 72 Yale L.J. at 29-33 (cited in note 62); see also Paul A. Freund, *New Vistas in Constitutional Law*, 112 U. Pa. L. Rev. 631, 638-39 (1964) (supporting the *Baker* Court's intervention because Tennessee's political process could not resolve the problem, but criticizing "a simplistic criterion of one man, one vote. . . . [as] question-begging in the case of a collegial body to be chosen with a view to balanced representation").

72. 372 U.S. 368 (1963).

73. Id. at 370-72, 379. Each citizen's vote counted less and less as the population of his county increased; thus, a combination of units from the smallest rural districts gave counties having one-third of the total population a clear majority of the county votes. Id. at 372.

74. First, the Court found that the plaintiff, a Georgia voter, had standing to sue because his right to vote had been impaired. Id. at 375. Second, even though the state Democratic Committee had voted to hold the 1962 primary election on a popular-vote basis, the case was not moot because the law allowed Georgia to revert to the county-unit system. Id. at 375-76.

75. Id. at 379-80.

76. Id. at 381.

But Americans had never accepted this notion of "political equality," as Justice Harlan explained.[77] Indeed, he contended that the Electoral College refuted any such argument and that the state's use of similar voting mechanisms could hardly be deemed "irrational" under the Equal Protection Clause.[78] Moreover, Justice Harlan emphasized that the Court had rejected four previous constitutional challenges to Georgia's system.[79] Finally, he lamented the Court's continuing entanglement in politics, contrary to its hope in *Baker* that states would restructure their electoral systems without the need for further judicial intervention.[80]

Downplaying such concerns, the Court in *Wesberry v. Sanders*[81] held that a Georgia law creating single-member congressional districts with unequal populations violated Article I, Section 2, Clause 1 of the Constitution, which provides that "[t]he House of Representatives shall be . . . chosen . . . by the People of the several States."[82] The majority interpreted this language as "mean[ing] that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[83] The Court's historical justification for this principle rested on the Convention's decision to apportion Representatives "among the several States . . . according to their respective Numbers" (embodied in Article I, § 2, Clause 3) and to ensure their election "by the People."[84]

---

77. Id. at 384 (Harlan, J., dissenting).

78. Id. at 384-85; see also id. at 388 (documenting that any disparities in the Georgia system were akin to those in the Electoral College). As in *Baker*, a state could reasonably grant disproportionately more seats to agricultural than to urban communities, and the Court's decision to judge constitutional rationality based on "pure arithmetic" was "judicial fiat." Id. at 386-88. The majority rejected the analogy to the Electoral College on the ground that the Constitution explicitly authorized its numerical inequality to address specific historical concerns. Id. at 378.

79. See id. at 383 (citing *Turman v. Duckworth*, 329 U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfield v. Sloan*, 357 U.S. 916 (1958)). Although these four decisions were short *per curiam* dismissals, the Court had given plenary consideration to the same constitutional attack on an Illinois law in *MacDougall v. Green*, 335 U.S. 281, 284 (1948). See *Gray*, 372 U.S. at 385 (Harlan, J., dissenting).

80. *Gray*, 372 U.S. at 382, 388-89 (Harlan, J., dissenting).

81. 376 U.S. 1 (1964).

82. Id. at 7-18.

83. Id. at 7-8.

84. Id. at 11-15. These provisions reflected the wishes of the large states, whereas the Senate—composed of two members from each state elected by their legislatures—satisfied the small states. See id. at 11-13 (discussing this "Great Compromise"). The Court also cited various historical statements that the House had to reflect the proportionate populations of the states to support the (quite different) proposition that, *within* each state, there had to be equal representation for equal numbers of people. See id. at

Justice Harlan, however, asserted that the language of Article I and its relevant history were "all in strong and consistent direct contradiction of the Court's holding."[85] First of all, he faulted the majority for focusing exclusively on the "chosen by the People" phrase and ignoring the rest of Clause 1, which confers the right to vote for Representatives only on those people whom "*the State* has found qualified to vote for members of . . . the State Legislature."[86] Indeed, every state since 1789 had set qualifications for voting (*e.g.*, property ownership), just as the Framers intended.[87]

Furthermore, Justice Harlan pointed out that Section 2, Clause 3 simply provides for apportionment of Representatives "*among* the several States" based on their populations, but does not deal with how Representatives would be chosen *within* each state.[88] Finally, he emphasized that the only constitutional provision that covers districting within a state is Section 4 of Article I: "The Times, Places, and *Manner* of holding [congressional] Elections . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[89] By Justice Harlan's lights, Section 4 placed no restrictions on this power and did not mention—much less mandate—equal representation in districting.[90] In fact, he showed that the entire history of the drafting, ratification, and implementation of Section 4 revealed that only Congress—not federal courts—had authority to review the states' exercise of their power to select their Representatives according to any method of popular election they chose.[91] Justice Harlan accused

---

8-18.

85. Id. at 41-42 (Harlan, J., dissenting).

86. Id. at 25.

87. Id. at 25-27 n.7; see also id. at 30-31 (demonstrating that even those Convention delegates who favored representation based on population thought that only propertied citizens should vote). Thus, Section 2 itself could not possibly prevent a state from apportioning Representatives as it pleased. See id. at 26.

88. Id. at 27; see also id. at 31-32 (establishing that the Convention debates on this clause exclusively concerned how Representatives should be apportioned among, not within, the states). Moreover, even among the states, the Framers did not endorse absolute numerical equality, as shown by two provisions in Clause 3. One guaranteed each state a Representative regardless of population. Id. at 28-29 (illustrating this point by noting that sparsely populated states like Wyoming have one Representative, even though their population is significantly less than that of the average congressional district within other states). The second provision counted three-fifths of slaves in their state's representation, thereby giving Southern states representation far in excess of their voting population. Id. at 27.

89. Id. at 29.

90. Id. at 29-30.

91. Id. at 23-24, 29-30, 32-42 (citing uncontested statements by Madison, Wilson,

his colleagues of substituting their judgment about sound political principles for that of Congress, thereby upsetting the constitutional separation of powers.[92] He asserted that the Justices had weakened the political process by imposing their political theory of selecting Representatives on the states and Congress "for no reason other than that it seems wise to the majority of the present Court."[93]

Justice Harlan concluded that (1) all the historical evidence confirmed his straightforward interpretation of Article I, and (2) no one had ever before suggested that Section 2's "by the People" language created a "one person, one vote" principle that restricted the Section 4 power of either the states or Congress.[94] Hence, he alleged that "[t]he constitutional right which the Court create[d] [was] manufactured out of whole cloth."[95]

Although Justice Stewart believed that Harlan had "unanswerably demonstrated" the incorrectness of *Wesberry*'s holding,[96] the Court quickly extended it to state legislatures in *Reynolds v. Sims*.[97] After finding justiciable a challenge by Alabama voters to the malapportionment of their legislature[98] and determining that they had no effective political remedy,[99] the Court declared: "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state

---

Hamilton, and others). Congress had always exercised plenary power to supervise state laws governing the manner of congressional elections. As the Court had previously recognized, in 1929 Congress deleted—and repeatedly refused to reinstate—its 1872 statutory provision requiring that Representatives "be elected by districts . . . containing as nearly as practicable an equal number of inhabitants." Id. at 42-44 (citing relevant precedent and legislation).

Despite this evidence, the majority held that Section 4 did not immunize state or congressional apportionment decisions from judicial review. Id. at 5-7 (citing *Baker v. Carr*, 369 U.S. 186, 232 (1962)).

92. See id. at 22, 48 (Harlan, J., dissenting).

93. Id. at 30; see also id. at 48 (emphasizing that reliance on the Court to spearhead political reform would weaken the political process).

94. Id. at 30-42.

95. Id. at 42 (Harlan, J., dissenting).

96. Id. at 50-51 (Stewart, J., dissenting) (agreeing with Justice Harlan's substantive analysis of Article I, but deeming the case justiciable).

97. 377 U.S. 533 (1964).

98. Id. at 537-59. Congress's admission into the Union of states with apportionment plans not based on population (and thus its judgment that such states had a Republican Form of Government) did not prevent the Court from determining whether such schemes violated the Equal Protection Clause. Id. at 582.

99. The Court undercut its own conclusion by conceding that Alabama (unlike Tennessee) had a constitutional amendment process, and that indeed its voters had rejected an amendment proposing greater representation in one legislative house based upon population. Id. at 553-54, 570.

legislators."[100] Accordingly, representation in both houses had to be based on population, not place of residence, geography, economic interests, or historical practice.[101] The Court distinguished the Constitution's congressional system of representation as reflecting an essential compromise among sovereign states—a unique circumstance without relevance to state legislative districting schemes.[102] Borrowing *Wesberry*'s "as nearly as is practicable" qualifier, however, the Court announced it would permit minor deviations from the equal-population principle when incidental to effectuating a rational state policy, such as ensuring some voice to political subdivisions (but not geographical considerations alone, economic interests, or historical patterns).[103]

Justices Clark and Stewart, concurring, would have held that Alabama's sixty-year old apportionment plan was plainly irrational under the Equal Protection Clause.[104] They faulted the majority for elaborating legal standards based on "meaningless phrases."[105]

In a five-part argument, Justice Harlan assailed the Court for spouting "generalities" that totally ignored the Fourteenth Amendment's language, drafting and ratification process, implementing history, and precedent.[106] First, the Court's interpretation of the phrase "equal protection" in Section 1 (the lone provision it considered) was refuted by Section 2, which explicitly recognized the states' power to "deny" or "abridge" the right

100. Id. at 566.

101. Id. at 561-76; see also id. at 568 (arguing that "equal protection" meant "substantially equal state legislative representation for all citizens" because legislators represented people, not areas or group interests).

102. Id. at 571-75.

103. Id. at 577-81.

104. See id. at 587-88 (Clark, J., concurring); id. at 588-89 (Stewart, J., concurring).

105. See, e.g., id. at 587-88 (Clark, J., concurring) ("Whether 'nearly as is practicable' means 'one person, one vote' qualified by 'approximately equal' or 'some deviations' or by the impossibility of 'mathematical nicety' is not clear from the majority's use of these vague and meaningless phrases."); see also id. at 588-89 (Stewart, J., concurring).

In a companion case, both of these Justices (along with Harlan) dissented from the majority's invalidation of Colorado's apportionment law because that state had ensured equality in its House and had rationally based representation in its Senate on a combination of factors such as population, its mountainous geography, and economic considerations. *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 741-44 (1964) (Clark, J., dissenting); id. at 744-65 (Stewart, J., dissenting).

106. *Reynolds*, 377 U.S. at 589-625 (Harlan, J., dissenting) (contending that this evidence demonstrated that states (1) could choose any method they wished for apportioning their legislatures and (2) did not have to ensure that all legislators represented substantially the same number of people).

to vote.[107] Second, the legislative history of the Fourteenth Amendment revealed Congress's deliberate refusal to impose any limits on the states' exclusive and plenary power over voting rights (including legislative apportionment), because attempting to do so would have jeopardized adoption of the Amendment.[108] All the ratifying states also shared this understanding.[109] Third, after 1868 states routinely exercised their independent power to structure their legislatures as they saw fit,[110] and as of 1964 the constitutions of eighty percent of the states recognized bases of apportionment other than population.[111] Fourth, the Fifteenth and Nineteenth Amendments, which prohibited abridgement of the right to suffrage on account of race and gender, would have been unnecessary if the Fourteenth Amendment already protected equality in voting.[112] Finally, the Court had silently overruled its pertinent pre-*Baker* cases, which had uniformly held that the Fourteenth Amendment does not confer the right either to vote or to a state legislature apportioned by population.[113]

Justice Harlan contended that the majority was amending the Constitution by adding something that had been deliberately excluded, not applying general constitutional language to a situation that had not been contemplated.[114] Thus, he claimed that, as in *Baker*, *Gray*, and *Wesberry*, the Court had exceeded its Article III authority by imposing its own notions of reform because of its impatience with the political process.[115] Moreover, these apportionment cases sanctioned intolerable interference with the

107. Id. at 593-94 (noting that Section 2 also set forth a remedy if a state exercised this power: reducing that state's basis of representation proportionately to those excluded).

108. Id. at 595-99 (showing that every Congressman who spoke on this issue held this view).

109. First, most of the "loyal" ratifying states had constitutions that allowed apportionment in at least one legislative chamber to be based on factors other than population, and they certainly did not think that ratification of the Fourteenth Amendment voided their own constitutions. Id. at 602-04. Second, Congress demanded that the ten "reconstructed" states ratify the Fourteenth Amendment and readmitted those states even though their constitutions usually departed from the "equal representation" principle. Id. at 604-07.

110. Id. at 608-10.

111. Id. at 610-11.

112. Id. at 611-12.

113. Id. at 612-14 (citing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

114. Id. at 590-91, 608, 625. Therefore, the Court's decision "cannot be excused or explained by any concept of 'developing' constitutionalism. It is meaningless to speak of constitutional 'development' when both the language and history of the controlling provisions of the Constitution are wholly ignored." Id. at 591.

115. Id. at 615, 624-25.

states by "placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary."[116]

> These decisions . . . cut deeply into the fabric of our federalism. . . . [T]he aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary.[117]

3. A Summary of the Apportionment Cases

Baker and *Reynolds* created an equal protection requirement that state legislatures be apportioned according to equality of population. The Court in *Gray* applied that rule to state representation schemes for federal Senate elections, and in *Wesberry* discovered the identical principle in the Article I provisions governing congressional districting.[118] Justice Harlan argued, however, that these holdings lacked any foundation in the Constitution's words, history, or precedent and subverted the traditional understanding of the judiciary's proper role in the federal system.[119]

---

116. Id. at 589 (Harlan, J., dissenting); see also id. at 615-22 (describing how federal district courts were pressuring state legislatures to reapportion hastily according to standardless political judgments that judges were incompetent to make).

117. See id. at 624 (Harlan, J., dissenting); see also Samuel Issacharoff, et al., *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000* at 45-46 (Foundation Press, 2001) (describing *Reynolds* as "one of the most dramatically destabilizing decisions in the Court's history. . . . [r]equir[ing] the massive and immediate restructuring of virtually every State legislature in the country"); but see Auerbach, 1964 S. Ct. Rev. at 72-73 (cited in note 52) (arguing that malapportionment also adversely affects the federal system by skewing the political parties' selection of congressional candidates and national convention delegates, by creating "safe" districts that reinforce Congress's seniority system, and by forcing the federal government to deal directly with cities because states do not effectively represent their interests).

118. Developed in the context of drawing legislative districts, the principle that all voters must have an equal opportunity to participate in elections was swiftly extended to qualifications for exercising the franchise. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665-70 (1966) (striking down a state's attempt to impose wealth-based classifications for voting such as poll taxes).

119. See Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 Mich. L. Rev. 209 (1964) (largely agreeing with Justice Harlan and contending that the Court's exclusive focus on the numerical equality of each individual vote ignored that representation also involves interest groups and political parties); see also Issacharoff, et al., *When Elections Go Bad* at 46 (cited in note 117) ("[T]he [apportionment] decisions held that the original constitutional structures had to be synthesized with emerging conceptions of democracy that required political equality among all voters, a conception that the Court read back into the Fourteenth Amendment.").

Despite its shaky constitutional underpinnings, the Court's "one person, one vote" slogan had broad popular appeal.[120] Within a few years the validity of *Baker* became widely accepted, even among scholars who had initially attacked it.[121] *Baker* and its progeny still lacked any coherent intellectual foundation, however.[122]

4. *Baker* Rationalized, Sanitized, and Lionized

Baker remained a result in search of a rationale until John Hart Ely published his influential thesis that judicial review in a democracy should be limited to situations where representative government cannot be trusted because of failures in the political process.[123] Hence, Professor Ely endorsed the *Baker* line of cases because "they involve[d] rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[124]

With rare exceptions,[125] writers after Ely have accepted *Baker*'s correctness and wisdom.[126] Indeed, prominent scholars

120. See Ely, *Democracy and Distrust* at 121 (cited in note 60); see also supra note 67 and accompanying text (describing the popularity of *Baker*). When the Court enters the political fray, it not surprisingly uses catchy political sound-bites that are easy to understand, like "one person, one vote" or "the right to choose."

121. See, e.g., Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 Harv. L. Rev. 986, 991 (1967) ("At least some of us who shook our heads over *Baker v. Carr* are prepared to admit . . . that it has not impaired, indeed that it has enhanced, the prestige of the Court.").

122. An early attempt to build one was William P. Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 Mich. L. Rev. 729 (1969) (arguing that the Court's adoption of an "equal population" standard (1) created a free market for interest representation by eliminating statutory biases favoring particular interests (such as farmers and the wealthy), and (2) avoided difficult political questions regarding how legislatures behaved in reconciling various interests).

123. Ely, *Democracy and Distrust* at 73-183 (cited in note 60). Thus, federal courts should correct problems in the process of representation to ensure that ordinary political channels of change remain open, rather than second-guess the content of the political choices made. Id.

124. Id. at 117. In fairness to the Court, it did mention in *Baker* that one impetus for its intervention was the unavailability of ordinary political remedies to resolve the malapportionment. See supra note 32 and accompanying text (citing the concurring opinions of Justices Clark and Douglas). Nonetheless, the majority did not rest their decision on that fact, but rather on the justiciability of a "vote debasement" claim under the Equal Protection Clause. And the Warren Court certainly did not follow Professor Ely's corollary that the Justices should not disturb substantive policy determinations made by political officials elected and operating in an open democratic process.

125. See, e.g., Douglas W. Kmiec and Stephen B. Presser, *The American Constitutional Order: History, Cases, and Philosophy* 1288-89 (Anderson Publishing Co., 1998) (questioning the *Baker* Court's abandonment of judicial restraint and its refusal to grant states the same political latitude as Congress in having one legislative chamber based on

have expended considerable energy in developing theories to justify *Baker* and other Warren Court decisions as grounded in constitutional law, not merely liberal politics.[127] For instance, Erwin Chemerinsky has argued that the Warren Court illustrates the proper judicial role: to interpret the Constitution authoritatively by exercising discretion, informed by the Justices' moral sensibilities, to give specific meaning to the Constitution's abstract language—an indeterminate, evolutionary, and open-ended process that strives to identify and preserve society's fundamental values.[128] He praises *Baker* as exemplifying this pro-

---

non-population interests); Samuel Issacharoff, *Political Judgments*, 68 U. Chi. L. Rev. 637, 639-40 (2001) (arguing that *Baker* "evaded the political question straitjacket . . . by denying the applicability of a truncated version of the political question doctrine and by invoking curiously assumed 'judicial standards that are well developed and familiar,'" but that the Court never cogently explained either its discarding of this doctrine or how judges could avoid entangling themselves in political disputes); Michael McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J. L. & Pub. Pol. 103 (2000) (asserting that *Baker* and its progeny adopted a mathematically precise "equal population" principle that had no basis in the text or history of the Equal Protection Clause or in the Constitution's structure, and that application of this rule has had the practical effect of allowing entrenched partisan politicians to gerrymander favorable districts).

126. The leading constitutional law treatises and casebooks simply summarize *Baker*, without seriously challenging it. See, e.g., William Cohen and Jonathan D. Varat, *Constitutional Law: Cases and Materials* 103-05 (Foundation Press, 11th ed. 2001); Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law* 46-54 (Foundation Press, 13th ed. 1997); Jesse H. Choper, et al., *Constitutional Law: Cases—Comments—Questions* 36-38 (West Publishing Co., 9th ed. 2001); Ronald Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law* 314, 564-65 (West Group, 3d ed. 1999); 3 *Treatise on Constitutional Law* at 740-41; Geoffrey R. Stone, et al., *Constitutional Law* 112, 120, 123-33, 748 (Little Brown & Co., 4th ed. 2001). *Baker*'s "landmark" status has often been duly noted. See Laurence Tribe, 1 *American Constitutional Law* 371-72 (Foundation Press, 3d ed. 2000); see also Paul Brest, et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 733 (Aspen Law & Business, 4th ed. 2000) (deeming *Baker* "canonical").

127. For example, Professor Sunstein declares: "[T]he Constitution is law. If the Constitution is law, then it stands above politics. All public officials—whether Democratic, Republican, or something else—must obey. The Constitution does not mean what particular people want it to mean; otherwise it would not be law at all." Cass R. Sunstein, *The Partial Constitution* 93 (Harvard U. Press, 1993). But he then adds that "the Constitution is often extremely vague" and that "[r]easonable people disagree about what it means." Id. Sunstein praises the (presumably "reasonable") interpretations of the Warren Court as promoting constitutional "ideals" such as equality in voting, privacy rights, religious liberty, and freedom from discrimination. Id. at 98, 260. See also Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 Const. Comm. 11, 14 (1991) (citing *Baker* as "exemplary of the Warren Court's jurisprudence" in reconstructing constitutional law on the basis of individualism and democracy).

128. Erwin Chemerinsky, *Interpreting the Constitution* 45-141 (Praeger, 1987). The Warren Court embodies Chemerinsky's ideal:

> [O]nly a constitution that evolves by interpretation can adequately protect minorities and safeguard fundamental rights. A judiciary insulated from the political process is uniquely suited to articulate society's deepest values and apply them to protect interests and groups most in need of assistance. The powerful in society can succeed in the legislature, but the powerless and unpopular need

gressive, nonoriginalist approach: "The reapportionment of state legislatures would not have occurred without judicial action, and the Court's enforcement of a 'one person/one vote' rule has made state legislatures much more responsive and effective in dealing with urban problems."[129]

Chemerinsky's assessment of *Baker* expresses the mainstream academic view. Indeed, as Professors Balkin and Levinson have noted, the case has become part of a "constitutional canon" that is immune from serious scholarly questioning.[130]

Moreover, federal judicial forays into electoral matters have become so routine that they attract little controversy. For example, in 1992 the Court relied upon *Baker* and *Wesberry* in unanimously permitting a challenge to Congress's selection of a method for apportionment of congressional districts among states under Article I, Section 2.[131]

The lesson of *Baker*, then, seems plain. When a majority of the Justices perceive a nationwide electoral crisis that admits of no easy political solution, they should resolve it by making up new equal protection law and by ignoring principles of justiciability, federalism, and *stare decisis*. Dissenting colleagues and commentators may warn that such flagrant political interference will undermine the Court's independence and prestige, but such

---

judicial protection. The Warren Court's legacy is a lesson of the benefits that can result from judicial discretion. No other institution but the Court would have desegregated the South . . . reapportioned state legislatures . . . [and] had the courage to uphold the right to reproductive autonomy.

Id. at 127.

129. Id. at 141. Reaching "progressive" policy results apparently outweighs the legal shortcomings of *Baker* that Chemerinsky has identified elsewhere. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 119, 125 (Aspen Law & Business, 1997) (contending that Justice Brennan's six-factor test for determining political questions was "useless" and that he drew "a fatuous distinction" that apportionment was justiciable under the Equal Protection Clause but not the Guarantee Clause).

130. Liberal law professors have placed "the beloved precedents of the beloved Warren Court" in a "constitutional canon," so that no respectable theorist can dare suggest that these cases might be normatively incorrect. See J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 964, 997-1002 (1998). They note the "irony" that "it is liberals who defend the [legal] academic theory canon against the 'barbarians' on the right," because in every other discipline liberal pragmatists argue that "all knowledge is revisable if good enough reasons can be provided." Id. at 998.

131. *Dept. of Commerce v. Montana*, 503 U.S. 442, 456-59 (1992). In the special context of gerrymandering designed to enhance the voting clout of African Americans, however, a few Justices have resurrected the Frankfurter/Harlan argument that the Court should abstain from second-guessing states' choices in balancing competing political interests in their districting plans. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 918-25 (1996) (Stevens, J., dissenting).

dire predictions will prove groundless. Against this background, *Bush v. Gore*[132] seems not only plausible but inevitable.

II. *BUSH v. GORE* AND ITS FALLOUT

A. THE CASE

Democratic presidential candidate Al Gore protested Florida's determination that Republican George Bush had won its 25 electoral votes. Gore requested a manual recount in Miami-Dade, Palm Beach, Broward, and Volusia Counties.[133] Overruling the Florida Secretary of State's order that such recounts had to be completed by the statutory deadline of November 14, that state's supreme court granted a twelve-day extension.[134] Because of uncertainty over the grounds of that decision, the United States Supreme Court vacated.[135]

On November 26, Florida's Elections Commission certified Bush the winner.[136] Gore contested this certification under a statute that required him to prove a "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[137] Reversing a trial judge's ruling that Gore had failed to meet this burden, the Florida Supreme Court interpreted "legal vote" to mean one that expressed a "clear indication of the intent of the voter"[138] and ordered (1) a hand recount of 9000 Miami-Dade ballots with "undervotes" (*i.e.*, those with no machine-detected vote), (2) inclusion of Miami-Dade's partial manual recount, which yielded 168 Gore votes, and (3) the addition of 215 Gore votes from Palm Beach County, even though these results had been submitted after the court's own November 26 deadline.[139] Seven U.S. Supreme Court Justices concluded that this order violated the Equal Protection Clause by allowing "standardless manual recounts."[140]

---

132. 531 U.S. 98 (2000) (*per curiam*).
133. Id. at 101.
134. Id.
135. Id. The Florida high court reinstated its judgment on December 11. Id.
136. Id.
137. Id., citing Fla. Stat. Ann. § 102.168(3)(c).
138. Id. at 102.
139. Id.
140. Id. at 529. Two Justices agreed with this equal protection holding, but would have declined to exercise jurisdiction in the first place. See id. at 129, 134 (Souter, J., dissenting); id. at 551 (Breyer, J., dissenting).

Five Justices joined a per curiam opinion. Initially, they reaffirmed an 1892 case that had construed Article II, Section 1 of the Constitution, which provides that "[e]ach State shall appoint [presidential electors] in such Manner as the Legislature thereof may direct,"[141] as a grant of plenary authority.[142] If a state legislature chose to exercise that appointment power by authorizing its citizens to vote, then under *Reynolds* the Equal Protection Clause gave them a fundamental right which could not be violated by arbitrary or disparate action that valued one person's vote over another's.[143]

The majority held that Florida's Supreme Court had committed precisely this violation by failing to specify uniform rules to be applied in determining the general statutory "intent of the voter."[144] For instance, the state court included recounts from three counties that had used divergent standards, contrary to *Gray*'s holding that states cannot disparately treat voters in different counties.[145] 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."[146] For example, in Miami-Dade three canvassing board members applied three different criteria in defining a legal vote.[147] Even more troubling was the Palm Beach County board, which

> 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 pre-

141. U.S. Const., Art. II, § 1, cl. 2.

142. *Bush v. Gore*, 531 U.S. at 104 (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)).

143. Id. at 104-05 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), discussed supra notes 97-117 and accompanying text).

144. Id. at 105-06. Although a state may allow local entities to "develop different systems for implementing elections," here a state court with power to establish uniform standards ordered a recount but did not ensure equal treatment. Id. at 109. To illustrate, recounts in three counties extended to all ballots, not just "undervotes." Id. at 107. Another example was the Florida Supreme Court's allowing partial recount totals from Miami-Dade County but complete totals from others. Id. at 107-08. Moreover, the *ad hoc* counting teams lacked training in handling and interpreting ballots, and observers were prohibited from objecting during the recount. Id. at 109.

145. Id. at 107 (citing, e.g., *Gray v. Sanders*, 372 U.S. 368 (1963), discussed supra notes 72-80 and accompanying text).

146. Id. at 106.

147. Id.

> tense of a *per se* rule, only to have a court order that the county consider dimpled chads legal.[148]

Turning to the remedy, the majority declined to remand for a constitutionally proper contest because Florida's Legislature had mandated that any contest be completed by December 12—the date of the Court's decision.[149] The per curiam opinion ended by brushing off justiciability concerns:

> 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.[150]

In a concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, maintained that the Florida Supreme Court had also violated Article II.[151] In the Chief Justice's view, his Court had to enforce Article II by determining whether the state court had altered its Legislature's directions concerning the appointment of electors.[152] Here the Florida Supreme Court had done so by overriding the Secretary of State's reasonable exercise of her delegated statutory discretion (1) to enforce the Legislature's deadline for certification and to disregard untimely recounted ballots,[153] and (2) to interpret "legal vote" as not requiring the counting of improperly marked ballots.[154]

---

148. Id. at 106-07.

149. Id. at 110.

150. Id. at 111.

151. Id. at 533-39 (Rehnquist, C.J., concurring) (citing U.S. Const., Art. II, § 1, cl. 2, which provides that "[e]ach State shall appoint [presidential electors], in such manner as the *Legislature* thereof may direct") (emphasis added).

152. *Bush v. Gore*, 531 U.S. at 111-15 (making this point and stressing that Article II created an exception to the usual federalism principle of deference to state judiciaries in interpreting their own laws). The Constitution thus required the Court "to undertake an independent, if still deferential, analysis of state law .... To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." Id. at 114-15.

153. Id. at 119-20. Likewise, the state court had no business reviewing the canvassing boards' exercise of their statutory discretion to decide whether or not to count ballots received after the deadline. Id. at 121-22. Another interpretive problem was that the Florida court had "emptie[d] certification of virtually all legal consequence." Id.

154. Id. at 118-20 (declaring that the Florida Supreme Court had impermissibly substituted its "peculiar" interpretation that the statute mandated counting votes that had

Four Justices dissented. Justice Breyer chastised the Court for unnecessarily becoming entangled in the political process of selecting a President, especially since two federal laws left such electoral matters to political resolution.[155] First, the Twelfth Amendment empowers Congress to count electoral votes.[156] Second, an 1887 federal statute authorizes states to attempt to settle any electoral disputes (either directly or by delegation to courts) and Congress to determine any remaining controversies—including judging the legality of votes—according to specified rules.[157] Justice Breyer declared:

> [I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure .... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.... [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation. I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have ... [abandoned] self-restraint.[158]

Justice Souter echoed these political question concerns and also suggested ripeness and mootness problems.[159] Moreover, Justices Souter and Breyer faulted the majority for second-guessing the Florida Supreme Court's interpretation of its state's election law, which they deemed reasonable and not designed to change the legislature's commands in violation of Article II.[160] Both Justices concluded that the Court, having exercised juris-

---

not been marked according to the clear ballot instructions). The Chief Justice also found that the Florida court had jeopardized its Legislature's wish to take advantage of 3 U.S.C. § 5, which guaranteed finality to a state's slate of electors if they were chosen under statutes enacted before the election and were selected six days before the Electoral College met (i.e., by December 12). Id. at 113-14, 120-22.

155. See id. at 153-58 (Breyer, J., dissenting); see also id. at 144 (beginning his opinion by declaring that "[t]he Court was wrong to take this case").

156. Id. at 153.

157. Id. at 153-58. Moreover, this statute aimed to avoid a repeat of 1876, when Congress appointed a commission (including five Justices) to resolve the contested presidential election and Justice Bradley cast the deciding vote, which "embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process." Id. at 157.

158. Id. at 157-58.

159. See id. at 129 (Souter, J., dissenting) ("If this Court had allowed the State [to proceed] .... it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress ....").

160. See id. at 130-33; id. at 148-52 (Breyer, J., dissenting). They also argued that 3 U.S.C. § 5 authorized Congress, not the federal courts, to make the political determination as to the validity of each state's slate of electors. See id. at 130 (Souter, J., dissenting); id. at 148-49 (Breyer, J., dissenting).

diction, correctly found an equal protection violation.[161] Nonetheless, they would have remanded so that the Florida court could apply a uniform standard in a recount and determine whether this process could be completed by December 18 (when the electors were to meet).[162]

Justices Stevens and Ginsburg agreed with Souter and Breyer that (1) the Court had forsaken its ordinary principles of judicial restraint and federalism,[163] (2) the Florida Supreme Court had reasonably interpreted state law,[164] and (3) the remedy of stopping the recounts was improper.[165] They broke with their seven colleagues, however, in concluding that the Florida court's adherence to a general "intent of the voter" standard did not constitute an equal protection violation.[166]

B. THE REACTION OF THE LEGAL ACADEMY

In contrast to their generally warm embrace of *Baker,* law professors overwhelmingly excoriated the Court's opinion. Indeed, about 550 of them signed a full-page ad in the New York Times on January 13, 2001, which asserted:

> By stopping the vote count in Florida, the U.S. Supreme 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. As teachers whose lives have been dedicated to the rule of law, we protest.

---

161. See id. at 133-34 (Souter, J., dissenting); id. at 145-46 (Breyer, J., dissenting).

162. See id. at 133-35 (Souter, J., dissenting); id. at 146-47 (Breyer, J., dissenting).

163. See, e.g., id. at 123-25 (Stevens, J., dissenting) (arguing that these principles counseled leaving presidential election disputes to the states and Congress). Justice Ginsburg echoed these concerns and asserted that Article II did not justify the Court's departure from its usual practice, rooted in federalism, of showing extraordinary deference to state court interpretations of state law, even when federal rights were at stake. Id. at 135-43 (Ginsburg, J., dissenting).

164. See id. at 124, 127-28 (Stevens, J., dissenting); id. at 135-36 (Ginsburg, J., dissenting). Both dismissed the statutory Section 5 argument for the reasons given by Justices Souter and Breyer. See id. at 124 (Stevens, J., dissenting); id. at 143-44 (Ginsburg, J., dissenting). Justice Stevens accused the majority of challenging the Florida courts' "impartiality and capacity," thereby cynically undermining "the Nation's confidence in the judge as an impartial guardian of the rule of law." Id. at 128, 129 (Stevens, J., dissenting).

165. See id. at 126-27; id. at 143-44 (Ginsburg, J., dissenting).

166. See id. at 126-27 (Stevens, J., dissenting) (contending that the Equal Protection Clause did not authorize the Court to question the states' power either to set substantive standards for determining whether a vote has been legally cast or to allow counties to design their own balloting system, and distinguishing cases finding that votes had been weighted unequally); id. at 143 (Ginsburg, J., dissenting) (claiming that the Florida Supreme Court's recount order would yield a result as fair as the earlier certification).

To take another representative example, Erwin Chemerinsky charged that "five conservative Republican justices handed the election to the Republican candidate, George W. Bush."[167] He argued that "haste" had led the majority to disregard various justiciability doctrines[168] and that the Court's decision "had no basis in law or fact."[169] For instance, the Court failed to explain why Florida's intercounty variation in determining which votes counted—but not other inconsistencies such as differences in voting machines and ballots—violated equal protection.[170] Chemerinsky also claimed that "the Court offered no persuasive rationale for ending the recount."[171] Similarly, Bruce Ackerman deemed the decision "a blatantly partisan act, without any legal basis whatsoever," which "betrayed the nation's trust in the rule of law."[172]

Some liberal scholars, however, recognized that hypocrisy ran both ways. For example, Sandy Levinson maintained that five conservative Republican Justices had engaged in "low" politics and asked:

> How can one take seriously the majority's claims that their award of the presidency to Bush is based on their deep concern for safeguarding the fundamental values of equality? This majority has been infamous in recent years for relent-

167. Erwin Chemerinsky, *The Self-Inflicted Wound*, 2001 Cal. Bus. J. 8.

168. Id. Specifically, Bush's claim that the proposed recount would lack equality could not be properly evaluated until after the recount had been completed and the state judges had ruled on his objections; indeed, Bush may have retained his lead, thereby obviating the need for decision. Id. Moreover, Bush lacked standing because he did not allege any individual discrimination against him, but rather raised the equal protection claims of Florida voters. Id. Thus, the Court issued an "impermissible advisory opinion." Id.

169. Id. at 9.

170. Id. Furthermore, Florida (and many other states) did have a uniform standard—the intent of the voter—which satisfied equal protection concerns. Id.

171. Id. See also Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 Notre Dame L. Rev. 1093 (2001) (amplifying the theme that the Court should not have intervened).

172. Bruce Ackerman, *The Court Packs Itself*, 12 Am. Prospect 48 (Feb. 12, 2001). Likewise, Professor Dershowitz accused the majority Justices of rendering a biased political decision that contradicted their own previous opinions (and the Court's precedent generally) on standing, equal protection, and federalism. See Alan M. Dershowitz, *Supreme Injustice* (Oxford U. Press, 2001). At the same time, however, he praised the Warren Court's expansion of constitutional rights, especially in electoral matters, without mentioning that those opinions also ignored the controlling law. See id. at 6, 70-71, 89, 119, 185-86. To his credit, however, Dershowitz acknowledged that liberals had sown the seeds of *Bush v. Gore* through their strategy of resolving political problems (like abortion) by relying on the Court to create new constitutional rights rather than engaging in the political process. Id. at 190-97.

> lessly defending states' rights against the invocation of national legal or constitutional norms.[173]

Yet Levinson also noted "[the] tension between the generally nationalist, equality-protecting positions taken by the dissenters and their esteem in *Bush v. Gore* for state autonomy and, concomitantly, for the different standards being applied in various county recounts."[174] Professor Issacharoff highlighted similar contradictions, but concluded that the Court should not have intervened because (1) government officials elected through a properly functioning majoritarian political process could have provided redress, and (2) the majority failed to articulate clear constitutional principles to support its decision.[175]

Conservative commentators such as Robert Bork derided Justices like Stevens and Ginsburg for their new-found commitment to federalism and to judicial avoidance of political morasses, given their record of imposing a liberal agenda instead of adhering to legal principles.[176] Judge Bork traced this approach to the 1950s and 1960s:

> During the era of the Warren Court, the contempt for law and the desire to make major policy were so blatant that even the court's supporters repeatedly warned that results reached with so little respect for craftsmanship and candor made the court vulnerable. We have learned that those failings, however egregious, have not lessened the power of the court to do what it wants. There is, unfortunately, no particular reason to believe that will change. Indeed, Earl Warren, the exemplar of lawless judges, is now celebrated as a great and humane jurist.[177]

Bork, however, failed to see *Bush v. Gore* as part of that Warren Court tradition, albeit serving conservative rather than liberal political ends. Rather, he claimed that the decision "was a valiant effort, legitimate in law, to rein in runaway political passions

---

173. Sanford Levinson, *The Return of Legal Realism*, 272 The Nation 8 (January 8, 2001).

174. Id. Perhaps the best example of liberal scholars providing a balanced and nuanced appraisal of *Bush* as an extension of the existing law governing elections, rather than as a partisan political decision, is Issacharoff, et al., *When Elections Go Bad* (cited in note 117).

175. Issacharoff, 68 U. Chi. L. Rev. at 637-41, 650-56 (cited in note 125).

176. Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 New Criterion 4, 8-11 (March, 2001) (citing as examples these Justices' opinions on abortion, school prayer, gay rights, and single-sex military schools).

177. Id. at 8.

and a lawless state court."[178] In Bork's view, however, only the concurring Justices identified the proper constitutional rationale—Article II, which applied specifically to presidential elections.[179] He recognized that the equal protection holding "raise[d] serious difficulties" because "similar disparities have always existed within states under our semi-chaotic election processes.... By raising that [inconsistency] to the level of a constitutional violation, the court federalized state election laws.... Ironically, several justices known for their concern about the independence of the states struck a blow against federalism."[180] Ultimately, however, Bork concluded that the end justified the means: "The court's choice was between an inadequate majority opinion and permitting the stealing of a presidential election."[181] Like Bork, Judge Posner conceded the weakness of the majority's legal analysis, especially under the Equal Protection Clause, but defended the decision as necessary to prevent a national crisis.[182] Richard Epstein wisely declined to endorse the Bork/Posner "constitutional emergency" justification.[183] Instead, he contended that the sole (and persuasive) rationale for the Court's intervention was to preserve the Florida Legislature's Article II power to direct the selection of electors, which the Florida Supreme Court had usurped through statutory "interpretations" that grossly deviated from the written election law.[184]

In short, the voluminous commentary on *Bush v. Gore* has mirrored the Court's ideological split. These political blinders

178. Id. at 11.
179. Id. at 5-7.
180. Id. at 5.
181. Id. at 6.
182. *The Triumph of Expedience,* Harper's 31, 31-34 (May 2001) ("*Triumph*"); see also Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Dispute and the Ensuing Litigation,* 2000 S. Ct. Rev. 1.
183. Professor Dershowitz has provided a convincing response: Resolution of the presidential election dispute on nonlegal grounds by the politically unaccountable Justices represents a greater crisis than its resolution by political officials pursuant to the Constitution. See Dershowitz, *Supreme Injustice* at 89-93, 130 (cited in note 172). He stressed that the Justices are not "'self-appointed national saviors' with a roving commission to save us from ourselves even if we have selected other institutions to do the job." Id. at. 90. Dershowitz's argument, however, applies with equal force to *Baker* and its progeny—cases he lauds. See id. at 6, 70-71, 89, 119, 185-86.
184. See 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); cf. Michael McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. Chi. L. Rev. 657, 660-77 (2001) (maintaining that both the equal protection holding and the concurrence's Article II analysis were legally sound, and rejecting the "constitutional crisis" rationale).

have caused legal scholars to miss a crucial point: *Bush* is *Baker v. Carr* in conservative garb.

III. A COMPARISON OF *BAKER* AND *BUSH*

A. SIMILARITIES

Baker and *Bush* are strikingly similar. A majority of Justices sought to resolve a perceived national electoral crisis that seemed insoluble by ordinary political means. In both cases, the Court abandoned the constraints of justiciability, federalism, and equal protection law and precedent.[185] Finally, both decisions featured acidic dissents containing nearly identical rhetoric. In *Baker*, Justice Frankfurter feared that the majority's

> [d]isregard of inherent limits in the effective exercise of the Court's "judicial Power".... may well impair the Court's.... authority—possessed of neither the purse nor the sword—[which] ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[186]

In *Bush*, Justice Breyer cited Frankfurter's disciple Alexander Bickel in arguing that the majority's decision

> runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure.... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.... [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation. [W]e have... [abandoned] self-restraint.[187]

Because *Baker* and *Bush* are cut from the same cloth, I reject the current liberal orthodoxy, which canonizes *Baker* and demonizes *Bush*. Nor can I agree with conservatives who applaud *Bush* while decrying the political excesses of the Warren Court that *Baker* epitomizes. Rather, I submit that true respect

185. See supra notes 20-71 and accompanying text (summarizing and criticizing *Baker*); supra notes 133-184 and accompanying text (examining *Bush*).

186. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

187. *Bush v. Gore*, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting).

for the rule of law compels the conclusion that both decisions were normatively wrong.[188]

Baker lacked support in the Constitution's text, history, and precedent. For several decades, the Court had dismissed all constitutional challenges to state apportionments on two alternative grounds: nonjusticiability under the Republican Form of Government Clause or equitable principles rooted in federalism. Furthermore, the Court had consistently interpreted the Equal Protection Clause as safeguarding the *civil* rights of individuals and minority groups, not the general *political* (*i.e.*, voting) rights of majorities.[189] More specifically, the Court had never suggested that equal protection requires representation based exclusively upon population, because doing so would have contradicted both the understanding of the Fourteenth Amendment's framers and ratifiers and America's practice since 1789. Justice Brennan simply whitewashed these seemingly insuperable political question and equal protection problems.

Instead, the *Baker* Court should have conceded that the urban voters' allegation—that Tennessee's apportionment statute overweighted rural votes—did not implicate equal protection, but rather the guarantee to each state of a Republican Form of Government.[190] Justice Brennan then should have acknowledged that *Luther v. Borden*[191] did not hold all Guarantee Clause complaints to be nonjusticiable, that the Court adjudicated many such claims until 1912, and that for fifty years it had misconstrued *Luther* and its progeny as creating a blanket political question bar.[192]

As in the *Luther* line of cases, however, the Court should have interpreted the Guarantee Clause with extraordinary deference to the political branches, who have primary responsibility for enforcing its provisions and should not be second-guessed except in the most egregious cases (such as approval of a state's

188. It would also be intellectually consistent to contend that both decisions were correct. I will leave that argument to someone else.

189. Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 753-54 (1994).

190. See Ely, *Democracy and Distrust* at 122 (cited in note 60). See also McConnell, 24 Harv. J. L. & Pub. Policy at 113-16 (cited in note 125) (arguing that the Court should evaluate electoral districting based upon the Guarantee Clause and accordingly should invalidate schemes that systemically prevent effective majority rule, as Tennessee's did).

191. 48 U.S. (7 How.) 1 (1849).

192. See supra note 9 and accompanying text.

establishment of martial law).[193] The Court therefore should have respected the conclusion of Congress and the President that state apportionment schemes based on interest-group and geographical representation (*e.g.*, favoring agricultural over urban areas) did not render their governments nonrepublican.[194] Although a "democratic" government might require representation based on equal population, a "republican" government does not, as the Senate and the Electoral College illustrate.[195]

In a nutshell, a Supreme Court disciplined by law would have rejected the constitutional claims presented in *Baker*. The same goes for *Bush v. Gore*.

The justiciability barriers in *Bush* were at least as formidable as those in *Baker*. As Bush was not a Florida voter, it is unclear why he had standing to allege that Florida's differential vote-counting standards violated his individual equal protection rights.[196] Moreover, the Constitution and implementing congressional legislation contemplate political rather than judicial resolution of disputes over presidential elections.[197] Initially, at the

193. In *Luther*, the Court concluded that Rhode Island's temporary imposition of martial law had not violated the Republican Form of Government Clause, but suggested that permanent martial law would. 48 U.S. (7 How.) at 45. Presumably, the Court could also invalidate as "nonrepublican" state attempts to set up a monarchy or a theocracy—possibilities seen as realistic at the time Article IV was ratified.

194. See supra notes 38-42, 45-50, 63-66 and accompanying text.

195. See supra notes 40, 45-48, 65-66 and accompanying text.

196. See, e.g., Dershowitz, *Supreme Injustice* at 77-81 (cited in note 172) (providing a detailed analysis of standing); Chemerinsky, 76 Notre Dame L. Rev. at 1097-1102 (cited in note 171); see also *United States v. Hays*, 515 U.S. 737, 742-47 (1995) (holding that Louisiana voters who did not live in a congressional district that they alleged had been racially gerrymandered lacked the individualized harm required for standing); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 472-90 (1996) (endorsing the Court's bedrock requirement that a plaintiff must show a personalized injury in order to challenge a constitutional provision like the Equal Protection Clause that protects individual rights). Third parties do not have standing to raise the claims of others, absent certain extraordinary circumstances (e.g., where the third party either lacks the ability to sue or enjoys a uniquely close relationship with the plaintiff). See Charles Alan Wright, *Law of Federal Courts* 79-82 (West Publishing Co., 5th ed. 1994) (describing the relevant cases). None of these exceptions applied to the relationship between Bush and the Florida voters.

197. See supra notes 155-157 and accompanying text. The Twelfth Amendment provides that the Vice President "shall, in the presence of the Senate and House of Representatives, open all the certificates [transmitted by the state electors] and the votes shall then be counted." It is not clear whether the Vice President or Congress should do the counting, although the latter has assumed this function. Furthermore, the Amendment could be read as imposing a mere nondiscretionary clerical responsibility to count the votes.

Nonetheless, Congress has long construed this Amendment, in conjunction with the Necessary and Proper Clause, as authorizing it to regulate such details as the electors' performance of their duties and the procedures for election contests. See James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27

state level, courts (as in Florida) usually have statutory jurisdiction over such controversies, and Article II arguably gives each Legislature power to review such judicial decisions and to appoint its own electors if it concludes that the courts ignored its pre-election statutory directives.[198] Next, Congress ultimately counts (and hence determines the validity of) each state's electoral votes.[199]

These layers of political scrutiny implicate three justiciability doctrines. First, as Bush did not exhaust his remedies in Florida or in Congress, his claim did not seem ripe for review.[200] Second, success in either of these venues would have mooted his case.[201] Third, under the political question doctrine, the Consti-

---

L. & Contemp. Probs. 495, 498-500 (1962) (citing the relevant constitutional and statutory provisions). This settled practice reflects a reasonable, albeit not inevitable, interpretation of the Constitution.

198. Article II, Section 1, Clause 2 authorizes the "Legislature" of "[e]ach State" to direct the "Manner" of "appoint[ing] . . . electors." Quoting *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), the Court interpreted this provision as a grant of "plenary power" which could be exercised at any time. *Bush v. Gore*, 531 U.S. 98, 104 (2000). Hence, the Florida Legislature may have had the authority to review its judiciary's decisions regarding the presidential election to ensure fidelity to its statutory commands, wholly independent of the United States Supreme Court's appellate jurisdiction over the same subject matter. See, e.g., John Yoo, *A Legislature's Duty*, Wall S. J. A24 (Dec. 4, 2000) (arguing that the Florida Legislature had the power and duty to appoint its state's 25 electors directly).

The majority's emphatic reaffirmation of *McPherson* is odd because its central premise—that the Constitution grants state legislatures absolute control over the selection of electors—has been undercut by *Baker* and its progeny, which limited state legislatures' power over apportionment that the Constitution seemed to make every bit as plenary as their power over presidential electors. See supra notes 20-50, 72-122 and accompanying text. The Warren Court justified such restrictions by articulating a meta-constitutional principle (found in Article I, § 2 and in the Fourteenth, Fifteenth, Seventeenth, and Nineteenth Amendments) that our democracy requires representation based on the equally weighted vote of each citizen. That precept cannot easily be reconciled with the *Bush* Court's recognition of a state legislature's authority to appoint presidential electors itself. See Issacharoff, et al., *When Elections Go Bad* at 105-06 (cited in note 117) (noting this tension).

199. See supra notes 156-157 and accompanying text.

200. See Pushaw, 81 Cornell L. Rev. at 493-97 (cited in note 196) (examining cases and scholarship on ripeness). Concededly, ripeness turns largely on a discretionary determination concerning "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, 148-49 (1967). The Justices might have concluded that this test had been met. First, the constitutional legal questions may have been deemed suitable for immediate decision because the Florida Supreme Court had issued its final interpretation of its state's law. Second, delay may have caused hardship by allowing the recount to continue and the winner to be announced, only to have the Court invalidate the outcome—or perhaps not to have had enough time to issue a judgment at all, given the tight deadlines for selecting presidential electors (with December 18 as the drop-dead date for ensuring that Congress would count Florida's electoral votes). Unfortunately, the Court did not explain why it found the case to be ripe.

201. See Pushaw, 81 Cornell L. Rev. at 490-93 (cited in note 196) (analyzing moot-

tution could have been interpreted as committing to Congress final authority to decide election disputes.[202] The Court thus had multiple grounds for declining judicial review, at least until the political process had run its course.[203]

Even putting aside these justiciability concerns, nothing in the Equal Protection Clause's language, history, or precedent prohibited inconsistencies within states in counting votes.[204] The

---

ness). Obviously, the possibility that an action may become moot (which always exists) does not deprive the Court of jurisdiction. Nonetheless, the Justices undoubtedly knew that the Florida Legislature had announced its intention to name its slate of electors for Bush, which would have mooted the case (although Gore might then have sued to challenge the Legislature's authority to act unilaterally). Conversely, unexpected failure in Florida (or in Congress) would have kept Bush's claims alive. He may have lost the opportunity to have them adjudicated, however, if Congress had rejected his arguments at a date too late to have permitted the Court to decide.

202. See, e.g., Issacharoff, et al., *When Elections Go Bad* at 61-62 (cited in note 117); Chemerinsky, 76 Notre Dame L. Rev. at 1105-09 (cited in note 171). Admittedly, *Baker v. Carr*, 369 U.S. 186 (1962), created a discretionary multi-factor test which brought many previously "political" questions within the purview of judicial review. See supra notes 25-26 and accompanying text (outlining *Baker*'s new approach); see also Pushaw, 81 Cornell L. Rev. at 498-99 (cited in note 196) (summarizing the post-*Baker* political question cases).

The Court, however, could have declined jurisdiction based on almost any of the *Baker* criteria, such as "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. An essay written long before *Bush*, and thus unbiased by political preferences, supports this conclusion. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 Mich. L. Rev. 1, 26-30 (1968) (arguing 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).

203. Cf. *Growe v. Emison*, 507 U.S. 25 (1993) (reaffirming that federal judges generally should defer their consideration until state proceedings concerning legislative apportionment have been completed).

204. Seven Justices accepted the equal protection rationale. See *Bush v. Gore*, 531 U.S. 98, 104-11 (2000) (*per curiam* opinion joined by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Thomas, JJ.); id. at 133-35 (Souter, J., dissenting); id. at 145 (Breyer, J., dissenting). But see Cass R. Sunstein, *Order Without Law*, 68 U. Chi. L. Rev. 737, 758, 763-64 (2001) (contending that this equal protection holding, although appealing as a potential avenue for expanding voting rights, had no basis in precedent or history and was not logically explained); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. Chi. L. Rev. 679, 684-85 (2001) (pointing out that all previous equal protection cases had involved a state's pre-election classification of voters based upon factors such as race, place of residence, wealth, or party).

The concurring Justices identified an additional constitutional offense: The Florida Supreme Court had violated Article II by changing its Legislature's prescribed certification deadline and its delegation of power to various state executive officials (such as the Secretary of State) and agencies (such as the county canvassing boards). Id. at 112-22 (Rehnquist, C.J., concurring), discussed supra notes 152-154 and accompanying text. It may well be that the Florida Justices' political leanings influenced their statutory construction and that other interpretations were more reasonable. Nonetheless, existing Supreme Court precedent mandated extreme deference to state court explications of state law as long as they had some plausible basis, and the Florida court's interpretation seemed to meet this exceedingly lenient test. See id. at 135-43 (Ginsburg, J., dissenting), discussed supra notes 163-164 and accompanying text; see also Harold J. Krent, *Judging*

Court's creation of a new equal protection right to be free from such discrepancies seems as specious as the *Baker* Court's assertion that this Clause requires apportionment based solely upon population.[205]

In sum, *Bush* is the conservative child of *Baker*. Both cases reached incorrect results through similarly defective reasoning.

B. DIFFERENCES

Critics on both ends of the political spectrum might reject my analogy because of seemingly major distinctions between *Baker* and *Bush*. Although I readily acknowledge certain differences, they have a negligible effect on my thesis.

1. The Conservative Response

Conservatives might argue that *Bush* is far less radical than *Baker* in terms of both its novelty and impact. *Baker* repudiated the traditional idea that the judiciary plays a limited role in our federal system—most importantly, that the justiciability doctrines impose barriers to judicial review and that federalism generally precludes federal judicial interference in internal state political matters. More specifically, *Baker*, *Gray*, and *Reynolds* reversed the Court's uniform precedent refusing to tamper with state apportionment decisions and its unbroken century-old understanding that the Equal Protection Clause did not apply to this area. Instead, *Baker* and its progeny authorized federal district courts to reconstruct state governments *qua* governments. These cases thereby inflicted a wound to federalism far more devastating than the judicial thrusts that struck down pieces of legislation produced by state governments on social, cultural, and moral issues (*e.g.*, contraception and crime) that had formerly been reserved to the states.[206]

Judging: The Problem of Secondguessing State Judges' Interpretation of State Law in Bush v. Gore, 29 Fla. St. U. L. Rev. 493 (2001) (setting forth this argument in exhaustive detail); Robert J. Pushaw, *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 Fla. St. U. L. Rev. 603, 616-19 (2001) (agreeing with this position).

205. These cases illustrate the more general danger of a textualist approach that ignores the Constitution's structure and history. See Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 B.Y. U. L. Rev. 847, 847-55.

206. See Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 113-19 (1999) (defending a classical Federalist theory of federalism that views uniformity as beneficial in commerce but det-

Baker, then, was a pathbreaking opinion that has had a pervasive, profound, and long-lasting impact. That is precisely why Chief Justice Warren deemed it "the most important decision" of his tenure.[207] By contrast, conservatives could claim that, although *Bush* made a big initial splash, its ripple effect should be comparatively small, for two reasons.

First, while *Baker* broke new ground, *Bush* trod a well-worn path. *Baker* set a "precedent" that the Justices could intervene to resolve political crises by superimposing their own political beliefs onto the Constitution through the creation of new equal protection principles. It is not a coincidence that the majority in *Bush* soothingly cited several Warren Court cases establishing the right to equal treatment in voting matters.[208] Moreover, because *Baker* refashioned the political question doctrine into a multi-factor "test" that is almost entirely discretionary,[209] the worst that can be said of the Rehnquist Court is that it stepped in imprudently, not unlawfully. In short, the very fact that *Baker* had already been decided makes *Bush* less objectionable.

---

rimental as to social, cultural, ideological, and moral issues).

207. See *The Warren Court: An Editorial Preface*, 67 Mich. L. Rev. 219, 220 (1968) (citing a statement by Chief Justice Warren). The watershed significance of *Baker* was not lost on Justices Frankfurter and Harlan, who wrote unusually long and vituperative dissents. See supra notes 34-50 and accompanying text.

208. See *Bush v. Gore*, 531 U.S. at 104-05 (citing, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533 (1964)). In fairness, I should point out that not all scholars have dismissed the majority's equal protection holding. For example, Professors Issacharoff, Karlan, and Pildes have characterized *Bush* as the third stage in the development of the constitutional law of elections. First, the Court struck down state statutes imposing exclusionary conditions on access to the ballot box, such as white skin color (e.g., *Herndon*) and poll taxes (e.g., *Harris*). Issacharoff, et al, *When Elections Go Bad* at 4, 7, 45, 47 (cited in note 117). Second, through the "one person, one vote" principle, the Court redesigned state legislatures to address how votes were aggregated to produce electoral outcomes. Id. at 4, 7, 45-47. Third, *Bush* "extend[ed] these doctrines to the micro-level of the actual operation of the election machinery" in a presidential contest. Id. at 47. *Bush* featured the same basic structure as those opinions, particularly in reaffirming that if state legislatures chose to allow popular election, they had to ensure equal protection. Id. at 44, 47.

Professor McConnell has contended that, although as an original matter the Court had little legal basis for extending the Fourteenth Amendment to voting rights, this jurisprudence is now firmly entrenched. McConnell, 68 U. Chi. L. Rev. at 663 (cited in note 185). He concludes that the *Bush* majority properly applied established equal protection principles in striking down the Florida Supreme Court's order, which had allowed canvassing boards to use inconsistent and arbitrary vote-counting rules that had been formulated for partisan political reasons. Id. at 659-73; see also John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. Chi. L. Rev. 775, 784-89 (2001) (arguing that federal judicial intervention into state electoral matters has become routine and that, more generally, the Rehnquist Court has taken an activist role in asserting its supreme power to interpret the Constitution in many crucial areas).

209. See supra notes 25-26 and accompanying text.

Considered from a purely political perspective, this argument has great force: What's good for the left-wing goose (*Baker*) should be good for the right-wing gander (*Bush*). Nonetheless, from a legal standpoint, conservatives should hesitate to make it because it contradicts their advocacy of traditional conceptions of adjudication and judicial restraint. Under their model, constitutional decisionmaking should involve identifying principles of law (found in the Constitution's text, history, and precedent) and applying them consistently across time—not creating an unprecedented equal protection "right" (to uniform standards in counting ballots) and suggesting that it will control only that case.[210] Similarly, champions of judicial self-discipline should not invoke the malleability of the justiciability doctrines to excuse the Court's intervention. On the contrary, restraint should have led the Justices to exercise the (admittedly vast) discretion allowed by those doctrines to avoid becoming entangled in the presidential election dispute.

Second, conservatives might predict that, unlike *Baker*, *Bush* will have a minimal future impact. Indeed, the Court admitted as much by confining its holding "to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[211] If by "the present circumstances" the majority meant presidential elections decided by razor-thin margins necessitating a recount in one state, then *Bush* will almost surely never rear its head again. Even if "the present circumstances" were construed to encompass all contested elections, however, the opinion focused narrowly on court-ordered recounts, not statutory differences among (and within) states concerning items such as voting machines, ballot designs, and the qualifications of canvassing board members.[212]

---

210. See *Bush v. Gore*, 531 U.S. at 109 (stressing that its holding was "limited to the present circumstances"); Dershowitz, *Supreme Injustice* at 77, 81-84 (cited in note 172) (noting that many commentators, including some conservatives, had criticized this aspect of the majority's opinion). I have elsewhere described in detail the classical understanding that courts should not make new law, but rather should ascertain and apply preexisting rules in light of precedent in order to ensure continuity and certainty. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 449-50, 472-79 (1994); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 741, 809, 827 (2001).

211. *Bush v. Gore*, 531 U.S. at 109.

212. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount [without] some assurance that the rudimentary requirements of equal treatment and fundamental fairness are

Concededly, *Bush*'s long-term doctrinal impact will be negligible compared to *Baker*'s. Again, however, true conservatives—who value the consistent judicial application of legal principles over time—should be alarmed by the Court's apparent caveat that its new Equal Protection Clause "law" will apply to that case alone. Moreover, despite this cautious language, *Bush*'s broad reading of that Clause may invite litigation over discrepancies in ballot format and counting—and hence lead to further judicial lawmaking adventures.

Finally, conservatives may contend that *Bush* dealt with the election of the President—a quintessentially national interest even though states run the election machinery[213]—whereas *Baker* involved the state's own legislature and implicated no genuine federal interest. This distinction has real bite. Nonetheless, for better or worse, our Constitution leaves the selection of presidential electors largely to state governments.[214] Thus, *Bush* did infringe upon state control over elections, albeit not as egregiously as *Baker*.

In conclusion, *Bush* admittedly cannot match *Baker* for novelty, impact, and intrusiveness. None of these factors, however, undermines my theme that the Court's process of deciding these two cases was remarkably similar—and similarly unconservative.

2. The Liberal Critique

Liberals might highlight two key distinctions. First, *Baker* created constitutional electoral law that the Court intended to (and did) follow in later cases, while *Bush* was "limited to the present circumstances."[215] This argument is powerful in con-

---

satisfied.

Id.

213. The concurring Justices made precisely this point. See id. at 112-15 (Rehnquist, C.J., concurring).

214. For that reason, the Warren Court apportionment cases most directly on point are those involving *state* districting that affected *federal* congressional elections. See *Wesberry v. Sanders*, 376 U.S. 1 (1964) (House of Representatives) and *Gray v. Sanders*, 372 U.S. 368 (1963) (Senate), discussed supra notes 72-96 and accompanying text. See also Issacharoff, et al., *When Elections Go Bad* at 4-7, 24-25, 62, 75 (cited in note 117) (recognizing the direct federal constitutional and statutory commands that govern presidential elections and the unique national interest involved, but noting that the Constitution still grants the states control over most of the pertinent election procedures–including the resolution of disputes between candidates).

215. *Bush v. Gore*, 531 U.S. at 109. See Auerbach, 1964 S. Ct. Rev. at 70-71 (cited in note 52) (emphasizing that "one person, one vote" was a true constitutional principle "for an expanding future," not a rule for "the passing hour") (quoting Benjamin N. Car-

trasting *Bush* to several apportionment cases, but not *Baker* itself. There the majority held that Tennessee voters had a justiciable equal protection claim but studiously avoided explaining how that Clause had been violated, hoping that the threat of discretionary reapportionment by federal judges would compel legislatures to act on their own.[216] Only when coercion failed did the Court articulate a legal principle for legislative representation—one person, one vote.[217]

Nonetheless, the Court has adhered to that maxim ever since, in contrast to its apparent desire to restrict the *Bush* holding to its facts. This difference, however, has no bearing on my thesis: that both the Warren and Rehnquist Courts manufactured new equal protection law, regardless of how they intended to apply it in the future.[218]

Second, liberals might maintain that the Court in *Baker* sought to further democracy and vindicate individual voting rights, whereas in *Bush* it thwarted these goals.[219] I have no rea-

---

dozo, *The Nature of the Judicial Process* 83 (Yale U. Press, 1921)).

216. See supra notes 22-50 and accompanying text. *Baker* thus constituted the worst kind of advisory opinion—one that provided no legal advice. See 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) (book review) (discussing this practice).

The *Baker* Court's pressure tactics seem at least as offensive as the *Bush* Court's "one-shot deal" approach.

217. See supra notes 72-122 and accompanying text (describing the evolution of this standard).

218. Professor Issacharoff unfavorably contrasts *Bush* with the reapportionment cases, which he deems a successful intervention into the political arena because the Court set forth a clear constitutional standard of "one person, one vote." Issacharoff, 68 U. Chi. L. Rev. at 640-41, 656 (cited in note 125). I am not persuaded, however, that a fabricated constitutional doctrine becomes legitimate merely because it is crystallized in a simplistic slogan. For instance, I do not think that *Bush* would be more defensible if the Court had coined a "one recount, one standard" catch-phrase to govern judicial resolution of contested elections.

219. See, e.g., Dershowitz, *Supreme Injustice* at 70-75 (cited in note 172) (deeming "curious" the majority's attempt to justify its exclusion of votes by invoking Warren Court cases that increased the number of voters and that ensured all votes would be weighted equally and counted correctly); Pamela S. Karlan, *The Court Casts Its Vote*, N.Y. Times A31 (Dec. 11, 2000), reprinted in E.J. Dionne, Jr. and William Kristol, eds., Bush v. Gore: *The Court Cases and Commentary* 262-63 (Brookings Institution Press, 2001) ("*Commentary*") (arguing that the Court in *Bush* (1) risked its reputation as a protector of voting rights by halting the recount of lawful votes, and (2) should not have intervened because the political process was actively trying to resolve the problem—unlike the situation in the 1960s, when the Court had to step in because legislatures would not reform themselves); Issacharoff, 68 U. Chi. L. Rev. at 638-41, 650-56 (cited in note 125) (to similar effect). But see Dionne and Kristol, eds., *Commentary* at 284-87 (reproducing an essay by Richard Epstein titled *Constitutional Crash Landing* and originally published in the Dec. 13, 2000 edition of the National Review Online contending that voters did not need Court-ordered reapportionment to participate equally in the election, but simply had to follow the directions on the ballot).

son to doubt that the Warren Court sincerely thought it was promoting democracy and the right to suffrage by mandating legislative representation based upon equal population. Yet I also have no basis for questioning the good faith of the Rehnquist Court's belief that it was saving the democratic process and upholding the integrity of the votes cast. After all, the majority cited undisputed evidence that certain county canvassing board members had repeatedly altered their standards for determining whether a ballot had been legally marked,[220] for the apparent (some would say transparent) partisan purpose of trying to help Al Gore garner more votes.[221] The Justices also must have been suspicious that the Florida Supreme Court, composed entirely of Democrats, decided nearly every significant legal issue in favor of Gore, the Democratic candidate.[222] Thus, in their

220. *Bush v. Gore*, 531 U.S. at 106-08.

221. Millions of Americans watching the hand recounts on television concluded that the changing standards reflected partisan motives, especially because it occurred in heavily Democratic counties and a more lenient standard (e.g., counting ballots that had been indented but not dislodged) would pick up votes that had not been detected by machines, which had twice given Bush the edge. Indeed, even fair-minded Democrats acknowledged this problem. See, e.g., Alan Brinkley, *What Now?*, Slate (Nov. 22, 2000), reprinted in *Commentary* at 195 (cited in note 219) ("[H]aving rejected that standard [i.e., allowing dimpled chads] earlier in the counting, it seems to me politically unwise, to say the least, to change the standard simply because the original standard wasn't producing enough Gore votes. That does seem calculating and unfair to me, even as a Democrat and a Gore supporter.").

The Justices did not mention the unpleasant possibility of naked partisanship, but one can safely assume that they were aware of it, given the relentless media coverage.

222. See, e.g., *Triumph* at 36 (cited in note 182) ("The Florida Supreme Court knew, of course, exactly what kind of recount procedures to adopt in order to maximize the likelihood that Gore would overtake Bush's lead.") (quoting Richard Posner); Stuart Taylor, Jr., *Why the Florida Recount Was Egregiously One-Sided*, Nat'l Journal 3932-33 (Dec. 23, 2000), reprinted in *Commentary* at 332-36 (cited in note 219). This suspicion of political bias likely explains the unusual conclusion of Chief Justice Rehnquist and Justices Scalia and Thomas that Florida's high court had changed—not merely interpreted—its state's election statutes. See *Bush v. Gore*, 531 U.S. at 116-20 (Rehnquist, C.J., concurring), discussed supra notes 151-154 and accompanying text. Although neither the concurring nor the *per curiam* opinion contains a direct accusation of partisanship, Justice Stevens assailed the majority 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." See id. at 128 (Stevens, J., dissenting).

When judges enter the political thicket, they must be politically savvy. An example is the Court's unanimous decision to decline review of the Florida Supreme Court's initial judgment against Bush because of uncertainty over whether the state court had considered the relevant federal constitutional and statutory provisions. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (*per curiam*). Three Florida Justices read between the lines and would have accepted this implicit invitation to save face by holding for Bush. See *Gore v. Harris*, 772 So. 2d 1243, 1262-70 (Wells, C.J., dissenting); id. at 1270-73 (Harding and Shaw, JJ., dissenting). Their four colleagues, however, issued another opinion that seemed almost designed to strike the Supreme Court's conservative Republican Justices as aggressively pro-Gore—for instance, by accepting 215 net Gore votes in Palm Beach County submitted after the Florida Supreme Court's own Novem-

minds doing nothing may have enabled one state's Democratic partisans to bend (or perhaps break) the law to dictate the outcome of a presidential election. This prospect may have struck the majority as worse than exposing themselves to the charge that they decided the case to ensure the victory of the Republican candidate, George Bush.[223]

Of course, it could well be that (1) the Justices' perceptions were shaped by their own political or ideological biases,[224] and (2) the most accurate result would have been yielded by a manual recount under a general "intent of the voter" standard, subject to review by a judge to reconcile any discrepancies.[225] But it is difficult for liberals to attack the Court on this score while simultaneously lauding *Baker*, which placed blind faith in the subjective political instincts of a majority of Justices about what will best serve democracy and protect voting rights.[226] If *Baker* is legitimate as a matter of law, then it should make no difference

---

ber 26 deadline. See id. at 1260. Considered from a raw political standpoint, these Florida Justices displayed naiveté in failing to realize (or to care) that their decision would prompt a reversal on the merits.

223. See McConnell, 68 U. Chi. L. Rev. at 659 (cited in note 185) (making this point). The Justices' knowledge that their judgment would effectively result in Bush's election contrasts with *Baker* and its progeny, which established general standards that did not benefit any particular candidate or party. The Warren Court likely understood, however, that its opinion would greatly increase the voting strength of liberals.

The Rehnquist Court's dilemma was hardly unique. In post-election disputes, all government actors (including judges) realize that their decisions are outcome-determinative. See Issacharoff, et al., *When Elections Go Bad* at 3 (cited in note 117). Not surprisingly, political officials continue to act in a partisan manner when given the chance to interpret (or even alter) election laws. Id. Courts must "act with tremendous circumspection" because their integrity may be threatened by the political impact of any potential course of action. Id. Yet the failure of judges to intervene could undermine the legitimacy of the political process itself. Id. Thus, the Court was in a classic "damned if you do, damned if you don't" situation.

224. This theory does not explain, however, why two of the Court's reliable liberals on constitutional issues, Justices Breyer (a Democrat) and Souter (a Republican), joined the majority's equal protection holding. Moreover, a straight party-line vote would have aligned both Souter and Justice Stevens (a Republican) with the majority on every issue.

225. See *Bush v. Gore*, 531 U.S. at 124-25 (Stevens, J., dissenting) (stressing that the Florida Supreme Court's order establishing such a process was constitutionally adequate).

226. Professor Sunstein, a liberal supporter of *Baker*, has argued that the Court in *Bush* had a reasonable basis for concluding that its decision was necessary to restore order and avert a constitutional crisis, even if its legal reasoning was weak. Sunstein, 68 U. Chi. L. Rev. at 758-59, 768-69 (cited in note 204). Although I applaud Sunstein's even-handedness, I reject the "constitutional emergency" justification. See supra note 182. For similar reasons, I cannot accept Professor Issacharoff's claim that *Baker*, unlike *Bush*, involved a true electoral crisis because the political avenues of redress had been closed. See Issacharoff, 68 U. Chi. L. Rev. at 638-41, 650-56 (cited in note 125). The reapportionment cases leave entirely to the Court's discretion the determination of whether the political process has malfunctioned and a constitutional emergency has arisen of sufficient magnitude to warrant intervention.

whether its application produces a liberal or conservative political result.

IV. CONCLUSION

The Justices who decided *Baker v. Carr* undoubtedly had pure motives. But the road to hell is paved with good intentions. Legal giants like Justice Harlan and Robert McCloskey warned that the *Baker* Court's adherence to political dogma (no matter how noble) rather than legal principles would have dangerous consequences.

They were right, as the Warren Court inadvertently laid the groundwork for *Bush v. Gore*. Both the Court and legal scholars should recognize that *Baker* and *Bush* are equally pernicious to a constitutional regime based upon the rule of law.