Political Judgments

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Without doubt, the partisan fires of the last presidential election still burn too fiercely for retrospective evaluations to have much chance of standing independent of their outcome-determinative quality. The still smoldering events of the Florida protest and contest phases continue to shape the positions taken by observers across the political spectrum. On the left, there are the sudden converts to state autonomy, unfettered local electoral discretion, the ability of local jurisdictions to proclaim a “do-over” in a national election, and the perfidy of the Electoral College. On the right, the former champions of states’ rights have now embraced federalism in its original nationalist guise, have become infatuated with the Fourteenth Amendment, and have learned to love their federal courts as aggressive as they come.

Despite the odds against drawing a successful balance sheet at this point, there are observations that should be made, and that can be measured against standards independent of who won and who lost in Florida. The first point that may be lost amid the partisan ardor is that the legal system responded remarkably well to tremendous stress. For over a month, the U.S. underwent what in much of the world would have been characterized as a succession crisis following the end of an incumbent’s reign. Strikingly, however, throughout this period, there was essentially no social unrest, no crisis of governance, no inability to maintain discipline in foreign affairs, no instability in financial markets, no crisis in consumer markets, no stockpiling of goods, and so forth. Instead, there was a captivating display of high-powered lawyering that seized the national spotlight and resolved what in much of human history would have been an invitation to disorder and despair.

Much may be argued about the excess of legal regulation of our society. But it was law and lawyering that allowed a resolution of an election whose margin of victory proved less than the margin of error in the electoral system overall. Undoubtedly, there will be many proposals for change of the more ossified electoral practices. But in the manner of the well-intentioned proposal to move first base back five

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feet—so as to avoid so many close calls at first—so too there will never be any mass electoral system that will completely escape the frailties of human design. At the end of the day, law and the popular faith in the legal process brought an orderly end to the election crisis.

The second point, however, is much less rosy. Although the legal system brought closure to the process, it did so at a price. Hastily concocted doctrines and resolutions brought the judiciary into the public’s political scrutiny as rarely before. Particularly after *Bush v Gore,* the question must be asked, did the Court accomplish anything more than the delivery of a resolution to the dispute that placed in office the candidate most in keeping with the Court’s philosophical predilections? The fact that law was the instrumentality of resolving disputes does not of itself establish that the law was well utilized or that its principles were wisely applied.

Here there is simply no escaping the fact that the Supreme Court’s foray into Election 2000 is the first time that the Court has pronounced a victor in any election, let alone the most dramatic election of all. Prior to *Bush v Gore,* the Court categorically eschewed reviewing the outcomes of elections. The Supreme Court was simply not in the business of providing solace to disappointed office-seekers; in Justice White’s time-honored terms, “As our system has it, one candidate wins, the others lose.” Even when courts had to look at election outcomes to determine if the system had malfunctioned, they did so only over the long term to see if “the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole,” or if a minority group had encountered structural obstacles that allowed majority voters “usually to defeat the minority’s preferred candidate.” And when called upon to evaluate tensions between state electoral processes and federal dates for assuming office, the Court showed tremendous solicitude for state practices, including recounts, that were an “integral part” of state practice and accordingly fell “within the ambit of the broad powers delegated to the States” by the Constitution.

Certainly, events change, new legal issues require doctrine to be reformulated, and the facts of the cases just invoked do not precisely correspond to the events in Florida. But the general tenor of this case

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1 121 S Ct 525 (2000) (per curiam).
3 *Davis v Bandemer,* 478 US 109, 155 (1986) (holding that the district court’s findings did not meet the threshold for showing vote dilution).
5 *Roudebush v Harke,* 405 US 15, 25 (1972) (lifting a lower federal court’s injunction on a recount proceeding under state law).
law imposes some burden of justification for the Court’s unprecedented and swaggeringly confident intervention into Election 2000. In what follows, I will suggest that the Court may well have been justified in its desire to expand constitutional scrutiny to cover on-the-run, post hoc alterations of electoral practices, but that it failed in the preservation of an institutional reticence to intercede in the political thicket when other institutional actors were amply well positioned to address the claimed harm. For those keeping score at home, this puts me most in line with Justice Breyer’s dissenting opinion, most notably his advocacy of “self-restraint” on the part of the Court.6

To make this assessment, it is necessary to go back to the still festering disputes over the Court’s abandonment of the political question doctrine. Until the breakthrough reapportionment cases of the 1960s, the Court refused to immerse itself in any claim implicating the political process. In Luther v Borden,7 the Court introduced a prudential bar on having courts adjudicate contested questions of electoral legitimacy and declined to entertain a challenge between contending factions claiming to be the rightful governors of Rhode Island. As defined by Justice Frankfurter in invoking caution about entering “the political thicket,” the “Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.”8

The Court evaded the political question straitjacket in 1962 in Baker v Carr,9 but did so by denying the applicability of a truncated version of the political question doctrine10 and by invoking curiously

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6 Bush v Gore, 121 S Ct at 557–58 (Breyer dissenting), quoting United States v Butler, 297 US 1, 79 (1936) (Stone dissenting).
7 48 US (7 Howard) 1 (1849) (addressing a “republican form of government” clause claim arising from the Dorr rebellion).
8 Colegrove v Green, 328 US 549, 556 (1946) (affirming the dismissal of an action to invalidate certain provisions of state law governing congressional districts).
9 369 US 186 (1962) (relying on the Equal Protection Clause to invalidate a state’s legislative apportionment scheme).
10 The Court’s redefinition was:

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 embarrassment from multifarious pronouncements by various departments on one question.

Id at 217.
assumed "[j]udicial standards [that] are well developed and familiar.""\(^1\)

*Baker* left to subsequent cases the task of providing guidance for how courts were to navigate the political shoals, most notably *Reynolds v Sims*\(^2\) and the development of the one-person, one-vote doctrine. As I have argued elsewhere,\(^3\) the Court in *Baker* never managed a cogent explanation of its abandonment of the political question doctrine or of how courts were to avoid being sullied by immersion into electoral disputes.

In retrospect, the successful evasion of the political question barrier to judicial review, most notably in the reapportionment context, required a combination of factors.\(^4\) First, and foremost, the Court needed to articulate a simple and judicially manageable standard for measuring the constitutional right at stake. This was a critical response to the challenge from Justice Harlan in *Reynolds* that "cases of this type are not amenable to the development of judicial standards."\(^5\) Second, and equally critical, the Court needed clearly to explain why it should be the institutional actor to provide redress, in effect rising to answer Frankfurter's invocation in *Colegrove* of the executive, the legislature, and the people as the repositories of constitutional vindication.\(^6\) This point is compellingly argued in *Baker* by Justice Clark, who clearly sets out why the courts were the only source of potential remedy for claims of systemic malapportionment:

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the . . . majority of the voters have been caught up in a legislative strait jacket. Tennessee has an "informed, civically militant electorate" and "an aroused popular conscience," but it does not sear "the conscience of the people's representatives." This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the

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\(^1\) Id at 226.

\(^2\) 377 US 533 (1964) (striking down a plan for apportionment not based on population).


\(^4\) I treat this theme more fully in an earlier critical assessment of the Court’s willingness to entertain political gerrymandering claims in *Davis v Bandemer*, 478 US 109. See Issacharoff, 71 Tex L Rev 1643 (cited in note 13).

\(^5\) 377 US at 621 (Harlan dissenting).

\(^6\) 328 US at 556.
Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result, and Governors have fought the tide only to flounder. . . . We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.  

The question then becomes how does *Bush v Gore* measure up against this two-part template for successful avoidance of the Court being ensnared in the political thicket. Has the Court identified a clear constitutional principle and how it is that it shall be managed judicially? And, has the Court explained why the judiciary is the proper institutional actor to ford the turbulent political streams?

I. THE CONSTITUTIONAL INTEREST IN ELECTION PRACTICES

The first question to address is the nature of the constitutional harm identified in *Bush v Gore*. There are three different theories put forward by the Court in *Bush v Gore* and its immediate predecessor, *Bush v Palm Beach County Canvassing Board*. As an initial matter, therefore, the political question inquiry requires addressing the clarity and robustness of the claimed federal constitutional interest.

A. Article II, Section 1

The first claimed harm concerns the source of state law authority for regulating electoral disputes. This narrow issue turns on the peculiarity of presidential elections given the language of Article II, Section 1 of the Constitution, which provides that electors shall be appointed "in such Manner as the Legislature Thereof May Direct." In *Bush v Palm Beach County Canvassing Board*, the Court vacated and remanded the Florida Supreme Court’s reconfiguration of the Florida statutory protest and contest phases on the grounds that, "we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2." This approach, which ultimately garnered only three votes in *Bush v Gore*, provides little basis for a robust approach to the problem of elections gone bad.

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17 369 US at 258–59 (Clark concurring) (footnotes omitted).
18 121 S Ct 471 (2000) (per curiam).
19 US Const Art II, § 1, cl 2.
20 121 S Ct at 475.
21 In his Essay in this Symposium, Richard Epstein makes a strong case for the proposition that the Florida Supreme Court created new rules of conduct for the election after-the-fact.
To begin with, the Court in *Bush v Palm Beach County Canvassing Board* and Rehnquist's concurrence in *Bush v Gore* place great emphasis on the distinction between the acts of the Florida legislature and the other sources of state law derived either from the state constitution or the principles of equity. Perhaps not since *Erie v Tompkins* has a decision turned so heavily on the question of the source of state law. *Bush v Palm Beach County Canvassing Board* suggests that the constitutional delegation of authority in Article II, Section 1 of the Constitution is an exclusive grant of authority to the state legislature to create the procedures for the election of the state's presidential electors. The opinion further raises the possibility that no other state law (including the state constitution) may intercede absent an express delegation of authority from the legislature. If so, the invocation of state constitutional law to cabin the acts of the state legislature would, by extension, violate the Supremacy Clause of the U.S. Constitution.

This formal rendition of the source of state law actually accomplishes very little. As matters stood after *Bush v Palm Beach County Canvassing Board*, there still appeared room for the normal operation of judicial interpretation of statutes. *Bush v Palm Beach County Canvassing Board* did not entail the notion that the state legislative activities were in any way improper. From this he attempts to draw the conclusion that the Article II, Section 1 claim was in fact the decisive constitutional issue. See Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": The Outcome in *Bush v Gore Defended*, 68 U Chi L Rev 613 (2001). As I will set out, there are two defects with this approach. First, it proves too much. If the problem is with after-the-fact alterations of electoral processes in a potentially outcome-determinative fashion, why should this principle be limited to presidential elections alone, subject to Article II, Section 1? Should not the protection of the integrity of the election system correspond to a more central constitutional command? Second, the claim proves too little. The fact that the Florida Supreme Court recast the state electoral practices does not in itself mean that a violation of Article II, Section 1 was present. What if the Florida Supreme Court overturned a legislative enactment that limited the franchise to only men? Or only white citizens? Does anyone seriously claim that Article II, Section 1 would be an obstacle to enforcement of the federal constitutional protections of the Fifteenth and Nineteenth Amendments?

22 304 US 64 (1938).

23 41 US (16 Pet) 1 (1842).

24 *Swift* had drawn a sharp distinction between legislative enactments and decisional law of the state courts. For Justice Story, the former were true sources of law that federal courts under the Rules of Decision Act were obligated to follow in construing state law in diversity cases. The latter were merely interpretive guides that could be subsumed under the federal common law without doing violence to state law. Id at 9–11.


26 *Bush v Palm Beach County Canvassing Board*, 121 S Ct at 474–75.
scheme would either be fully responsive to any emergency that might arise, or that it would be entirely self-revealing and consistent. In this sense, the Court rejected the more extreme argument advanced by the Bush campaign that any state judicial review or interpretation would violate the federal constitutional scheme. "Bush v Palm Beach County Canvassing Board does, however, appear to contemplate that state judicial review of presidential election disputes takes as its cue state legislative enactments rather than state constitutional or common law authority. What remains uncertain is the source of remedial authority of state courts in the event of a problem in the administration of the state statutory election system. Thus, the Bush v Palm Beach County Canvassing Board remand leaves unclear whether the Florida Supreme Court's recasting of the statutory date for certification could stand if it were based on a conflict in the state election code combined with the need for redress through emergency court action. The plurality opinion in Bush v Gore adds little to the rationale of the Court in Bush v Palm Beach County Canvassing Board.

Perhaps more problematic for this approach, the reliance on Article II, Section 1 entails a curiously cabined view of the federal interest in presidential elections. In light of the expansion of federal oversight of state practices under the Fourteenth Amendment, the treatment of Article II (or the Twelfth Amendment) as the sole source of constitutional concern in federal elections is curious, and certainly cannot survive Bush v Gore. For example, if a state legislature decided to enact a system of election of presidential electors that was based on a county-unit voting system, or some other basis that violated the requirements of one-person, one-vote, is it conceivable that such a selection mechanism would be unaffected by the equipopulation requirement of the Fourteenth Amendment? Or could a state enact a system of selecting electors that limited the franchise to men, in derogation of the Nineteenth Amendment? To ask these questions is to answer them. It is simply inconceivable that any court would seriously entertain the proposition that the selection of presidential electors stands apart from other constitutional provisions covering the right to vote, regardless of whether they are in the form of the text of other provisions of the Constitution or exist in the extensive interpretive case law of the past century.

Once the scope of federal constitutional oversight of presidential elections is recognized as sweeping beyond Article II, the power of the

28 121 S Ct at 473–74.
Article II approach is significantly vitiated, even as a limitation on state courts. The objectionable opinion of the Florida Supreme Court did indeed rely on state constitutional doctrine as the basis for its equitable intervention into the first stages of Election 2000. But the principles drawn from Florida constitutional law were at such a level of generality that they could as easily have been derived from the basic federal cases establishing the right to vote as a fundamental right—indeed, the very cases the U.S. Supreme Court subsequently relied upon in crafting the equal protection doctrines of Bush v Gore. Moreover, in its own opinion on the remand from Bush v Palm Beach County Canvassing Board, the Florida Supreme Court came to precisely the same ruling as it had initially, but was duly chastened from ever mentioning its own state constitution. To the extent that the constitutional infirmity in Florida turned on the use of state constitutional law, the Supreme Court’s intervention into the Florida election crisis makes little sense. It is hard to give much credence to a constitutional principle that treats state constitutional law ultimately as the law that dare not speak its name.

B. Retrospective Changes in State Procedures

In the brief window between Bush v Palm Beach County Canvassing Board and Bush v Gore, it appeared that the Court was searching for a constitutional principle that would look with great skepticism on after-the-fact alterations of election procedures. Certainly the skeletal rendition of the facts in Florida provided ammunition for such a concern. It was clear, for example, that the Florida Supreme Court’s exercise in statutory interpretation in Palm Beach County Canvassing Board v Harris was mightily strained and that the claimed statutory conflict between the “may” and “shall” instructions to the Secretary of State could have been reconciled in a variety of ways that required less judicial rewriting of the Florida election code.
Similarly, there was serious reason for concern in Palm Beach County where prior county board rules on the counting of the now infamous dimpled chads were fairly clearly abrogated in the rush to accommodate claims of voter error and defective voting machines in Election 2000. Particularly in light of the peculiar claims for selected recounts under shifting procedures, the Florida scenario was ripe for claims that the integrity of the process was being compromised for partisan aims.

The concurring opinion by Chief Justice Rehnquist attempted to construe these alterations of preexisting practices as the core of an Article II, Section 1 violation independent of the earlier reliance on the Florida state constitution. The difficulty in raising this concern to a constitutional principle under Article II, Section 1 is that it would appear to proscribe actions taken in nonpresidential elections and alterations undertaken after-the-fact by the state legislature itself. Respond within three days to a request by the county to verify election software. The existence of this deadline, on the Department of State no less, could indicate that the legislature contemplated that the protest phase could and probably would take at a minimum eight days, and in any case could plausibly last longer than the seven day “shall” deadline. Thus, one reading could be that the “shall” language applies to results that have not been protested. This is further supported by the fact that Section 101.5614(8) specifies that “write-in, absentee and manually counted results shall constitute the official returns.” Fla Stat Ann § 101.5614(8) (West 2000). This is also quoted by the Florida Supreme Court. See Palm Beach County Canvassing Board v Harris, 772 S2d at 1235. Because the statutory provisions for manual recount are in the protest section, it follows that official returns cannot be calculated until the protest phase (at least when manual recounts occur) is complete. If they cannot be calculated, they cannot be certified since Section 101.111 requires that the Canvassing Commission “shall” certify “official” results.

There is however the complication of the penalties provided in Section 102.112 and the “shall be ignored” clause in Section 102.111. However, the “shall” language of Section 102.111 applies to elections that could have been certified by the county and were not or were and were not sent to the Secretary of State and the “may” language applies to those that could not have been certified because of a protest or other delay. Under this reading, the statutory scheme would appear to be best read to give the Secretary of State discretionary power to determine whether there would be a meaningful right to protest.

The next statutory difficulty is that the contest phase can begin only after the results are certified and thus on my reading after all manual recounts are complete. See Fla Stat Ann § 102.168 (West 2000). There are no statutory deadlines for the completion of the contest or the protest. The most aggressive step taken by the Florida Supreme Court was to manufacture from whole cloth its own deadline by relying on the safe harbor provision of 3 USC § 5 and the right to a meaningful contest. This is clearly without foundation. See Palm Beach County Canvassing Board v Harris, 772 S2d at 1237. Certainly, this appears nowhere in the statute and since this is not a statute specific to presidential elections, it would not even come into play in the majority of elections held pursuant to it. The court cites no legislative history to support its conclusion that the legislature intended to comply with this deadline.

35 Jeffrey Toobin, Miami Postcard: As Nasty As They Gotta Be, New Yorker 70 (Nov 27, 2000).

36 Hence I do not really take issue with Judge Posner’s claim in this symposium that the final effect of the Supreme Court’s intervention may have been “rough justice.” See Richard A. Posner, Bush v Gore: Prolegomenon to an Assessment, 68 U Chi L Rev 719 (2001). Judge Posner leaves aside the question whether the outcome was “legal justice”—but it is that question that occupies me.
haps accordingly, the Article II, Section 1 argument was rejected by six members of the Court and, instead, the question of fidelity to previously enacted electoral procedures was transferred into a reliance on 3 USC § 5 (1994). This now famous statutory provision forecloses congressional challenge to a state’s designated electors so long as a “State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of...electors...by judicial or other methods....”

It is entirely fair to read 3 USC § 5 as codifying an important principle of electoral democracy requiring the rules of engagement to be explicated ex ante and to be fairly immutable under the strain of electoral conflict. The basic premise is that election officials, who are most likely partisan figures, cannot be trusted to improvise electoral remedies once the impact of their decisions is known and the temptation toward self-serving behavior becomes irresistible. Such an approach would have the advantage of fitting in well within a theory of democratic governance that relies heavily on procedural precommitments to insure fairness. It further has the advantage of actually corresponding to a previously developed line of election cases that identifies significant legal interests, both federal and state, that are implicated by manipulations of the rules of elections.

There are two key drawbacks to the altered procedures standard for constitutional review. The first is that despite the apparent concern over such alterations in Bush v Palm Beach County Canvassing Board, the Court essentially abandoned this path in Bush v Gore in favor of a revitalized equal protection approach. The second difficulty is a managerial one for federal courts. Resting federal constitutional oversight on fidelity to preexisting election procedures necessarily involves an assessment of what prior procedures were and what alterations were actually made. Since the conduct of elections is basically entrusted to states, and since states in turn devolve responsibility to

37 For a further explication of this thesis, with particular application to the redistricting context, see Issacharoff, 71 Tex L Rev at 1661 (cited in note 13). The concept of precommitment and the political theory of constitutions as precommitment strategies have, at this point, extensive pedigrees. On precommitment, see, for example, Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 37-47 (Cambridge 1979) (discussing precommitment strategies). See also Thomas C. Schelling, Enforcing Rules on Oneself, 1 J L, Econ & Org 357 (1985). Other scholarly works apply precommitment theory to constitutions. See Jon Elster, Intertemporal Choice and Political Thought, in George Loewenstein and Jon Elster, eds, Choice over Time 35 (Russell Sage 1992); Stephen Holmes, Precommitment and the Paradox of Democracy, in Jon Elster and Rune Slagstad, eds, Constitutionalism and Democracy 195 (Cambridge 1988).

38 The clearest example is from the Roe line of cases in the Eleventh Circuit, dealing with after-the-fact alterations in counting procedures for absentee ballots in an Alabama local election. See Roe v Alabama, 43 F3d 574 (11th Cir 1995). A fuller discussion of the Roe cases and the constitutional principles underlying them can be found in Issacharoff, Karlan, and Pildes, When Elections Go Bad at 15–24 (cited in note 25).
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county level election officials, federal constitutional review of changed state election procedures would in turn require that every local and state election procedure be subject to federal judicial scrutiny. Such an approach would run counter to long-standing abstention doctrines that would have federal courts step clearly aside when matters of interpreting state law and procedures are inherent to federal questions.\(^{39}\)

To some extent the groundwork for more invasive federal examination has already been laid. Already, for example, the Supreme Court in the redistricting context has recast the familiar principle that federal courts should *abstain* from cases requiring interpretation of state law to one that they should retain jurisdiction but *defer* judgment until the state law issue may be resolved,\(^{40}\) perhaps by certification to the highest court of the state.\(^{41}\) The Court may well have realized that the articulation of a central federal concern in the proper application of state procedures would set aside all federalism-based considerations of federal court abstention. A significant step in that direction can be found in the Eleventh Circuit's treatment of abstention in the direct federal court challenge to Election 2000:

> Our conclusion that abstention is inappropriate is strengthened by the fact that Plaintiffs allege a constitutional violation of their voting rights. In considering abstention, we must take into account the nature of the controversy and the importance of the right allegedly impaired. Our cases have held that voting rights cases are particularly inappropriate for abstention. In light of this precedent, the importance of the rights asserted by Plaintiffs...

\(^{39}\) These are the well-known *Pullman* and *Burford* abstention doctrines. The abstention doctrine developed in *Railroad Commission of Texas v Pullman Co*, 312 US 496, 501 (1941), emerges from concern that there should not be premature federal court intervention when ongoing state proceedings might obviate the need for the federal court to act. The abstention doctrine set forth in *Burford v Sun Oil Co*, 319 US 315, 332-34 (1943), is based on considerations of federalism and comity that require federal courts to resist disrupting the customary procedures of state law.

\(^{40}\) See *Growe v Emison*, 507 US 25, 32 n 1 (1993):

>We have referred to the *Pullman* doctrine as a form of "abstention." To bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* "deferral." *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute.

\(^{41}\) In *Tunick v Safir*, 209 F3d 67, 73 (2d Cir 2000), Judge Calabresi seized upon a statement by the Supreme Court that "[c]ertification today covers territory once dominated by a deferral device called 'Pullman abstention,'" *Arizonans for Official English v Arizona*, 520 US 43, 75 (2000). Judge Calabresi noted, "The teaching of *Arizonans*, therefore, is that we should consider certifying in more instances than had previously been thought appropriate, and do so even when the federal courts might think that the meaning of a state law is 'plain.'" *Tunick*, 209 F3d at 73.
counsels against our abstention in this case; although, as discussed below, we are mindful of the limited role of the federal courts in assessing a state's electoral process.\footnote{Siegel v LePore, 234 F3d 1163, 1174 (11th Cir 2000) (citations omitted).}

The risk in this approach is the federalization of all election law, akin to the concern a generation ago that the recognition of a due process interest in employment would constitutionalize all public sector employment law.\footnote{See Bishop v Wood, 426 US 341, 349-50 (1976) (Justice Stevens invoking the principle that the Constitution must not become the vehicle for federalizing all state employment decisions).} Since all state procedures would trigger a constitutional voting rights concern, either all election challenges would be immediately reviewable in federal court, or they would linger forever unripe since matters of state law interpretation would inevitably be present. Perhaps because of the disruption that would be caused to the law of federal courts, the constitutionalization of altered procedures was another path not chosen by the Supreme Court.

C. The New Equal Protection

In the scramble to find a suitable constitutional principle on which to rest its distrust of the Florida events, the Court finally settled on a sweeping, but rather vague rendition of equal protection. According to the Court:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.\footnote{Bush v Gore, 121 S Ct at 530.}

In so holding, the Court revived the fundamental rights line of cases from the 1960s, most notably Reynolds and Harper v Virginia Board of Elections,\footnote{383 US 663 (1966) (striking down the poll tax as an abridgment of the fundamental right to vote).} that had essentially collapsed of its own weight decades ago. The demise of this equal protection approach was, in part, the result of the unsuccessful attempt to extend fundamental rights claims to everything from privacy to wealth distinctions. In part as well, the fundamental rights line of cases succumbed to the emergence of intent-based equal protection review after Washington v Davis.\footnote{426 US 229 (1976) (holding that the racially disproportionate impact of a written employment test, which was neutral on its face, did not warrant the conclusion that the test was a purposely discriminatory device).} But part of the blame must also lie with the amorphousness of
the claimed fundamental right to vote. Take for example the core constitutional principle relied upon by the Court in *Reynolds* in formulating the one-person, one-vote rule of apportionment:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

As evocative as the principle of "full and effective participation" might be, it remains unclear thirty-five years later what are the precise parameters of this claimed right. When reduced to a manageable doctrine, such as the equipopulation rule of apportionment, courts have successfully been able to constrain the structural obstacles to participation that were present in cases such as *Baker* and *Reynolds*. But how far does "fair and effective participation" extend into campaign finance, party access to ballots, minority representation, or any of the other issues that have dominated the law of the political process over the past decade?

What then is the scope of the Court's newfound equal protection jurisprudence? Certainly the claim that states have a responsibility to ensure equality of access to the franchise is welcome. Since the emergence of suspect classifications as the sole effective source of equal protection redress, and following the development of the post-1982 Voting Rights Act as the most powerful vehicle for judicial intervention in the political arena, there has been a strong incentive to recast all claims of partisan disadvantage in the judicial arena as claims for racial redress. To the extent that *Bush v Gore* revitalizes a non-race
based standard of constitutional protection of rights in the political process, the resulting diminution in the need to dress up all claims of wrongdoing in racial garb could be quite welcome. But even so, the newly articulated equal protection doctrine is dramatically wide-reaching. The claimed wrong in Florida, the disparity in the standards for counting contested ballots, pales before other disparities in access to a meaningful vote, most notably the well-documented failure of voting machines used in one part, but not in another, of many states, Florida included. That clearly would fall under the Court's new injunction that states have an obligation "to avoid arbitrary and disparate treatment of the members" of the electorate."

The difficulty in defining the scope of this new equal protection right is made all the worse by the Court's disingenuous limiting instruction. Without explanation or doctrinal mooring, the per curiam opinion suddenly pronounces, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities," as if by such incantation the Court could restrict the sweeping new equal protection doctrine to the peculiar facts of recount procedures—the classic "good for this train, and this train only" offer. But without any principled distinction between recounts and any number of other procedures that might result in "arbitrary and disparate treatment" of different parts of the electorate, the limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree.

II. THE INSTITUTIONAL ROLE OF COURTS

A. The Availability of Political Redress

The second facet of the political question inquiry is not simply whether there are clear terms of legal engagement, but whether courts are the proper institutional actors to repair the perceived constitutional harm. In both *Bush v Palm Beach County Canvassing Board* and *Bush v Gore*, the Court invoked, as part of its rationale in overturning the Florida Supreme Court, the concerns for established procedural orderliness and for clear time frames set forth in the federal Electoral Count Act. Unfortunately, the Court's invocation of 3 USC § 5 raises more questions than it answers.

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Act] as stalking horses"); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 Tex L Rev 1705, 1732 (1993) (stating that "the political parties will enlist at least some members of the relevant groups to advance their views").

51 *Bush v Gore*, 121 S Ct at 530.
52 Id at 532.
Initially, the Court held up this portion of the Electoral Count Act as setting forth the federal interest in procedural regularity in the
conduct of elections. That invocation of the federal interest leaves un-
touched the remedial question of how a breach of the federal interest
should be remedied. Going back to Justice Clark’s response to the
Frankfurter/Harlan dissents in *Baker and Reynolds*, the question must
be asked whether, independent of the substantive federal interest, it is
the courts that should act to provide a politically contentious remedy
in an electoral dispute. The direct inquiry set out by Clark carefully
considered all other potential actors and concluded that the Court
must act only after assessing the failure of all other potential avenues
of redress. 54

*Bush v Gore* is entirely lacking in such analysis. The Court pre-
sumed that once it found the federal interest, its remedial obligations
followed. 55 In this regard, the Court’s reliance on the magic December
12 date for the safe harbor under 3 USC § 5 is particularly ironic. This
statutory provision emerged from a rather deliberate congressional ef-
fort to provide for orderly resolution of presidential election contro-
versies in the wake of the hastily-crafted Electoral Commission ap-
proach from 1877. 56 A review of this statute, however, reveals that it
carefully reserved to the political branches the key role in resolving
contested presidential elections.

If one looks beyond 3 USC § 5 and examines the statute as a
whole, there is actually a coherent attempt made to place responsibil-
ity for resolving contested presidential elections in the domain of poli-
tics. Thus, for example, as bizarre as it may sound to contemporary
court-accustomed observers, federal law actually anticipates a poten-
tial role for state legislatures: when a state “has failed to make a
choice [of electors to the electoral college] on the day prescribed by
law, the electors may be appointed on a subsequent day in such a
manner as the legislature of such State may direct.” 57 More directly, 3
USC § 15 expressly anticipates that there could even be rival sets of
electors each claiming to represent their states—as occurred with the
Florida, Louisiana, and South Carolina delegations in 1876. Resolu-
tion of such disputes is entrusted to independent determination by

54 See text accompanying note 17.
55 Indeed, the expansiveness of that assumption may explain why Justices Ginsburg and
Stevens in dissent so categorically refused to entertain any potential violation of federal law in
the Florida imbroglio.
56 The history of the Electoral Commission and its controversial role in resolving the 1876
Hayes-Tilden election is set forth in Issacharoff, Karlan, and Pildes, *When Elections Go Bad* at
96–98 (cited in note 25).
57 3 USC § 2 (1994).
each branch of Congress—with a preference in case of a split between the House and Senate going to the delegation whose certificates of appointment bear the signature of the governor of their state of origin.*

Nor was this delegation of dispute resolution authority to the political branches an oversight. Rather this was a considered judgment of Congress responding to the lessons of the stormy 1876 presidential election and the need to devise procedures for resolving future contested designations of presidential electors. Congress clearly concluded that such decisions would have an inevitable political cast and should therefore be kept clearly confined within the political branches. As set forth in the opening speech by the sponsor of the Electoral Count Act, Senator Sherman, Congress actually contemplated and rejected a role for the Court akin to the role assumed in *Bush v Gore:*

Another plan which has been proposed in the debates at different times, and I think also in the constitutional convention, was to allow questions of this kind to be certified at once to the Supreme Court for its decisions in case of a division between the two Houses. If the House should be one way and the Senate the other, then it was proposed to let the case be referred directly to the prompt and summary decision of the Supreme Court. But there is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions, and therefore this proposition has not met with much favor. It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after all has to sit upon the life and property of all the people of the United States. It would tend to bring that court into public odium of one or the other of the two great parties. Therefore that plan may probably be rejected as an unwise provision. I believe, however, it is the provision made in other countries.59

In place of the Court, the statutory scheme envisioned a different set of actors. In Election 2000, that would have meant Florida’s governor and its legislature and the newly-elected members of Congress. Note well that all of the designated actors in this rendition of the drama would be partisan elected officials. Nothing in the statutory scheme envisions a role for courts, even if our conception of judicial involve-

58 Id § 15.
59 Counting of Electoral Votes, 17 Cong Rec S 817–18 (Jan 21, 1886) (Sen Sherman).
ment in the political arena is much more developed than it was over a century ago when the Electoral Count Act was first devised.

No doubt, this scenario would look to many modern observers like a pure power grab, a partisan circumvention of orderly legal processes. But why is it either surprising or alarming that an electoral deadlock should be resolved by political officials and bodies elected by the same voters? The root cause of the difficulties in Florida was that the election proved undecisive and given the particular distribution of votes nationwide, the Florida electoral resolution would in turn decide the national election. Justice Breyer well captures this point: “However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.”

In the heated rhetorical battle of Election 2000, no charge was bandied about with greater derision than the claim that one or another group of partisans was engaged in partisanship. But it was, after all, a partisan election that was at stake. It hardly seems an affront to democratic self-governance to channel the ultimate resolution of a true electoral deadlock into other democratically-elected branches of government. All the more, if the alternative were to have judges making ad hoc judgments that further state proceedings might “cast a cloud” on the “legitimacy” of a Bush election. As expressed by Justice Breyer, “Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court.”

B. The Majoritarian Dilemma

Much of course has changed since the first breach of the political question wall in the 1960s. We have become properly accustomed to the role of courts in guarding against fundamental distortions of the political process, particularly when the distortions serve to lock in incumbents by thwarting political competition, or serve to lock out ra-

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60 *Bush v Gore*, 121 S Ct at 556 (Breyer dissenting).
61 *Bush v Gore*, 121 S Ct 512, 512 (2000) (application for stay) (Scalia concurring). Lest I be accused of rehashing partisan views of my own, let me make clear that the likely beneficiary of reserving matters to the political branches would have been Governor Bush. Were there to have been rival slates of electors, his would have carried certificates bearing the signature of the governor of Florida (conveniently his brother), his party commanded control in one house of Congress, his allies controlled the Florida legislature, and under any number of scenarios, some combination of these factors would have delivered the presidency to him.
62 *Bush v Gore*, 121 S Ct at 556 (Breyer dissenting).
63 For a discussion of the importance of protecting competition in the political arena, see
cial minorities. Each of these interventions corresponds to a claim that the election system "is systematically malfunctioning," as formulated by John Hart Ely's pioneering work. But neither of these forms of distortions was at work in the procedures by which state and federal elected representatives could have directed the ultimate outcome of the contested 2000 presidential election.

Comparing the Court's response to Election 2000 to prior interventions into the political arena actually illuminates an unexplored problem in *Bush v Gore*. Invariably, the process of judicial review in the electoral arena gives rise in a particularly acute form to the concern over the countermajoritarian difficulty. After all, every time a court strikes down an election statute, or every time it calls into question electoral processes, the unelected judiciary substitutes its judgment for that of the democratically elected branches.

There are two distinct theories that justify such judicial intervention into the political arena, and each turns on the incapacity for repair from within. The first is the *Carolene Products* rationale that identifies the need for judicial intervention to protect the famously termed "discrete and insular minorities." Of importance here is not simply that the political process might be infected by prejudice, but that there is reason to believe that the challenged state practices "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." In other words, the process is unable to engage in self-repair because of the particular outcast quality of the minority.

The second rationale both builds on *Carolene Products* and extends it to conditions in which the political process has become immune to competitive challenge to the status quo. In cases of such process failure, denoted primarily by the entrenchment or lockup of

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Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in ... and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system. Obviously our elected representatives are the last persons we should trust with identification of either of these situations.


67 Id at 152 n 4.

68 Id.
political power in the hands of an electorally unshakable group, the
impetus for judicial intervention is greatest. The classic example goes
back to the distortions of political power evident in the fact patterns
of cases such as *Baker* and *Reynolds*. In each of these cases a maldis-
tribution of political power because of malapportionment made it im-
possible for even a majority of voters to dislodge minority rural con-
trol over state legislatures.69

What emerges from these rationales, paradoxical as it may sound,
is greater legitimacy to judicial intervention in the political process for
countermajoritarian purposes than when the Court seeks to invoke
the role of protector of majority preferences. The premise of both *Carolene Products* and the political process theories that followed is
that intervention is required because an electoral lock on power has
made the system unresponsive to permanent electoral minorities—
even if the protected minority happens to be a numerical majority of
the population, as in *Baker* and *Reynolds*. The unexplored flip-side of
this rationale is that there is correspondingly less justification for judi-
cial intervention into the political process for majoritarian aims. This
rationale dovetails with the second part of the Court's response to the
political question demand for abstention from election controversies.
As formulated by Justice Clark in his concurrence in *Baker*, the predi-
cate for judicial intervention had to be the absence of alternative insti-
tutional actors capable of repairing the claimed harm.70 In the case of
discrete and insular minorities, or in the case of locked-in political
power structures, presumably no other actor could fit the bill because
of the unresponsiveness of the governing coalition to the claims of in-
justice by those on the outs politically. But that rationale extends
poorly to electoral majorities, particularly those that control alterna-
tive political institutional actors. For such politically engaged majori-
ties, the presumption should be quite the contrary and should begin
with the premise that vindication lies in the political arena.

**CONCLUSION**

In dissent, Justice Breyer struck an important tone of judicial
modesty. Invoking Alexander Bickel, who termed the proper level of
judicial restraint the "passive virtues,"71 Justice Breyer worried that in

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69 The justification for judicial intervention based on the lockup of power through anti-
competitive devices is developed at length in Issacharoff and Pildes, 50 Stan L. Rev at 643 (cited
in note 63).

70 369 US at 258–59 (Clark concurring).

71 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of
Politics* 111–98 (Yale 2d ed 1986).
spite of significant federal concerns in the Florida events, the Court had been insufficiently attentive to the risk of "undermining respect for the judicial process" as a result of its headlong leap into the electoral battleground.\textsuperscript{72} It is not that the Court \textit{cannot} enter the domain of politics, but that there are often compelling reasons why it \textit{should not}. The demise of the political question doctrine left the Court with a warrant to enter the political fray, albeit reluctantly, when the lines of constitutional engagement were sufficiently clear and when no other institutional actor could repair the damage. What emerges most clearly from \textit{Bush v Gore} is that this Court appears seriously lacking in the appropriate spirit of reluctance.

\textsuperscript{72} \textit{Bush v Gore}, 121 S Ct at 557 (Breyer dissenting).