BUSH v. GORE'S LEGACY: MANIPULATING JUSTICIABILITY DOCTRINES IN ELECTION CASES

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INTRODUCTION

Cases over the past quarter century have confirmed what *Bush v. Gore*[1] illustrated: Courts manipulate the malleable justiciability doctrines depending on their eagerness to adjudicate matters relevant to democracy. The Supreme Court developed these doctrines starting in the 1940s and asserted that Article III and separation of powers had always required them.

Most justiciability decisions in election-related cases involve the political question doctrine (PQD),[2] which distinguishes judicially reviewable legal issues from those that must be resolved exclusively by political officials.[3] Other precedent concerns standing,[4] which requires plaintiffs to show a particularized "injury in fact" caused by the defendant that is likely to be judicially redressed.[5] Finally, courts consider whether an election case is ripe (i.e., sufficiently developed factually and legally) or moot (if the parties no longer have a stake in the outcome).[6]

The Warren Court began the selective deployment of justiciability in *Baker v. Carr*[7] with two holdings. First, urban voters had standing to claim that their state had violated the Equal Protection Clause (EPC) by malapportioning its legislative districts to favor rural areas,[8]

1. 531 U.S. 98 (2000).

2. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684 (2019) (overruling established precedent and holding that partisan gerrymandering was a political question). *See also infra* notes 467-484 and accompanying text.

3. *See infra* Section II.C.1.

4. *See* Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (concluding that Texas lacked standing to claim that Pennsylvania, by changing its legislature's election rules to benefit Democratic candidates in the 2020 election, violated the Constitution by diluting Texas's presidential electoral votes). *See also infra* notes 539-543 (analyzing this case).

5. *See infra* Section IV.B.

6. *See, e.g.*, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (dismissing as moot the Party's federal constitutional challenge to a state supreme court's extension of the statutory deadline for mail-in ballots, even though the case had become moot because the Court had refused to consider the claim before the November 2020 election when it was ripe and instead waited to rule until after Joseph Biden had been inaugurated). *See also infra* Section VI.B.1 (critiquing *Degraffenreid*); *infra* Sections II.C.2, IV.B, VI.A.1 (summarizing ripeness and mootness).

7. 369 U.S. 186 (1962).

8. *Id.* at 204-08.

contrary to the "one person, one vote" principle.[9] Second, the PQD did not bar the suit, based on the application of a new test that gave judges discretion to weigh six vague factors.[10]

Baker furthered the liberal Justices' ideology but lacked a credible legal basis. Initially, the EPC protects *civil* rights, not *political* ones.[11] As the Clause does not grant voters a right to a legislature allocated equally by population, they could not have standing to enforce any such "right."[12] Furthermore, bedrock precedent had established that legislative apportionment was a political question that the Constitution reserved to the states.[13] Despite such problems, the Court from 1963 to 1999 adjudicated many issues that would previously have been deemed nonjusticiable, including every constitutional challenge to electoral matters.[14]

This precedent should have made it unsurprising that five conservative Republican Justices in *Bush v. Gore*[15] decided the contested 2000 presidential election. Initially, they disregarded several justiciability issues, most obviously that such disputes raised political questions that the Constitution left for resolution to the states initially and Congress ultimately.[16] The Court then articulated a novel EPC rule: In presidential election recounts, state courts must provide a specific, uniform standard to determine which ballots were valid.[17] Because Florida had failed to do so, the Court stopped the recount, which resulted in Republican candidate George W. Bush receiving that state's decisive twenty-five electoral votes.[18] As in *Baker*, the majority ignored justiciability constraints and discovered a new EPC law to achieve a political and ideological goal, this time a conservative one.[19]

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9. The Court limited its holding to the justiciability issues. *Id.* at 226. It formulated the "one person, one vote" rule shortly thereafter. *See infra* Section IV.A.

10. *See Baker*, 369 U.S. at 208-37. For example, two criteria are whether a question (1) can be resolved through "judicially discoverable and manageable standards" or (2) would require a "policy determination." *Id.* at 217. But these factors depend on judges' willingness to find novel standards in the Constitution and to impose their policy preferences—as the Warren Court did routinely, including in *Baker*. *See infra* notes 215-221, 243-294 and accompanying text.

11. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753-54 (1994).

12. *See infra* notes 210-212 and accompanying text.

13. *See infra* notes 163-174 and accompanying text.

14. *See infra* Section IV.A.

15. 531 U.S. 98 (2000) (per curiam).

16. *See infra* notes 373-387 and accompanying text.

17. *Bush*, 531 U.S. at 103-08.

18. *See infra* text accompanying notes 345, 351-353.

19. I developed this thesis in Robert J. Pushaw, Jr., Bush v. Gore: *Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359 (2001) [hereinafter Pushaw, *Conservative Mirror*].

Nonetheless, the Democratic Party and its media allies relentlessly attacked the Republican Justices as partisan hacks, which likely explains why the Court has never again intervened *after* a presidential election. For example, in the 2020 race, it invoked justiciability doctrines to decline jurisdiction in several cases in which Republican Donald Trump alleged voting irregularities that favored Democrat Joseph Biden.[20] However, the Court has often decided important legal questions *before* elections that affected the outcome, such as holding that states could not exclude Trump from ballots in 2024.[21] Moreover, the Court has made puzzling distinctions about which issues concerning democracy are justiciable. Most notably, in *Rucho v. Common Cause*,[22] a majority deemed partisan gerrymandering a political question, thereby overturning several prior cases and subverting *Baker*'s rationale that all voters should be treated equally.[23]

Lower federal courts and state judges have followed the Court's lead by arbitrarily invoking justiciability doctrines—and if they reach the merits, by applying vague constitutional standards to override clear provisions in election-related statutes.[24] Adjudication of election cases has become routine and has recently received legislative support.[25]

Proponents of judicial review contend that courts are best suited to settle electoral matters because they have two advantages over political actors.[26] First, judges are impartial and hence in a unique position to reinforce democracy by preventing incumbents from restricting the political process (e.g., through malapportionment, gerrymandering, and restricting voting access) to entrench themselves and their parties.[27] Second, judges are qualified experts who (a) find facts through established rules of procedure and evidence, and (b) apply legal principles to the facts.

Those justifications are not entirely persuasive. Concededly, Article III guarantees federal judges life tenure and non-reducible compensation to insulate them from direct political pressure.[28] But that neutrality is weakened (especially in the public's mind) when they become embroiled in electoral controversies. The losers naturally suspect that

20. *See infra* Section VI.B.1.

21. *See* Trump v. Anderson, 601 U.S. 100 (2024). See also *infra* Section VI.B.2.(b) for a discussion of the case.

22. 588 U.S. 684 (2019).

23. *See id.* at 689-721.

24. *See infra* notes 501, 504, 508, 523, 557, 612-613 and accompanying text.

25. *See* Electoral Count Reform and Presidential Transition Improvement Act of 2022, 3 U.S.C. § 5 (endorsing federal court resolution of presidential election disputes).

26. The following two paragraphs will be fleshed out *infra* Section VII.B.

27. Several Justices in *Baker* emphasized this point. *See infra* notes 190, 198 and accompanying text. For a famous development of this theme, see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

28. U.S. CONST. art. III, § 1.

judges who rule against them are politically biased. Furthermore, generalist Article III judges—particularly the current Justices, who have no electoral experience—likely know less about election law and policy than political officials. Moreover, in election cases, the Court has distorted jurisdictional and procedural rules and developed a constitutional "law" of democracy that consists of mushy standards.

The Constitution leaves elections primarily to states, which can delegate resolution of electoral disputes to their courts. However, state judges are rarely disinterested or especially skilled legal analysts. Most states select judges through some form of election—either direct voting or gubernatorial appointment followed by a "yes/no" retention vote or possible reappointment. Therefore, state judges are democratically accountable for their decisions, including those pertaining to elections. But those judges are beholden to their political and financial supporters, which creates bias (or its appearance). Furthermore, judges' low pay often makes financially successful attorneys reluctant to seek such positions. Paradoxically, however, state judges' credibility depends significantly on the public's perception (however misguided) that they are impartial and possess superior legal ability.

Bush v. Gore illustrates the problems of bias and competence.[29] The Florida Supreme Court, dominated by Democrats, twisted state law to rule in favor of Democrat Al Gore. Then five conservative Republican U.S. Justices creatively interpreted federal jurisdictional and substantive law to hand the presidency to Bush, the Republican candidate. Most Americans believed that politics had influenced the result. This lack of confidence in the Court's legitimacy as an objective legal tribunal has bled over into its other major constitutional decisions.

The foregoing analysis illuminates why the Constitution, properly understood, commits almost all election disputes for resolution by political officials who have superior institutional competence to do so and can be held directly responsible.[30] *Baker* upended the constitutional design, and *Bush* exacerbated the problem. The majority of current Justices, professed originalists, should effectuate the Constitution's text in light of its structure, political theory, original understanding, and implementing practice and precedent.[31]

The Constitution's original approach to justiciability, used for over 150 years, had four elements.[32] First, federal courts exercised Article III "judicial power" to render a final judgment by applying the law to the facts in a litigated "Case," so they could not give political officials abstract legal advice. Second, "judicial power" presumptively extended

29. I examine this case *infra* Part V.

30. *See infra* Sections II.A, III.C, VII.

31. *See infra* Part VII.

32. *See infra* Part II (providing massive support for the propositions in the following paragraph).

to "all Cases . . . arising under the Constitution," unless its provisions as historically understood left a legal question for final resolution by political officials (such as military affairs). *Baker* abandoned this PQD and substituted a subjective multi-factor inquiry. Third, plaintiffs had standing if a law gave them an interest that could be vindicated in a recognized judicial form. It did not matter if a party had suffered an "injury in fact" inflicted by an adverse defendant. Fourth, Article III did not mandate dismissing moot cases. Rather, courts had discretion to decide them if they presented issues of great public importance. Finally, ripeness did not exist.

As applied to cases involving democratic institutions and procedures, the PQD was the key justiciability doctrine, and it generally required courts to abstain. Initially, everyone understood that the Constitution preserved each state's existing exclusive power over all electoral matters concerning state offices.[33] Furthermore, the Constitution provides that states' laws would apply to elections to the U.S. House of Representatives, Senate, and Presidency, subject to oversight and alteration by Congress alone.[34] The only relevant changes were the Fifteenth Amendment (1869) and Nineteenth Amendment (1920), which prohibited states from abridging the right to vote on account of race or sex—rights that were judicially enforceable. As long as states granted black and female voters equal ballot access, however, Congress retained exclusive power to review all other state election laws.

In the 173 years before *Baker*, government officials faithfully implemented the constitutional design.[35] Federal election disputes were resolved initially by state officials and finally by Congress. The Court treated these political officials' determinations and state decisions on their internal electoral matters as political questions, absent intentional race or gender discrimination in voting. Those exceptions were later extended to include voting discrimination against the poor (1964's Twenty-fourth Amendment) and those who are eighteen or older (1971's Twenty-sixth Amendment), as well as Warren Court-created protections for First Amendment freedom of expression and association. But even these specified justiciable cases should be subject to deferential judicial review that respects the political process, which necessarily entails imposing reasonable limits on the right to vote and related election details.[36] Until *Baker*, the Court correctly

33. *See infra* Section I.A.1 and notes 202-209, 263 and accompanying text.

34. *See infra* Section I.A.

35. *See infra* Part I and Section II.C (describing this history).

36. For example, plaintiffs who claim that apportionment of state legislatures or congressional districts abridges the right to vote based on race, ethnicity, or wealth should bear the burden of proving that government officials intended that result, as contrasted with effects incidental to the necessary balancing of myriad factors (e.g., political, economic, social, geographical, historical, and practical). That approach should also be applied to similar attacks on voter ID and mail-in ballot deadlines, which serve the government's strong interest in combating fraud. Likewise, courts should be skeptical of First Amendment challenges to

rejected plaintiffs' standing under the EPC to challenge electoral rules. And it never invoked ripeness or mootness in this context.

Returning to the traditional constitutional approach might sound quixotic,[37] but certain developments could induce change. Most importantly, the Court's holding in *Rucho* that partisan gerrymandering is a political question cannot be reconciled with *Baker*'s rationale that only Article III courts can ensure that voters in a state are treated equally.[38] Furthermore, the Justices' concern with eroding public trust in the Court and judges as apolitical legal decision-makers might be alleviated, in part, if they stopped intervening in partisan politics.

The foregoing points will be elaborated in a seven-part analysis. Part I will describe the Constitution's framework for elections. Part II will summarize the original and longstanding understanding of justiciability. Part III will explain how the *Baker* Court distorted standing and the PQD to justify its intervention in elections. Part IV will describe how the Court after 1962 continued to ignore justiciability concerns in adjudicating political disputes. Part V will maintain that the Court in *Bush* starkly revealed the folly of judicial interference in partisan political matters. Part VI will examine key cases after *Bush* in which the Court manipulated justiciability doctrines depending on the Justices' desire to resolve election-related matters. Part VII will argue that the Court should repudiate *Baker* and severely limit the federal judiciary's involvement in electoral politics.[39]

I. THE CONSTITUTION'S ELECTION PROVISIONS AND THEIR IMPLEMENTATION

A. The Constitutional Framework

The Framers kept existing state election laws intact. However, the Constitution provides that such state rules would be subject to congressional oversight when applied to the House of Representatives, Senate, and Presidency.

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limitations on campaign contributions (designed to reduce corruption) and false campaign statements shortly before an election (aimed at preventing voter confusion). *See infra* notes 276-278, 408 and accompanying text and Part VII.

37. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 2, 9-10, 13 (2003) (contending that *Baker* will never be overruled, so debate should focus not on whether courts should decide election cases, but how they should do so).

38. Partisan gerrymandering technically complies with *Baker* as long as each district's allocated legislative seats are based on population, but votes for the minority party in each gerrymandered district are effectively worthless. *See infra* notes 279-282 and accompanying text.

39. My area of expertise has long been justiciability. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 500-01 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) [hereinafter Pushaw, *Case/Controversy*]. Thus, my analysis focuses on the application of the justiciability doctrines in election cases, not substantive Election Law.

1. Congressional Elections

Article I, Section 2, Clause 1 requires that members of the House be "chosen . . . by the People of the several States," with voter eligibility determined in each state. Clause 3 authorizes Congress, every ten years, to "apportion[] [Representatives] among the several States" based on population, but each state was entitled to "at least one Representative" and the total number was capped at one for every 30,000 people—exceptions that gave sparsely populated states more electoral power. Article I, Section 3 directs that each state's two Senators be selected by its Legislature (changed by the Seventeenth Amendment in 1913 to popular election). Section 5 guarantees that each chamber "shall be the Judge of the Elections, Returns, and Qualifications of its own Members."

Most importantly, Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Hamilton argued that there were "only three ways" that power over federal elections could be assigned: "wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former."[40] The Framers chose the third option to preserve state autonomy but allow Congress to intervene if necessary to ensure that states did not abuse their power by unreasonably infringing voting rights.[41] Hamilton found it obvious that a Constitution that created the "National Government" would not "leave [its] existence . . . entirely at the[ ] mercy" of State Legislatures—and that, conversely, the Constitution would not "empower[] the United States to regulate the elections for the particular States."[42] Significantly, Hamilton did not consider federal judicial review as (1) a fourth way to allocate power over federal elections, or (2) ever appropriate in purely state elections. Hamilton's position had been foreshadowed at the Convention by Madison.[43]

In sum, Article I exclusively authorized Congress to apportion the House of Representatives, oversee state election procedures for federal

40. THE FEDERALIST NO. 59, at 398-99 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

41. *Id.* at 399.

42. *Id.*

43. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240-41 (Max Farrand ed., 1911) (arguing that (1) Congress must ultimately control federal elections because state legislatures might sometimes abuse their power, and (2) it would be as improper to give states final authority over federal elections as it would be to give Congress power over elections to state legislatures).

legislators, and determine its membership.[44] The Court adhered to this understanding for 173 years.[45]

2. Presidential Elections

Article II, Section 1 vests "executive power" in a President selected through a process that emerged after extended debate at the Convention.[46] Clause 2 provides that, on Election Day (the first Tuesday in November), "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" equal to the total of the state's Senators and Representatives.[47] Congress determined the time of selecting the Electors and the day they had to vote.[48] Clause 3 provided that (1) on that date, each elector would cast two votes (with no distinction made between President and Vice President), and (2) the electors would transmit a certified list of their votes (with the number of votes each candidate received) to the Senate President, who would open the certificates and count the ballots in Congress's presence.[49] Congress would sometimes have to determine the validity of votes if a dispute arose as to whether an elector had been duly appointed or had properly voted.[50] The candidate who received a majority of votes would become President, but if no one had a majority, the House would choose the President.[51]

In short, the method for electing the President entrusted discretion initially to state legislatures and electors and finally to Congress,[52] and judicial involvement "was out of the question," as Madison said.[53] Three contested presidential elections in the nineteenth century manifested this understanding.

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44. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8-9 (1959) (citing Congress's exercise of these powers as the most obvious political questions).

45. *See infra* Section II.C.

46. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 277-86 (2002) (thoroughly examining Article II's text and drafting history).

47. U.S. CONST. art. II, § 1, cl. 2.

48. *Id.* cl. 4.

49. *Id.* cl. 3.

50. *See* Barkow, *supra* note 46, at 278-80, 284 (citing numerous supporting historical sources).

51. U.S. CONST. art. II, § 1, cl. 3.

52. The Framers granted power to appoint electors to state legislatures rather than Congress because those legislatures would be less likely to band together to extract promises from presidential candidates, more attuned to state concerns, and more directly accountable. *See* Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493, 509-11 (2001). As a backstop, however, the Framers authorized Congress to ensure the integrity of the state's appointment of electors and their casting of votes.

53. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 43, at 109.

First, the 1800 election pitted incumbent President John Adams and his running mate Charles Pinckney against the Democratic-Republican nominees, Thomas Jefferson and Aaron Burr.[54] Jefferson and Burr each received seventy-three electoral votes, more than the seventy needed to win.[55] The House of Representatives, after thirty-five ballots, chose Jefferson as President.[56] No one thought to resolve this deadlock through litigation.[57] To prevent a recurrence of the 1800 scenario, the Twelfth Amendment provided that electors would cast one vote for President and one for Vice President.

Second, in 1824, Andrew Jackson won the most popular and electoral votes, but no candidate received a majority in the Electoral College.[58] The House decided the election for John Quincy Adams.[59] Again, it did not occur to either side to ask federal courts to intervene.

Third, in 1876, Democratic candidate Samuel Tilden won a majority of the popular vote and 184 electoral votes—one short of the 185 needed to prevail.[60] Republican Rutherford Hayes received 165 electoral votes, and 20 votes in Oregon, Florida, South Carolina, and Louisiana were contested as fraudulent or rendered in violation of state law.[61] Congress struggled to resolve the matter.[62]

To settle the dispute, Congress on January 29, 1877 created an Electoral Commission, consisting of ten congressmen (five from each party) and five Justices (two Republicans and two Democrats, who would select the fifth member).[63] These Justices favored their colleague David Davis (an independent), but the Illinois Legislature appointed him to the Senate, and he resigned from the Court.[64] The four Justices replaced Davis with Joseph Bradley, who they believed was the most independent of the remaining Justices, all Republicans.[65] Shortly thereafter, the Commission, on an 8-7 party-line vote, awarded

54. The definitive history is EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN (2007).

55. *Id.* at 239-43.

56. *Id.* at 243-70.

57. Indeed, in debates months before the 1800 election, the Senate and House had agreed that Congress—not federal courts—must resolve disputes over the validity of electoral votes. *See* Barkow, *supra* note 46, at 286 (citing legislative history).

58. *See* DAVID P. CALLAHAN, THE POLITICS OF CORRUPTION: THE ELECTION OF 1824 AND THE MAKING OF PRESIDENTS IN JACKSONIAN AMERICA 182-83 (2022).

59. *Id.* at 211.

60. *See Bush v. Gore*, 531 U.S. 98, 156-57 (2000) (Breyer, J., dissenting) (summarizing the Hayes-Tilden contest).

61. *See* KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION 203, 210-31 (1973).

62. Congress assumed that Article II authorized it to decide which electoral votes to count. Congress rejected proposals to delegate this power to the Court. *See* Barkow, *supra* note 46, at 288-89.

63. *See id.* at 289.

64. *See id.* at 289-90.

65. *See id.* at 290.

all twenty contested votes to Hayes, giving him a one-vote margin of victory.[66]

Two points deserve emphasis. First, neither the candidates nor Congress litigated the election dispute in court. Rather, Congress asked the Justices to serve as commissioners, not judges. Second, that service compromised their reputation for impartiality, as all the Justices voted for their party's candidate.[67] Democrats vitriolically attacked Bradley's integrity. In short,

> [T]he participation in the work of the electoral commission by five Justices . . . did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.[68]

B. The Electoral Count Act

Responding to the Hayes-Tilden crisis and tight elections in 1880 and 1884, Congress abandoned its *ad hoc* approach and enacted the Electoral Count Act of 1887 (ECA) to regulate voting.[69] The first section required each state's electors to meet on the second Monday in January. Section 2 provided that a state's "final determination" of any controversy concerning the appointment of its electors "by judicial or other methods or procedures" that was (1) made pursuant to a state law enacted before Election Day and (2) rendered "at least six days before the time fixed for the meeting of electors" would be "conclusive" as to counting the state's electoral votes.[70] Section 3 directed each state's governor, "as soon as practicable after the conclusion of the appointment of electors," to submit to the U.S. Secretary of State a certificate of "final ascertainment" containing those electors' names and their votes (along with any "final determination" made under Section 2), with copies sent to Congress.

Section 4 obliged Congress to "be in session on the second Wednesday in February" to witness the Vice President's opening and reading of the certified electoral votes. Congressmen could object solely on the grounds that (1) a vote had not been "regularly given" by an elector (e.g., resulted from bribery, corruption, fraud, or failure to comply with legal requirements), or (2) the elector had not been lawfully "certified."

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66. *See id.* Democrats reluctantly accepted this outcome because Hayes agreed to grant the Democratic-dominated South special benefits, most importantly ending Reconstruction.

67. *See* Barkow, *supra* note 46, at 290-91.

68. *See Bush*, 531 U.S. at 157 (Breyer, J., dissenting).

69. Electoral Count Act, Pub. L. No. 49-90, 24 Stat. 373 (codified as amended at 3 U.S.C. § § 5, 15).

70. This provision supplied a "safe harbor" for states that wished to avoid the possibility that Congress would independently second-guess their slate of electors. *See* Barkow, *supra* note 46, at 291-92 (citing legislative history).

Each chamber would then meet separately, and the objection would not be sustained unless both concurred. If two or more state returns were submitted, and the House and Senate could not agree on which one was valid, "the votes of the electors whose appointment shall have been certified by the [governor under Section 3] . . . shall be counted."

Applying a textualist analysis of the ECA, Section 2 gave state legislatures the option of delegating to their courts the "final determination" of disputes concerning the appointment of electors; Section 3 authorized the governor to certify those electors to the federal government; and Section 4 empowered Congress to decide which electoral votes to count. The Act "nowhere provides for involvement by the United States Supreme Court."[71]

Legislative history confirms that presidential election controversies were not justiciable. The House Report stated that "[t]he power to determine [the legality of electoral votes] rests with the two Houses, and there is no other constitutional tribunal."[72] And the Senate rejected a proposal to have the Court resolve such disputes to protect its legitimacy. As Senator Sherman stressed, entangling the Court in presidential "political questions" would bring it "into public odium."[73] Congressmen recognized that the Justices' participation in the 1876 election had produced negative consequences for the Court and the nation.

C. McPherson

For over two centuries, the Court honored Article II, Section 1, Clause 3 of the Constitution and the ECA by declining to interfere with Congress's power to resolve disputed presidential election issues. In *McPherson v. Blacker*,[74] the Court interpreted a different provision—Clause 2, which authorized each state to appoint presidential electors "in such Manner as the Legislature thereof may direct"[75]—as giving

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71. *Bush*, 531 U.S. at 153 (Breyer, J., dissenting).

72. H.R. REP. NO. 49-1638 (1886). The Representative who introduced the Act explained that the Constitution "devolved the duty to count the [electoral] votes" to Congress, 18 CONG. REC. 31 (1886) (statement of Rep. Andrew Caldwell), which necessarily included judging the legality of votes:

> The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body [i.e., Congress], in which the States in their federal relationships and the people in their sovereign capacity should be represented.

Id. at 30.

73. *See* 17 CONG. REC. S. 817-18 (1886); *see also* Samuel Issacharoff, *When Presidential Elections Go Bad,* 52 FLA. ST. U.L. Rev. 341 (2026) (maintaining that the ECA's drafters failed to appreciate that the problem in 1877 was involving the Justices as political commissioners rather than as judges constrained by rules of procedure, evidence, and substantive law).

74. 146 U.S. 1 (1892).

75. U.S. CONST. art. II § 1, cl. 2.

each Legislature "plenary" and "exclusive[]" power (e.g., by selecting electors itself or by allowing voters to choose).[76] Accordingly, the Court held that the Michigan Legislature could allocate electoral votes among its congressional districts, rather than the state as a whole.[77] Indeed, Clause 2 granted state legislatures absolute power over such appointments:

> This power is conferred . . . by the Constitution . . . and cannot be taken from them or modified by their State constitutions . . . . Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[78]

The Court thus exercised judicial review for the limited purpose of affirming that Clause 2 gave each state complete discretion over appointing electors.[79] The Court nowhere suggested that, *after* the electors (however appointed) had voted, it could review Congress's determinations under Clause 3 concerning the legality of the votes cast.[80] Moreover, the Court rejected the argument that the state's exercise of its Article II power was restricted by the EPC, which did not address voting.[81]

Overall, the Constitution left primary control over all elections (including federal ones) to the states, subject to Congress's supervision. Federal courts had no power to second-guess Congress's decisions about elections to the House, Senate, or Presidency.

II. "JUSTICIABILITY" BEFORE *BAKER*

A. The Original Understanding

The modern Court has developed complex justiciability doctrines based on two claims about the Constitution. First, justiciability

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76. *See McPherson*, 146 U.S. at 25, 35.

77. *Id.* at 42.

78. *See id.* at 35 (quoting S. REP. NO. 43-395).

79. The Court asserted jurisdiction because the case arose under the Constitution, and it denied that "all questions connected with the election of a presidential elector are political." *Id.* at 23. By negative implication, *some* such questions would be nonjusticiable, such as Congress's Clause 3 power to resolve disputed electoral votes.

Analytically, the preferable approach would have been to declare that all Article II provisions concerning presidential elections presented political question. Realistically, however, the Court's deference to state legislatures was so extraordinary that the result was the same. *See* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1494-96 (2005) (arguing that (1) the Court effectively made Clause 2 claims political questions by giving states plenary power, and (2) Article II, Section 1 cases are nonjusticiable, except in the rare situation where a state clearly violates individual rights (e.g., by prohibiting black or female citizens from being electors)).

80. *See* Barkow, *supra* note 46, at 293-95.

81. *McPherson*, 146 U.S. at 39, 40.

reflects the Founders' vision of separation of powers.[82] Second, standing, ripeness, and mootness effectuate the original meaning of Article III "Cases" and "Controversies" by requiring a live, concrete dispute pitting an injured plaintiff against an adverse defendant.[83] These assertions lack a historical foundation.[84]

As a starting point, "We the People" ratified a Constitution that assigned part of their sovereign power—legislative, executive, and judicial—to their federal representatives in three coordinate departments to address specified interstate and international matters.[85] Article III vests "judicial power"—rendering a judgment after interpreting the law and applying it to the facts[86]—in judges appointed through a selective process and granted life tenure and non-reducible compensation to guarantee their quality and independence.[87] A court's judgment had to be final—unreviewable by political officials.[88]

Article III extends judicial power to three categories of "Cases" and six "Controversies."[89] Although the modern Court has treated those two words as synonyms, they had distinct meanings in 1787.[90] "Controversies" were disputes, and in Article III they always refer to parties (e.g., citizens of different states).[91] Hence, in "Controversies" judges' main function would be to resolve disputes between the named parties, with any legal exposition incidental.[92]

By contrast, Article III "Cases" were defined by subject matter (e.g., the federal Constitution and laws) and primarily required courts to

82. *See generally* Pushaw, *Justiciability*, *supra* note 39 (documenting this assertion and refuting it).

83. *See, e.g.*, *id.* at 447, 454-68, 472, 490-501 (summarizing the Court's jurisprudence).

84. I have detailed this theme in several lengthy articles that provide voluminous citations to primary sources. The following paragraphs encapsulate my main points.

85. *See* Pushaw, *Justiciability*, *supra* note 39, at 397-99, 410-54, 469.

86. *See id.* at 398, 417-18,426; *see also* Pushaw, *Case/Controversy*, *supra* note 39, at 490-91. For a detailed explanation of "judicial power," see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741, 746, 799, 810, 816, 826-28, 845-46 (2001).

87. U.S. CONST. art. III, § 1.

88. *See* Pushaw, *Justiciability*, *supra* note 39, at 398-99, 417-18, 432-33, 438-41, 452, 469-70; *see also* Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 478-87, 492-97 (1998) [hereinafter Pushaw, *Advisory Opinions*] (reviewing STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997)).

89. U.S. CONST. art. III, § 2, cl. 1.

90. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 447-519.

91. *See id.* at 447, 449-50, 472, 482-84. 487-89. America's leading Federal Courts scholar recently provided additional historical evidence confirming the meaning of "Controversies." *See* JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 5, 9-10, 12, 73-79, 148-49, 165, 168, 193, 238 (2021).

92. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 450, 459, 482-84, 493-95, 504-11, 519-23, 531; *see also* PFANDER, *supra* note 91, at 10, 73-75.

interpret and apply that law.[93] A "Case" arose when a law granted a party an interest that could be presented as a question in a judicial form recognized by law.[94] Some "Cases" involved an adversarial dispute, such as violations of federal rights that gave rise to common law claims.[95] However, other kinds of "Cases" did not require such a clash[96]—for example, *ex parte* petitions for naturalization, bankruptcy, and default judgments.[97] Similarly, plaintiffs could bring "public" law actions under either (1) prerogative writs like mandamus, prohibition, and *quo warranto* asking courts to limit political officials' power, or (2) legislation authorizing "informers" or "relators" to sue on the government's behalf to enforce a statute (e.g., prohibiting evasion of customs duties).[98]

The Framers and Ratifiers believed that federal judges could expound the law only in a litigated "Case"—not by giving legal opinions upon the request of Congress or the President.[99] Furthermore, parties who did not have a genuine legal interest at stake could not bring feigned claims.[100]

Finally, courts could decide "legal" issues, but not "political" questions.[101] Independent Article III judges represented the People by

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93. Pushaw, *Case/Controversy*, *supra* note 39, at 447, 449, 472-82, 487-92, 494-504, 512, 519, 523-31.

94. *See id.* at 449, 472-76, 480; *see also* PFANDER, *supra* note 91, at 1-11, 18-25, 73, 166-68, 181-82 (demonstrating that English, colonial, and early state and federal courts decided claims of legal right set forth in a form prescribed by law—a "litigable" interest, which could be either "contentious" (i.e., brought against an adverse defendant) or "noncontentious").

95. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 449, 476-80; *see also* PFANDER, *supra* note 91, at 19. In such "Cases," plaintiffs' legal rights must have been violated because of a fortuitous event beyond their control, as contrasted with deliberately manufacturing a claim. *See* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 11-16, 66-69, 73-79, 82-97, 101, 104-05 (2010) [hereinafter Pushaw, *Limiting*].

96. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 449, 480-82 (describing such non-adversarial cases in England); *id.* at 448-50, 495-504, 526 (arguing that Article III "Cases" included such litigation).

97. *See id.* at 526; PFANDER, *supra* note 91, at 4-12, 17-24, 42, 61-64, 166, 182 (agreeing and adding other cases relevant to Article III (such as certain admiralty and equity proceedings) as well as non-adversarial "cases" in English and state law involving probate, family law, and property registration).

98. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 458, 480-81, 498, 526; Pushaw, *Justiciability*, *supra* note 39, at 402, 426, 451; PFANDER, *supra* note 91, at 110-13, 176-85, 224-25. Consequently, the current majority of originalist Justices should refashion the justiciability doctrines in federal question "Cases" to allow claims that Congress has recognized and focus on expounding the law, regardless of the presence of a dispute. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 450, 523-31; Robert J. Pushaw, Jr., *"Originalist" Justices and the Myth That Article III "Cases" Always Require Adversarial Disputes*, 37 CONST. COMMENT. 259, 259-63, 266-74 (2022).

99. *See* Pushaw, *Advisory Opinions*, *supra* note 88, at 479; Pushaw, *Justiciability*, *supra* note 39, at 398, 432, 438, 442-44, 451-52, 469.

100. *See* Pushaw, *Limiting*, *supra* note 95, at 11-15, 66-69, 74-77.

101. *See* Pushaw, *Justiciability*, *supra* note 39, at 422-25, 449-51, 453, 497, 503-11; Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the*

deciding "all Cases" arising under the Constitution, the supreme and fundamental law.[102] Judges thus had a duty to invalidate actions of government officials that clearly exceeded the written limits on their power or violated individual constitutional rights.[103]

The foregoing concept of judicial review was famously explained by Hamilton in *The Federalist Number 78*. However, his corollary principle had been overlooked until I unearthed it in 1996: This "natural presumption" favoring judicial review could be rebutted by showing that "particular provisions in the Constitution" left a question for ultimate determination by political officials.[104] The analytical difficulty is that the Constitution grants Congress and the President many powers and reserves all others to the states or "the People," but never says whether the exercise of any of these powers is or is not judicially reviewable.[105] Therefore, the latter "political questions" must be determined by reading the Constitution's language in light of its structure, its underlying political theory, and Anglo-American historical understandings.[106] Most political questions involve two types of "checks."

First, one branch sometimes can exercise the primary function of another.[107] For instance, although Congress's core power is "legislative" (lawmaking), the House has the executive power of impeaching (akin to indicting) executive and judicial officials, and the Senate has the judicial power of trying and then convicting or acquitting them.[108] Similarly, while the President exercises "the executive Power" of administering the law, he can participate in legislation by vetoing bills.[109]

Second, the President must share with Congress (or the Senate alone) certain powers that had been classified in England as the Chief Executive's prerogative. Examples include making war and treaties, as well as appointing principal executive officials and judges.[110]

Federalist "Rebuttable Presumption" Analysis, 80 N.C. L. REV. 1165 (2002) [hereinafter Pushaw, *Judicial Review*].

102. *See* U.S. CONST. art. III, § 2; *see also* Pushaw, *Justiciability*, *supra* note 39, at 398, 411, 417-25, 466, 469, 503.

103. *See id.* at 398, 420-25, 432-34, 451, 485-86, 503.

104. *Id.* at 424 (quoting THE FEDERALIST NO. 78, at 524-25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); *id.* at 448, 451, 503-04.

105. *See id.* at 504-09; *see also* Pushaw, *Judicial Review*, *supra* note 101, at 1185.

106. Pushaw, *Justiciability*, *supra* note 39, at 398-99, 417-25, 504-09.

107. *See id.* at 427-31, 504-06; *see also* Pushaw, *Judicial Review*, *supra* note 101, at 1186-87.

108. *See* Pushaw, *Justiciability*, *supra* note 39, at 415-16, 429-30, 433, 505.

109. *ee id.* at 416-17, 428-29, 434, 505; Pushaw, *Judicial Review*, *supra* note 101, at 1186-87, 1189-90.

110. *See* Pushaw, *Justiciability*, *supra* note 39, at 428, 430-31, 507; *see also* Pushaw, *Judicial Review*, *supra* note 101, at 1187, 1190. Congress's authorization of war and regulation of the military, the President's decisions in waging war, and foreign policy (such as the negotiation of treaties) were political questions. However, when military or foreign affairs decisions allegedly violated individual constitutional rights, courts could exercise judicial review, albeit with extraordinary deference to the political branches. *See* Robert J. Pushaw,

These checks presuppose that Congress and the President—who are electorally accountable, have superior competence as to certain subjects (like military affairs), and have the means and incentives to protect their turf—will resolve any conflicts without judicial interference.[111] Likewise immune from judicial review are a few constitutional provisions that expressly authorize Congress or the President (or both) to supervise certain state actions.[112]

The Framers gave federal judges no share in legislative or executive power to avoid entangling them in politics.[113] Rather, courts could restrain the political departments only through judicial review in cases presented in recognized legal forms of action or appeals.[114] Consequently, federal judges would violate separation of powers if they either (1) declined jurisdiction that Congress had validly conferred pursuant to Articles I and III (e.g., by applying novel doctrines of standing, ripeness, and mootness) or (2) decided questions that the Constitution entrusted exclusively to the political branches (as the modern PQD allows).[115]

Moreover, to preserve federalism, the Constitution left certain matters exclusively to the states, such as internal state electoral matters.[116] The Constitution's provisions concerning federal elections are also political questions that rebut the presumption of judicial reviewability.[117] Article I provides that federal legislators would be selected as prescribed by state laws, with Congress permitted to alter such regulations[118] and with each chamber authorized to be the "Judge of the Elections, Returns, and Qualifications of its own Members."[119] The choice of the word "judge" indicates that Congress must exercise "judicial power" in this situation, analogous to the Senate sitting as a "court" of impeachment. Such "judicial power" must be final and hence not subject to revision (in this instance, by the judiciary).[120]

Similarly, Article II provides that (1) state legislators would determine appointment of presidential electors, who would vote for the

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Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1017-25, 1078-81 (2007) [hereinafter Pushaw, *Enemy Combatant*].

111. *See* Pushaw, *Justiciability*, *supra* note 39, at 418, 428-31, 434, 448-51, 497, 503-09.

112. *See infra* notes 121-122, 376, 381-382 and accompanying text.

113. *See* Pushaw, *Justiciability*, *supra* note 39, at 431-32 (describing the Constitutional Convention's rejection of proposals to include (1) federal judges in a council to revise legislative bills and (2) the Chief Justice in a Privy Council to advise the President).

114. *See supra* notes 94-100 and accompanying text.

115. Therefore, modern justiciability doctrines actually subvert the Constitution's separation-of-powers structure. *See* Pushaw, *Justiciability, supra* note 39, at 395, 454, 481-511.

116. *See supra* notes 13, 33, 35, 42-43, 76-78 and accompanying text.

117. *See supra* notes 104, 116 and accompanying text.

118. U.S. CONST. art. I, § 4, cl. 1.

119. *Id.* § 5, cl. 1.

120. *See supra* notes 86-88 and accompanying text.

President and Vice President (with Congress deciding on timing); (2) the Senate President would count the votes, with Congress ultimately determining their validity; and (3) if no candidate received a majority, the House would choose the President.[121] This elaborate system would be upset if federal courts could interfere with it.[122]

Under the Constitution, then, certain political questions rebutted the "natural presumption" of judicial review.[123] The Framers expected that government representatives, when deciding such constitutional issues, would make deliberative and principled judgments, not assert unbridled discretion to engage in ordinary partisan politics.[124] Almost all political questions implicate separation of powers (including checks and balances) and federalism—matters of practical governance in which political officials (1) have superior institutional competence as compared to judges and (2) can be trusted to decide because they can be held politically accountable.[125]

No one suggested that the PQD involved a discretionary, multi-factor test.[126] Nor did anyone mention that Article III required plaintiffs to establish standing by showing an "injury in fact" caused by an adverse defendant that was likely to be judicially redressable. Rather, courts simply determined whether a law gave plaintiff a right to sue, and such Article III "Cases" included non-adversarial proceedings authorized by Congress.[127] Similarly, there was never a reference to "ripeness" until the mid-twentieth century.[128] Finally, mootness was not a *constitutional* requirement. Rather, eighteenth-century courts had prudential discretion to dismiss moot cases but could choose to decide them, particularly if the legal questions presented were of great public importance.[129]

In sum, the original understanding of "justiciability" was that federal courts could exercise "judicial power" over any Article III "Case" raising a legal question in an established form of action, but could not

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121. U.S. CONST. art. II, § 1, cls. 2-4.

122. *See supra* notes 16, 34-35, 46-81 and accompanying text.

123. Writing before *Baker*, America's leading authority on federal jurisdiction submitted that the most obvious political questions involved Congress's Article I powers to seat its members, regulate congressional elections, apportion congressional seats, and handle impeachments. Wechsler, *supra* note 44, at 8-9.

124. *See* Choper, *supra* note 79, at 1463-67, 1471, 1494-96.

125. *See id.* at 1460-69, 1472-73,1476,1479,1523. Professor Choper has developed this thesis over many decades. Although I agree with him that almost all political questions implicate separation of powers and federalism, not all questions about constitutional structural are political. *See supra* notes 79, 101-124 and accompanying text; *infra* notes 144-145, 151-174, 243-294, 439-500 and accompanying text.

126. *See supra* notes 10, 32-35, 101-125 and accompanying text.

127. *See supra* notes 94-100 and accompanying text.

128. *See infra* notes 184-188 and accompanying text.

129. *See* Pushaw, *Justiciability*, *supra* note 39, at 490. For example, the great Lord Mansfield decided a moot case to resolve a significant issue regarding the interpretation of wills. *See* Perrin v. Blake, 98 Eng. Rep. 355 (1770).

render non-final judgments, issue advisory opinions, or decide political questions. The Court followed this approach for well over a century.

B. Early Precedent on Judicial Review and Justiciability

The early Justices had helped draft or ratify the Constitution (or both), so their opinions about Article III are unusually well-informed.[130] The Court affirmed federal judges' independence in exercising their "judicial power" to decide "Cases" and prevented using judges for personal or political purposes, in four ways.

First, the Justices refused to render formal "advisory opinions" on legal questions submitted outside the context of a litigated "Case."[131]

Second, the Court generally rejected parties' attempts to bring feigned claims or collusive suits to obtain a judgment on a legal issues.[132]

Third, in *Hayburn's Case,*[133] all the Justices sitting on circuit exercised judicial review and concluded that because court judgments had to be final, Congress had unconstitutionally authorized federal judges to determine pension applications from disabled veterans, subject to revision by the political departments.[134] Congress quickly amended the statute to delete this provision, so the Court as a whole did not have the opportunity to affirm that it had judicial review power over the coordinate branches.[135]

Fourth, the Marshall Court did so in *Marbury v. Madison*[136] by repeating Hamilton's argument, but also reiterated his point that the presumption favoring judicial review was rebuttable.[137] Federal judges could not decide discretionary "[q]uestions, in their nature political, or which are, by the Constitution and laws, submitted to the executive,"[138] such as foreign affairs and appointments.[139] The Marshall Court later

130. *See* Pushaw, *Justiciability*, *supra* note 39, at 436-38.

131. *See* Pushaw, *Advisory Opinions*, *supra* note 88, at 474, 477 (providing a detailed analysis that supports the Justices' unanimous conclusion that the Constitution's Framers and Ratifiers rejected the English practice of having judges render formal legal advice to political officials).

132. *See* Pushaw, *Limiting*, *supra* note 95, at 80-81, 80 n.355 (describing how federal courts gradually adopted this English practice).

133. 2 U.S. (2 Dall.) 409 (1792). *See* Pushaw, *Advisory Opinions*, *supra* note 88, at 478-87, 492-97 (arguing that the Justices correctly imposed this finality requirement).

134. *See Hayburn's Case*, 2 U.S. at 410 n.1.

135. *See* Pushaw, *Justiciability*, *supra* note 39, at 440-41, 441 n.215.

136. 5 U.S. (1 Cranch) 137 (1803).

137. *See id.* at 176-80. Marshall did not say that judicial review is an aspect of the Court's duty to decide adversarial disputes. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 499-501, 523-24 n.356.

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

139. *See id.* at 166-70; *see also* Pushaw, *Justiciability*, *supra* note 39, at 436-37, 444-49, 503-04 (contending that *Marbury* applied muscular judicial review but correctly recognized that courts could not decide political questions).

ruled that the President's assertion of power as Commander in Chief—specifically, whether to use the militia to repel an invasion—was a political question.[140] Likewise nonjusticiable were determinations regarding America's treaty obligations, recognition of foreign governments, and the rights of aliens.[141] Similarly, the Court concluded that Congress's exercise of certain powers could not be judicially reviewed, such as authorizing the use of armed force[142] and making policy judgments in areas where Article I authorized Congress to act.[143]

The Marshall Court applied the PQD to state actions. For instance, in *Cherokee Nation v. Georgia*,[144] it refused to enjoin Georgia's decision to abolish the Cherokee Tribe to avoid inflaming political tensions in that state.[145]

Turning to the other justiciability doctrines, the Marshall Court articulated the familiar standing concept that an Article III "Case" arose when "any question respecting [federal law] shall assume such a form that the judicial power is capable of acting on it. . . . [that is,] when the subject is submitted . . . by a party who asserts his rights in the form prescribed by law."[146] The Court routinely adjudicated many such cases that did not involve a dispute between adverse parties, particularly when Congress followed English law by authorizing *ex parte* petitions (e.g., for naturalization and bankruptcy) and public law actions such as prerogative writs and informer and relator suits.[147] The Court

140. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-32 (1827). Similarly, the early Court concluded that whether another country had breached a treaty and had engaged in warlike acts was a question committed to the political branches. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 221-96 (1796); *see also* The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819) (refusing to second-guess the President's decisions about whether a state of war existed); *see also* Pushaw, *Enemy Combatant*, *supra* note 110, at 1024-27 (summarizing the Marshall Court's war powers cases and noting that it occasionally reviewed claims that the assertion of such powers violated individual legal rights, albeit with great deference to the political branches).

141. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633-35 (1818).

142. *See* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

143. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court exercised judicial review and held that a federal statute governing the licensing of ships in the interstate coastal trade was (1) a regulation of "commerce" (i.e., market-oriented activity) that was (2) "among the several States" because the vessels affected commerce in more than one state. *Id.* at 189-97, 215-18. The Court could only determine whether the law fell within Congress's Commerce Clause power, and if so had no business analyzing Congress's policy determinations. *See id.* at 196-97; *see also* Grant S. Nelson & 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, 57-63 (1999) (analyzing *Gibbons*).

144. 30 U.S. (5 Pet.) 1 (1831).

145. *Id.* at 15-20.

146. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824). *See also, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378, 393, 405, 408 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333-36, 347-48 (1816); *Marbury*, 5 U.S. (1 Cranch) at 169, 173-74; Pushaw, *Case/Controversy*, *supra* note 39, at 473-75 (noting that the Marshall Court adopted the established English law definition of "case").

147. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 448-50, 495-504, 517 n.333, 526; *see also* Pushaw, *Justiciability*, *supra* note 39, at 437-38, 485 n.447; PFANDER, *supra* note 91, at 5-6, 8-9, 12, 25, 33-59, 76-77, 147-49, 164-65, 175, 178-85, 223-32. Similarly, the Court

distinguished such Article III "Cases," which focused on legal subjects of national and international significance, from "Controversies" (i.e., disputes) of federal concern between named parties that could best be resolved by impartial federal judges.[148] Finally, the Court never suggested that Article III mandated that cases be ripe and not moot.

C. Relevant Precedent from 1836 to the Warren Court

Justiciability remained stable for about a century.[149] Courts typically dismissed moot cases but had discretion to decide them.[150] The most numerous decisions concerned the PQD, as discussed in Section 1. Section 2 describes how the Court responded to the explosion in federal dockets during the New Deal by crafting new doctrines of standing and ripeness.

1. The Political Question Doctrine

The Court routinely applied the PQD to avoid second-guessing Congress, such as when it verified that a statute had been properly enacted, authenticated, and enrolled.[151] The Court also reaffirmed the general non-justiciability of military and foreign affairs decisions.[152]

The key cases involved claims under Article IV, Section 4's clause providing that "[t]he United States shall guarantee to every State in

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adjudicated many "Cases" that had begun with an adversarial dispute that had since become nonexistent or nominal, such as default judgments and equity receiverships. PFANDER, *supra* note 91, at 48-50, 192-94, 200-02.

148. *See, e.g.*, *Osborn*, 22 U.S. at 809, 812, 818-22; *Cohens*, 19 U.S. at 378, 383-84, 393; *Martin*, 14 U.S. at 334, 347; Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 85 (1809); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 9 (1799). *See also* Pushaw, *Case/Controversy*, *supra* note 39, at 473-75, 495-512 (summarizing the early Court's jurisprudence on "Cases" and "Controversies"); PFANDER, *supra* note 91, at 5-7, 9-12, 61-83, 143, 148-49, 165, 168-69, 181-82, 193, 208-10, 213, 225-33, 238.

149. *See* Pushaw, *Justiciability*, *supra* note 39, at 452-54.

150. *See, e.g.*, Mills v. Green, 159 U.S. 651 (1895).

151. *See* Field v. Clark, 143 U.S. 649, 672-80 (1892).

152. The Court has never reviewed (1) Congress's decisions to authorize war or regulate the military or (2) the President's strategy or tactics. *See supra* note 110 and accompanying text. When plaintiffs have claimed that the exercise of military powers violated their individual rights, the Court has taken inconsistent approaches. Sometimes it has deemed such questions political, as with Lincoln's many decisions that appeared to abridge Fifth Amendment rights, such as seizing ships that sailed toward blockaded Confederate ports and establishing military commissions. *See* Pushaw, *Enemy Combatant*, *supra* note 110, at 1015, 1027-32. More often, the Court has exercised judicial review, but with deference bordering on abdication, as in World War I and II cases. *See id.* at 1009-10, 1013-16, 1034-39, 1041-42, 1045-46. At other times (e.g., during Reconstruction and the Korean War), the Court has exercised rigorous judicial review. *See id.* at 1011 n.19, 1014-15, 1033-34, 1040, 1042-44, 1046. This precedent cannot be explained through legal principles, but rather by the Justices' consideration of factors such as (1) the severity and urgency of the military crisis and the felt necessity of the President's response; and (2) the President's political strength (especially when supported by Congress)—which if great enough might lead him to ignore an adverse court judgment. *Id.* at 1013-16, 1034, 1043-44, 1046-47, 1081-83. The same inconsistency can be seen in foreign policy cases. *See id.* at 1008, 1014, 1020, 1024-26, 1035, 1040, 1045-46.

this Union a Republican Form of Government." In *Luther v. Borden*,[153] Rhode Island's government, chartered in 1663, temporarily declared martial law to thwart a rebellious new regime, and the President (with Congress's authorization) called out the militia to stop the insurrection.[154] The upstart government claimed that the charter government (controlled by a small group) was not republican in form.[155] Initially, the Court held that federalism counseled (1) respect for the state courts' determination that the charter government was legitimate, and (2) avoiding the chaos that would result from invalidating all prior state laws and decisions.[156] Moreover, the Court deferred to the recognition by Congress and the President that the charter government was valid and sufficiently "republican,"[157] but did not hold that all complaints under the Guarantee Clause were political questions.[158]

Indeed, the Court later exercised judicial review over many such claims, although it invariably rejected them on the merits to preserve state autonomy.[159] Sometimes, however, the Court declined to even consider such complaints.[160] For example, in *Taylor & Marshall v. Beckham*, it refused to entertain a claim that Kentucky's resolution of a disputed gubernatorial election had denied state voters a republican

153. 48 U.S. (7 How.) 1 (1849).

154. *Id.* at 32-44.

155. *See id.* at 34-38.

156. *See id.* at 38-42.

157. *ee id*. at 42-47.

158. The Court did not reach the issue of "to what extent, nor under what circumstances, [martial law] power may be exercised by a State" in a way that would run afoul of the Guarantee Clause. *Id.* at 45. This statement would make no sense if the Court thought all claims under this Clause were political questions.

159. In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), the Court asserted jurisdiction and ruled that a state's decision to deny women the right to vote did not run afoul of the requirement of a republican form of government. *See id.* at 175-76. Other relevant cases followed this pattern. *See, e.g.*, *In re* Duncan, 139 U.S. 449, 461-62 (1891) (ruling that the Guarantee Clause did not prohibit a state court from determining whether a state statute had been lawfully enacted); Forsyth v. Hammond, 166 U.S. 506, 519 (1897) (rejecting a challenge under this Clause and affirming a state's power to entrust the determination of municipal boundaries to its courts rather than its legislature); Michigan *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905) (holding that a state legislature did not violate this Clause by creating and altering school districts).

160. In *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), the Court would not review a Guarantee Clause challenge to Congress's replacement of Georgia's government with military rule. *Id.* at 71-77. This holding reflects the reality that the Court during Reconstruction could not confront a Congress dominated by Radical Republicans who wanted to punish the South for causing the Civil War—and who impeached and nearly convicted President Johnson for thwarting their efforts. The Court was in an especially weak position because its disastrous ruling in *Dred Scott* in 1857 had helped precipitate the Civil War. Another example of its subservience was allowing Congress to repeal the Court's appellate jurisdiction in a pending case challenging the constitutionality of Reconstruction laws. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-15 (1868).

government.[161] That case confirmed that the Constitution left state electoral matters to state political processes.[162]

In 1912, in *Pacific States Telephone & Telegraph Co. v. Oregon*,[163] the Court declared that all Guarantee Clause complaints raised political questions and therefore refused to hear a company's challenge under that Clause to a state law enacted by initiative.[164] The Court dismissed as "superficial" the company's attempt to recharacterize this claim as one arising under the Fourteenth Amendment.[165]

Thereafter, the Court treated the Guarantee Clause as nonjusticiable,[166] including in cases involving apportionment of state legislative districts. Shortly after *Pacific States*, the Court deemed it a political question whether the invalidation of a state reapportionment statute by referendum rendered the law insufficiently "republican."[167] Similarly, in *Colegrove v. Green*,[168] Justice Frankfurter recognized that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts"[169] and accordingly dismissed a complaint (repackaged as one arising under the EPC) that Illinois's apportionment of congressional districts had not accounted for population changes.[170] Although Justice Frankfurter wrote a plurality opinion, the majority of Justices quickly endorsed his view.[171] In many later cases, the Court declined to consider constitutional challenges to state election laws.[172]

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161. 178 U.S. 548, 579-81 (1900).

162. *See supra* notes 13, 33, 35, 43, 76-78, 116 and accompanying text.

163. 223 U.S. 118 (1912).

164. *Id.* at 142-51.

165. *Id.* at 137, 139-40.

166. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 362 (citing cases from 1913, 1915, 1916, 1930, and 1937).

167. Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916).

168. 328 U.S. 549 (1946).

169. *Id.* at 556.

170. *Id.* at 552-56.

171. *See* Colegrove v. Barrett, 330 U.S. 804 (1947); *see also* Cook v. Fortson, 329 U.S. 675, 675-79 (1946) (summarily dismissing an appeal from a federal district court decision that had relied upon *Colegrove* to reject a Fourteenth Amendment challenge to Georgia's "county unit" election system, which disproportionately weighted votes to favor the state's sparsely populated rural counties). The Court did take jurisdiction in one case to reiterate Justice Frankfurter's rejection of Fourteenth Amendment claims that state apportionment schemes discriminated against urban voters. MacDougall v. Green, 335 U.S. 281, 284 (1948) ("It would be strange . . . for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses . . . . The Constitution—a practical instrument of government—makes no such demands on the States.").

172. These cases are provided in chronological order. *See, e.g.*, Tedesco v. Bd. of Supervisors, 339 U.S. 940 (1950); Remmey v. Smith, 342 U.S. 916 (1952); Anderson v. Jordan, 343 U.S. 912 (1952); Radford v. Gary, 352 U.S. 991 (1957); Matthews v. Handley, 361 U.S. 127 (1959). Indeed, one case concerned the Tennessee law that would be invoked in *Baker*. *See* Kidd v. McCanless, 352 U.S. 920 (1956).

The lone exception to this political question analysis arose when states intentionally discriminated against black voters in electoral matters, thereby violating the Fifteenth Amendment.[173] Significantly, the Court distinguished "singl[ing] out a readily isolated segment of a racial minority for special discriminatory treatment" from *Colegrove*, where the plaintiffs "complained only of a dilution of the strength of their votes."[174]

2. Standing and Ripeness

The Court long took jurisdiction over "Cases" that raised a legal question in a traditional judicial form.[175] Although Justice Brandeis reiterated this concept,[176] he led the Court in reinterpreting Article III's "Cases" and "Controversies" language as granting federal courts equitable discretion to confine "standing" to plaintiffs who could show a personal, concrete dispute with an adverse defendant.[177] Justice Frankfurter, appointed in 1939, quickly asserted that such an adversarial dispute was not merely prudential but rather required by Article III as historically understood, and the majority accepted this notion in 1952.[178]

This mythical "history" masked the true reason for creating a new standing doctrine: to keep federal court dockets manageable as Congress rapidly expanded regulatory legislation, especially during the

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Most of the *Colegrove* progeny featured terse per curiam opinions, so the Court's reasoning was not always spelled out. On the one hand, it treated challenges to state apportionment laws brought under the Guarantee Clause as political questions. On the other hand, the same challenges brought under the Fourteenth Amendment were dismissed as either nonjusticiable, as inappropriate exercises of a court's equitable discretion, or both. *See, e.g.*, South v. Peters, 339 U.S. 276, 277 (1950) (citing *Colegrove* to support its conclusions that apportionment raised a political question and that "[f]ederal 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").

173. *See* Gomillion v. Lightfoot, 364 U.S. 339, 340-45 (1960) (invalidating an Alabama law that redistricted a municipality to deprive black citizens of their right to vote). For earlier similar cases, see *Terry v. Adams*, 345 U.S. 461 (1953), *Smith v. Allwright*, 321 U.S. 649 (1944), and *Nixon v. Herndon*, 273 U.S. 536 (1927).

174. *Gomillion*, 364 U.S. at 346. Rachel Barkow has endorsed my argument that the early Court followed Hamilton's classical PQD: The norm of judicial review was subject to certain exceptions grounded in the Constitution's text, structure, and history. *See* Barkow, *supra* note 46, at 246-57, 319-34. She contends that it eventually became apparent that determining such exceptions sometimes required the Court to exercise discretionary judgments about avoiding conflict with political actors, and that this "prudential" strand of the PQD became pronounced in the 1940s and 1950s. *Id.* at 253-63.

175. *See supra* notes 94-100, 114, 146-148 and accompanying text.

176. *See* Tutun v. United States, 270 U.S. 568, 577 (1926).

177. Justice Brandeis developed his idea, which the Court had mentioned in passing in 1887. *See* PFANDER, *supra* note 91, at 12, 85-94, 99-110, 157-58, 163-65; *see also* Pushaw, *Case/Controversy*, *supra* note 39, at 451-52, 517 n.333; Pushaw, *Limiting*, *supra* note 95, at 19-20.

178. *See* Pushaw, *Justiciability*, *supra* note 39, at 395-96, 399, 453, 458-63; *see also* Pushaw, *Case/Controversy*, *supra* note 39, at 452-54, 531; Pushaw, *Limiting*, *supra* note 95, at 22-23.

New Deal.[179] Significantly, however, Frankfurter maintained that standing should focus on whether plaintiffs had suffered an individualized injury to an interest recognized by law (constitutional, statutory, regulatory, or common law).[180] Although the alleged violation of certain novel federal statutes and regulations could create a cause of action in federal court, Congress typically provided that a plaintiff must first exhaust administrative agency remedies.[181]

The emerging standing doctrine, positing that Article III courts had always been confined to resolving disputes between adverse parties, could not account for why Congress from day one had authorized uncontested actions such as naturalization, bankruptcy, and prerogative writs—and why federal judges had routinely adjudicated such cases.[182] The Court characterized such statutes and precedent as historical anomalies that had to be accepted on *stare decisis* grounds.[183]

In the 1940s, Justice Frankfurter also spearheaded the creation of a new justiciability doctrine, "ripeness," to minimize challenges under the Declaratory Judgment Act (DJA).[184] The DJA authorized federal suits by plaintiffs who had an "actual controversy" with a defendant who was threatening to enforce a statute.[185]

Ripeness focused on when enforcement was so likely that an actual dispute existed, and two approaches emerged.[186] First, if a plaintiff claimed that an agency lacked power because its authorizing statute was unconstitutional, the Court held that, under Article III, making this determination "in advance of its immediate adverse effect[s] in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."[187] Second, if a plaintiff

179. *See* Pushaw, *Justiciability*, *supra* note 39, at 454-63; *see also* Pushaw, *Case/Controversy*, *supra* note 39, at 452-53. The Court has never been explicit about this docket-control purpose because that would be inconsistent with its longstanding position that Congress alone controls the scope of federal court jurisdiction. *See* Pushaw, *Limiting*, *supra* note 95, at 10, 17, 19-22, 26, 97, 102.

180. *See* Pushaw, *Justiciability*, *supra* note 39, at 458-59; Pushaw, *Limiting*, *supra* note 95, at 25-26.

181. *See* Pushaw, *Justiciability*, *supra* note 39, at 456-59.

182. *See supra* notes 93-98 and accompanying text.

183. Most notably, in *Tutun v. United States*, 270 U.S. 568 (1926), the Court in an opinion by Justice Brandeis held that historical practice and precedent supported the conclusion that a petition brought under a federal naturalization statute qualified as an Article III "case," despite the absence of an adverse defendant. *See* Pushaw, *Justiciability*, *supra* note 39, at 458, 462, 483 (arguing that neither Brandeis nor Frankfurter could explain why their assertions about Article III's history conflicted with the views of the Constitution's drafters, ratifiers, and early implementers).

184 *See* H.R. 4337, 73d Cong., 48 Stat. 955 (1934); *see also* Pushaw *Justiciability, supra* note 39, at 463 & n.343, 494-95 (describing Justice Frankfurter's key role in developing ripeness doctrine).

185. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (upholding the DJA).

186. *See* Pushaw, *Justiciability*, *supra* note 39, at 493-97.

187. Int'l Longshoremen's Union v. Boyd, 347 U.S. 222, 224 (1954) (citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)).

complained that a statute did not permit an agency's proposed action, ripeness was a discretionary determination as to whether a court should wait for the agency to reach a final decision.[188]

When *Baker* arose, there were two applicable justiciability doctrines. First, standing would be granted only to plaintiffs who could show an injury to an interest recognized by law and a genuine dispute with an adverse defendant. Second, under the PQD, the Constitution created a presumption favoring judicial review, which could be rebutted if particular constitutional provisions conferred ultimate power to interpret and apply them on political officials.

III. THE *BAKER* REVOLUTION

A. The Justices' Dueling Opinions

In *Baker v. Carr*,[189] seven Justices asserted power to review the complaint of urban voters that Tennessee had failed to reapportion its legislative districts to reflect the movement of people away from rural areas, thereby diluting their votes in violation of the EPC.[190] In his majority opinion, Justice Brennan initially ruled that the plaintiffs had standing because the state's infringement of their right to vote had "produce[d] a legally cognizable injury."[191] They had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[192]

The Court then declared that the PQD was based solely on separation of powers (not federalism)[193] and required a six factor "case-by-case inquiry"[194]:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of

188. *See, e.g.*, Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 241-47 (1952).

189. 369 U.S. 186 (1962).

190. *Id.* at 187-237.

191. *Id.* at 204-08.

192. *Id.* at 204.

193. *Id.* at 210. Here, the Court was not reviewing a decision of Congress or the President but rather determining whether a state had violated the Constitution. *Id.* at 226.

194. *Id.* at 210-11.

> embarrassment from multifarious pronouncements by various departments on one question.[195]

Applying these criteria, Brennan acknowledged that the case was nonjusticiable under the Guarantee Clause.[196] Nevertheless, he concluded that the voters could bring the same complaint under the EPC.[197] The Court declined to articulate any substantive rules, hoping that the threat of a federal judicial reapportionment of state legislatures would coerce them to act.[198]

Justice Frankfurter's dissent made the following argument.[199] The Court had disregarded its entrenched precedent holding Guarantee Clause claims nonjusticiable, including those involving state legislative apportionment.[200] The majority had simply relabeled this complaint as one of an equal protection debasement of individual voting rights.[201] But that Clause did not yield any legal principles to evaluate state apportionments, which entailed myriad policy considerations (e.g., geography, historical practices, keeping existing government subdivisions intact, and competing rural and urban economic and social interests) that were the domain of political officials.[202] Indeed, the Court had never interpreted the EPC as requiring states to allocate legislative representation based on population, and no other constitutional provision or principle supported such a notion (as the Senate illustrated).[203] The majority had now licensed federal judges, without any rules, to determine the appropriate allocation of legislative districts in every state.[204] Such authorization deviated from the Court's historical reluctance to allow judicial intervention into states' affairs, except where they violated express, judicially enforceable

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

196. *See id*. at 209-10, 217-29.

197. *Id.* at 208-37.

198. The Court mentioned the substantive law in only one sentence: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at 226.

Justice Clark criticized the majority for failing to provide lower federal courts with any legal guidance and "blackjacking" state legislatures to reapportion. *Id.* at 251, 260 (Clark, J., concurring). He joined the opinion, however, on the ground that federal courts alone could resolve this problem because the political process would never do so, as the disproportionately represented rural legislators would not give up their power. *See id.*at 259; *see also id.* at 248-49 (Douglas, J., concurring) (same).

199. *Id.* at 266-330 (Frankfurter, J., dissenting).

200. *Id.* at 186, 266-67, 277-80, 289-97 (Frankfurter, J., dissenting).

201. *Baker*, 369 U.S at 297-99.

202. *Id.* at 268-69, 322-24.

203. *Id.* at 301-23.

204. *Id.* at 267-70, 324-28.

constitutional provisions (e.g., the ban on race discrimination).[205] Justice Frankfurter 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.[206]

Similarly, Justice Harlan contended that nothing in the Constitution required states to apportion legislatures by population.[207] Rather, the majority had rewritten the Constitution to give federal judges discretion to second-guess the wisdom of each state's policy choices.[208] He concluded:

> 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.[209]

B. Baker as Anti-Law

The dissenters' legal arguments were impregnable. The majority's decision rested on the EPC, but that Clause concerns civil rather than political rights.[210] If it had prohibited discrimination in voting,

205. *Id.* at 267, 284-86 (Frankfurter, J., dissenting).

206. *Baker*, 369 U.S. at 267.

207. *Id.* at 332-40 (Harlan, J., dissenting). The only possibly relevant constitutional restriction provided that the United States had to ensure that each state had a republican form of government, but the federal government had never intimated that this clause required states to apportion their legislatures by population. *Id.* at 333-34. Furthermore, the Senate's system allocating two senators for each state demonstrated that there was no general constitutional principle of republicanism that dictated that every vote was entitled to equal weight. *Id.* at 333.

208. *Id.* at 332-33, 338-39 (Harlan, J., dissenting). For instance, states could rationally encourage vital agricultural production by giving rural areas more electoral power. *Id.* at 334-36.

209. *Id.* at 339-40.

210. *See supra* notes 11-12 and accompanying text.

Congress would not have later pushed through the Fifteenth Amendment, which banned states from abridging the right to vote based on race.[211] Since the EPC does not confer an individual right to a legislature apportioned by population, any alleged "injury" to that right could not be legally cognizable, and therefore the Court erroneously granted standing.[212]

Nor did Justice Brennan's treatment of the PQD have a constitutional foundation. His assertion that the PQD was based entirely on separation of powers[213] disregarded the many times the doctrine had been applied to promote federalism, starting with *Cherokee Nation* and continuing with cases that involved state autonomy over electoral matters.[214] Moreover, the Court's new six-factor test provided little guidance in identifying "political" questions.[215] First, the Constitution's text commits many issues to Congress and the President, but never expressly says which of those questions can or cannot be judicially reviewed.[216] Second, the "lack of judicially discoverable or manageable standards" has not prevented the Justices from finding and implementing new standards – for example, a right to privacy lurking in the shadows of several constitutional amendments.[217] Third, such cases belie the assertion that courts cannot make discretionary "policy determinations." Fourth, whenever the Court invalidates an Act of Congress or executive action, it can be characterized as "expressing lack of respect due coordinate branches."[218] The same goes for the sixth criterion, "embarrassment." As for the fifth factor, when is "unquestioning adherence to a political decision" mandatory? One obvious answer would be the President's orders as Commander in Chief, but the Court has repeatedly adjudicated challenges to such decisions.[219]

The *Baker* criteria, then, are so malleable that they can be applied to justify almost any result.[220] Indeed, the Court devised them precisely so that it had a legal fig leaf for its unprecedented interference

211. *See infra* note 264 and accompanying text.

212. *See supra* notes 11-12, 17 and accompanying text. *Baker* accurately set forth the then-current standing doctrine: A plaintiff had to show "a personal stake" in the case – a "legally cognizable injury" inflicted by an adverse defendant. *Baker*, 369 U.S. at 204, 208. The Court then misapplied that doctrine. *See* Pushaw, *Limiting*, *supra* note 95, at 26-28 (arguing that the Warren Court in several cases paid lip service to existing standing doctrine but manipulated the doctrine to increase access to liberal plaintiffs).

213. *See Baker*, 369 U.S. at 210, 226.

214. *See supra* notes 144-145, 153-172 and accompanying text.

215. *See* Pushaw, *Judicial Review, supra* note 101, at 1175.

216. *See id*. at 1176-77.

217. *ee* Griswold v. Conn., 381 U.S. 479, 484-86 (1965) (discerning a right to privacy in "penumbras" emanating from the First, Third, Fourth, and Fifth Amendments, and accordingly invalidating a state law prohibiting the sale and use of contraceptives).

218. *See* Pushaw, *Judicial Review*, *supra* note 101, at 1175-76.

219. *See* Pushaw, *Enemy Combatant*, *supra* note 110, at 1024-83.

220. *See* Pushaw, *Justiciability*, *supra* note 39, at 500-01 (describing the ineffectiveness of the *Baker* factors in differentiating "political" from "legal" questions).

in state apportionment decisions, probably to increase voting power among liberal urban voters vis-á-vis their conservative rural counterparts.[221]

C. The Reaction to Baker and an Originalist Critique

Liberal legal scholars praised the Court for discarding established constitutional law and instead taking a leap forward to achieve justice and equality.[222] Traditionalist law professors, however, criticized the majority's notion that state legislatures represented only individuals whose votes had to be given equal weight.[223] Rather, apportionments had evolved through a complicated political process that balanced competing interest groups; tradition, especially established government units like counties; keeping districts compact and contiguous; geography (e.g., a river that divided a state); and many other considerations.[224] Accordingly, the Court had always properly declined to interfere because the Constitution (1) did not provide any rules for evaluating such political decisions and (2) counseled respect for state autonomy.[225] Unfortunately, the Justices had abandoned their Article III role–developing and consistently applying federal legal principles–and instead imposed their personal ideas of political fairness.[226] These scholars warned that such a usurpation of legislative power would eventually erode Americans' confidence in the Court as a neutral legal tribunal.[227]

I largely agree with this contemporaneous conservative critique, but apply a different originalist approach. The Court should have started with the Hamilton/Marshall presumption that Article III judges can review all claims arising under the Constitution, rebuttable by showing that a particular provision was ultimately left to the political process.[228] Article IV's clause providing that "[t]he United States shall guarantee to every State in the Union a Republican Form of Government" does not fall within that exception. The United States includes the judiciary, which must enforce that guarantee in a properly presented case. And no one during the Constitution's framing, ratification, or early implementation period said otherwise.

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221. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 359-60 n.3, 401 n.223.

222. *Id.* at 368-69 (citing legal luminaries such as Thomas Emerson, Charles Black, and Louis Pollak).

223. *Id.* at 369-70 (describing the commentary of Alex Bickel, Robert McCloskey, and others).

224. *Id.* at 370.

225. *Id.*

226. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 371.

227. *Id.* at 371-72.

228. *See supra* notes 104-125, 136-145 and accompanying text.

In fact, in 1849, the Court in *Luther v. Borden*[229] asserted judicial review to hear a claim that Rhode Island had run afoul of this Clause by temporarily declaring martial law to quell an insurrection.[230] The Court found no such violation, but cautioned that it might if a state imposed martial law for a longer duration.[231] Presumably, federal judges could also strike down other state actions that were clearly not republican, such as establishing a theocracy. And for more than sixty years after *Luther*, the Court adjudicated Guarantee Clause cases, albeit with exceptional deference to the states and the federal political branches.[232]

Applying this original understanding in *Baker*, the plaintiffs' Guarantee Clause claim was justiciable. On the merits, however, the Court should have followed *Luther* and its progeny by applying the Clause with great respect for the political officials who have the primary obligation for implementing its provisions–and whose judgments should not be overturned except in the most extreme situations. [233] Thus, the majority should have accepted the determination of Congress and the President that state apportionment schemes which accounted for factors besides population did not make their governments non-republican.[234] Indeed, Conventions in the original thirteen states, none of which had a legislature apportioned by population, could not have ratified a Constitution that condemned their governments as non-republican.[235] Nor did this possibility occur to Congress when it approved the admission of thirty-seven other states. [236]

Similarly, the Court should have rejected any claim under the EPC, for reasons already described.[237] The states that ratified the Fourteenth Amendment surely did not think it invalidated their legislatures. In fact, the Court did not have to consider the equal protection claim at all, as plaintiffs lacked standing to sue under it.[238]

Finally, the majority's insertion of federal judges into inherently partisan disputes would weaken public confidence in the judiciary's impartiality.[239] That mistrust would carry over into questioning the

229. 48 U.S. (7 How.) 1 (1849). *Luther* is further discussed *supra* notes 153-158 and accompanying text.

230. *See Luther*, 43 U.S. at 38-47.

231. *Id*. at 45.

232. The Court later acknowledged that, starting in 1912, it had misinterpreted *Luther* and its progeny as creating an absolute political question bar on such claims. *See* N.Y. v. United States, 505 U.S. 144, 184-85 (1992).

233. *See supra* notes 156-172 and accompanying text.

234. *See supra* notes 202-208, 225-226 and accompanying text.

235. *See* Baker v. Carr, 369 U.S. 186, 301, 307-09 (1962) (Frankfurter, J., dissenting).

236. *See* CONG. RESEARCH AND SERV., .R47747, ADMISSION OF STATES TO THE UNION: A HISTORICAL REFERENCE GUIDE 1 (2024)

237. *See supra* notes 11-12, 170-172, 201-203 and accompanying text.

238. *See supra* notes 11-12, 171 and accompanying text.

239. *See supra* notes 206, 209, 225-227 and accompanying text.

Court's authority when it decided cases involving properly presented constitutional questions that have political overtones.[240]

The Court ignored these problems and kept plunging deeper into the political thicket. Most importantly for present purposes, Justice Brennan's discarding of federalism as a PQD consideration meant that federal courts could now review states' power to structure and operate their governments.[241]

IV. JUSTICIABILITY FROM *BAKER* TO *BUSH*

In the thirty-seven years after *Baker*, the Court applied its PQD to decide many questions that would have earlier been deemed nonjusticiable.[242] The Court did, however, make significant changes to standing, ripeness, and mootness. None of these purported doctrines of self-restraint, however, actually limited federal judges' ability to intervene in political disputes. I will first discuss the development of the PQD, then turn to the other justiciability doctrines.

A. The Political Question Doctrine

The Court repeatedly applied the *Baker* factors to transform formerly political questions into legal issues, including every constitutional challenge to laws governing democracy. Most notably, the Court quickly reaffirmed *Baker* in three cases and announced that equal protection required representation based on "one person, one vote."[243]

First, *Gray v. Sanders*[244] held that a Georgia voter had standing to allege that his right to an equal vote had been abridged because the state gave rural counties disproportionate electoral power in Democratic primary elections for the U.S. Senate.[245] Moreover, the Democratic Committee's agreement to hold the 1962 primary election on an equal population basis did not moot the case because the Committee could reinstate the old system.[246] On the merits, the Court sustained

240. *See supra* notes 209, 227 and accompanying text.

241. *See* Pushaw, *Judicial Review*, *supra* note 101, at 1173-74, 1177.

242. The Court's rejection of the traditional PQD reflects its assertion of "judicial supremacy": The Justices alone can definitively interpret the meaning of the entire Constitution. *See id.* at 1166-67, 1178-83, 1196. The Court initially decides whether the Constitution commits a question to Congress or the President (or both) – and almost never concludes that the Court should defer to the judgment of the political branches, either substantially (e.g., when Congress under Section 5 of the Fourteenth Amendment enforces due process and equal protection rights) or completely (i.e., a political question). Consequently, the Court rarely considers that political officials may have superior institutional competence (especially as to fact-finding and policymaking) to decide certain constitutional issues. *See* Barkow, *supra* note 46, at 239-44, 300-336.

243. This Court announced this slogan in *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

244. *Id.* at 368.

245. *Id.* at 370-75.

246. *Id.* at 375-76.

the plaintiff's claim.[247] Justice Harlan castigated the majority for overruling cases that had sustained the same Georgia law, ignoring that the Electoral College used a similar weighted voting mechanism, and enmeshing judges in state politics.[248]

Second, in *Wesberry v. Sanders*,[249] the Court concluded that a Georgia statute establishing single-member congressional districts with unequal populations violated the "one person, one vote" principle assertedly contained in Article I, Section 2.[250] The majority quoted snippets of Section 2–Representatives would be apportioned "'among the several States . . . according to their respective Numbers'" to ensure that they were "chosen 'by the People'"–as mandating that all voters in congressional elections had to be treated equally.[251]

Justice Harlan assailed that interpretation as contrary to the text of Section 2 read as a whole in light of history.[252] Section 2 apportioned Representatives "*among* the States" based on each state's population and did not mention voters *within* each State.[253] Indeed, even among the States, the drafters did not mandate numerical equality: As the total number of Representatives was capped and each state was entitled to at least one, a thinly settled state would have a population significantly less than that of a congressional district within a large state.[254] Furthermore, Section 2 does not grant the right to vote to all "the People," but only those whom the state has deemed qualified to vote for members of the State Legislature.[255] Manifesting that understanding, states had always fixed voting qualifications.[256] Finally, the sole constitutional provision that addressed congressional elections *within* a state was Article I, Section 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations." Section 4 did not contain any hint that states or Congress had to ensure equal-population voting.[257]

As explained earlier, the Constitution's Framers, Ratifiers, and implementers for 177 years had uniformly understood Article I's words as conveying their plain meaning: The method of choosing

247. *Id*. at 376-81.

248. *See Gray*, 372 U.S. at 382-89 (Harlan, J., dissenting); *see also supra* notes 153-172 and accompanying text (summarizing this precedent).

249. 376 U.S. 1 (1964).

250. *Id*. at 5-18.

251. *Id*. at 7-18.

252. *See id*. at 23-48 (Harlan, J., dissenting).

253. *See Wesberry*, 367 U.S. at 31-32 (emphasis added).

254. See *id*. at 28-29.

255. S*ee id*. at 25.

256. *See id*. at 25-30.

257. *See id*. at 29-42.

Representatives was left to each state, with review entrusted to Congress.[258] This evidence rebuts the presumption of judicial review.[259] Thus, the *Wesberry* majority dubbed a political question a "legal" one, construed Article I according to the Justices' new political mantra of "one person, one vote," and overturned the constitutionally authorized decisions of the states and Congress.

Third, in *Reynolds v. Sims*,[260] the Court extended that equal-population ideal to states' apportionment of their own legislatures,[261] as *Baker* had foreshadowed.[262] Again, Justice Harlan argued that the Fourteenth Amendment's framing, ratification, implementation for nearly a century, as well as pre-*Baker* precedent, demonstrated that states had discretion to choose how to apportion their legislatures and did not have to provide that each legislator represented the same number of people.[263] He noted that the only later restraints on that discretion were the Fifteenth and Nineteenth Amendments, which would have been redundant if the Fourteenth Amendment had already mandated equality in voting.[264]

Despite the constitutional infirmities of *Baker* and its progeny, the new PQD and "one person, one vote" principle swiftly gained broad acceptance.[265] Moreover, in *Williams v. Rhodes,*[266] the Warren Court limited the states' formerly plenary power under Article II, Section 1 to determine the manner of appointing Presidential electors.[267] Six Justices concluded that an Ohio law making it extremely difficult for new political parties and independent candidates to get on the ballot (1) discriminated against them in favor of the two established parties, and (2) heavily burdened citizens' right to vote and their First Amendment right to associate to advance their political views.[268] Furthermore, the state's asserted interests–in political stability, ensuring a majority rather than plurality winner, and avoiding voter confusion–were not "compelling" enough to justify these burdens.[269]

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258. *See Wesberry*, 367 U.S. at 23-24, 29-44.

259. *See supra* notes 40-45, 101-120 and accompanying text.

260. 377 U.S. 533 (1964).

261. *Id*. at 568.

262. *See supra* notes 190-198 and accompanying text.

263. *See Reynolds*, 377 U.S. at 589-615 (Harlan, J., dissenting). Indeed, Section 2 of the Fourteenth Amendment authorizes states to "deny" or "abridge" the right to vote, which would make no sense if Section 1's Equal Protection Clause conferred an equal right to vote. *Id*. at 593-94.

264. *See id*. at 611-12.

265. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 378-81 (describing the widespread acceptance of *Baker* among lawyers and scholars).

266. 393 U.S. 23 (1968).

267. *See supra* Sections I.A.2, I.B, and I.C.

268. *Williams*, 393 U.S. at 24-31.

269. *Id*. at 31-34.

In *Anderson*[270] and *Burdick,*[271] the Court modified *Williams*. It held that when state election regulations "severely" burden First or Fourteenth Amendment rights, strict scrutiny applies.[272] However, if a law imposes "only `reasonable, nondiscriminatory restrictions,'" judges must balance "'the character and magnitude of the [voters'] asserted injury'" against a state's interests justifying its law.[273] Alas, the Court has never specified any rules for determining whether a burden is "severe" or "reasonable" and, if the latter, how to perform the required balancing test. The Justices have fragmented in applying these nebulous standards, as *Anderson*,[274] *Burdick*,[275] and later cases demonstrate.[276] Federal judges are therefore free to engage in *ad hoc* second-guessing of electoral policy decisions.[277]

The Court has further expanded judicial review to include almost all democratic institutions and processes, including fair representation of diverse groups in political bodies; voting details such as technology, voter ID, mail-in voting, and counting methods; regulating electoral

270. Anderson v. Celebrezze, 460 U.S. 780 (1983).

271. Burdick v. Takushi, 504 U.S. 428 (1992).

272. *Id*. at 434.

273. *Id*. (citing *Anderson*, 460 U.S. at 788-89).

274. In *Anderson*, a bare majority held that Ohio's early filing deadline for independent presidential candidates discriminated against them vis-a-vis candidates of the two major parties and burdened the constitutional voting and associational rights of such candidates' supporters, which was not outweighed by the state's asserted interest in ensuring that voters were adequately informed about candidates. 460 U.S. at 786-806. Four Justices argued that the majority's test was unclear and that courts should uphold states' exercise of their plenary power to regulate presidential elections under Article II, Section 1. *See id*. at 806-23 (Rehnquist, J., dissenting).

275. *See Burdick*, 504 U.S. at 432-42 (concluding that Hawaii's ban on write-in voting did not unreasonably infringe upon its voters' rights to freedom of expression and association); *but see id*. at 442-50 (Kennedy, J., joined by Blackmun & Stevens, JJ., dissenting).

276. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), the Court upheld Indiana's voter ID law, but the Justices wrote five separate opinions. Three Justices ruled that the state's interest in preventing voter fraud justified the burden on voters who could not produce identification. *See id*. at 189-204 (Stevens, J.). Three Justices agreed with that result, but would always defer to a state's non-severe, non-discriminatory voting restrictions. *Id*. at 204-09 (Scalia, J., concurring in judgment). Three Justices, in separate opinions, concluded that the law unconstitutionally burdened poor and older voters. *Id*. at 209-37 (Souter, J., dissenting); *id*. at 237-41 (Breyer, J., dissenting).

277. *See* Kate Hardiman Rhodes, *Restoring the Proper Role of Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine*, 20 GEO. J. L. & PUB. POL'Y 755, 762-66 (2022) (describing criticism of the vague *Anderson-Burdick* test by several federal judges and by scholars such as Edward Foley, Richard Hasen, and Derek Muller); *see also* Note, *As the Legislature has Prescribed: Removing Presidential Elections from the* Anderson-Burdick *Framework*, 135 HARV. L. REV. 1082 (2022) (contending that the test is generally unsound and particularly inappropriate in Presidential elections, which Article II leaves entirely to the states' discretion unless they violate a separate constitutional provision such as the amendments banning race and sex discrimination in voting – and even then judicial review should be deferential).

commissions; campaign finance; term limits; and resolving disputed elections.[278]

Most significantly, some state legislatures used partisan gerrymanders that technically complied with *Baker* by allocating districts by population, but undermined its rationale of voter equality by drawing the map to ensure that certain districts remained safely under either Republican or Democratic control.[279] In 1983, the Court decided a gerrymandering case without considering the PQD.[280] In 1986,[281] six Justices reaffirmed that such claims were justiciable, but without setting forth substantive legal rules to determine when a gerrymander went so far as to become unconstitutional.[282]

The Court routinely applied the *Baker* criteria to decide other questions that had always been regarded as "political." For example, Article I, Section 5, Clause 1 authorizes each chamber of Congress to "Judge . . . the qualifications of its own Members." As described earlier, this judgment is final and cannot be judicially reviewed.[283]

278. *See* Richard H. Pildes, *The Supreme Court, 2003 Term, Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31-32, 34-41, 153-54 (2003) (approving the Court's development of constitutional law in these areas to supervise the basic structure of democracy, especially by removing artificial barriers to effective political participation). Professor Pildes analyzes three key problems with the Court's approach. First, it has paid insufficient attention to the tendency of political power holders to formulate rules of democracy to entrench themselves and their political parties. *Id.* at 38-49, 54-55, 76-83, 130, 154. Second, the Court has mechanically applied its general jurisprudence of individual rights (such as freedom of speech and association) and equality to the political realm, instead of modifying this law to account for the unique nature of politics, where harms are widely shared rather than individualized – and remedies must therefore be broader. *Id.* at 40-41, 46-55. Third, such unitary constitutional law has sometimes made democratic institutions and processes too rigid and has improperly stifled fluidity and innovation in the organization of politics, based on the Justices' cultural assumption that democracy must be stable, orderly, and appropriately restrained. *Id.* at 39-41, 116, 126-30, 153-54. The case law and scholarship on these topics is voluminous and cannot be considered in detail here.

279. *See* Choper, *supra* note 79, at 1470, 1476, 1486-92 (recognizing that gerrymandering effectively nullifies *Baker*'s right to an equal vote, and arguing that both gerrymandering and apportionment should be treated as political questions).

280. *See* Karcher v. Daggett, 462 U.S. 725 (1983) (invalidating New Jersey's reapportionment of its congressional districts because its admittedly trivial deviation from the "one person, one vote" principle was driven by partisan considerations); *id.* at 744-65 (Stevens, J. concurring) (explaining that political gerrymandering was not a political question because it involved the legal EPC issue of vote dilution).

281. Davis v. Bandemer, 478 U.S. 109 (1986).

282. *See id.* at 118-27; *but see id.* at 144-61 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring) (maintaining that the Constitution leaves gerrymandering claims to the political process, not judicial review). After 1986, the Court struggled to devise governing legal principles before finally giving up. *See* Rucho v. Common Cause, 588 U.S. 684, 689, 700-702 (2019) (citing cases), discussed *infra* notes 466-483 and accompanying text.

283. *See supra* notes 119-120 and accompanying text.

Nonetheless, in *Powell v. McCormack*,[284] the Court deemed this Clause justiciable and concluded that the House had violated it.[285]

The Court also reviewed Congress's exercise of its seemingly plenary Article I powers to (1) determine procedures for enacting statutes[286] and (2) choose a method for apportioning congressional districts among states.[287] Similarly, the Court considered as justiciable matters that had previously been deemed the exclusive province of the Executive Branch,[288] such as determining whether another nation had complied with a treaty.[289]

Indeed, in the sixteen PQD cases between *Baker* and *Bush*, only two questions were determined to be "political": military training[290] and impeachment.[291] Those holdings plainly comported with the original understanding,[292] but could have gone either way under the *Baker* criteria.[293]

In short, the PQD has been drained of force. In particular, the Court has ruled that challenges to almost all election laws are justiciable. But such judicial review is appropriate only to enforce constitutional amendments that limited governments' previously total discretion over electoral matters by prohibiting discrimination in voting based on

284. 395 U.S. 486 (1969).

285. *Id.* at 512-50. Powell challenged the House's refusal to seat him, but while his case was pending, he won reelection and was seated. The case thus seemed moot, but the Court held otherwise. *Id.* at 495-500.

286. *See, e.g.*, United States v. Munoz-Flores, 495 U.S, 385, 389-96 (1990); INS v. Chadha, 462 U.S. 919, 940-43 (1983). When this issue arose before *Baker*, the Court held it to be a political question. *See supra* note 151 and accompanying text. However, although the Constitution entrusts *enactment* of a statute to Congress and the President, a court arguably should be able to review the *application* of a statute that allegedly did not comply with Article I procedures to a plaintiff whose life or liberty is at stake, albeit with great deference to the political branches.

287. Dep't of Com. v. Mont., 503 U.S. 442, 456-59 (1992). Until 1963, Article I, Section 2 had always been interpreted as ultimately leaving the apportionment of congressional districts to Congress. *See supra* notes 40-45, 101-120, 257-259 and accompanying text.

288. *See, e.g.*, United States v. Nixon, 418 U.S, 683, 692-97 (1974) (holding that federal courts could order the President to disclose confidential communications with his subordinate executive officials, despite the previous understanding that Article II gave the President complete control over such internal executive branch matters).

289. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229-30 (1986).

290. Gilligan v. Morgan, 413 U.S. 1, 5-12 (1973).

291. Walter Nixon v. United States, 506 U.S. 224, 226-38 (1993).

292. *See supra* notes 108, 110, 140, 142 and accompanying text.

293. For example, applying *Baker*, it is not clear why military training is more "political" than other military and foreign affairs that the Court has found justiciable. Likewise, although Article I commits impeachment exclusively to Congress, the same can be said for Congress's decisions about seating a Representative or Senator, its procedures for enacting statutes, and its supervision of states' apportionment of congressional districts and their selection of electors. *See* U.S. CONST. art. I, § 2, cl. 5 and §3, cl. 6 (impeachment); art. I, §5, cl.1 (seating members); art. I, §7 (procedures for passing laws); art. I, §4, cl. 1 (oversight of state congressional districting); art. II, §1, cls. 3-4 (choosing electors).

race, sex, poverty, or age.[294] Beyond that narrow category, the Court's intervention has entangled judges in issues that are political, not legal.

B. Standing, Ripeness, and Mootness

The Court has developed intricate standards for the other justiciability doctrines. Most critical was its transformation of standing. An Article III "Case" long arose when a party submitted a legal question in a form recognized by law, which included certain uncontested actions.[295] Although the Court in the early twentieth century added an "adversarial dispute" requirement, it retained the concept of injury as a harm to a plaintiff's *legal* interest.[296] In the early 1970s, however, the Court abruptly changed this requirement to a particularized "injury *in fact*" that is actual or imminent.[297] However, this determination is arbitrary, especially absent a common law harm such as monetary loss or personal injury.[298]

The Burger Court also fabricated two new requirements. First, plaintiff's injury had to be "fairly traceable" to defendant.[299] Causation in law, however, is a slippery concept that entails discretionary policy judgments.[300] Second, the injury must be "'likely to be redressed by the requested relief.'"[301] But standing is a threshold inquiry, and it is often unclear at that stage whether a court can "likely" provide an adequate remedy.[302]

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294. *See supra* notes 33-36, 173-174, 205, 264 and accompanying text.

295. *See supra* notes 93-100 and accompanying text.

296. *See supra* notes 175-180 and accompanying text.

297. Initially, this new requirement applied to standing to allege the violation of federal *statutory* rights. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-55 (1970). The Court swiftly extended "injury in fact" and made it an Article III requirement to bring *constitutional* claims. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Pushaw, *Justiciability*, *supra* note 39, at 473-74.

298. Pushaw, *Limiting*, *supra* note 95, at 4-5, 12-16, 82-91. For instance, to allow suits under novel Acts of Congress, the Court in the 1970s found "injury in fact" to (1) aesthetic, recreational, and emotional interests from the violation of environmental laws, and (2) the right to live in a multicultural community from the violation of civil rights statutes. *See id.* at 4, 29-33, 83-85, 93-94. Conservative Republican Justices, who eventually formed a majority, looked skeptically at such abstract "injuries." *Id.* at 34-38.

299. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617-19 (1973).

300. *See* Pushaw, *Limiting*, *supra* note 95, at 5, 39-40, 51-52, 91-92. For example, in *Allen v. Wright*, 468 U.S. 737 (1984), the Court concluded that the IRS's failure to deny tax-exempt status to private schools that racially discriminated had not caused plaintiffs' "injury in fact" (the inability to get an education in racially integrated public schools), which had instead resulted from the actions of the private institutions. *Id.* at 757-59. The dissenters responded that the tax exemptions supported the private schools and thereby helped cause unconstitutional segregation in public schools. *See id.* at 766-83 (Brennan, J., dissenting); *see also id.* at 783-95 (Stevens, J., dissenting). It is impossible to tell which side correctly applied the "fairly traceable" standard, which depends on how direct the causation must be.

301. *See Linda R.S.*, 410 U.S. at 617-19.

302. *See* Pushaw, *Limiting,* supra note 95, at 5-6, 39-40, 52, 92-93.

The Justices have applied the injury, causation, and redressability criteria in wildly inconsistent ways, both within and across cases.[303] The liberal Justices tend to grant standing to plaintiffs claiming violations of civil rights, environmental, and consumer protection laws, whereas the conservatives do the opposite.[304]

Of special relevance here, Article III standing requirements–especially individualized injury–cannot sensibly be applied to election-related claims because they typically involve harms to the overall democratic structure and thus hurt citizens generally.[305] Furthermore, plaintiffs' asserted injuries often do not actually occur until Election Day, at which point it is too late to obtain a deliberative judicial decision, the damage wrought by the contested election regulation is irreparable, and the costs of bringing suit outweigh the benefits.[306] Consequently, courts sometimes stretch standing doctrine–for example, when plaintiffs allege that racially gerrymandered legislative districts violate the Fourteenth and Fifteenth Amendments–and when they reach the merits, they apply mushy substantive standards.[307]

Ripeness doctrine is similarly impressionistic. Starting in the 1940s, the Court held that, if a plaintiff claimed that a statute did not authorize an agency's proposed action, ripeness was discretionary.[308] Hence, judges should generally avoid "premature adjudication" that would interfere with an agency's "policies" or "administrative decisions," but could make an exception if the issues were "fit[] . . . for

303. *See id.* at 4, 18, 26-54.

304. *See id.* at 4, 19, 26-43.

305. *See, e.g.*, Pildes, *supra* note 278, at 46-55.

306. *See* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy: The Changing Nature and Importance of As-Applied Challenges in the Supreme Court's Election Law Decisions*, 93 MINN. L. REV. 1644, 1645-46, 1648-49, 1672-73 (2009) (arguing that such problems, and the special need for clarity about rules before an election, should induce the Court to relax standing and ripeness doctrines to facilitate facial challenges).

307. The Voting Rights Act (VRA) of 1965, 42 U.S.C. § 1983, prohibits states from discriminating against minority groups. A thorny issue concerns state attempts to gerrymander certain legislative districts to ensure that a majority of voters therein are members of such groups. When white voters brought constitutional challenges, the Court sometimes punted by holding that such plaintiffs lacked standing because they had not demonstrated any personalized factual injury. *See, e.g.*, Sinkfield v. Kelley, 531 U.S. 28 (2000); United States v. Hays, 515 U.S. 737 (1995). When the Court did exercise jurisdiction, it set forth vague substantive standards (e.g., that race cannot be the "predominant factor" in redistricting) that gave lower federal courts little concrete guidance. *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667 (2002) (maintaining that the Court can extricate itself from this morass by deeming such issues nonjusticiable, articulating loose substantive standards that virtually every law will meet, or declaring that the congressional and judicial interventions have succeeded in making the political process workable).

I cannot here consider the voluminous case law and scholarship on the VRA and racial gerrymandering. I will simply note that Justice Thomas recently concluded that the Court's jurisprudence is so unprincipled that it should treat all gerrymandering as nonjusticiable. *See infra* notes 490-495 and accompanying text.

308. *See supra* note 188 and accompanying text.

judicial decision" and delay would cause "hardship to the parties."[309] In the early 1970s, however, the Court declared that ripeness was also an Article III limit focused on whether the plaintiff had experienced an "injury" that was imminent rather than speculative.[310]

The problem is that ripeness typically arises when plaintiffs seek equitable remedies, which are inherently discretionary. In particular, under the DJA, plaintiffs sometimes can have standing even though they have not yet suffered a concrete "injury in fact," and their case can be ripe even though the agency has not yet developed a full record.[311] The Court's insistence that a prudential judgment is an Article III mandate has made ripeness incoherent.[312]

In election law cases, the Court prefers to wait until a case is ripe, which usually occurs when an allegedly unconstitutional law has been applied against a plaintiff on Election Day.[313] Again, by then it is often too late to provide adequate relief.[314] Thus, the Court has sometimes relaxed the Article III "injury" requirement for ripeness when it wants to reach the merits.[315]

Finally, for many centuries, Anglo-American courts have had discretion to decide moot cases, such as when the issue presented was of great public importance.[316] In a footnote in 1964, however, the Court asserted that mootness was also an Article III requirement.[317] In later opinions, the Justices supported this move by borrowing from standing analysis: The parties' live, adverse dispute had ended (e.g., through a settlement), so they no longer had legal rights at stake.[318]

Nonetheless, the Court has recognized several exceptions, most notably when a moot case is "capable of repetition, yet evading review" ("CORYER").[319] "Capable of repetition" means "a reasonable

309. Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

310. *See* Pushaw, *Case/Controversy*, *supra* note 39, at 453, 455-56, 529-30.

311. *See supra* notes 184-188 and accompanying text.

312. *See* Pushaw, *Justiciability*, *supra* note 39, at 496-97 (arguing that the Court should set forth specific separation-of-powers principles to guide the exercise of discretion in ripeness determinations).

313. *See* Persily & Rosenberg, *supra* note 306, at 1644-46, 1648-49, 1658-72 (citing cases).

314. *See supra* note 306 and accompanying text.

315. *See* Vikram David Amar & Evan Caminker, *The Basis for Election Exceptionalism in Justiciability and Related Doctrines: "Constitutional Compensation" in Light of* Purcell, 2024 U. ILL. L. REV. 1451,1479-85 (citing illustrative cases).

316. *See supra* note 129 and accompanying text.

317. *See* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

318. *See, e.g.*, U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 395-97 (1980) (citing standing precedent as support for Article III mootness).

319. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 134-139 (9th ed. 2025). The other main exception is when the defendant voluntarily ceases the illegal conduct but cannot prove there is "no reasonable expectation that the wrong will be repeated." *See* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 448 (2d Cir. 1945)).

expectation" that the party will later be subjected to the same unlawful action, and "evading review" refers to a time frame too short to allow full litigation.[320]

The Justices selectively apply mootness doctrine depending on their eagerness to reach the merits.[321] For example, in *DeFunis v. Odegaard*,[322] a bare majority distorted mootness to avoid deciding the explosive issue of affirmative action.[323]

More generally, exceptions to mootness make no sense if federal judges lack Article III jurisdiction to decide such cases.[324] Thus, the Court's assertion that mootness is a constitutional command disguises prudential judgments, and it should candidly identify the factors that guide the exercise of that discretion.[325] When a court, to ensure standing and ripeness, waits until after an election to hear a constitutional challenge to a rule governing that election, the case is moot because a new election cannot be ordered.[326] Moreover, if election results are disputed, courts are under intense time pressure because a winner must

320. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007). A famous example of CORYER is *Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (holding that even though Roe's constitutional challenge to Texas's law banning abortion was moot because she had already delivered her baby, such cases would likely recur and escape review since it would take more than nine months for them to be processed through lower courts and receive Supreme Court review).

321. *See* Pushaw, *Justiciability*, *supra* note 39, at 490-92 (citing cases).

322. 416 U.S. 312 (1974).

323. A white man claimed a state law school had violated equal protection by denying him admission because of his race. *Id*. at 314. By the time the case reached the Court, the plaintiff had been admitted pursuant to a trial judge's order, he had registered for his final term, and the university stipulated that he would be permitted to complete this term. *Id*. at 314-16. Five Justices dismissed the case as moot on the ground that any judgment would have no effect on the student and the two possible exceptions did not apply. *Id*. at 316-20. First, mootness did not depend on the university voluntarily ending its admission practices (it did not), but rather on its agreement to allow the student to finish the term. *Id*. at 316-18. Second, although the question would likely recur, a prompt future constitutional challenge would not evade the Court's review. *Id*. at 318-19.

Four liberal Justices dissented and argued that the university's ceasing of its allegedly unlawful action as to the student's initial admission did not moot the case, as he might not graduate because of an unexpected event such as illness – and then would have to apply for readmission subject to the discriminatory program. *Id*. at 348-50 (Brennan, J., dissenting). The dissenters accused the majority of manipulating mootness rules to abdicate their duty to resolve a critical constitutional question that would surely arise again, thereby "disserv[ing] the public interest." *Id*. at 350. Justice Douglas agreed and concluded that affirmative action programs did not violate equal protection. *Id*. at 320-48.

It is impossible to say which side correctly applied mootness doctrine because it is so flexible. Nonetheless, it seems plain that the majority's desire to avoid the issue influenced their mootness analysis, whereas the opposite was true of the dissenters.

324. *See* Pushaw, *Justiciability*, *supra* note 39, at 490-92.

325. *See id*. at 492-93 (recommending that judges should weigh factors such as whether the legal issue presented is important to the public or merely to the parties; the court's role in checking illegal conduct, especially by the government; the government's interest in avoiding an adverse and unnecessary judgment without its consent; and the liberty interests of plaintiffs and non-parties).

326. *See* Amar & Caminker, *supra* note 315, at 1466.

be certified fairly quickly. Accordingly, courts sometimes invoke the CORYER exception when they want to reach the merits. As for "capable of repetition," the Court (1) has vast discretion in applying the subjective "reasonable expectation" of recurrence standard and (2) has ignored or stretched the "same party" and "same unlawful action" standards when it wishes to decide the merits.[327] Similarly, the Court can find that the challenged election law will often "evade review" because of a short timetable–for example, a few months between a primary and general election or a few weeks in which a winner must be certified in a post-election case.[328]

C. Justiciability in Election Cases

As the foregoing analysis reveals, the inadequacies of the justiciability doctrines are especially apparent in the election context. Initially, no questions are more "political" than those concerning elections, which is why the Framers committed them to political officials.[329] Furthermore, election disputes typically involve alleged structural harms (e.g., to the democratic legitimacy of the government's election processes and mechanisms that affect all citizens), whereas standing, ripeness, and mootness require a plaintiff to have an "injury" that is individualized, actual or imminent, and live.[330]

Therefore, courts can exercise jurisdiction in election cases only by further distorting the justiciability doctrines to ensure that governments conform to what judges believe are basic democratic norms.[331] Many commentators have applauded such creativity and urged the Court to set forth liberalized justiciability standards in the unique context of elections to promote expeditious resolution of time-sensitive claims well ahead of Election Day, thereby vindicating democracy.[332]

That proposal makes sense if one accepts the constitutional validity of the modern justiciability doctrines and their relaxation to enmesh federal judges in partisan election disputes. I do not. Adding another patch to the crazy quilt of justiciability will just compound complexity.

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327. *See id*. at 1467-69.

328. *See id*. at 1467-77 (citing Court cases from 1969, 1972, 1974, 1978, 2007, and 2020 illustrating the flexible application of the CORYER exception); *see also id*. at 1478-79 (emphasizing that application of CORYER prevents the illegal conduct in future elections but not in the election just completed, so to vindicate democracy election disputes should be resolved well before an election by loosening standing and ripeness requirements).

329. *See supra* Section I.A. Again, the exception would be where governments intentionally discriminate based on race, sex, or wealth or arbitrarily violate freedom of expression.

330. Many scholars have recognized this problem and tried to address it. *See generally* Saul Zipkin, *Democratic Standing*, 26 J. L. & POL. 179 (2011) (citing Guy-Uriel Charles, Heather Gerken, Tom Goldstein, Sam Issacharoff, Pam Karlan, Gene Nichol, Nat Persily, and Rick Pildes).

331. *See id*. at 180, 238.

332. *See, e.g.*, Amar & Caminker, *supra* note 315, at 1451, 1454,1460-63, 1479-85, 1492-93, 1496.

Moreover, the perceived need to create special justiciability doctrines for election cases further reveals that those doctrines are discretionary, not constitutionally mandated.

Finally, liberal commentators who believe that judges should manipulate justiciability doctrines to decide election disputes should be careful what they wish for. That is exactly what the Court did in *Bush v. Gore*.[333]

V. *BUSH V. GORE*

It should not have been surprising that the Court effectively ignored justiciability concerns to decide the disputed 2000 Presidential election based on new equal protection principles. I will analyze the case in detail and describe my perspective on it.

A. Litigating the 2000 Presidential Election

The contest between Republican George W. Bush and Democrat Al Gore boiled down to Florida's twenty-five electoral votes.[334] On November 8, the Florida Division of Elections reported that Bush had won by 1784 votes (of 5.8 million cast).[335] Because the margin was so close, state law required an automatic machine recount, which confirmed Bush's victory, but by a lesser margin.[336] Gore protested this decision and requested a manual recount in four counties, all having Democratic majorities.[337] Florida's Secretary of State determined that, under state statutes, these recounts had to be completed by November 14.[338] The Florida Supreme Court, dominated by Democratic appointees, overturned that ruling and extended the deadline by twelve days.[339] The legal basis of that judgment was vague, leading the U.S. Supreme Court to vacate it and remand.[340]

On November 26, Florida's Elections Commission certified that Bush had prevailed.[341] The next day, Gore invoked a state law allowing him to contest that certification if he could prove a "'rejection of a number of legal votes sufficient to change or place in doubt the result of the election.'"[342] A state trial judge concluded that Gore had not met this standard, but the Florida Supreme Court reversed on December 8.[343]

333. 531 U.S. 98 (2000).
334. *Id.* at 100-03.
335. *Id.* at 100-01.
336. *Id.* at 101.
337. *Id.*
338. *Bush*, 531 U.S. at 101.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* (citing Fla. Stat. Ann. § 102.168(3)(c) (Supp. 2001)).
343. *Bush*, 531 U.S. at 98, 101-02.

That Court (1) construed "'legal votes'" as those that expressed a ""clear indication of the intent of the voter;"" (2) required that this criterion be applied to hand recounts of 9000 ballots in Miami-Dade County; and (3) ordered the addition of 383 Gore votes from that County and Palm Beach County.[344] Seven U.S. Supreme Court justices swiftly held that the Florida Supreme Court had violated the EPC by allowing "standardless manual recounts."[345]

The five conservative Republican Justices issued a *per curiam* opinion.[346] Initially, they cited *McPherson v. Blacker*[347] for the proposition that Article II, which provides that "[e]ach State shall appoint [electors], in such Manner as the Legislature thereof may direct,"[348] gives each Legislature "plenary" power to select electors or to delegate that choice to its voters (albeit with the Legislature ultimately able to take back its appointment power).[349] If a state permitted the people to choose, the EPC, as construed in cases like *Reynolds* and *Sanders,* prohibited a state from treating votes disparately.[350] The majority ruled that Florida's high court had violated this Clause by instructing county officials to determine the "intent of the voter" from the recounted ballots arbitrarily instead of through uniform legal rules – most importantly, whether a valid paper ballot had to show next to a candidate's name a complete hole, a hanging chad, or an indentation.[351]

The majority did not remand to allow Florida officials to recount the ballots using a uniform standard because of time constraints.[352] The Florida Legislature sought to take advantage of the Electoral Count Act, which guaranteed a "safe harbor" for a state's electors if they

344. *Id*. at 102-03.

345. *See id*. at 103-11. Justices Souter and Breyer agreed only with the Equal Protection holding. *See id*. at 134 (Souter, J., dissenting); *id*. at 145-46 (Breyer, J., dissenting).

346. *See generally id*. at 99-111. The majority consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas.

347. 146 U.S. 1 (1892).

348. U.S. CONST. art. II, § 1, cl. 2.

349. *Bush*, 531 U.S. at 104. This interpretation of Article II means that even if Florida's Legislature had authorized its courts to decide disputes arising out of the voters' choices in presidential elections, the Legislature ultimately could have overturned such decisions and reasserted its power to appoint electors.

350. *See id*. at 104-07. Directly on point was *Gray v. Sanders*, 372 U.S. 368 (1963), which held that this Clause forbade a state from treating voters in different *counties* in a dissimilar manner. *See Bush*, 531 U.S. at 104-07; *see also id*. (citing a 1969 case applying that principle to strike down a state procedure that diluted the votes of citizens in larger counties in a presidential election); *id.* at 105 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), which established that states could not debase the weight of any citizen's vote).

351. *Id*. at 105-06. The Court cited numerous examples of the disparate handling of recounted ballots, both within a county–depending on the judgment of members of different counting teams who had been hastily assembled, lacked training in interpreting ballots, and often changed the definition of a valid legal ballot as the counting progressed–and across the four counties (such as by allowing partial recounts in some counties but not others). *See id*. at 106-09.

352. *Id*. at 110-11.

were selected pursuant to statutes enacted before Election Day and appointed six days before the Electoral College met–that is, by December 12, the date of the Court's opinion.[353]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred but added that the Florida Supreme Court had also violated Article II by failing to follow its Legislature's directions for appointing presidential electors.[354] Specifically, that court had disregarded the Legislature's delegation of power to the Secretary of State, which she had reasonably exercised to (1) enforce the statutory deadline for certification of electoral votes (and ignore later-submitted recounted ballots), and (2) determine that statutory "legal votes" did not include incorrectly marked ballots.[355]

Justices Souter and Breyer agreed with the Court on equal protection, but otherwise joined the dissents of Justices Stevens and Ginsburg.[356] All four criticized the majority for needlessly intervening, as federal laws provided a three-step process for political resolution of presidential election disputes.[357] First, Article II, Section 1 authorized state "Legislatures" to direct electors' appointment, but did not insulate those lawmakers from judicial review to ensure that they had obeyed state statutory and constitutional limits.[358] Second, Article II and the Twelfth Amendment provided that the Senate President must count the votes in Congress.[359] Third, the Electoral Count Act set forth detailed rules for states to resolve disputes and for Congress ultimately to decide any lingering issues, including the validity of each state's slate of electors.[360] Accordingly, "[t]he Court was wrong to take this case."[361] Justice Souter added that the case was not ripe: "If this Court had allowed the State to [continue], . . . it is entirely possible that there would ultimately have been no issue requiring our review, and political tension would have worked itself out in the Congress…"[362]

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353. *See id.; accord id*. at 113-14, 120-22 (Rehnquist, C.J., concurring).

354. *Id*. at 111-22 (Rehnquist, C.J., concurring); *id*. at 111-15 (stressing the Court's duty to enforce Article II because of the exceptional national importance of presidential elections, which it could not abdicate by deferring to state court judgments about state law that did not honor its Legislature's directions).

355. *Bush*, 531 U.S. at 118-22 (Rehnquist, C.J., concurring).

356. *Id*. at 129-35 (Souter, J., dissenting); *id*. at 144-58 (Breyer, J., dissenting).

357. Justice Breyer provided a detailed survey of the constitutional and statutory framework. *See id*. at 153-58 (Breyer, J., dissenting). The other dissenters agreed with Breyer's analysis. *See id*. at 123-24 (Stevens, J., dissenting); *id*. at 129-30, 133 (Souter, J., dissenting); *id*. at 141-42 (Ginsburg, J., dissenting).

358. *See id*. at 147-48 (Breyer, J., dissenting); *id*. at 123-24 (Stevens, J., dissenting); *id*. at 141-43 (Ginsburg, J., dissenting).

359. *See id*. at 153, 155 (Breyer, J., dissenting).

360. *See id*. at 148-49, 153-57 (Breyer, J., dissenting) (closely examining the text and legislative history of the Act); *id*. at 124, 127 (Stevens, J., dissenting) (agreeing with Breyer's conclusions).

361. *See Bush*, 531 U.S. at 144 (Breyer, J., dissenting).

362. *See id*. at 129 (Souter, J., dissenting).

As the Court had asserted jurisdiction, however, Justices Souter and Breyer turned to the merits. Initially, they argued that federalism counseled deference to the Florida Supreme Court's reasonable interpretation of its state's election laws, which did not alter its Legislature's directions in violation of Article II.[363] But these Justices concluded that the state law, so construed, violated the EPC.[364] They would have remanded to enable the Florida courts to determine whether application of a uniform legal standard to the ballots could be completed by December 18, when the Florida electors were to meet.[365] Justice Breyer warned:

> [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 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 close, we have . . . [forsaken] "self-restraint."[366]

Justices Stevens and Ginsburg dissented from the majority's opinion in its entirety and agreed with Justices Souter and Breyer on all points but one: The Florida court's "intent of the voter" standard did not violate equal protection requirements.[367] Stevens rebuked the majority for groundlessly expressing a

> lack of confidence in the impartiality and capacity of the state judges . . . , [thereby] lend[ing] credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. . . [The majority has shaken] the Nation's confidence in the judge as an impartial guardian of the rule of law.[368]

Interestingly, no Justice cited *Baker*. The majority could have applied its six factors to find the case justiciable under the EPC, whereas the other four Justices could have deemed the questions "political"

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363. *See id*. at 130-33 (Souter, J., dissenting); *id*. at 135-36, 148-52 (Breyer, J., dissenting). Justices Stevens and Ginsburg agreed. *See id*. at 123, 127-28 (Stevens, J., dissenting). *id*. at 135-41 (Ginsburg, J., dissenting).

364. *See id*. at 134 (Souter, J., dissenting); *id*. at 145-46 (Breyer, J., dissenting).

365. *See id*. at 129, 134-35 (Souter, J., dissenting); *id*. at 144, 146-47, 157-58 (Breyer, J., dissenting); *id*. at 126-27 (Stevens, J., dissenting); *id*. at 143-44 (Ginsburg, J., dissenting).

366. *Id*. at 157-58 (Breyer, J., dissenting).

367. *See Bush*, 531 U.S. at 123-29 (Stevens, J., dissenting); *id*. at 135-44 (Ginsburg, J., dissenting).

368. *See id*. at 128-29 (Stevens, J., dissenting); *see also id*. at 136-37, 144 (Ginsburg, J., dissenting).

under the Constitution's provisions concerning presidential electors (as Breyer suggested).[369]

B. The Reaction to Bush

The response of politicians, ordinary Americans, and commentators mirrored the Court's split: Republicans agreed with the Court, whereas Democrats did not.[370] Members of Congress should have expressed bipartisan outrage that the Court had usurped their constitutional role of resolving presidential election disputes, but they found it expedient to let the Court take the political heat. Echoing the dissents, the overwhelmingly liberal legal academy and mainstream media skewered the five conservative Republican Justices for abandoning their professed commitments to judicial restraint, fidelity to the written Constitution, and federalism by interfering with a state's administrative and judicial processes to secure the election of a Republican President.[371] Conversely, several prominent conservative thinkers

369. First, Justice Breyer indicated that Article II and the Twelfth Amendment textually commit presidential elections to the states and Congress. *See supra* notes 357-361 and accompanying text. However, the majority relied on post-*Baker* precedent holding that the later-ratified (and judicially reviewable) EPC limited this power. Second, and similarly, Article II and the Twelfth Amendment do not yield "judicially discoverable and manageable standards," but the EPC does ("one person, one vote"). Third, although the decision seemingly involved a discretionary "policy determination," the majority concluded that it was a legal decision based on equality principles. As for the other three factors, if the Court had waited until Congress rendered a final judgment, there would have been a "need for unquestioning adherence to a political decision already made," and a contrary judicial judgment would have shown a "lack of respect" to Congress and caused it "embarrassment." By intervening when it did, the Court sidestepped those three possibilities.

In short, *Baker*'s elastic criteria gave the Justices discretion to either exercise judicial review or deem the case nonjusticiable. *See* Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Kent & Shane*, 29 FLA. ST. U. L. REV. 603, 605, 611-16, 618-19 (2001) [hereinafter Pushaw, *Presidential Election*]. Moreover, the Court in *Baker* declared that the PQD did not implicate federalism. *See supra* note 193 and accompanying text. Thus, Florida's interest in processing presidential election ballots under state law was irrelevant.

370. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 386-89, 400-01; *see also* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1230 (2002). Admittedly, the political split was not exact. The five conservative Republican Justices and the liberal Democrat Ruth Bader Ginsburg voted along predictable political lines. Democratic appointee Stephen Breyer did the same on three of the main issues, but crossed the political aisle on Equal Protection. Finally, dissenting Justices Stevens and Souter were appointed by Republican Presidents. However, both were ideologically liberals who, among other things, timed their retirements to ensure that their successors were chosen in 2010 by liberal Democratic President Barack Obama.

371. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 386-88, 399-400 (quoting scholars such as Bruce Ackerman, Erwin Chemerinsky, and Sandy Levinson); Pushaw, *Judicial Review*, *supra* note 101, at 1180 nn.96 & 98, 1181 n.99 (citing articles by Laurence Tribe and Larry Kramer).

praised the Court for intervening to prevent a constitutional crisis, despite certain legal flaws in its analysis.[372]

I took a unique view–a conservative Republican who agreed with the liberals that the Court should have declined jurisdiction but that, having forged ahead, should not have crafted new equal protection law.[373] My conclusion did not reflect their reasoning, but rather my prior scholarship arguing that the Court in the *Baker* line of cases had made mincemeat of the Constitution's text, structure, history, and precedent.[374] Again, the EPC exclusively concerns *civil* rights, so no one has standing to claim that their *political* right to an equal vote had been abridged.[375] Furthermore, the Constitution leaves disputes over electoral matters for final resolution to states, except that in federal elections Congress–but not federal courts–can review the states' determinations.[376] Finally, the Warren Court's decision to embroil federal judges in the political questions inherent in electoral disputes by applying made-up substantive rules would justifiably lead the public to doubt that the Justices are impartially expounding the Constitution as law.[377]

I applied my originalist critique of *Baker* to *Bush*.[378] Most pertinently, the majority did not mention standing, ripeness, mootness, or the PQD.[379] Their only nod to justiciability was the following statement:

> 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.[380]

The Court should not merely "admir[e] . . . the Constitution's design," but enforce it. Most importantly, the Constitution rebuts the presumption of judicial review of its provisions on presidential elections by

372. Pushaw, *Conservative Mirror*, *supra* note 19, at 388-89, 400 (citing Robert Bork, Richard Epstein, and Richard Posner).

373. *See id*. at 360-61, 381-82, 390-402.

374. *See e.g.*, Pushaw, *Justiciability, supra* note 39, at 444-51, 464-67, 469-70, 497-511.

375. *See supra* notes 11-12, 171, 210 and accompanying text.

376. *See supra* notes 30-31, 33-35, 39-81, 116-118, 122-124, 163-172, 202-209, 233-238, 252-259, 263-264, 294, 329-330 and accompanying text.

377. *See supra* Part III and Section IV.A..

378. *See* Pushaw, *Conservative Mirror, supra* note 19, at 390-95.

379. *See* Tushnet, *supra* note 370, at 1222-35 (arguing that this silence about standing and the PQD reflects the transformation of these doctrines into tools that enable the Court to assert judicial supremacy in deciding all constitutional law issues instead of making prudential judgments about whether political officials might be better equipped to resolve certain constitutional disputes).

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

authorizing Congress alone to resolve any disputes about the validity of electoral votes,[381] for reasons previously detailed.[382] Relatedly, the case may have been unripe because, if the Court had waited for the constitutionally mandated process to play out, Congress likely would have resolved the issue and obviated the need for judicial review.[383] Another timing issue is that, if Bush had succeeded in Florida and

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381. The Court had recognized this point. *See* Oregon v. Mitchell, 400 U.S. 112, 124 (1970).

382. *See supra* notes 46-81, 112, 121-122 and accompanying text. Article II, Section 1 authorizes (1) each state "Legislature" to "direct the manner of appointing electors" and (2) Congress to determine the time the electors are to be chosen and the date they must vote. Both Article II and the Twelfth Amendment provide that the Senate President must count the votes in Congress's presence and that, if no candidate receives a majority, the House must elect the President. These detailed constitutional provisions entrusted presidential elections exclusively to electorally accountable officials, as evidenced by Congress's resolution of three presidential election disputes in the 1800s and its later passage of the Electoral Count Act, which deliberately excluded the U.S. Supreme Court from any role. *See supra* notes 46-81, 112, 121-122 and accompanying text.

The *Bush* Court reaffirmed its 1892 holding in *McPherson* that Article II granted each state Legislature plenary power to appoint electors at any time, even after a Legislature had delegated that choice to its voters. *Bush*, 531 U.S. at 104. However, that interpretation of Article II did not seem to survive the *Baker* line of cases, which rejected the understanding that the Constitution gave state Legislatures total control over apportionment of state legislative and congressional districts and instead held that constitutional democracy requires a "one person, one vote" standard. *See supra* Part III and Section IV.A. Applying that rationale to presidential elections, a state Legislature should not be able to completely negate its voters' choice of electors. *See* Pushaw, *Presidential Election*, *supra* note 369, at 616-17.

I previously argued that Article II and the Twelfth Amendment were "justiciable yet should be interpreted by according the highest respect to the judgments of the government officials primarily entrusted with administering them." *Id.*at 616. The Court did not show such extraordinary deference to either Florida officials in appointing electors or Congress in determining the validity of the electoral votes submitted by the state–indeed, did not even wait for those two governments to exercise their constitutional powers and reach a final decision. *Id.* at 616-19. Further research has led me conclude that the Court, based on the original understanding of Article II and the Twelfth Amendment, never should have intervened. The Justices could justify any kind of judicial review of political officials' actions only by reference to *Baker* and its progeny.

383. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 393-94; s*ee also* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1102-05 (2001) (arguing that the case was not ripe because the recounting under a uniform standard had not yet occurred, and Bush may have prevailed in the end). The Court did not address ripeness. The majority-Republican Florida Legislature had announced its intention to accept the Secretary of State's certification of Bush as the winner of the state's twenty-five electoral votes. If Congress also received an alternate slate of Gore electors submitted pursuant to a Florida Supreme Court judgment, the Republican-controlled Congress would probably have decided the deadlock in favor of Bush. The Republican politicians who made such decisions would then be accountable to their voters, as the Constitution contemplated. *See* Barkow, *supra* note 46, at 298-300, 329-31, 336.

The counter-argument that the case was ripe in December 2000 is that the strict constitutional and statutory deadlines for processing presidential elections were fast approaching. However, ripeness doctrine assumes that judicial review can be exercised and focuses on the appropriate timing of such review. That is why the PQD was the key applicable justiciability doctrine: The Constitution precludes judicial review of presidential election disputes, making it unnecessary to consider any other doctrines.

Congress (as is probable),[384] his case would have been mooted.[385] Finally, none of the Justices considered standing, which would have been denied under the traditional approach.[386] But even if the Court had applied its modern precedent, only Florida voters–not Bush–had suffered a particularized "injury in fact" to their equal protection right to have their votes counted uniformly.[387]

Moreover, nothing in the EPC's language, history, or pre-*Baker* precedent conferred such a right, and no case before *Bush* had prohibited variances within states in recounting ballots (presidential or otherwise).[388] The Court's invention of a new equal protection right to be free from such discrepancies in the highest-profile case imaginable further eroded public trust in the Court as an apolitical legal tribunal. Indeed, most American thought that politics had influenced the Justices' positions.[389]

The foregoing analysis led me to criticize *Bush* as the conservative flip side of *Baker*.[390] Both cases involved a majority of Justices who (1) believed that only they had the intellectual and moral authority to address perceived unfair state electoral practices; (2) abandoned the constraints of justiciability, federalism, and separation of powers that should have precluded review; and (3) fashioned a new equal protection principle and held that a state had violated it.[391] Furthermore, both decisions prompted dissents charging the majority with mangling

384. Again, Republicans controlled both the state and federal legislatures. *See supra* note 383.

385. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 393.

386. *See supra* notes 11-12, 171, 210, 375 and accompanying text (explaining that no plaintiff has standing to bring voting rights claims under the Equal Protection Clause).

387. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 392; *see also* Chemerinsky, *supra* note 383, at 1094-1102 (to similar effect); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1347-55, 1356-65 (2001) (maintaining that *Bush* continued the development of "structural" Equal Protection: Instead of safeguarding an identifiable group of individuals (particularly minorities), the Court imposes its own formalist vision of democracy and usurps the role of the states and Congress in supervising the electoral process, thereby producing less democracy and equality).

388. The EPC did not affect the Constitution's provisions granting states broad discretion in administering state and federal elections (including presidential ones). Thus, voters will certainly be treated unequally in different states. Furthermore, many states have exercised their discretion to provide an "intent of the voter" standard for determining the legal validity of ballots cast, which may lead to differential handling of voters within their states. If the Florida Supreme Court correctly construed its state law as requiring (or even permitting) application of this standard, no equal protection violation would result. What likely persuaded the Justices to hold otherwise was that canvassing boards and counting teams within heavily Democratic counties kept changing the definition of a legal ballot with the transparent aim of yielding more votes for Gore. *See* Pushaw, *Presidential Election*, *supra* note 369, at 619-22.

389. Many Americans, and virtually all Democrats, viewed *Bush* as a partisan ruling, which damaged the Court's credibility. *See, e.g.*, Chemerinsky, *supra* note 383, at 1093-94, 1106, 1112; Barkow, *supra* note 46, at 296-98.

390. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 359-61, 390-402.

391. *See id.*

constitutional law and compromising the public's confidence in the Court.[392] In short, *Baker* and *Bush* are strikingly similar, and both should be excoriated.

Therefore, I criticized Republicans who praised *Bush* after years of decrying the political excesses of the Warren Court that *Baker* epitomized and that later Courts often continued.[393] Conversely, I rejected the position of liberal scholars that *Baker* was a canonical constitutional decision, whereas *Bush* was an abomination.[394] After all, they have long supported not only *Baker* but all of the Court's "interpretations" of the Constitution that imposed liberal ideological preferences, only to suddenly–and temporarily–embrace judicial restraint, principled legal analysis, respect for state prerogatives, and avoiding political entanglements.[395]

These scholars mirrored the double standard of the dissenters. Before and after *Bush*, these Justices embraced liberal constitutionalism and ignored federalism (e.g., in their abortion opinions).[396] Nonetheless, they criticized the majority for disparaging the Florida judges' impartiality and competence–and thereby undermining public confidence in courts as neutral defenders of the rule of law.[397]

But it was rational to doubt that the Florida jurists were objectively discerning the meaning of state law. In that state, all judges are elected except for appellate judges, who are appointed by the governor, face an up-or-down vote at the next election, and, if approved, get a six-year term.[398] As a Democratic governor had appointed all of the Florida Justices,[399] they would be expected to favor Democrats like Gore.[400] Indeed, the whole point of selecting judges through a political process and limiting their terms is to ensure their political accountability.[401] By contrast, if impartiality and legal excellence were the goal,

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392. I have detailed the striking similarity of the rhetoric of the dissenting Justices in *Baker* and *Bush*. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 359-60, 365-67, 385-86, 390.

393. *See id.* at 388-91, 395-97.

394. *See id.* at 386-88, 390.

395. *See id.* at 360, 386-88, 398-402.

396. *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J. L. & PUB. POL'Y 519, 520-91 (2008).

397. *See supra* notes 356-368 and accompanying text.

398. *See* FLA. CONST. art. V, § § 10-11.

399. *See* Richard A. Oppel Jr., *Counting the Vote: The Supreme Court Justices; In Florida's State Government, Court Is a Democratic Enclave* , N.Y. TIMES, Nov. 17, 2000, at A 27.

400. Initially, the Florida Supreme Court unanimously sustained Gore's position, but its reasoning was so muddled that the U.S. Supreme Court remanded for clarification as to whether the state court had adequately considered the federal law issues. *See supra* note 340 and accompanying text. Four Florida Justices then rendered a similar judgment that was even more transparently pro-Gore (e.g., giving him 383 more votes), whereas three dissenting Justices were politically astute enough to realize that this ruling would prompt a reversal. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 400.

401. *See infra* Section VII.B.

then a state would devise a system to appoint as judges top legal minds and give them life tenure.

That is what the Constitution's drafters thought they were doing by ensuring federal judges' independence from direct political pressure (although their other goal of uniformly high legal acumen has proved elusive).[402] Yet Article III judges have often issued opinions that can best be explained by politics or ideology, not law. *Bush v. Gore* exemplifies this phenomenon, as the conservative Republican Justices may have favored (perhaps subconsciously) the presidential candidate who shared their views.[403] But liberal Democrats cannot plausibly assert that *Bush* is novel or unique, especially after praising the Warren Court for its nakedly political and ideological reconstruction of constitutional law.

In short, I argued that genuine respect for the Constitution and intellectual consistency required concluding that both *Baker* and *Bush* were wrong.[404] The extension of the *Baker*/*Bush* idea of judicial supremacy in election-related matters over the past 25 years has reaffirmed my view that the Court has gone off the rails.

VI. THE IMPACT OF *BUSH V. GORE*

At first glance, *Bush* appears to have had little effect. The Court limited its holding "to the present circumstances,"[405] realizing its decision was hasty and politically explosive. Because *Bush* tarnished the Court's reputation,[406] it has never cited the majority opinion or intervened *after* a disputed Presidential election.

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402. *See supra* notes 86-87, 99, 102-103, 113-115 and accompanying text.

403. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 399-402. They may also have concluded that this predictable accusation of political bias was preferable to allowing partisan Democrats in Florida to steal a presidential election. *Id.* at 401.

404. My critique of *Baker* and *Bush* focuses on the law of the Constitution from its drafting in 1787 until the *Baker* decision in 1962. However, someone who took a consistent common law approach to constitutional decision-making would reject *Baker* as literally unprecedented but conclude that the Court in *Bush* at least had many years of precedent–affirming the justiciability of election disputes and the constitutional right to voting equality–to support its extension of that right to presidential election deadlocks. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 395-97 (making this point and noting that several distinguished scholars had recognized the legal plausibility of this extension).

405. *Bush*, 531 U.S. at 109. This suspicious limitation (a rule that applies to a single case is not really "law") distinguished *Bush* from *Baker* and *Reynolds*, where the Court announced new principles that would apply to all state legislative apportionment schemes. *See* Pushaw, *Conservative Mirror*, *supra* note 19, at 398-99.

406. *See* David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427, 1427-30 (2006) (describing the backlash against the Court); *id.* at 1430-44 (contending that several conservative Justices sought to rehabilitate the Court's reputation by siding with the liberals and stressing the rule of law, as exemplified by holding that the Bush Administration had violated the rights of detained enemy combatants); *but also* Issacharoff, *supra* note 73, at 345 (citing studies showing that *Bush* did not significantly damage public trust in the Court, especially compared to Congress).

On closer inspection, however, *Bush* has had significant ramifications. From a general perspective, the Justices have continued to exercise nearly unbridled discretion in making justiciability determinations.[407] Furthermore, the Court has not overruled *Bush*, so it remains a precedent for lower federal and state courts. Even when these judges have not cited *Bush*, they have often followed its lead by disregarding justiciability concerns and holding that, to protect equality and other constitutional rights, they must sometimes disregard a state's election laws.[408]

The Court has usually dismissed appeals from such cases without comment. When it has granted review, the Justices have manipulated the justiciability doctrines. Sometimes the Court finds cases non-reviewable, as it did after the 2020 presidential contest between incumbent Republican President Trump and his Democratic opponent Biden.[409] At other times, the Court has brushed aside justiciability and judicial restraint principles to reach the merits of important constitutional questions, as it did before the 2024 election.[410]

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407. *See infra* Section VI.A.

408. *See infra* Sections VI.A.2 (6) and VI.B. Rick Hasen speculated that, if lower courts and state officials took *Bush* seriously, they would adopt more equitable voting procedures and mechanisms. *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 380-81, 386, 392-99, 406 (2001). Other scholars have concluded that *Bush* has prompted federal courts to routinely decide election disputes to promote equality and fairness, and this ligation has spurred states to make needed reforms. *See* Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide who can be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31 (2008).

Professor Hasen has argued that the Court, starting with *Baker*, has properly treated election-related cases as justiciable when a social consensus has emerged that certain "core" democratic principles require constitutional protection – for example, that governments cannot violate "one person, one vote," discriminate based on race or wealth, censor unpopular political speech, or prevent citizens from associating collectively to pursue political objectives. *See* HASEN, *supra* note 37, at 1-46, 61-62, 73-100, 138, 153-54, 163. Because elected officials seek to entrench themselves and their party, courts should identify rules that reflect Americans' evolving sense of democracy and that move in the direction of greater equality. *See id*. at 7-12, 46, 94-100, 102, 118, 137-38. However, where such ideas are contested (as with gerrymanders), the Court should not choose one side, but rather should leave the issue to lower federal courts to engage in a dialogue with political officials until a principled approach can be worked out. *See id*. at 7-10, 47-72, 97, 102–05, 163.

I disagree that the Court has the power or competence to create new constitutional principles based on the majority's perception that a social consensus has emerged on a particular issue. Rather, the Court must enforce the Constitution as written, and under Article V "We the People" can make amendments to reflect new super-majoritarian norms that have developed. As relevant here, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments prohibited voting discrimination based on race, sex, ability to pay a tax, and age. Thus, courts have the power to enforce those amendments, which limited governments' previously complete discretion to regulate election-related matters. But such judicial review should be confined to ferreting out invidious discrimination–not all electoral matters. Finally, the Court's jurisprudence in this area, such as *Baker*'s malleable PQD factors and invented EPC doctrine and the incomprehensible *Anderson-Burdick* test, does not inspire confidence that federal judges are capable of performing the role that Hasen thinks they should be assigned.

409. *See infra* Section VI.B.1.

410. *See infra* Section VI.B.2.

In short, *Bush*'s impact on elections and the law of democracy has been indirect but significant.[411] I will illustrate this point by considering the Court's post-2000 justiciability cases, then exploring its decisions during the 2020 and 2024 presidential elections.

A. Justiciability Precedent

1. Standing, Ripeness, and Mootness

The Court has continued to apply these doctrines haphazardly. The most numerous cases concern standing, and I have elsewhere detailed the Justices' divergent opinions in many cases.[412] To illustrate, in *Massachusetts v. EPA,*[413] several liberal states and environmentalists claimed that the EPA's decision not to regulate greenhouse gas emissions from new motor vehicles violated the Clean Air Act.[414] A bare majority of Justices held that the three standing prongs had been satisfied.[415] First, Massachusetts had alleged a sufficient "injury in fact": The EPA's failure to regulate new vehicle emissions would slightly increase carbon dioxide levels, which would contribute to global warming, which would raise sea levels, which might erode a few feet of the state's coastal property a century later.[416] The dissent responded that such an injury was not "actual or imminent."[417] Second, the Court ruled that the state's injury was fairly traceable to the EPA's inaction.[418] The dissent countered that causation was speculative, as American new car emissions would have a trivial effect on global climate change, and many other factors might contribute to coastal land erosion.[419] Third, the majority found that the remedy sought—ordering the EPA to regulate—would likely redress the injury.[420] The dissent disagreed and stressed that hugely increased pollution from developing nations would dwarf the tiny gains from stricter EPA emission limits.[421]

The majority stretched the elastic standing doctrine past the breaking point because they, like the plaintiffs, disliked the Bush

411. *See* Michael S. Kang & Joanna M. Shepherd , *The Long Shadow of* Bush v. Gore, 68 STAN. L. REV 1411, 1413, 1430-35, 1443 (2016) (noting that election cases have risen dramatically since *Bush* and raised concerns about partisan, result-driven judicial decisions).

412. *See* Pushaw, *Limiting*, *supra* note 95, at 3-6, 14-15,34, 38, 40-49, 89-93; *see also* Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism*," 31 GEO. MASON L. REV. 893, 897-916, 922-33 (2024).

413. 549 U.S. 497 (2007).

414. *See id.* at 505-10.

415. *See id*. at 518-26.

416. *See id.* at 521-22.

417. *See id*. at 541-42 (Roberts. C.J., dissenting).

418. *See id.* at 523-25 (majority).

419. *See id*. at 543-44 (Roberts, C.J., dissenting).

420. *Id.* at 523-25 (majority).

421. *See id*. at 545-46 (Roberts, C.J., dissenting).

Administration's environmental policies.[422] However, a lawsuit manufactured for political purposes by parties who feigned a legal interest is not an Article III "Case."[423] Moreover, contrary to the Court's assertion that standing promotes separation of powers, it negated Congress's decision to commit rulemaking to the EPA's discretion.[424]

Ripeness cases are similarly confused, for two main reasons. First, the Court has recognized that, when Article III standing focuses on whether a concrete injury is "imminent," this inquiry converges with ripeness.[425] Second, ripeness has both constitutional and discretionary elements, although the Court has tended to collapse the two.[426] The Justices' conflicting opinions suggest that they are making subjective judgments about whether delaying a decision would be prudent.

For example, *Susan B. Anthony List (SBA) v. Driehaus*[427] involved an incumbent federal Representative who complained to the Ohio Electoral Commission that the pro-life SBA, by asserting that he supported "taxpayer-funded abortion," had violated a state law criminalizing "false statements" about candidates.[428] SBA asked a federal court to enjoin enforcement of this law as violating its right to freedom of expression.[429] The candidate lost the election and withdrew his complaint, but SBA continued its challenge because its members intended to make supposedly "false statements" in later campaigns.[430] The Court held that (1) SBA had alleged a substantial threat of future enforcement of the law—a concrete injury that was sufficiently imminent to satisfy Article III standing and ripeness requirements, and (2) applying the discretionary *Abbott Labs* balancing test, the case presented a purely legal question and withholding a decision would impose an undue hardship on SBA.[431]

More recently, in *Trump v. New York*,[432] the President directed the Secretary of Commerce to exclude illegal immigrants from the census calculation "to the maximum extent feasible."[433] States with many such immigrants complained that (1) Trump violated federal law, which

422. *See* Pushaw, *Limiting, supra* note 95, at 89, 92-93.

423. *See supra* notes 100, 132 and accompanying text; *see also* Pushaw, *Limiting*, *supra* note 95, at 14-15, 45-47, 50, 52, 92-93.

424. *See* Pushaw, *Limiting, supra* note 95, at 14-15, 45-47, 92-93.

425. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014).

426. *See, e.g.*, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) (noting that the constitutional "injury" requirement overlaps with the discretionary test in *Abbott Laboratories* as to whether withholding judicial consideration would cause the parties undue hardship).

427. 573 U.S. 149 (2014).

428. *Id.* at 151-54.

429. *Id.* at 154.

430. *Id.* at 155.

431. *Id.* at 161-66

432. 592 U.S. 125 (2020).

433. *Id.* at 129-30.

requires the census to be based on population, and (2) they would be injured because the census would determine apportionment for congressional representation and federal funding.[434] Six Justices concluded that, because the Secretary had not yet issued his Census Report, plaintiffs' asserted injury was not "imminent" for Article III standing and ripeness purposes, but rather reflected speculation about how the Executive Branch might implement this policy.[435] Three dissenters contended that plaintiffs had satisfied Article III and that Trump's instruction ran afoul of federal law.[436] Ripeness standards are so pliable that it is impossible to say which side was correct.

Finally, the Court has continued to insist that mootness is an Article III jurisdictional requirement, yet apply exceptions that highlight its discretionary nature.[437] The doctrine is flexible enough to support almost any result.[438]

2. The Political Question Doctrine

Cases applying the *Baker* factors are also impressionistic, as described in Subsections (a) and (b). For example, the Justices have disagreed on whether military and foreign affairs raise political questions. The Court has also selectively invoked the PQD in domestic cases, as illustrated by its flip-flop on partisan gerrymandering.

(a) Military and Foreign Policy

(i) Military.

The Court aggressively reviewed cases challenging the War on Terrorism. Most troubling was *Boumediene v. Bush,*[439] which involved Congress's decisions to (1) eliminate the Court's appellate jurisdiction over habeas corpus petitions from enemy combatants detained in Guantanamo Bay, Cuba, and (2) provide detainees who had legal claims with detailed military and judicial review (culminating with an

434. *Id.*

435. *Id.* at 131-34.

436. *Id.* at 134-53 (Breyer, J., dissenting).

437. *See, e.g.*, FBI v. Fikre, 601 U.S. 234 (2024); Already, LLC v. Nike, Inc., 568 U.S. 85, 90-100 (2013); Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 173-74, 180, 189-94 (2000).

438. In *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023), Laufer sued hundreds of hotels for unlawfully failing to state whether they had disability accommodations, even though she had no intention of booking a room. *Id.* at 3. Laufer generated a circuit split as to whether she had standing, the Court granted review, and the case was briefed and argued. *Id.* Then one of Laufer's lawyers in a different matter was sanctioned, and she dismissed all her pending cases. *Id.* at 4. The majority concluded that she had not done so to evade the Court's review and that the case was moot, but cautioned that "we might exercise our discretion differently in a future case." *Id.* at 5; *but see id.* at 22-27 (Thomas, J., concurring in judgment) (reaching the opposite conclusion and maintaining that Laufer lacked standing).

439. 553 U.S. 723 (2008).

appeal to the Court).[440] The Court could have declined jurisdiction on several grounds.[441] Most critically, the Constitution authorizes Congress to regulate the armed forces; Congress in doing so has been respectful of the President's power as Commander in Chief; and the Court has often deemed such military matters to be political questions (or has been extraordinarily deferential to the political branches).[442]

Four Justices would have exercised such judicial restraint.[443] The majority, however, reached the merits and ruled that (1) the Constitution's habeas writ applied to foreign enemies captured and detained outside the United States; (2) Congress had unlawfully suspended the writ; and (3) its alternative procedures were inadequate to protect due process.[444] This holding had no basis in the Constitution's text, structure, historical understanding, or precedent.[445] Thus, it can only be explained as a personal rebuke of Bush when he was politically weak. He had been fighting terrorism since the September 2001 attacks; Americans had grown tired of the ongoing conflict; Bush's popularity was at an all-time low by mid-2008; and his party would lose the presidential election a few months later.[446]

(ii) Foreign Affairs.

The Court has applied the PQD inconsistently. For instance, *Zivotovsky v. Clinton*[447] concerned a federal statute that allowed Americans born in Jerusalem to have "Israel" listed as their place of birth on their passports.[448] An eligible American requested this designation, but the State Department refused based on its policy of maintaining a neutral position on Jerusalem's political status.[449]

Applying the first two *Baker* factors, the Court reversed the lower courts' conclusion that the case raised a political question, as they should have reviewed whether the statute violated the President's

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440. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, Sec. 7(a), 120 Stat. 2600, 2635 (codified as amended, 28 U.S.C. § 2241(e)).

441. Initially, the majority ignored a case directly on point, which required dismissal when Congress exercised its express Article III power to make "Exceptions" to the Court's appellate jurisdiction over habeas cases. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-15 (1869). The Court also cast aside its longstanding prudential rule of avoiding constitutional questions until claimants had exhausted other remedies (here, those available under the 2006 statute).

442. *See supra* notes 110-111, 140, 142, 152, 290 and accompanying text.

443. *See Boumediene*, 553 U.S. at 801-26 (Roberts, C.J., dissenting); *id.* at 826-850 (Scalia, J., dissenting). Justices Thomas and Alito joined these dissents.

444. *Id.* at 740-98 (majority).

445. *See* Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic*?, 84 NOTRE DAME L. REV. 1975, 1975-79, 2038-39 (2009).

446. *See id.* at 1975-81, 2036-51.

447. 566 U.S. 189 (2012).

448. *Id.* at 191-92.

449. *Id*. at 191-93.

constitutional power to recognize foreign sovereigns.[450] First, the Constitution's text did not demonstrably commit this issue to the President alone.[451] Rather, courts could decide whether Congress—which had numerous Article I foreign affairs power— had intruded on the President's Article II authority to deal with other nations.[452] Second, there were "judicially discoverable and manageable standards"':[453] "Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers."[454]

Justice Sotomayor agreed that the lower courts had erred in dismissing based on *Baker*'s "textual commitment" criterion.[455] However, she criticized *Baker* for failing to identify "when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication."[456] Sotomayor argued that the factors reflected three different justifications.[457] First, if the Constitution committed an issue to the political branches, federal courts lacked power to proceed.[458] Second, the "lack of standards" and "discretionary policy judgments" criteria dictated abstention because a decision would lie beyond the judiciary's traditional competence.[459] Third, the last three factors addressed rare circumstances where prudence counseled abstention (e.g., not questioning the good faith of Congress or the President as to their internal procedures).[460]

Justice Breyer dissented on the ground that exceptional circumstances warranted dismissal in light of *Baker*'s prudential considerations.[461] In his view, judicial resolution of the constitutional questions could have serious implications for foreign policy—a delicate and complex subject over which Congress and the President had shared constitutional power and processes to work out their differences.[462] Judicial review would be particularly unwise here because the claimant's legal

450. *Id*. at 194-202.
451. *Id*. at 194-97.
452. *Zivotovsky*, 566 U.S. at 196-99.
453. *Id*. at 197.
454. *See id*. at 201.
455. *Id.* at 202, 210 (Sotomayor, J., concurring).
456. *Id.* at 202-03.
457. *Id.* at 203.
458. *Zivotovsky*, 566 U.S. at 203.
459. *Id.* at 203-04.
460. *Id.* at 204-07.
461. *Id.* at 212-20.
462. *Id.* at 213-20 (Breyer, J., dissenting).

interest was largely ideological—as contrasted with a situation where a fundamental right like liberty was at stake.[463]

Although Justice Sotomayor properly criticized *Baker* for generating confusion, I disagree that its factors can be subdivided into categories of power, competence, and discretion. Rather, all the criteria are discretionary. For that reason, one cannot determine which *Zivotofsky* opinion correctly applied *Baker*.

(b) Domestic Affairs and Gerrymandering

Domestic cases also demonstrate the scattershot approach to justiciability. The most relevant decisions have involved partisan gerrymandering. In *Davis v. Bandemer*,[464] six Justices held that gerrymandering was not a political question.[465] Over the following three decades, the Court never overruled *Davis*, but struggled to devise governing legal principles.[466]

Finally, in *Rucho v. Common Cause*,[467] Chief Justice Roberts wrote for his four conservative Republican colleagues in reversing course.[468] North Carolina and Maryland voters claimed that their states' congressional districting maps, which ensured disproportionate representation by Republicans (in North Carolina) or Democrats (in Maryland), violated the Article I Elections Clause, the First Amendment, and the EPC.[469]

The Court applied *Baker*'s second factor to hold that gerrymandering raised a political question because of a lack of " 'judicially discoverable and manageable standards for resolving'" such cases, based on the following analysis.[470] Aware of gerrymandering, the Framers in the Elections Clause (art. I, § 4, cl. 1) authorized state legislatures to prescribe the "Times, Places and Manner" of congressional elections, subject to Congress's power to "make or alter" such regulations—with no suggestion that federal courts could review such decisions.[471] Indeed, the Court had intervened only when states in congressional districting violated clear constitutional equality principles by (1) racially discriminating, or (2) failing to provide districts equal in population.[472]

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463. *Id.* at 218-19.

464. 478 U.S. 109 (1986).

465. *See id.* at 118-27; *but see id.* at 144-61 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment) (arguing that the Constitution leaves gerrymandering claims to the political process).

466. *See* Rucho v. Common Cause, 588 U.S. 684, 689, 700-02 (2019) (citing cases).

467. 588 U.S. 684.

468. *See id.* at 689-720.

469. *See id.* at 689-93.

470. *See id.* at 699, 702-09 (citing *Baker*, 369 U.S. at 217).

471. *See id.* at 695-99.

472. *See id.* at 697-700.

By contrast, because state legislatures inevitably considered politics when drawing congressional districts, the problem was determining when such partisanship went "too far"—a judgment that could not be made based on precise, neutral, and manageable *legal* standards.[473] The Constitution does not require proportional representation, and courts had neither the power nor the competence "to apportion political power as a matter of fairness."[474] The lower courts' proposed tests for evaluating partisan gerrymandering claims did not articulate manageable legal standards.[475]

The Court distinguished the *Baker* line of cases as simply establishing that each person's vote must carry equal weight (a mathematical determination that courts could easily make)—not that each voter was "entitled to have his political party achieve representation . . . commensurate to its share of statewide support."[476] The Court concluded that the Constitution left complaints about partisan gerrymandering to the political process.[477] Chief Justice Roberts noted that many states were addressing the issue through constitutional amendments or legislation (e.g., empowering independent commissions to draw electoral districts) and that Congress was also considering possible solutions.[478]

Justice Kagan, joined by her three Democratic colleagues, dissented on the ground that federal courts could remedy partisan gerrymanders, which violated the Constitution by (1) diluting the right to vote and have each vote valued equally, and (2) subverting democracy by allowing politicians to entrench themselves in office against their citizens' preferences.[479] She emphasized that the Court had long redressed state legislatures' unconstitutional gerrymandering based on race and "city vs. rural" residence and concluded that partisan gerrymandering could similarly be judicially evaluated by applying manageable legal standards.[480] Indeed, several lower federal courts had developed such workable standards—for example, whether a state legislature's gerrymander was so extreme that it (1) violated the state's own objective, traditional districting criteria (e.g., compactness, contiguity, and respecting existing governmental subdivisions), or (2) "substantially diluted" the votes of the rival parties' supporters.[481] Finally, she contended that submitting partisan gerrymandering to the political

473. *See Rucho*, 588 U.S. 684 at 700-09, 716-18.

474. *See id.* at 704. "Fairness" was a discretionary opinion, not a legal standard. *See id.* at 705-06.

475. *See id.* at 709-18.

476. *See id.* at 707.

477. *See id.* at 718-20.

478. *See id.*

479. *See Rucho*, 588 U.S. 684 at 721-51 (Kagan, J., dissenting).

480. *See id.* at 727-34, 746-50.

481. *See id.* at 721, 734-50.

process would be futile in states where politicians currently in office had effectively entrenched themselves.[482]

Rucho reached the correct result based on the original understanding, as the Constitution's provisions entrusting state legislative districting entirely to the states and Congress rebut the presumption of judicial reviewability.[483] However, the partisan gerrymandering cases illustrate the pliability of the modern PQD. A divided Court first held that such claims were justiciable, and later deemed them political questions. It is hopeless to try to ascertain which view is correct, since the *Baker* factors make either conclusion plausible. Nonetheless, *Rucho* cannot be reconciled with *Baker*'s overarching interpretation of our Constitution as creating a democracy that hinges on the will of the majority of voters.[484]

The Court has amplified this confusion by ruling that gerrymandering claims based on race are justiciable, whereas those based on partisan politics are not.[485] Those two precedents collide where race and partisanship are highly correlated. To resolve this tension, the Court has (1) adopted a presumption that a legislature acted in good faith, and (2) imposed a demanding burden of proof on plaintiffs to demonstrate that race was the legislature's predominant motivating factor[486]—for example, by producing "an alternative map showing that a rational legislature sincerely driven by its professed partisan goals would have drawn a different map with greater racial balance."[487]

In *Alexander*, the Court overturned as "clearly erroneous" a District Court's finding that race had predominated in the South Carolina Legislature's congressional redistricting plan.[488] Three dissenters argued that the "clear error" standard required significant deference to the lower court's findings, which rested on a careful consideration of detailed evidence.[489]

Justice Thomas concurred but maintained that all constitutional challenges to congressional districting—whether based on partisan gerrymandering, racial gerrymandering, or racial vote dilution—raised political questions under *Baker*, for two reasons.[490] First, the

482. *See id.* at 746-48.

483. *See supra* notes 13, 33, 41-43, 112, 116, 199-209, 223-236, 252-259, 263-264, 376 and accompanying text.

484. *See supra* notes 27, 190, 279, 479-482 and accompanying text; *see also* Rhodes, *supra* note 277, at 757, 766-78 (arguing that *Rucho*'s reinvigorated PQD (1) has cast doubt on the continuing viability of the standardless *Anderson-Burdick* balancing test, and (2) should be extended to limit judicial intervention in election law to a relatively small set of cases, such as those in which a state intentionally discriminates against a particular group of voters).

485. *See infra* notes 486-497 and accompanying text.

486. Alexander v. S.C. State Conf. of NAACP, 602 U.S. 1, 6-10 (2024).

487. *Id.* at 9.

488. *Id.* at 17-38.

489. *Id.* at 66-99 (Kagan, J, dissenting).

490. *Id.* at 39-66 (Thomas, J., concurring in part).

Elections Clause textually commits supervision of state legislative decisions about congressional districts exclusively to Congress, and nothing in the Fourteenth or Fifteenth Amendments changed that.[491] Second, because such map-drawing is inherently political, the Court had failed to develop "judicially manageable" legal standards, as evidenced by its long series of *ad hoc* judgments.[492]

The logical implication of Justice Thomas's opinion is that *Baker* and its progeny were also wrong. Indeed, he cited Justice Frankfurter's *Baker* dissent three times[493] and Justice Harlan's dissent in *Reynolds*.[494] Although Thomas applied the first two *Baker* factors, he appeared to grasp that the Court's unprecedented power grab in *Baker* is the root of the flawed analysis in congressional redistricting cases. After all, Thomas maintained that (1) a state's drawing of electoral maps is an inherently political process that defies judicial review based on clear legal standards, and (2) the EPC does not supply workable legal rules to determine the constitutionality of such political judgments.[495]

Justice Thomas's argument reflects the original understanding.[496] Moreover, although he focused on congressional districting, his reasoning applies *a fortiori* to the states' apportionment of state legislative seats because such districting does not implicate any federal government interest.[497]

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491. *Id.* at 40-42, 49-55. He noted that the Fourteenth Amendment EPC addressed civil—not political—rights, which explains why the Fifteenth Amendment was necessary to prevent states from abridging the right to vote based on race. *Id.* at 52-54. The latter Amendment simply required free ballot access and had no effect on Congress's supervisory power over congressional districting. *Id*. at 54. Thomas correctly described the original understanding of Article I and the Fourteenth and Fifteenth Amendments. However, in most cases the result will be the same regardless of whether the Court deems racial gerrymandering a political question or exercises judicial review but requires plaintiffs to prove that race rather than politics was the predominant factor.

492. *Alexander*, 602 U.S. at 40-49, 54, 66. Moreover, in racial gerrymandering and vote-dilution cases, the Court had often engaged in unconstitutional race-based reasoning and stereotypes. *See id.* at 40, 55-59; *see also id.* at (contending that federal court orders to redraw legislative maps exceed the judiciary's traditional equity powers); *but see* Richard Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. 50, 56-80 (2020) (arguing that the Roberts Court—by ignoring political reality, presuming legislative good faith, and allowing legislatures to re-characterize racially animated gerrymandering policies as instead motivated by politics—has given politicians freer rein to enforce self-entrenching policies, which benefits Republicans).

493. *See Alexander*, 602 U.S. at 47 (Thomas, J., concurring in part) (citing Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); *id.* at 61 (citing *Baker*, 369 U.S. at 328 (Frankfurter, J., dissenting)); *id.* at 62 (citing *Baker*, 369 U.S. at 327 (Frankfurter, J., dissenting)).

494. *See id.* at 54 (citing Reynolds v. Sims, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting)).

495. *See id.* at 39-66.

496. *See supra* Part I and notes 112, 116, 121-125 and accompanying text.

497. *See supra* notes 13, 33, 42, 116, 199-209, 263-264 and accompanying text.

In sum, the standing, ripeness, mootness, and political question doctrines can be applied strictly or leniently (or ignored) depending on a judge's desire to reach the merits, which reflects *sub rosa* political, ideological, and pragmatic considerations. These problems plague election-related cases and have been exacerbated by the Court's creation of the "*Purcell* principle": Federal judges should not apply federal law to alter state election laws too close to Election Day because doing so causes confusion among voters and election administrators and undermines public confidence in the integrity of elections.[498] However, if a court waits until after an election to decide such cases, they will be moot.[499] Conversely, if such challenges are brought well before Election Day, a plaintiff's injury may be deemed speculative and not "imminent" enough to support standing or ripeness.[500]

Overall, *Bush* further licensed judges to manipulate justiciability doctrines in election litigation. Of the hundreds of exemplary cases, I will focus on Court decisions in the last two presidential elections.

B. The 2020 and 2024 Presidential Election Cases

Lower federal and state courts have often downplayed justiciability concerns to hold that constitutional provisions overrode a state's legislature's power under the U.S. Constitution to enact laws for congressional and presidential elections (subject to Congress's superintendence).[501] In the few instances when the Court has reviewed such decisions, the Justices have inconsistently applied principles of justiciability and judicial restraint depending upon their eagerness to decide federal constitutional issues in light of political circumstances. This point becomes clear upon examining the 2020 and 2024 presidential election cases.

498. *See* Purcell v. Gonzalez, 549 U.S. 1, 4-6 (2006); *see also* Daniel Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OH. ST. L.J. 1065 (2007) (arguing that the Court should rarely intervene in, or cut short, lower courts' processing of election-administration cases because those courts can better deal with factual complexities, the frequent need for expedited consideration, the heated political climate, and the democratic values at stake).

499. *See supra* notes 326-328 and accompanying text.

500. *See supra* notes 313-315 and accompanying text; *see also* Amar & Caminker, *supra* note 315, at 1455-65, 1492-94 (urging the Court to compensate for *Purcell*'s negative effects by modifying standing, ripeness, and mootness doctrines to facilitate early federal law challenges to election laws).

501. *See infra* notes 508, 523, 556-557, 612-613 and accompanying text.

1. The 2020 Election Decisions

The 2020 elections generated over 350 lawsuits.[502] As Justice Thomas observed:

> The Constitution gives to each state legislature authority to determine the "manner" of federal elections. Art. I, § 4, cl. 1 [Congress]; Article II, §1, cl. 2 [the President]. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead. As a result, we received an unusually high number of petitions and emergency applications contesting those changes.[503]

In particular, many courts ruled that constitutional provisions protecting voting rights displaced a state's election code.[504] These decisions undercut both state legislatures' constitutional power to regulate federal elections and the "*Purcell* principle." The Court summarily rejected most review petitions and avoided formal majority opinions, although a few Justices wrote individually.[505]

The most important cases concerned the Trump-Biden presidential contest. The Justices took radically different approaches to both justiciability and the substantive constitutional issues.

The most convoluted litigation was *Republican Party of Pennsylvania v. Degraffenreid*,[506] which involved the Pennsylvania Legislature's requirement that mail-in ballots be received by 8:00 PM on Election Day.[507] The state supreme court held that its state constitution, which provides that elections "be free and equal," permitted it to extend this deadline by three days in light of increased mail-in voting triggered by the COVID-19 pandemic—and to count those late ballots even if there was no postmark showing they had been mailed by Election Day.[508] A critical constitutional issue was presented: whether the court's departure from the statute's clear language violated the federal constitutional provisions empowering state legislatures to make rules governing federal elections.[509]

Justices Thomas, Alito, Gorsuch, and Kavanaugh voted to grant the Republican Party's emergency stay application on September 28, but

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502. *See* Rhodes, supra note 277, at 756, 767-73.

503. *See* Republican Party of Pa. v. Degraffenreid, 141 S.Ct. 732, 732 (2021) (Thomas, J., dissenting from the denial of certiorari).

504. *See infra* notes 508, 523, 575, 612-613 and accompanying text.

505. *See infra* notes 510-530 and accompanying text.

506. 141 S.Ct. 732 (2021).

507. *See id*. at 733 (Thomas, J., dissenting from the denial of certiorari) (citing Pa. Stat. Ann. Title 25, §§ 3146.6c, 3150.16c (Purdon 2020)).

508. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345-62, 371-72 (2020). The court disregarded that the state legislature had responded to COVID-19 by making amendments to its election laws but had chosen not to extend the "receipt by election day" deadline. *See Degraffenreid*, 141 S.Ct. at 733 (Thomas, J., dissenting from the denial of certiorari).

509. *See Degraffenreid*, 141 S.Ct. at 732-37 (Thomas, J., dissenting from the denial of certiorari); *id.* at 738 (Alito, J., joined by Gorsuch, J., dissenting from the denial of certiorari).

could not persuade any other colleagues to agree.[510] After the Court's denial in late October, petitioners promptly requested certiorari and moved to expedite review, but by then the election was only a week away and the Court declined to act.[511] When the constitutional question was finally considered, the Court tersely dismissed the certiorari petition as moot with no explanation.[512] Three Justices dissented from the denial of cert. I will focus on Justice Thomas's opinion,[513] which Justice Alito (joined by Gorsuch) reinforced.[514]

Thomas initially cited Chief Justice Rehnquist's *Bush* concurrence to contend that petitioners had made a strong argument that the Pennsylvania Supreme Court violated the federal Constitution by changing the state legislature's ballot-receipt deadline—and did so very close to Election Day.[515] He further noted that the Court could not meaningfully review such rule alterations after a federal election because of severe time constraints (e.g., about five weeks for presidential elections).[516] Such pressure (1) made it impossible to resolve complicated disputed facts, such as claims of maladminstration, voter suppression, or fraud—a problem exacerbated by extensive mail-in voting; and (2) required judges to make improper policy decisions (e.g., whether to count ballots cast by voters who had relied on a state official's wrongful rule changes).[517] Finally, he argued that the case fell within the CORYER exception to mootness because complaints that non-legislative officials had illegally altered rules in federal elections would likely recur, yet escape judicial review because of the compressed time frame.[518]

Degraffenreid illustrates the plasticity of justiciability doctrines. The Republican Party had standing and the case was ripe in September 2020, but the majority refused to hear it.[519] The Court's own inaction caused the case to become moot by January 2021.[520] Even then, however, the Court could have decided the case as raising a constitutional issue that was "capable of repetition, yet evading review."[521]

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510. *See* Scarnati v. Boockvar, 141 S.Ct. 644 (2020).

511. *See* Republican Party of Pa. v. Boockvar, 141 S.Ct. 1 (2000).

512. *See Degraffenreid*, 141 S.Ct. at 732.

513. *See id*. at 732-38 (Thomas, J., dissenting).

514. *See id*. at 738-40 (Alito, J., dissenting).

515. *See id*. at 733-35 (Thomas, J., dissenting) (citing Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)); *id*. at 738 (Alito, J., dissenting).

516. *See id*. at 735-37 (Thomas, J., dissenting); *id*. at 739 (Alito, J., dissenting).

517. *See id*. at 735-37 (Thomas, J., dissenting); *id*. at 739 (Alito, J., dissenting).

518. *See id*. at 737-38 (Thomas, J., dissenting); *id*. at 738-39 (Alito, J., dissenting).

519. *See supra* notes 510-511 and accompanying text.

520. *See supra* note 512 and accompanying text.

521. *See supra* notes 319-320, 327-328 and accompanying text.

The Court applied a different analysis in *Democratic National Committee v. Wisconsin State Legislature*, decided on October 26, 2020.[522] It denied, in a single sentence, the Committee's application to vacate the Seventh Circuit's stay of a federal district court's order, rendered six weeks before the November 2020 election, extending by six days Wisconsin's statutory absentee ballot deadline of Election Day.[523]

Justices Gorsuch and Kavanaugh each wrote supporting opinions and rejected the district court's conclusion that the COVID-19 pandemic warranted this extension to safeguard the federal constitutional right to vote.[524] Applying the *Purcell* principle, they maintained that the trial court could not change its state's election law so near the election.[525] Moreover, COVID-19 did not justify this extension because the Wisconsin legislature had already accounted for the pandemic through various measures (e.g., sending voters ballots well before the election), but chose not to change the Election Day cutoff for receipt—a reasonable deadline adopted by thirty states.[526] Kavanaugh cited Chief Justice Rehnquist's *Bush* concurrence to add in dicta that state courts also lacked discretion to rewrite state election laws for federal elections because the Constitution committed that task exclusively to state legislatures.[527]

Chief Justice Roberts agreed with the majority that the federal district court had improperly invoked general *federal* constitutional principles to alter state election legislation.[528] He contrasted the Pennsylvania Supreme Court's reliance on its *state* constitution to vary its state's election laws, which he had allowed.[529]

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented on the ground that the federal district court had properly exercised discretion to read Wisconsin law in a way that protected the federal constitutional right to vote in light of pandemic challenges.[530]

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522. 141 S.Ct. 28 (2020).

523. *Id.* at 28.

524. *Id.* at 28-30 (Gorsuch. J., joined by Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 30-40 (Kavanaugh, J., concurring in denial of application to vacate stay).

525. *Id.* at 30-31 (Kavanaugh, J., concurring) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006)). Justice Gorsuch did not cite *Purcell* but relied on its logic. *See id.* at 28-30 (Gorsuch. J., concurring).

526. *See id.* at 28-30 (Gorsuch. J., concurring); *id.* at 32-39 (Kavanaugh, J., concurring).

527. *Id.* at 34-35 n.1 (Kavanaugh, J., concurring) (citing Bush v. Gore, 531 U.S. 98, 113, 120 (2000) (Rehnquist, C.J., concurring)).

528. *Democratic National Committee*, 141 S.Ct. at 28 (Roberts. C.J., concurring in denial of application to vacate stay).

529. *Id.*

530. *Id.* at 40-46 (Kagan, J., dissenting). In an earlier 5-4 decision, the Court stayed the Wisconsin federal district court judge's order enjoining the state from enforcing its statutory requirement that primary election absentee ballots be postmarked by Election Day. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 423-26(2020); *but see id.* at

Degraffenreid and *Democratic National Committee* raised the same issue: Could a court legitimately change a state legislature's election-day deadline for receiving ballots to preserve the constitutional right to vote in the midst of COVID-19? Two sets of Justices answered that question consistently. First, Justices Thomas, Alito, and Gorsuch said no.[531] Second, Justices Breyer, Sotomayor, and Kagan said yes.[532] Justice Barrett was not on the Court when it considered either the Republican Party's emergency application to stay the Pennsylvania Supreme Court's order or *Democratic National Committee*, so her joining the *Degraffenreid* majority did not raise any concerns about waffling.

The other two Justices struck a middle ground. Justice Kavanaugh in *Degraffenreid* had voted with Justices Thomas, Alito, and Gorsuch in September 2020 to grant the emergency application, so he must have sympathized with them on the constitutional merits but concluded that the case was moot by February 2021.[533] But Chief Justice Roberts's approach is puzzling. In *Democratic National Committee*, he joined the majority in ruling that a *federal* court could not extend a state's statutory ballot-receipt deadline to vindicate the *federal* constitutional right to vote, but asserted in *Degraffenreid* that a *state* court could do the same thing to effectuate the identical right in the *state*'s constitution.[534] The Chief Justice did not explain why this distinction made a difference legally. Perhaps he thought that federalism required his Court to defer to a state's highest court in interpreting its state's laws. That "independent and adequate state ground" rationale is well-established in ordinary appeals,[535] but it should not apply to federal (especially presidential) elections because otherwise state courts could imaginatively construe their state's constitution and election laws in a way that frustrated federal constitutional requirements and rights (the *Bush* situation).

Indeed, the Court had repeatedly stressed that the Constitution entrusts federal election regulations to state legislatures and that last-minute judicial changes to such laws breed confusion and shake public confidence in the fairness of the election system.[536] Therefore, it should not matter which court (federal or state) makes such alterations or which government's Constitution they invoke, especially since the relevant constitutional principles are substantially similar (guaranteeing the right to vote).

427-31 (Ginsburg, J., dissenting) (arguing that the district court had safeguarded the right to vote by extending the deadline to receive ballots by one week).

531. *See supra* notes 510, 513-518, 523-527 and accompanying text.

532. *See supra* notes 511-512, 519, 530 and accompanying text.

533. *See supra* notes 510, 524-527 and accompanying text

534. *See supra* notes 511-512, 523, 528-529 and accompanying text.

535. *See* Murdock v. Memphis, 87 U.S. 590 (1874).

536. *See supra* notes 498, 515-517, 525-526 and accompanying text.

I suspect that, in *Degraffenreid*, the Chief Justice made a political calculus[537] that the Court should not review the 2020 presidential election process to avoid a repeat of *Bush*-style popular backlash. After all, Americans had just experienced the January 6, 2021 turmoil, which culminated Trump's unsuccessful efforts to persuade (1) seven states to submit alternate Republican slates of electors, and (2) Congress to accept these electors, with Vice President Mike Pence not merely mechanically counting the votes but also determining their validity.[538]

Another example of the Court's use of justiciability doctrines to avoid hearing post-election challenges is *Texas v. Pennsylvania*.[539] On December 8, shortly before the Electoral College was due to meet to certify Biden's win, Texas moved the Court to exercise its original jurisdiction to entertain the claim that Pennsylvania and several other states, by altering their legislatures' election rules, had violated Article II and also the EPC (by diluting Texas's electoral votes).[540] The Court tersely denied the motion "for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot."[541] Justices Alito and Thomas correctly dissented on the ground that the Court lacked discretion to refuse to exercise its original jurisdiction over disputes between states.[542] My concern, however, is the Court's failure to explain why Texas lacked standing when it had previously granted standing (1) to plaintiffs who made EPC vote-dilution claims, and (2) more generally, to states that had far less at stake (e.g., in *Massachusetts v. EPA*).[543]

An originalist approach to the 2020 presidential election cases would have streamlined analysis. The critical point is that the EPC addresses civil, not political, rights.[544] As the Clause does not confer a right to equality in voting, no plaintiff has standing to assert such a nonexistent "right." Moreover, the EPC did not alter Articles I and II and the Twelfth Amendment, which rebut the presumption of judicial review by leaving all questions about presidential and congressional elections to a political process in which the states make initial

537. In the two most important decisions of Chief Justice Roberts's tenure—the Obamacare case and *Dobbs*—he wrote opinions so legally unsound that not a single colleague joined him, thereby suggesting that they were politically driven. *See* Robert J. Pushaw, Jr., *Defending* Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion*, 69 SAN DIEGO L. REV. 265, 269, 309, 332 (2023).

538. *See* Issacharoff, *supra* note 73, at 348–49.

539. 141 S.Ct. 1230 (2020).

540. *See generally* Motion for Leave to File Bill of Complaint, Tex. v. Pa., 141 S.Ct. 1230 (2020).

541. *Texas*, 141 S.Ct. at 1230.

542. *Id.* (Statement of Alito, J., joined by Thomas, J.).

543. *See supra* notes 413-423 and accompanying text.

544. *See supra* notes 11, 170-171, 201-203, 210 and accompanying text.

decisions, subject to ultimate review by Congress.[545] Finally, courts historically had discretion to decide moot cases of great public significance, and *Degraffenreid* surely qualifies.

The tumultuous 2020 election forced a reexamination of the comparative institutional competence of Congress and the federal judiciary in resolving presidential election disputes.[546] The eventual result was the Electoral Court Reform Act of 2022 (ECRA).[547] Section 15 made express what had been implicit in the ECA: The Vice President simply counted the electoral votes and had no discretion to change them. Similarly, the ECRA reaffirmed the ECA provision that a state executive's timely certificate appointing electors will be "conclusive on Congress."[548] However, the ECRA broke new ground in three respects. First, the state executive's certificate will be superseded by a state or federal court judgment, issued before the date of the electors' meeting, regarding their appointment.[549] Second, a federal court's determination of federal law issues related to the appointment of electors binds Congress.[550] Third, an aggrieved presidential candidate's federal question case concerning a state's certificate appointing electors must receive expedited consideration by a panel consisting of a federal district court judge and two circuit judges, followed by an expedited appeal to the Supreme Court.[551]

The ECRA vindicated *Bush*, as Congress endorsed federal and state court litigation of presidential elections. Many scholars have applauded the ECRA on the ground that courts have institutional superiority in resolving election disputes because judges are limited by written rules of procedure, evidence, and substantive law.[552] I am skeptical of that claim in light of the Court's exercise of unbridled discretion in election law cases. More pertinently, the ECRA is a politically expedient way for Congress to "pass the buck" on presidential election controversies to the judiciary, whereas Article II and the Twelfth Amendment commit such matters to the politically accountable Congress.[553]

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545. *See supra* notes 11-13, 30-81, 118-125, 168-174, 201-203, 210-212, 228-238 and accompanying text.

546. *See* Issacharoff, *supra* note 73, at 348–49.

547. Pub. L. No. 117-328, 136 Stat. 5233 (2022), amending 3 U.S.C. §§ 5-7, 15-18.

548. ECRA, 3 U.S.C. § 5(a), (b) & (c) (1)(A).

549. *Id*. § 5(c)(1)(B).

550. *Id*. § 5(c)(2).

551. *Id*. § 5(d).

552. *See, e.g.*, Issacharoff, *supra* note 73, at 348–50.

553. *See supra* notes 11-13, 30-81, 121-125, 168-174, 201-203, 210-212, 228-238 and accompanying text. The Court further injected judges into election disputes in *Bost v. Illinois State Board of Elections*, 146 S. Ct. 513 (2026), by upholding the standing of a congressional candidate to challenge state rules for counting votes in his election because he had a particularized interest in a fair election process. However, Justice Jackson would have denied standing because any injury resulting from an unfair election process would be common to

The 2024 Biden-Trump rematch did not require the Court to apply the ECRA. However, the election presented other important legal issues.

2. The 2024 Election Cases

The Court did not directly interfere with the 2024 election. Nonetheless, it rendered critical pre-election decisions in *Moore v. Harper*[554] and *Trump v. Anderson*[555]—and ignored serious jurisdictional problems to resolve contentious election-related constitutional questions.

(a) Harper

North Carolina voters claimed that their legislature in 2021 had violated their state constitutional rights to "free elections" and voting equality by using partisan gerrymanders in reapportioning maps for congressional and state legislative districts.[556] In *Harper I*, the North Carolina Supreme Court (NCSC) agreed and rejected the legislature's defenses that (1) gerrymandering was a political question under the state constitution, and (2) if the case were justiciable, the federal constitutional provision authorizing "the Legislature" of each state to prescribe rules governing federal elections grants each "Legislature" exclusive and independent authority to draw congressional districts without state judicial interference.[557]

The NCSC enjoined use of the gerrymandered maps and remanded to the trial court to oversee drawing new ones.[558] The legislature then adopted a remedial congressional redistricting plan, which a trial court rejected and instead substituted its own maps.[559] The legislators filed an emergency application to the U.S. Supreme Court to stay the NCSC's decision.[560] The Court denied that request, but granted certiorari to determine whether the state legislature's federal law defense was correct.[561]

Subsequently, the NCSC in *Harper II* agreed with the trial court that the legislature's congressional redistricting plan complied with its *Harper I* requirements.[562] Later, however, the NCSC granted

all voters, not personal to any specific candidate. *Id.* at 525-536 (Jackson, J., dissenting) She predicted that the Court's unprecedented loosening of standing requirements for candidates would dramatically increase election-related litigation and thereby "unnecessarily thrust [ ] the Judiciary into the political arena." *Id.* at 526.

554. 600 U.S. 1 (2023).

555. 601 U.S. 100 (2024).

556. *Harper*, 600 U.S. at 7-8.

557. *Id.* at 8-12.

558. *Id.* at 12.

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.* at 12-13.

rehearing, withdrew its *Harper II* opinion, and overruled *Harper I* by accepting the legislature's defense that partisan gerrymandering claims were political questions under the state constitution and dismissing the voters' claims with prejudice.[563] The NCSC did not reinstate the lawmakers' 2021 map, but instead invited them to enact new redistricting plans.[564]

Justice Thomas, joined by Gorsuch and Alito, argued that the case the Court had agreed to review (*Harper I*) was now moot because the NCSC had rendered a final judgment overruling *Harper I*, dismissed all of the voters' claims on "adequate and independent state law" grounds, and resolved the whole case in favor of the legislators (the petitioners).[565] Therefore, the Court had no jurisdiction to reach the merits of those petitioners' federal election law defenses raised in *Harper I* because its opinion on such questions would have no effect on the parties' rights and liabilities.[566]

However, Chief Justice Roberts, writing for five colleagues, disagreed and concluded that the case was not moot because the legislators remained bound by the *Harper I* judgment enjoining their use of the 2021 plan, so the *Harper I* opinion could "alter the presently operative" state statutes.[567] The dissent responded that Article III "judicial power" did not allow courts to issue advisory opinions on statutes, but rather authorized only the adjudication of live disputes between adverse parties with legal rights at stake.[568]

On the merits, the Court held that Article I's provision that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by [its] Legislature" (the Elections Clause) did not insulate such a "Legislature" from its state courts' longstanding exercise of judicial review to determine whether it had violated its state's constitution.[569] Initially, the Court cited its analogous precedent recognizing that a state legislature's Elections Clause power to adopt rules for congressional elections was subject to state constitutional provisions that (1) required the governor's assent to legislation (*Smiley*)[570] and (2) allowed voters to override state

563. *Id* at 13.

564. *Id* at 13-14.

565. *Id.* at 40-55 (Thomas, J., dissenting).

566. *Id.*

567. *Id.* at 14-19 (majority opinion).

568. *Id.* at 40-41, 44-55 (Thomas, J., dissenting).

569. *Id.* at 19-37 (majority opinion).

570. *Id.* at 23-25 (citing Smiley v. Holm, 285 U.S. 255 (1932) (holding that the Minnesota Constitution, which provided that any law passed by its Legislature had to be approved by the governor, applied to its congressional districting statute, and that therefore the Election Clause did not authorize the Legislature to ignore the governor's veto and enact such a law independently)).

statutes by popular referenda (*Hildebrant*).[571] Chief Justice Roberts noted that, more recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[572] the Court had relied upon *Hildebrant* to hold that the Elections Clause did not prohibit Arizona voters, by ballot initiative, to amend their state constitution to transfer redistricting authority from the legislature to an independent commission.[573] All those cases "rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections"[574]—the "Independent State Legislature" (ISL) theory.

Accordingly, the majority rejected the argument that, because the U.S. Constitution grants each state's "Legislature" (i.e., its elected lawmakers) power to regulate federal elections, only that Constitution could restrain the exercise of that power (e.g., through the Fourteenth Amendment).[575] Rather, the Elections Clause did not affect the limits on a state legislature imposed by its constitution.[576] Roberts stressed that state constitutions trusted courts to enforce those restrictions: A state legislature was a creature of its constitution and thus obliged to obey it.[577] In short, when a legislature exercises its Elections Clause power, it "acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power."[578]

The Court concluded that *Smiley*, *Hildebrant*, and *Arizona State Legislature* did not support the dissent's attempt to distinguish those cases on the ground that they interpreted the Elections Clause as requiring each state legislature to follow its state constitution's *procedures* in enacting federal election laws, but as imposing no limits on the *substantive* content of such rules.[579] Chief Justice Roberts found similarly inapposite the dissent's reliance on *Leser v. Garrett*,[580] which had recognized that the federal Constitution's grant to state legislatures of power to ratify amendments " 'transcends any limitations sought to be imposed by the people of a State' "—including those in

571. *See Harper*, 600 U.S. at 23-26 (citing Ohio *ex rel* Davis v. Hildebrant, 241 U.S. 565 (1916) (ruling that the Ohio Constitution's provision authorizing voters to overturn legislation by referendum applied to a state statute governing congressional districting and rejecting the Legislature's argument that such a popular vote invaded its power under the Election Clause); *see also supra* note 167 (discussing *Hildebrant*).

572. 576 U.S. 787 (2015).

573. *Harper*, 600 U.S. at 25-26 (citing *Arizona*, 576 U.S. at 792, 813-14, 816-18).

574. *See id.* at 26.

575. *See id.* at 26-30 (citing *id.* at 54-56 (Thomas, J., dissenting)).

576. *See id.*

577. *See id.* at 19-34.

578. *See Harper*, 600 U.S. at 27.

579. *See id.* at 27-32 (citing *id.* at 56-60 (Thomas, J., dissenting)).

580. 258 U.S. 130 (1922) (cited in *Harper*, 600 U.S. at 56, 58-60 (Thomas, J., dissenting)).

their state constitutions.[581] He contrasted the complex act of lawmaking, which was subject to state constitutional limits, with the simple up-down ratification decision.[582]

Justice Thomas criticized the majority for mischaracterizing his argument. His premise was that states had no original, reserved power to regulate federal elections; rather, the federal Constitution delegated such power to each state and committed such power entirely to its "Legislature."[583] He maintained that the Court in *Smiley*, *Hildebrant*, *Arizona State Legislature*, and *Leser* had deferred to state constitutional provisions that specified *who* constituted the "Legislature" (e.g, as including not just the legislative branch but also the governor through his veto power) and *how* its legislative power would be exercised (e.g., through ordinary lawmaking or direct democracy).[584] Nothing in those cases, however, said that the People in a state constitution could substantively limit *what* the "Legislature" (however defined) prescribed for federal elections.[585] Justice Thomas concluded that because a state constitution could not restrict a legislature's federal constitutional power to regulate federal elections, a state court's ordinary judicial review function was irrelevant because there could not possibly be enforceable state constitutional limits on the legislature's authority.[586]

Even if the majority's description of *Smiley*, *Hildebrant*, *Arizona State Legislature*, and *Leser* were correct, however, its holding conflicted with *McPherson v. Blacker*.[587] That case concerned the parallel Article II provision authorizing each state to appoint presidential electors "in such Manner as the Legislature thereof may direct."[588] *McPherson* held that this Electors Clause allowed the Michigan Legislature to allocate electoral votes among congressional districts rather than the state as a whole.[589] Chief Justice Roberts asserted that, unlike *Harper*, *McPherson* did not involve a claim that a state legislature had violated its state's constitution, so the Court had no reason to reach that issue (although Roberts asserted that the Court had suggested that a state's constitution always limited its legislature).[590] By contrast, Justice Thomas quoted *McPherson* for the proposition that the Electors Clause was "a limitation upon the State in respect of any

581. *Harper*, 600 U.S. at 28 (citing *id.* at 58-59 (Thomas, J., dissenting), in turn citing *Leser*, 258 U.S. at 137)).

582. *Id.* at 28-30.

583. *Id.* at 56-59.

584. *Id.* at 56-62.

585. *Id.* at 58-60.

586. *Id.* at 60-62.

587. 146 U.S. 1 (1892).

588. U.S. CONST. art. II, § 1, cl. 2.

589. *Harper*, 600 U.S. at 27-28 (citing *McPherson*, 146 U.S. at 8-9).

590. *Id.*

attempt to circumscribe the legislative power"—including an attempt based on the state constitution.[591]

Justice Thomas faithfully read *McPherson*,[592] which characterized the Electors Clause as granting each state legislature "plenary" and "exclusive" power to determine the manner of appointing electors[593]—for example, by appointing them directly or allowing voters to choose and by allocating electors either statewide or by district.[594] The Clause placed the appointment power

> absolutely and wholly with the legislatures of the several states. . . . The power is conferred by the Constitution of the United States, and *cannot be taken from them or modified by their state constitutions*. . . . *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time*, for it can neither be taken away nor abdicated.[595]

That passage refutes Roberts's claim that courts can review a state legislature's appointment of presidential electors (or, by analogy, its congressional districting) to determine whether it complied with the state's constitution.[596]

Finally, the Court cautioned that state judges did not have "free rein" in Elections Clause cases: Whenever "the exercise of federal authority or the violation of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law."[597] The Court noted that almost all of the Justices in *Bush v. Gore*[598] had addressed this duty in two separate opinions.

First, Chief Justice Rehnquist (a) argued that " 'the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law,' " and (b) "declined to give effect to

591. *Id.* at 59 (Thomas, J., dissenting).

592. *See supra* Part I.C. (analyzing *McPherson*).

593. *See McPherson*, 146 U.S. at 25-27, 28-35.

594. *See id.* at 24-36.

595. *See id.* at 34-35.

596. The Court also highlighted that several early state constitutions had fixed the "places" and "manner" of federal elections (e.g., by ballot), which would have been unenforceable if the Elections Clause had given state legislatures exclusive power over such matters. *Harper*, 600 U.S. at 32-33. But such state constitutional provisions may well have been invalid; this issue apparently never arose in litigation. Moreover, the Court conceded that Justice Joseph Story, the preeminent constitutional scholar of his generation, argued that a proposed amendment to the Massachusetts Constitution regulating federal elections would violate the Elections Clause by purporting to control the state's legislature. *Id.* at 33-34.

597. *Id.* at 34.

598. 531 U.S. 98 (2000).

interpretations of Florida election laws by the Florida Supreme Court that 'impermissibly distorted them beyond what a fair reading required.' "[599]

Second, the four *Bush* dissenters, although they reached a different conclusion, also evaluated whether the state court had " 'transcend[ed] the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the `legislature' within the meaning of Article II.' "[600] Without adopting either of these formulations, the *Harper* Court concluded that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[601]

Justice Thomas found the separate *Bush* opinions inapposite because they addressed an Article III court's power to decide whether a state court's interpretation of a state *statute* so departed from the Legislature's intent as to violate the federal Electors Clause, whereas *Harper* considered whether a state court's construction of its state *constitution* had so exceeded the " 'ordinary bounds of judicial review' " as to invade its legislature's federal Elections Clause authority.[602] He warned that federal judges had no principled way to apply this nebulous standard to state constitutional provisions that were often open-ended and within the interpretive expertise of state courts—especially in politically contentious election law cases that had to be decided under time pressure.[603] Thus, he foresaw federal courts hastily deciding federal elections based on arbitrary determinations that a state court did, or did not, transgress ordinary judicial review limits.[604]

Overall, the Court disregarded established mootness doctrine to decide that the Elections Clause (and the Electors Clause) did not give state legislatures exclusive and independent power; rather, laws enacted under those Clauses were subject to judicial review. *Harper* followed *Bush* only insofar as the Court endorsed federal judicial review to ensure that a state court did not interpret state law so unreasonably as to usurp its legislature's federal constitutional power over federal elections. However, the Court's assertion that *McPherson* recognized that a state's constitution always limited its legislature contradicts what that case plainly said.[605] *Harper* therefore effectively disclaimed

599. *Harper*, 600 U.S. at 36 (citing Bush v. Gore, 531 U.S. 98, 114-15 (2000) (Rehnquist, C.J., concurring)).

600. *See id.* (citing *Bush*, 531 U.S. at 133 (Souter, joined by Stevens, Ginsburg & Breyer, JJ., dissenting)).

601. *Harper*, 600 U.S. at 35; *see also id.* at 38-40 (Kavanaugh, J., concurring) (recommending that the Court adopt the Rehnquist standard, which should apply to state court interpretations of both state statutes and state constitutions).

602. *Id.* at 63 (Thomas, J., dissenting).

603. *Id.* at 63-65.

604. *Id.* at 65.

605. *See supra* notes 587-596 and accompanying text.

the *Bush* majority's reliance on *McPherson* that a state legislature could assert its constitutional power to appoint presidential electors at any time, regardless of a state statute authorizing citizens to vote for such electors or a state constitutional provision guaranteeing the right to vote.[606]

The most logical conclusion is that the majority adjudicated a moot case because they were eager to reject the *McPherson*/*Bush* ISL theory.[607] The Court probably wanted to foreclose the possibility that if the 2024 presidential election were close, a candidate who lost the vote in a swing state where his party controlled the legislature would urge those lawmakers to appoint electors favorable to him. The majority's intervention might have been defensible under the original understanding that courts had discretion to decide moot cases that raised issues of public importance.[608] However, the Court has insisted that Article III requires dismissal of moot cases, subject to certain exceptions that did not apply in *Harper*.[609] Thus, the majority had to engage in intellectual gymnastics to conclude that the case was not moot.

As it turned out, Trump won the Electoral College with a margin of victory in the swing states large enough to preclude any ECRA challenges, so the specter of invoking ISL to pressure state legislatures to appoint electors contrary to the state's popular vote never materialized.[610] Put differently, the issue in *Harper* would not become ripe unless and until this scenario unfolded. Thus, the Court ran afoul of two justiciability doctrines.

In short, the Court abandoned judicial restraint and its established justiciability rules based on its desire to address potential problems well before the November 2024 election. A similar pattern can be seen in *Trump v. Anderson*.[611]

606. *See Bush*, 531 U.S. at 104 (citing *McPherson*, 146 U.S. at 35) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."); *id*. at 111, 112-15 (Rehnquist, C.J. concurring) (arguing that, in addition to the Court's Equal Protection holding, this ISL theory would have completely justified striking down the Florida Supreme Court's misinterpretation of its state election law).

607. The Court adopted the position long advocated by Vik Amar. *See* Vikram David Amar, *The* Moore *the Merrier*: *How* Moore v. Harper's *Complete Repudiation of the Independent State Legislature Theory is Happy News for the Court, the Country, and Commentator*s, 2023 CATO S.CT. REV. 275 (maintaining that the Court correctly endorsed his argument that, as to election laws, a state constitution can limit its ordinary elected "Legislature" by authorizing its governor to veto bills, its courts to enforce constitutional limits on the Legislature, and its citizens to exercise legislative power directly through initiatives and referenda). Here I am not concerned with the Court's substantive constitutional analysis, but rather its decision of a moot case.

608. *See supra* notes 129, 316 and accompanying text.

609. *See supra* notes 317-328 and accompanying text.

610. *See Presidential Election Results: Trump Wins,* N.Y. TIMES (March 4, 2025).

611. 601 U.S. 100 (2024).

(b) Trump v. Anderson

The Colorado Supreme Court ruled that Section 3 of the Fourteenth Amendment disqualified Trump from again becoming President because, after taking an oath to support the Constitution in 2017, he had engaged in an "insurrection" by inciting riots on January 6, 2021 to prevent the transfer of power to Biden.[612] The court concluded that the PQD did not preclude judicial review of these constitutional issues and ordered Trump's removal from Colorado's 2024 primary ballot.[613]

Without mentioning the PQD,[614] the U.S. Supreme Court in March 2024 reversed.[615] The Justices agreed that federalism principles prohibited states from enforcing Section 3 against presidential candidates.[616] The Court reasoned that the Fourteenth Amendment generally limited state power and specifically did not permit states to disqualify federal (as contrasted with state) officials and candidates—especially the President.[617] The Court cautioned that allowing a state-by-state "patchwork" in enforcing Section 3 would create "chaos."[618] All the Republican Justices except Barrett further held that Section 3 was not self-executing; rather, Section 5 authorized Congress, through implementing legislation with particular procedures, to enforce Section 3 against federal officers.[619]

Justices Barrett, Sotomayor, Kagan, and Jackson maintained that it was unnecessary to address this latter issue because the case did not concern any federal statute, but only the acts of one state.[620] The latter three Justices cited Justice Breyer's *Bush* dissent to support their lament that "[i]n a sensitive case crying out for judicial restraint, [the majority] abandons that course."[621]

So why did five conservative Republican Justices reach out to decide the question of whether Section 3 was self-executing? The probable answer is that they (1) wanted to clarify at the primary stage in

612. *Id*. at 104-05.

613. *Id*. at 105-07.

614. The Court's lack of discussion about the state court's PQD analysis undoubtedly reflected the Court's ahistorical assertion in *Baker* that the PQD solely concerns separation of powers, not federalism. *See supra* notes 193, 213-214 and accompanying text.

615. *Anderson*, 601 U.S. at 107-16.

616. *See id*. at 107-16; *id*. at 116-18 (Barrett, J., concurring in part and concurring in judgment); *id*. at 118-20 (Sotomayor, Kagan & Jackson, JJ., concurring in judgment).

617. *See id*. at 107-11.

618. *See id*. at 114-16.

619. *See id*. at 107-16.

620. *See id*. at 116-18 (Barrett, J., concurring in part and concurring in judgment); *id*. at 118-23 (Sotomayor, Kagan & Jackson, JJ., concurring in judgment).

621. *See Anderson*, 601 U.S. at 121 (Sotomayor, Kagan & Jackson, JJ., concurring in judgment) (citing Bush v. Gore, 531 U.S. 98,158 (2000) (Breyer, J., dissenting)); *see also id*. at 120-21 (questioning the majority's assertion that Section 3 required implementing federal legislation, as many other provisions of the Fourteenth Amendment (e.g., the Due Process and Equal Protection Clauses) were self-executing and could be enforced by courts directly).

March that states could not invoke Section 3 either to remove Trump from the November ballot or to challenge his election if he won, and (2) surmised that a Republican-controlled House would not support legislation disqualifying their party's candidate from assuming the Presidency.

But if ripeness is an Article III requirement,[622] then the Court had no jurisdiction to prematurely determine whether Section 3 was self-executing. Rather, it should have waited a few months to see if any state officials boldly invoked that provision to take Trump off the November ballot—an attempt that likely could have been dealt with expeditiously as foreclosed by *Anderson*. Similar logic could have been applied to shoot down state claims *after* Trump won that he was ineligible to serve under Section 3. Moreover, the Court surely would not have allowed such a challenge to overturn the results of a presidential election.

It may have been wise *pragmatically* to cut off potential state mischief under Section 3 in March, rather than wait to decide cases involving such state action until shortly before or after the November election. From a purely *legal* standpoint, however, the majority's decision cannot be squared with Article III ripeness doctrine.

More broadly, an originalist Court would have dismissed the case as a political question. As in *Bush*, the presumption favoring judicial review is rebutted by Article II, which authorizes states to appoint presidential electors (including determining which candidates are eligible) and Congress to decide the validity of the electoral votes submitted.[623] Thus, in exercising its appointment power, Colorado could have removed Trump from the ballot, unless Congress under Section 5 had set forth rules for Section 3 exclusion of candidates, and the state violated those rules. In the latter scenario, Congress could have declined to count Colorado's electoral votes for Trump's opponents as invalid. Absent such a new federal statute, however, both the Electoral Count Act and the ECRA would have required Congress to accept the state's electoral votes if timely submitted.[624]

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622. The Court has suggested that, even if a case is ripe under Article III, it can sometimes exercise discretion to refrain from rendering a decision. *See supra* notes 188, 308-309 and accompanying text. However, the Court has never said that it has discretion to decide a case that is unripe under Article III. *See supra* notes 187, 310 and accompanying text.

623. *See supra* Part I and notes 121-125 and accompanying text; *see also* Tokaji, *supra* note 408, at 31, 31-32, 35-40 (predicting the *Anderson* scenario and concluding that it would raise a political question in federal court, but noting that state courts could hear such a claim—subject to the U.S. Supreme Court's appellate federal question jurisdiction to ensure that a rogue state did not wrongly disqualify a candidate).

624. *See supra* Section I.B. and notes 547-553 and accompanying text.

C. Justiciability and the Post-Bush Election Cases: A Summary

Cases since 2000 reveal that the standing, ripeness, mootness, and PQD standards are so flexible that they can be applied to support either asserting or declining jurisdiction—a threshold determination that often depends on unspoken nonlegal calculations. The Justices disagree about these doctrines in almost every case, and the overall jurisprudence on justiciability is incoherent.

Election-related litigation illustrates these problems. Most notably, a majority of Justices manipulated justiciability doctrines to avoid deciding cases arising out of the 2020 presidential election but adjudicate federal legal claims in 2024. In every case, the Court could have plausibly applied justiciability standards to reach the opposite result.

VII. TREATING ELECTION CASES AS NONJUSTICIABLE

Ideally, the Court would replace the standing, ripeness, mootness, and political question doctrines with clear legal rules actually rooted in Article III's text, underlying political theory, original understanding, and implementing practice and precedent. More realistically, the Justices might wish to minimize the impact of these doctrines in subsets of cases where they are doing the most damage, like those involving the laws of democracy.

A. Restoring the Original Understanding of Justiciability

The Court created the modern justiciability doctrines to address a perceived practical need for federal docket control after the New Deal, yet asserted that they were compelled by Article III as historically understood.[625] Since then, the Court has clung to the latter myth and developed ever more elaborate standards. The result has been needless complexity and confusion.

A few Justices have recognized the flaws of specific justiciability doctrines. For example, Cheif Justice Rehnquist correctly (1) maintained that the Court should adopt the historical understanding of mootness as discretionary[626] and (2) conceded that the Court had not treated standing doctrine consistently, although he applied it.[627] Similarly, Justice Thomas has questioned *Baker*[628] and argued that plaintiffs need not demonstrate an "injury in fact" to establish standing to sue over private rights created by statute,[629] but has not recommended

625. *See supra* notes 178-188 and accompanying text.

626. Honig v. Doe, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J., concurring).

627. Valley Forge Christian Coll. v. Ams. United, 454 U.S. 464, 471-75 (1982).

628. *See supra* notes 493-497 and accompanying text.

629. *See* Spokeo v. Robins, 578 U.S. 330, 343-45, 1550-51 (Thomas, J., dissenting) (2016).

scrapping the PQD and standing analysis. Finally, Justice Sotomayor has submitted that the last three *Baker* factors are matters of prudential judgment rather than judicial power,[630] but would not acknowledge that the other three *Baker* criteria are also discretionary. The foregoing proposed modifications are piecemeal. The better approach would be to discard the justiciability doctrines and return to the understanding of Article III that was followed from 1789 until the 1940s.[631] This framework, far from being a historical remnant, could be applied today to produce legally principled results.

The basic rule is that an Article III "Case" arises whenever a party who has a genuine legal interest at stake presents a question in a recognized judicial form that requires exposition by independent federal judges. All such plaintiffs should be granted standing. If such a "case" becomes moot, courts have discretion to render a decision if the issue raised should be resolved because it is of public importance. However, the Constitution's presumption favoring judicial review can be rebutted if certain of its provisions, read in light of its structure and historical understandings, entrust a question for final resolution by political actors, federal or state. Ripeness doctrine has no historical pedigree and should be replaced by a simple rule that courts should decide "Cases" unless Congress has provided that administrative agencies must initially resolve the legal question. Finally, "judicial power" can be exercised only in a litigated case (not by rendering formal advice to political officials), and any judgment in such as case must be final.

Of course, *stare decisis* and pragmatism make it exceedingly unlikely that the Court will revive Article III's original meaning to replace the current standing, ripeness, mootness, and political question doctrines. In most instances, the arbitrary application of discretionary justiciability standards are of interest only to the litigants, their lawyers, and jurisdiction experts—so the Court has little practical incentive to clean up the mess. But the opposite is true of election-related cases.

B. Election Litigation

The manipulation of justiciability doctrines in election-related disputes—and the decisions when courts reach the merits—attract widespread attention. That publicity invariably features the losers accusing judges (including Justices) of unlawfully imposing their partisan political views. This suspicion carries over into courts' judgments on other legal matters.[632]

630. *See supra* note 460 and accompanying text.

631. The following analysis has been detailed *supra* Part II.

632. Political scientists have demonstrated empirically that the Justices' political, ideological, and policy preferences greatly influence their legal decisions. *See, e.g.*, JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

The Justices are deeply concerned about this erosion of public confidence in judges as neutral legal decision-makers.[633]An obvious place to start in restoring that trust would be to stop intervening in partisan politics, which would require reconsidering *Baker*. There the Court concluded that (1) it was the only institution capable of ensuring fair and equal electoral processes, and (2) achieving that overarching goal justified disregarding established principles of judicial restraint, justiciability, and substantive law.[634]

Federal and state judges have followed the Court's lead[635] based on the notion that they are in a superior position to resolve election disputes as compared to political officials, for two reasons.[636] First, judges are neutral and thus can prevent partisan politicians from harming democracy by rigging electoral institutions, processes, and mechanisms based on personal and political self-interest. Second, judges have specialized training to find facts through fixed rules of procedure and evidence, and to apply the law to those facts.

The foregoing rationale downplays some serious problems. Although Article III grants judges life tenure and a non-reducible salary to protect their independence, that impartiality is undermined when they become entangled in electoral disputes. The parties and the public, fairly or not, assume that politics influences such decisions. Moreover, the expertise justification has three flaws. First, federal judges decide a broad range of cases and have no special proficiency in election law and policy, whereas political officials do. Second, Justices when appointed are generalists who typically have no deep understanding of constitutional law. Therefore, they tend to avoid the arduous task of determining the Constitution's true meaning and instead build upon earlier cases that misinterpreted it (like *Baker*). The Court often does so by developing balancing tests (such as *Anderson-Burdick*) that give judges massive discretion to decide on the constitutional validity of electoral rules.[637] Third, although Article III courts concededly have unique competence as to rules of federal jurisdiction, procedure,

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Ordinary citizens increasingly understand this reality, which undermines the Court's reputation as an impartial legal arbiter.

633. *See, e.g.,* Chief Justice John G. Roberts, Jr., *2024 Year End Report on the Federal Judiciary* 3-9 (lamenting this trend).

634. *See supra* notes 189-198, 210-221, 223-241 and accompanying text.

635. My focus is on the U.S. Supreme Court, which should hold that Article III judges cannot decide election-related disputes because they raise political questions. Under federalism principles, however, state courts remain free to apply looser justiciability doctrines and decide election disputes concerning state offices. *See, e.g.*, Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 406, 408-11 (1984). Exploring this topic would exceed the scope of this Article.

636. The following paragraphs incorporate material cited *supra* notes 26-31, 43, 57, 67-68, 71-73, 101, 104-125, 131, 137-145, 151-174, 199-209, 213-221, 224-241, 248, 252-259, 263-294, 329-333, 356-369, 370-404, 408, 464-624 and accompanying text.

637. *See supra* notes 270-277 and accompanying text.

and evidence, that very fact enables them to manipulate those adjective laws in election cases.

The aforementioned deficiencies are far worse in state courts. With few exceptions, states select judges through either direct election or appointment by the governor followed by a "yes/no" retention vote or possible reappointment.[638] Accordingly, judges rely on their political and financial sponsors.[639] Although this system makes state judges (unlike their federal counterparts) politically accountable for their election-related decisions, it compromises their impartiality.[640] Furthermore, the relatively low compensation and status of state judges compared to skilled private practitioners often make the latter reluctant to pursue such positions. Ironically, though, state judges' legitimacy depends substantially on the public's belief that they are objective and singularly adept at legal analysis.

Bush v. Gore made the average citizen acutely aware of the above-described problems.[641] Perhaps subconsciously, the Democratic Florida Justices twisted state law to help Gore, whereas the Republican U.S. Supreme Court Justices manipulated federal jurisdictional and constitutional law to favor Bush.

More recent cases follow a similar pattern. Consider the two main 2020 presidential election decisions. First, in *Democratic National Committee v. Wisconsin State Legislature*,[642] an Obama-appointed federal judge cited constitutional voting equality principles to extend the state's absentee ballot deadline (presumably to help Biden); the Republican-dominated Seventh Circuit stayed this order; and the Republican Justices denied a petition to vacate the stay.[643] Second, in *Degraffenreid*, the elected Pennsylvania Supreme Court Justices who invoked the state constitution to lengthen the state's statutory mail-in ballot deadline were Democrats,[644] and the three most conservative

638. *See* Kang & Shepherd, *supra* note 411, at 1413 (noting that ninety percent of state judges are chosen through political processes).

639. In fairness, state judges have more protection against raw partisanship than elected officials because (1) judicial terms are longer (usually 6-14 years) and (2) judges are usually reappointed or continue after an up/down retention vote. Nonetheless, their reliance upon ongoing political and popular support creates, at the very least, the appearance of bias.

640. *See* Cory Conley & Tonja Jacobi, *Derailing Democracy, Shirking Responsibility: The New Election Law Landscape,* 76 FLA. L. REV. 1885, 1888-90, 1928-34 (2024) (contending that elected state judges cannot objectively decide election cases, especially when applying federal constitutional principles would disadvantage the judge's political party); Kang & Shepherd, *supra* note 411 , at 1417-18, 1436-38, 1442-48 (empirically studying candidate-litigated election disputes in state supreme courts and concluding that (1) judges, whether elected or appointed, curry favor with whoever controls their retention; and (2) Republican judges display greater partisan loyalty than Democrats, and this loyalty increases as party campaign money rises).

641. *See supra* Part V.

642. 141 S.Ct. 28 (2020).

643. *See supra* notes 522-529 and accompanying text.

644. *See supra* notes 506-508 and accompanying text. Most of the Justices had mediocre legal credentials, but extensive political experience.

Republicans on the U.S. Supreme Court criticized their colleagues for dismissing the case as moot.[645] And in *Trump v. Anderson*,[646] a Democratic-dominated Colorado Supreme Court upheld a liberal trial judge's disqualification of Trump from the presidential primary ballot,[647] only to be reversed by the U.S. Supreme Court in an opinion joined in full only by five Republican Justices. In short, post-*Bush* precedent has magnified the public feeling that judges who decide election cases are politicians in robes.

That is why the Constitution, correctly interpreted until *Baker*, generally leaves election disputes to political officials who are political experts and can be held directly responsible.[648] The Framers and Ratifiers found it obvious that each state retained sole power over all electoral matters pertaining entirely to its state. And state laws would even apply to federal elections, subject to supervision by Congress alone. The EPC did not affect this arrangement, as it did not concern political rights.

The only pertinent changes were Amendments XV (1869), XIX, (1920), XXIV (1964), and XXVI (1971), which prohibited governments from abridging the right to vote on account of race, sex, poverty, or age (18 or older). Those Amendments allowed judicial review but required plaintiffs to prove that states had intentionally abridged their right to vote, as most election rules have a disparate impact on some groups. These Amendments did not open the federal courts to non-voting electoral issues, such as apportioning state legislatures and congressional districts.

The Court should revive its traditional constitutional approach by treating as political questions (1) all state determinations as to state electoral matters, and (2) the resolution of federal election disputes initially by state officials and ultimately by Congress (absent intentional discrimination in voting). Such a revival would also either eliminate or drastically curtail judicial manipulation of standing, ripeness, and mootness doctrines to interfere in electoral matters.

CONCLUSION

Returning to a pre-*Baker* analytical framework is an admittedly radical proposal, but three developments provide some hope. First, *Rucho*'s application of the PQD to partisan gerrymandering conflicts

645. *See supra* notes 513-518 and accompanying text.

646. 601 U.S. 100 (2024).

647. To their credit, two Democratic Justices dissented—Samour on a due process rationale, and Berkenkotter on standing grounds. Nonetheless, the popular narrative was that a Democratic Court had found that the Republican Trump was an "insurrectionist" who was unfit to be a presidential candidate.

648. The following paragraph summarizes points made *supra* Part I and notes 167-172, 199-241, 248, 252-259, 263-264, 294, 336-362, 374-387, 471-472, 483, 490-497, 544-545, 583-596, 623 and accompanying text.

with *Baker*'s rationale that only federal judges have the independence and constitutional understanding to ensure that all state voters receive equal treatment. Second, Americans' confidence in judges (including Justices) as impartial expositors of law keeps waning, and the starting point to reverse this trend would be to minimize involvement with partisan politics. Third, the Court recently overruled the fifty-year-old *Roe v. Wade*[649] as contrary to the Fourteenth Amendment's language, history, and implementation for a century—all of which left abortion to the states. *Baker* deserves the same fate for similarly defying the meaning of the EPC and the true PQD.

649. 410 U.S. 113 (1973).