Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine

KATE HARDIMAN RHODES*

ABSTRACT

In the more than 350 lawsuits challenging election law procedures prior to the 2020 election, federal courts rarely found that the political question doctrine limited their role. Yet, the doctrine continues to prompt judicial abstention in other legal contexts, including political gerrymandering, foreign affairs, and impeachment. This Note examines why the Equal Protection exception announced in the canonical political question doctrine case Baker v. Carr has swallowed the core of its holding—that courts should decline to exercise jurisdiction over a case if any one of six factors render it a "political question." The answer is likely the intervening Anderson-Burdick doctrine, which eviscerates the political question doctrine and the separation of powers rationales for which it stands. This Note will posit that the political question doctrine should be reinvigorated to restore the courts' proper role in election law disputes over voting procedures. Baker's first factor—which counsels courts to decline jurisdiction where there is a textually demonstrable commitment to a coordinate political department—is especially pertinent insofar as the Elections Clause assigns control over the times, places, and manners of elections to state legislatures, checked by Congress. The modern textualist Court should consider applying this Baker factor, and others, to restore the proper balance between the branches vis-à-vis election law.

TABLE OF CONTENTS

---

* J.D., Georgetown University Law Center, 2022; B.A., University of Notre Dame, 2017. I thank Lisa Blatt and Paul Clement for their helpful comments on an earlier version of this Note written for their Separation of Powers Seminar. I am also grateful to Pete Patterson for his comments, and to my former colleagues at Cooper & Kirk for sparking my interest in election law.

I. INTRODUCTION – A TOOTHLESS POLITICAL QUESTION DOCTRINE IN ELECTION LAW

In the lead-up to the contentious 2020 election, litigants filed record-shattering numbers of voting rights lawsuits. By various counts, these lawsuits numbered more than 350 by the time America had elected Joseph R. Biden.[1] Filings between March and September 2020 alone were up by 82% compared to that same time period in 2016.[2] Many of the suits explicitly stemmed from the COVID-19 pandemic's impact on elections.[3] And some reflected the Democratic Party's broader strategy of filing in key battleground states to expand the

1. *See COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ [https://perma.cc/KS97-3SQZ]. *See also Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUSTICE (July 8, 2021), https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020 [https://perma.cc/T79T-6VX3] [hereinafter Brennan Litigation Tracker].

2. *See* TRAC Reports, *More Voting Rights Lawsuits Filed in 2020 Than in 2016*, SYRACUSE UNIV. (Sept. 21, 2020), https://trac.syr.edu/tracreports/civil/625/ [https://perma.cc/HMU4-P7UG]. *See also* Bianca Bruno, *Voting Rights Lawsuits Explode as 2020 Election Kicks into High Gear*, COURTHOUSE NEWS (Sept. 21, 2020), https://www.courthousenews.com/voting-rights-lawsuits-explode-as-2020-election-kicks-into-high-gear/ [https://perma.cc/697S-5L9U].

3. *See* Brennan Litigation Tracker, *supra* note 1.

electorate.[4] Most significantly, these lawsuits were filed against the backdrop of what promised to be an especially contentious presidential election—with both sides of the aisle clamoring that certain voting procedures were unfair.[5]

Despite the existence of the political question doctrine, articulated in the canonical case *Baker v. Carr*,[6] and recently reaffirmed in *Rucho v. Common Cause*,[7] precious few of the recent election law decisions invoked the doctrine, despite its continued application to gerrymandering and foreign affairs cases. This paper will examine why the political question doctrine today is mostly *Baker* and not enough *Rucho*. Or, in other words, why the Equal Protection exception announced in *Baker* has swallowed the core of its holding—the six-factor prudential test for justiciability recognized in *Rucho* but almost never applied in modern election law cases. The answer is likely the intervening *Anderson-Burdick* doctrine,[8] which eviscerates the political question doctrine and the separation of powers rationales for which it stands.

This Note will proceed in four parts to argue that the political question doctrine should have barred certain challenges to state election procedures prior to the 2020 election. First, it will briefly trace the origins and evolution of the political question doctrine. Second, it will examine the Supreme Court's first foray into the "political thicket" in *Baker v. Carr*, followed by the steady decline of the doctrine in election law until its brief reinvigoration in *Rucho v. Common Cause*. Third, it will discuss the sparse application of the political question doctrine—in contrast to the frequent application of the *Anderson-Burdick* test—to voting rights lawsuits before the 2020 election. Fourth, it will posit that the political question doctrine should be reinvigorated to restore the courts' proper role in election law. It will also attempt to provide a framework for thinking about what cases *should* be excluded on political question grounds. A political question doctrine with teeth is preferable to courts aggrandizing themselves by second-guessing state election procedures under the extremely subjective *Anderson-Burdick* formula. Reinvigorating the political question doctrine is necessary to achieve its stated goal—furthering the separation of powers.

---

4. Simone Pathé, *National Democratic Groups Litigate 2020 in the Courts*, ROLL CALL (Dec. 11, 2019, 6:00 AM), https://www.rollcall.com/2019/12/11/national-democratic-groups-litigate-2020-in-the-courts/ [https://perma.cc/R9JZ-86T9] (describing a "multimillion-dollar investment in a concerted legal strategy" in "future battlegrounds").

5. *See* Jane C. Timm, *An All-Out War Over Mail Voting Has Erupted in Courts Across the U.S. Here's What's at Stake*, NBC NEWS (Aug. 15, 2020, 5:30 AM), https://www.nbcnews.com/politics/donald-trump/all-out-war-over-mail-voting-has-erupted-courts-across-n1235216 [https://perma.cc/7292-BXVY] (noting, among other perceived problems, that Republicans worried about fraud from ballot harvesting, while Democrats feared that issues with mail-in balloting could disenfranchise voters).

6. 369 U.S. 186 (1962).

7. 139 S. Ct. 2484 (2019).

8. This doctrine derives its name from two cases: *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

II. THE ORIGINS & EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

A distinction between legal and political questions has existed in American law for over two hundred years.[9] In *Marbury v. Madison*, the Court recognized that "[q]uestions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."[10] A recognition of our tripartite structure of government, the doctrine is "primarily a function of the separation of powers."[11] At its historical core, the doctrine is a jurisdictional bar—it excludes certain questions from Article III review altogether (including constitutional claims) if they are within another branch's purview.[12]

Early applications of the political question doctrine reflected a strict approach to justiciability.[13] For example, in *Oetjen v. Central Leather Corporation*, the Court broadly held that the conduct of foreign relations "is committed by the Constitution to the Executive and Legislative—'the political'—Departments" and "is not subject to judicial inquiry or decision."[14] The Court has also historically refused to decide cases involving questions of war[15] or the recognition of foreign nations.[16] On the domestic front, the Court has declined to adjudicate cases challenging the validity of federal constitutional amendments under Article V of the Constitution on political question grounds.[17] And, most strikingly, in the period before *Baker v. Carr*, the Court "dismissed *every* constitutional challenge to state apportionment laws, usually on political question grounds," except one.[18] The lone exception, *Gomillion v. Lightfoot*, invalidated a racial gerrymander that "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment" in violation of the Fifteenth Amendment.[19]

---

9. *See generally* Oliver P. Field, *Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1923) (collecting decisions throughout the 1800s and early 1900s finding that the existence of a political question precluded judicial review).

10. 5 U.S. (1 Cranch) 137, 164 (1803).

11. *Baker*, 369 U.S. at 210.

12. *See id.* at 211–17 (discussing categories traditionally held to be political questions including the "dates of durations of hostilities," the "recognition of foreign governments," and the "status of Indian tribes").

13. *See* Robert J. Pushaw Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist Rebuttable Presumption Analysis*, 80 N.C. L. REV. 1165, 1168 (2002) ("During the first six decades of the twentieth century, the Court applied the political question doctrine rigorously to fence out many potential constitutional claims.").

14. 246 U.S. 297, 302 (1918); *see also* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818) (Marshall, C.J.).

15. *See, e.g.*, United States v. One Hundred and Twenty-Nine Packages, 2 Am. Law Reg. (N.S.) 419 (E.D. Mo. 1862) ("The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made.").

16. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410–11 (1964).

17. *See* Coleman v. Miller, 307 U.S. 433, 450–55 (1939).

18. Pushaw, *supra* note 13, at 1171.

19. 364 U.S. 339, 343–46 (1960).

The political question doctrine has evolved since its earlier strict applications to reflect prudential concerns.[20] Among them are concerns about judicial competence to address certain categories of questions[21] and the hope that the other branches will work out political disputes, as they have done throughout history, without involving the courts.[22] The Warren Court's preference for judicial supremacy[23]—that judges are, and should be, supreme expositors of the Constitution—also underlies the doctrine's evolution.[24] As the political question doctrine became more about prudence and less about the Constitution's tripartite allocation of power, judges also have more discretion to reject it.[25] Indeed, the political question doctrine continues to be applied whole-heartedly in some contexts and hardly at all in others. It remains highly relevant to foreign affairs,[26] war,[27] impeachment issues,[28] and political gerrymandering.[29] Yet, the political question doctrine played almost no role in the myriad pre-2020 lawsuits about election procedures.[30] Today, there are more questions about the doctrine's applicability than answers.[31] *Baker v. Carr*, in purporting to establish the modern political

20. *See* Luther v. Borden, 48 U.S. 1, 39 (1849) (noting that chaos would ensue if the Court invalidated Rhode Island's system of government); *see also* Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring in judgment) (noting that the political question doctrine "deriv[es] in large part from prudential concerns about the respect we owe the political departments.").

21. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). *See also* Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723 (2016).

22. *Cf.* Trump v. Mazars, 140 S. Ct. 2019, 2030 (2020) (noting that throughout American history "congressional demands for the President's information have been resolved by the political branches without involving [the Supreme] Court").

23. *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, 263–68 (2002).

24. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1959 & n.24 (2015) (collecting articles suggesting that the political question doctrine is at odds with current notions of judicial supremacy); *see also* Zivotofsky *ex rel*. Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (characterizing the political question doctrine as a "narrow exception" to the presumption of judicial review).

25. *See* Barkow, *supra* note 23, at 266–67.

26. *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190, 200 (D.C. Cir. 2005) (dismissing suit against Secretary of State Kissinger for his alleged role in a Chilean governor's death after he helped orchestrate a coup).

27. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (finding a nonjusticiable political question where congressmen alleged that President Reagan's provision of foreign aid amounted to waging war).

28. *See* Nixon v. United States, 506 U.S. 224, 226–28 (1993) (holding that the constitutionality of a Senate Rule allowing impeachments to be heard in committee is a nonjusticiable political question).

29. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019)

30. *See infra* Part IV.

31. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) ("That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court and among scholars.") (internal citations omitted); *see also* Doe v. Bush, 323 F.3d 133, 140 (1st Cir. 2003) ("The political question doctrine . . . is a famously murky one."). Some scholars have even suggested that it is not a "doctrine" because so many political question cases uphold the challenged government action on the merits insofar as it is within the purview of that political branch. *See, e.g.*, Louis Henken, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601 (1976).

question doctrine, effectively sowed the seeds of its destruction for election law disputes that do not revolve around political gerrymandering.

III. INTO THE "POLITICAL THICKET:" THE DECLINE OF THE POLITICAL QUESTION DOCTRINE IN ELECTION LAW

During oral argument in *Baker v. Carr*, Justice Frankfurter presciently stated to counsel: "But I do have to think of the road as I'm going on, what kind of road you're inviting me considering the fact that this [failure to reapportion] isn't a unique Tennessee situation."[32] Frankfurter's concern hearkened back to *Colegrove v. Green*, in which he wrote for the Court that "[t]o sustain this action [challenging unfairness in districting] would cut very deep into the very being of Congress. Courts ought not to enter this political thicket."[33] If the Court began deciding questions properly left to Congress, Frankfurter contended, it would never be able to extricate itself from those debates. And this is exactly what happened in *Baker v. Carr*, over Frankfurter's dissent.

Baker both announced the modern political question doctrine and declined to apply it. In holding that challenges to legislative reapportionment were justiciable under the Equal Protection Clause, it created a loophole. And, like most loopholes, *Baker*'s has been exploited. After *Baker* the Court adjudicated more challenges to state apportionment systems on equal protection grounds throughout the 1960s.[34] And the Court eventually read a "one person, one vote" standard into the Equal Protection Clause, holding that it requires the seats in both houses of a bicameral state legislature to be apportioned by population.[35] Eventually, the *Anderson-Burdick* test—which requires courts to weigh the benefits and burdens of an election regulation—precluded application of the political question doctrine in election law almost entirely. Though the political question doctrine experienced a brief resurgence in 2019,[36] it is not nearly as widely applied as it should be in election law today.[37]

---

32. Oral Reargument (Part 1) at 36:34, Baker v. Carr, 369 U.S. 186 (1962), www.oyez.org/cases/1960/6 [https://perma.cc/66JT-BKAX].

33. 328 U.S. 549, 556 (1946). For an interesting discussion of the impact of *Baker v. Carr* on the sitting justices at the time—including a nervous breakdown, a feud, and a hospitalization—see More Perfect, *The Political Thicket*, WNYC STUDIOS (June 10, 2016), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/the-political-thicket [https://perma.cc/M587-U584].

34. *See* Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964).

35. *See* Reynolds v. Sims, 377 U.S. 558, 569 (1964). Justice Harlan's impassioned dissent in this case echoes many of Justice Frankfurter's concerns about courts second-guessing aspects of state political systems. Alluding back to *Baker*, Justice Harlan argues that cases of this kind are not amenable to the development of judicial standards. *See id.* at 590 (Harlan, J., dissenting).

36. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

37. Indeed, in the voting rights context, the political question doctrine resembles the "nondelegation doctrine." After invoking nondelegation twice in 1935 to invalidate government actions, the Court has "uniformly rejected" such arguments ever since. *See Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring).

A. Baker v. Carr*'s Creative and Destructive Potential*

In *Baker*, individual voters challenged Tennessee's failure to follow its own law regarding reapportionment of legislative districts based on population.[38] The state had not reapportioned since 1901 despite "[t]he relative standings of the counties in terms of qualified voters [changing] significantly."[39] And the voters alleged that even the 1901 scheme appointed representatives "arbitrarily and capriciously" without "any logical or reasonable formula" in violation of the Equal Protection Clause.[40]

The *Baker* Court discussed justiciability vis-à-vis the political question doctrine at length.[41] It traced the development of the doctrine through the various contexts in which it has been applied.[42] And, most famously, it distilled the factors that typically indicate the existence of a nonjusticiable political question. The Court announced the following capacious, disjunctive, six-factor test:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[43]

Though only one of these indicia need be present for a court to decline to adjudicate a case on political question grounds, the Court found that none were present in *Baker*. Instead, the Court ruled that it could decide the apportionment challenge on Equal Protection grounds because "judicial standards under the Equal Protection Clause are well developed and familiar."[44] Thus, the Court basically ensured that any voting rights claim brought under the Equal Protection Clause will satisfy factor two of its test. Litigants and courts have taken their cue from *Baker* in the election law context. In adjudicating the lion's share of election law cases (both in 2020 and previously), courts rarely reference *Baker*'s factor test. Instead, they analyze cases using the *Anderson-Burdick* doctrine, which thoroughly eviscerates the political question doctrine.

---

38. Baker v. Carr, 369 U.S. 186 (1962).
39. *Id.* at 192.
40. *Id.* at 192–94.
41. *Id.* at 208–22.
42. *See id.*; *see also supra* Part II.
43. *Baker*, 369 U.S. at 217.
44. *Id.* at 226.

B. The Extinction of the Political Question Doctrine in Election Law

Today, litigants argue—and courts largely agree—that the "judicially manageable standards"[45] referenced in *Baker* for evaluating any number of challenges to voting procedures are supplied by the *Anderson-Burdick* test. This move hearkens back to *Baker* itself, where the Court argued that Equal Protection Clause doctrine supplied judicially manageable standards.[46] In line with modern notions of judicial supremacy,[47] the courts have had no qualms concluding that judicially manageable standards exist under a doctrine that is *itself* an "ad hoc and open-ended" judge-made test.[48]

Anderson-Burdick is the predominant modern framework for adjudicating Fourteenth Amendment—including Equal Protection—challenges to state election laws and regulations.[49] In simplified terms, courts must "weigh the asserted injury to the right to vote" against the "precise interests put forward by the State as justifications for the burden imposed by its rule."[50] In *Anderson*, a candidate and three voters challenged the constitutionality of Ohio's early filing deadline for independent candidates.[51] The Court held that in determining whether a particular election regulation is justified, courts must weigh the character and magnitude of the alleged burden to a voter's constitutional rights against the state's alleged interests.[52] And it suggested that lower courts may also consider whether those burdens are *necessary* to achieve the state's purported interests.[53] Then, nearly ten years later, the Court modified the inquiry in *Burdick*. In that case, a voter challenged Hawaii's prohibition on write-in voting on First Amendment grounds.[54] The *Burdick* court stated that when the right to vote is severely burdened, strict scrutiny applies.[55] However, if the restriction imposes "only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," courts must apply *Anderson*'s balancing test.[56]

---

45. *Id.*
46. *Baker*, 369 U.S. at 226.
47. *See supra* Part II and accompanying notes.
48. Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 479 (2019).
49. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263 (2020). *See also, e.g.*, Mays v. LaRoe, 951 F.3d 775, 783 (6th Cir. 2020) ("Normally we evaluate Equal Protection claims using the well known 'tiers of scrutiny[.]' . . . But when a 'plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters,'" *Anderson-Burdick* is required.)
50. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (quoting *Burdick*, 504 U.S. at 434).
51. Anderson v. Celebrezze, 460 U.S. 780, 782 (1983).
52. *Id.* at 789.
53. *Id.*
54. *Burdick*, 504 U.S. at 430.
55. *Id.* at 434.
56. *Id.* (quoting *Anderson*, 460 U.S. at 788).

This balancing test has taken on a life of its own.[57] It has been invoked in recent disputes over voter identification,[58] early-in person voting,[59] polling place hours,[60] absentee ballot voting issues,[61] witness requirements for mail-in voting,[62] candidate ordering on ballots,[63] straight-ticket voting,[64] ballot harvesting,[65] and more. By purporting to provide "judicially manageable standards" under *Baker*, the balancing test has obviated the need to inquire into whether *Baker*'s other factors counsel judicial abstention.

But the *Anderson-Burdick* standards are anything but judicially manageable. First, confusion exists at the threshold whether the burden on the right to vote must be "severe,"[66] "special,"[67] "undue,"[68] or merely a general "burden."[69] In this way, *Anderson-Burdick* begins to resemble *Planned Parenthood v. Casey*'s "inherently standardless" undue burden inquiry.[70] As in the abortion context, *Anderson-Burdick*'s undue burden inquiry invites judges "to give effect to [their] personal preferences"[71] about voting rights via analysis that "effectively takes the conclusion of the constitutional inquiry and costumes it as the constitutional standard."[72] Second, courts divide as to whether they examine the burden to a particular voter, small subset of voters, or voters generally.[73] This level-of-generality issue becomes particularly problematic when combined with the nebulous "undue burden" test; almost any voting law can be undue when applied to a particular voter experiencing challenging circumstances such as disability or poverty.

---

57. *See* Derek T. Muller, *What Happens to Election Law After the* Anderson-Burdick *Framework Is (Probably) Overturned?*, ELECTION L. BLOG (Feb. 25, 2022, 10:15 AM), https://electionlawblog.org/?p=127766 [https://perma.cc/4SM4-C5W5] (noting that *Anderson-Burdick* has "increasingly become a catch-all for federal review of election laws").

58. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008); Luft v. Evers, 963 F.3d 665, 671–72 (7th Cir. 2020).

59. *See, e.g.*, Obama for Am. v. Husted, 697 F.3d 423, 431 (6th Cir. 2012); Ohio State Conf. of NAACP v. Husted, 768 F.3d 524, 531 (6th Cir. 2014).

60. Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 216–17 (M.D.N.C. 2020).

61. *See, e.g.*, *id.* at 210–11; Fla. Democratic Party v. Detzner, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *2 (N.D. Fla. Oct. 16, 2016) (challenging signature matching requirements on absentee ballots).

62. *See Democracy N.C.*, 476 F. Supp. 3d at 193–94.

63. *See* Libertarian Party of Va. v. Alcorn, 826 F.3d 708, 716 (4th Cir. 2016).

64. *See* Mich. State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656, 660 (6th Cir. 2016).

65. *See* Feldman v. Ariz. Sec'y of State's Off., 843 F.3d 366, 368 (9th Cir. 2016).

66. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008).

67. *Id.* at 204 (Scalia, J., concurring).

68. *See* DCCC v. Ziriax, 487 F. Supp. 3d 1207, 1236 (N.D. Okla. 2020).

69. *See* A. Philip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 609 (N.D. Ohio 2020).

70. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992) (Scalia, J., concurring in part).

71. *Id.*

72. Cooper et. al., Roe *and* Casey *Were Grievously Wrong and Should Be Overruled*, HARV. J.L. & PUB. POL'Y PER CURIAM (2021) (emphases deleted), https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/11/Garnett-Dobbs-FINAL.pdf [https://perma.cc/7Q76-BXHL].

73. *Compare DCCC*, 487 F. Supp. 3d at 1230 ("The mere possibility that the burden may be greater on a small subset of voters does not entitle the plaintiffs to the sweeping relief they seek here."), *with* Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 240 (M.D.N.C. 2020) (looking to the burdens on one disabled voter in a nursing home).

Third, courts lack clarity about what the "right to vote" includes. Is it the bare ability to cast a ballot?[74] Or does the right include absentee voting, curbside voting, early voting, or some other guarantee?[75] It is challenging for courts to examine an alleged burden on a right without clear understanding of what the right encompasses.

Judges have begun to criticize both the expansion and the subjectivity of the doctrine in earnest. "[T]he temptation to overindulge in the *Anderson-Burdick* test has not gone unnoticed," wrote Sixth Circuit Judge Chad Readler, noting also that it has expanded to apply to almost all First and Fourteenth Amendment claims.[76] On the doctrine's subjectivity, the Sixth Circuit commented that it requires "legal gymnastics to quantify the 'burden'" that a State's facially neutral and generally applicable election laws place on voters.[77] A prime example of the manipulability of *Anderson-Burdick*'s burden inquiry appeared in *Jacobson v. Lee*, where the court reasoned that "although the *quantitative* burden [of the ballot ordering statute] on Plaintiffs' rights is small, the *practical* burden is severe indeed."[78] In other words, finding that the evidence didn't present an undue quantitative burden, the court reframed the nature of the burden entirely, with only a "*cf.*" citation to language from *Anderson* that a "realistic appraisal" of the burden is permitted.[79] And the Seventh Circuit explained that the *Anderson-Burdick* test "allows a political question—whether a rule is beneficial, on balance—to be treated as a constitutional question and resolve by the courts rather than by legislators."[80] Justice Scalia likewise called the test "amorphous," and argued that courts should only rely on *Burdick*, which cleaned up the mess of *Anderson*.[81] According to Justice Scalia, "the first step is to decide whether a challenged law

74. Likely not, as long as the one-person-one-vote standard remains good law. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

75. *See* William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 630 (2000) (Noting that there is "no federal or state constitutional right to vote by absentee ballot," but that states can statutorily provide this right, and all have chosen to do so).

76. Daunt v. Benson, 956 F.3d 396, 423 (6th Cir. 2020) (Readler, J., concurring). Indeed, the slope to expand *Anderson-Burdick* to myriad other public law contexts having only a tangential relationship to elections is "not just slippery; it is greased, frozen, and polished." Daunt v. Benson, 999 F.3d 299, 326 (6th Cir. 2021) (Readler, J., concurring).

77. Mays v. LaRose, 951 F.3d 775, 783 n.4 (6th Cir. 2020); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 207 (2008) (Scalia, Thomas & Alito, JJ., concurring) ("Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requirement exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.") (internal citations omitted).

78. Jacobson v. Lee, 411 F. Supp. 3d 1249, 1281 (N.D. Fla. 2019) (emphases added).

79. *Id.*

80. Luft v. Evers, 963 F.3d 665, 671 (2020) (arguing that only *Burdick* should apply).

81. *See Crawford*, 553 U.S. at 204 (Scalia, Thomas & Alito JJ., concurring). Election law scholar Derek Muller recently noted that *Crawford* "was a plurality opinion, badly fractured on how to apply *Anderson-Burdick* and eroding its stare decisis value." *See* Muller, *supra* note 57.

severely burdens the right to vote," because judges must "identify a burden before [they] can weigh it."[82]

But even once a judge has identified a burden to a voter or voters, "balancing" said burden against variegated state interests is also fraught with difficulty. As Justice Scalia explained—albeit in the dormant commerce clause context—"the scale analogy" for balancing is "not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy . . . the burdens the Court labels 'significant' are more determinative of its decision."[83] Scholars and commentators agree. Prominent election law scholar Edward Foley recently wrote that *Anderson-Burdick* is "such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another."[84] Professor Derek Muller called *Anderson-Burdick* a "flabby . . . ad hoc totality-of-the-circumstances examination of burdens and interests."[85] Some commentators have noted that the test is "very open-ended" and selectively applied.[86] Still others argue that *Anderson-Burdick* essentially counsels judges to second-guess the wisdom of a state's policy choice.[87] And, interestingly, election law expert Richard Hasen recently wrote that judges shifted their approach to *Anderson-Burdick* during the COVID-19 pandemic to apply a sort of "Democracy Canon."[88] Hasen argues that judges applied the test more stringently against state statutes *the judge* viewed as impeding democratic participation.[89] But the Democracy Canon, as Hasen admits, is applicable only to ambiguous statutes. Judges in the pre-2020 context used *Anderson-Burdick* to

---

82. *Crawford*, 553 U.S. at 204 (Scalia, Thomas, & Alito JJ., concurring) (emphasis added). Lower courts have not agreed with Scalia's suggestion that the burden identified must be severe or that only *Burdick* should be applied.

83. Bendix Autolite v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

84. Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1859 (2013). *See also* Note, *"As the Legislature Has Prescribed": Removing Presidential Elections from the* Anderson-Burdick *Framework*, 135 HARV. L. REV. 1082, 1085 (2022) ("Practically, the *Anderson-Burdick* balancing test is frustratingly vague. It does not guide courts in determining what constitutes a constitutional injury or a compelling justification, with the result that, especially in the emotional context of a presidential election, respected legal minds can reach opposite conclusions.").

85. Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, EXCESS OF DEMOCRACY (Apr. 20, 2020), https://excessofdemocracy.com/blog/2020/4/the-fundamental-weakness-of-flabby-balancing-tests-in-federal-election-law-litigation [https://perma.cc/YGH5-9Z7G].

86. Vikram David Amar & Jason Mazzone, *Wisconsin's Decision to Have an Election This Month Was Unjust, But Was it Also Unconstitutional? Why the Plaintiffs (Rightly) Lost in the Supreme Court*, VERDICT (Apr. 20, 2020), https://verdict.justia.com/2020/04/20/wisconsins-decision-to-have-an-election-this-month-was-unjust-but-was-it-also-unconstitutional [https://perma.cc/SHY3-SQAW].

87. Thomas Basile, *Inventing the "Right to Vote" in* Crawford v. Marion County Election Board, *128 S. Ct. 1610 (2008)*, 32 HARV. J.L. & PUB. POL'Y 431, 444–45 (2009).

88. *See* Hasen, *supra* note 49, at 278 (describing *League of Women Voters of Va. v. Va. State Bd. of Elections*, in which the district court acknowledged that a witness requirement may not pose a "significant burden" in "ordinary [non-pandemic] times.").

89. *Id.*

undo *clear* statutes, such as ones requiring that absentee ballots be received by election day.[90]

Such a test violates basic principles of the separation of powers, as "[i]t is for state legislatures to weigh the costs and benefits of possible changes to their election codes."[91] The test allows judges to rule "less deferentially to a state's political choices over time."[92] Put another way, *Anderson-Burdick* "is a dangerous tool," because "[i]n sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them."[93] This is especially problematic in election law. For, "[a] test this indeterminate is arguably no test at all, and thus the federal constitutional law that is supposed to supervise the operation of a state's electoral process has little objectivity or predictability."[94] If federal courts are to adjudicate "the most heated partisan issues"—election laws—they must formulate a standard that can reliably differentiate the constitutional from the unconstitutional.[95]

The ease with which courts have concluded that judicially manageable standards exist under the *Anderson-Burdick* doctrine—even when this is itself highly debatable—has an important additional ramification. Such a position has rendered the other five *Baker* factors essentially a null set. This turns *Baker* on its head. For the disjunctive test in *Baker* asks not whether *one* of the factors provides a satisfactory answer to a question, but rather counsels jurisdictional and prudential avoidance if *any* of the factors is present.[96] Today, it suffices to say that federal courts are thoroughly enmeshed in the most political of thickets—election law—just as Justice Frankfurter feared they would be.

C. The Rise (Again) of the Political Question Doctrine?

The Supreme Court recently applied and defended the political question doctrine in *Rucho v. Common Cause*.[97] In *Rucho*, North Carolina and Maryland voters challenged the states' congressional district maps as unconstitutional partisan gerrymanders under the First Amendment, the Equal Protection Clause, the Elections Clause, and Article I, Section 2.[98] The Court held that such partisan gerrymandering claims present nonjusticiable political questions.[99] It reasoned that the partisan gerrymandering challenge fails *Baker*'s prong of "judicially

90. *See, e.g.*, Wise v. Circosta, 978 F.3d 93, 95 (4th Cir. 2020)

91. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S 181, 208 (2008) (Scalia, Thomas & Alito JJ., concurring).

92. Daunt v. Benson, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring in judgment) [*Daunt* II]; *see also* Daunt v. Benson, 956 F.3d 396, 423 (6th Cir. 2020) (Readler, J., concurring in judgment) [*Daunt* I].

93. *Daunt* I, 956 F.3d at 396 (Readler, J., concurring in judgment).

94. *See* Foley, *supra* note 84, at 1859.

95. Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J, concurring in judgment).

96. Baker v. Carr, 369 U.S. 186, 217 (1962).

97. 139 S. Ct. 2484 (2019).

98. *Id.* at 2491.

99. *Id.* at 2506.

discoverable and manageable standards" because the issue boils down to "determining when political gerrymandering has gone too far."[100] In other words, the Court was faced with a threshold question of fairness. As the Court acknowledged, "it is not even clear what fairness looks like in this context," and "it is only after determining how to define fairness that you can even begin to answer the determinative question: 'How much is too much?'"[101]

The Court also pointed to prudential concerns about the consequences of deciding whether partisan gerrymanders are constitutional:

> The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically accountable branch of the Federal Government assuming such an extraordinary and unprecedented role.[102]

And Justice Frankfurter rolls over in his grave. These concerns about the political thicket were precisely those he echoed when the Court declined to apply the political question doctrine in *Baker*. As Part V will demonstrate, *Rucho*'s reasoning should be used to undo the *Anderson-Burdick* test's stranglehold on election law. Doing so will also allow for a reinvigoration of the political question doctrine in election law, aligned with the Framers' original design of our tripartite government.

IV. THE SPARSE APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO VOTING RIGHTS LAWSUITS BEFORE THE 2020 ELECTION

Because of *Anderson-Burdick*'s influence in election law, the political question doctrine today is mostly *Baker* and not enough *Rucho*. The bevy of cases prior to the 2020 election underscores this point. Indeed, only two lower courts relied on the political question doctrine to dismiss COVID-19 related challenges to election law procedures.[103] And only three lower courts invoked the doctrine to dismiss challenges to ballot ordering statutes.[104] Most of the 350-plus cases filed before the 2020 election[105] were decided under the *Anderson-Burdick* framework.

---

100. *Id*. at 2497.

101. *Id*. at 2500–01.

102. *Id*. at 2507.

103. *See* Coal. for Good Governance v. Raffensperger, 1:20-cv-1677-TCB, 2020 WL 2509092 (N.D. Ga. May 14, 2020); Mi Familia Vota v. Abbott, 484 F. Supp. 3d 435 (W.D. Tex. 2020), *rev'd in part*, Mi Familia Vota v. Abbott, 977 F.3d 461 (2020).

104. See Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1260 (11th Cir. 2020); Miller v. Hughs, 471 F. Supp. 3d 768, 778 (W.D. Tex. 2020); Mecinas v. Hobbs, 468 F. Supp. 3d 1186, 1207–08 (D. Ariz. 2020).

105. *See supra* note 1 & accompanying text.

This result was not for want of trying by litigants. Some did invoke the political question doctrine, arguing that federal courts should not be second guessing the wisdom of state policy choices on the nitty-gritty aspects of election administration.[106] Yet, their efforts to prevail on political question doctrine grounds were largely unavailing. The courts who did apply the doctrine reasoned persuasively.

A. The Eleventh Circuit's Application of the Political Question Doctrine to a Ballot Ordering Statute

The most definitive application of the political question doctrine in the pre-2020 context—insofar as it emanated from a federal court of appeals—occurred in *Jacobson v. Florida Secretary of State*.[107] In *Jacobson*, voters and organizations sued the Florida Secretary of State to enjoin a law governing the order in which candidates appear on the ballot in the state's general election.[108] The voters alleged violations of the Equal Protection Clause and the First Amendment on the grounds that the ballot ordering statute resulted in a "position bias" favoring Republican candidates, by which they would gain approximately 5% of the vote.[109] After a bench trial, the district court ruled that the case does not present a nonjusticiable political question.[110] Predictably, it then found that *Anderson-Burdick* provides the judicially manageable standards to resolve the dispute.[111] Finding the law unconstitutional under *Anderson-Burdick*, the district court held that it "impacted" the voters' rights because it was "politically discriminatory."[112] The district court reasoned that "although the quantitative burden on Plaintiffs' rights is small, the practical burden is severe indeed" and thus that heightened scrutiny applies.[113] And it found the state's asserted interests—"upholding the legislature's policy choice, preventing voter confusion, promoting uniformity, and promoting voter confidence in the election administration process"—"weak" and "not particularly persuasive."[114] Thus, the district court reasoned that the burden on voting rights outweighed the state's asserted interests.[115]

The Eleventh Circuit reversed. It held that the lawsuit "suffers from two fatal jurisdictional defects": a lack of standing and the presentation of a nonjusticiable

106. *See, e.g.*, Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 191–92 (M.D.N.C. 2020); Nelson v. Warner, No. 20-1860, 2021 WL 3889280 (4th Cir. Sept. 1, 2021).

107. 974 F.3d 1236 (11th Cir. 2020).

108. *See id.* at 1241.

109. *See id.*at 1242, 1244.

110. *See id.* at 1244.

111. *See id.*

112. *See id.*

113. Jacobson v. Lee, 411 F. Supp. 3d 1249, 1281 (N.D. Fla. 2019). Note the manipulability of *Anderson-Burdick* here. Finding that the evidence didn't present a quantitative burden, the court reframed the nature of the burden required, using only a *cf.* cite to *Anderson* to argue for a "realistic appraisal." *Id.*

114. *Id.*

115. *See id.*

political question.[116] À la *Rucho*, the Eleventh Circuit first looked to the history of ballot regulation in America—noting that "concerns about [it] are as old as the Republic itself" and that "the political branches of state governments have long taken the lead in resolving these controversies."[117] Also following *Rucho*, the court held that the question of whether the ballot statute confers an impermissible partisan advantage lacks judicially discoverable and manageable standards.[118] It reasoned that determining a politically "fair" ballot order was impossible.[119] This case represents a willingness to reclaim the applicability of the political question doctrine in election law against a lower court's expansive use of *Anderson-Burdick*.

B. Several Lower Courts Also Attempted to Apply the Political Question Doctrine to Claims About States' Election Procedures

Several lower courts also attempted to revive the political question doctrine in the pre-2020 context. In *Coalition for Good Governance v. Raffensperger*, plaintiffs asked the Northern District of Georgia to decide whether Georgia's June primary election should be postponed, whether the state could use touchscreen voting machines in light of the COVID-19 pandemic, and whether myriad other changes to the absentee ballot and general voting processes should be required.[120] The district court reasoned that these claims presented nonjusticiable political questions.[121] It relied on the first two *Baker* factors: a textually demonstrable constitutional commitment to a coordinate political department and a lack of judicially discoverable and manageable standards.[122] Pointing to the Elections Clause, the court reasoned that the Constitution "commits the administration of elections to Congress and state legislatures—not courts."[123] As such, "whether the executive branch [of Georgia] has done enough is a classic political question involving policy choices."[124] The court also invoked *Rucho*, arguing that "decid [ing] issues such as how early is too early to hold the election or how many safety measures are enough" is fundamentally a question of fairness—and thus no judicially manageable standards exist.[125]

---

116. Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1245 (11th Cir. 2020) (Pryor, C.J.).
117. *Id.* at 1258.
118. *See id.* at 1260.
119. *Id.* at 1262.
120. Coal. for Good Governance v. Raffensperger, 1:20-cv-1677-TCB, 2020 WL 2509092, at *2 (N. D. Ga. 2020) ("Plaintiffs request various forms of relief related to absentee voting. Specifically, they seek an extended deadline for receipt of the ballots; facilitated distribution and acceptance; speed processing . . . . In addition, Plaintiffs seek various forms of relief regarding in-person voting such as adjusting the number of voting stations, expanding early voting, implementing curbside voting and temporary mobile voting centers, streamlining voter check-in, offering state-provided personal protective equipment ("PPE"), and increasing physical distancing.").
121. *Id.* at *3.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

Similarly, in *Mi Familia Vota v. Abbott*, voters challenged the procedures in place for the November 2020 election in light of the COVID-19 pandemic.[126] The voters alleged that Black, Latino, and Native American voters faced greater risk to their health by voting because there were fewer polling sites in these communities, and Texas did not implement curbside or no-excuse absentee ballot voting.[127] Thus, Texas's failure to require modifications to the voting process unduly burdened their right to vote and constituted a denial of Equal Protection.[128]

The district court held that such claims presented nonjusticiable political questions.[129] And, unlike nearly every other court, the district court judge dutifully considered four of the six *Baker* factors.[130] As in *Raffensperger*, the court noted that the Elections Clause commits the time, place, and manner of elections to the state and federal legislative branches.[131] It then reasoned that the actions the voters requested fell within the "manner" of election administration delegated to state legislatures.[132] The court properly expressed hesitancy (also following *Rucho*) in "mandat[ing] and implement[ing] its own judgment about the proper administration of elections . . . [thereby] assum[ing] the role of the Texas legislature and exercis[ing] the discretion and authority explicitly reserved to that branch."[133] The court noted that assuming such a role would violate another of the *Baker* factors: failing to respect a coordinate branch of government.[134] Declining also to "make an initial policy determination clearly designed for nonjudicial discretion," in deciding the prudence of the state's election procedures, the court invoked another *Baker* factor.[135] Finally, the court considered the most popular *Baker* factor: a lack of judicially discoverable and manageable standards.[136] It reasoned that none exist "to determine a reasonable amount of poll workers and polling sites; to monitor wait times and personnel; to determine what safety measures should be taken and how much safety is enough, and what time frame is early enough for early voting to cure the speculated improprieties."[137]

Though the *Jacobson*, *Raffensperger*, and *Mi Familia Vota* courts persuasively articulated a role for the political question doctrine in election law, every other court found that judicially discoverable and manageable standards exist under *Anderson-Burdick* and did not consider the other *Baker* factors. Several cases presented factually identical issues to the three discussed above. For example, the

126. Mi Familia Vota v. Abbott, 484 F. Supp. 3d 435 (W.D. Tex. 2020), *rev'd in part*, 977 F.3d 461 (5th Cir. 2020).
127. *Id.* at 439.
128. *Id.* at 439–40.
129. *Id.* at 443.
130. *Id.*
131. *Id.* at 444.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 445.
137. *Id.* at 446 (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2500–01 (2019)).

Fourth Circuit decided a similar question to the one posed in *Jacobson* about whether a ballot-ordering statute conferring partisan advantage violated the Equal Protection Clause.[138] Unlike the Eleventh Circuit, the Fourth Circuit declined to apply the political question doctrine and looked to *Anderson-Burdick*. It found that the statute imposed only a "modest" burden on voting rights, which was justified by the state's important regulatory interests.[139] Similarly, Judge Osteen in the Middle District of North Carolina rejected the political question doctrine in favor of *Anderson-Burdick* in a case with similar claims to *Mi Familia Vota* and *Raffensperger*.[140] Finding that the state's procedures for the curing and witnessing of absentee ballots during the pandemic *did* present an undue burden to a particular disabled plaintiff, the court enjoined them as applied.[141] The divergent outcomes in these factually analogous cases and others suggest the need for a new path forward.

V. REINVIGORATING THE POLITICAL QUESTION DOCTRINE TO RESTORE THE PROPER ROLE OF THE COURTS IN ELECTION LAW

The political question doctrine must have some application in election law if it truly exists to further the separation of powers. *Rucho* sowed the seeds for the doctrine's resurgence in several ways by calling into question the foundations upon which *Anderson-Burdick* rests. By pointing to the original constitutional design, the Court made clear that state legislatures (checked by Congress) retain the lion's share of power when it comes to regulating elections. Moreover, the *Rucho* Court also signaled a shift toward prudential abstention, rather than judicial intervention, vis-à-vis hot button election law issues that present threshold questions of fairness. This decision lays the groundwork for a more rigorous application of *Baker*'s test, rather than a reliance on the discovery and weighing of "undue," "special," "practical," or other burdens that generally applicable election laws place on individual voters or voters as a whole.

A. Rucho*'s Reasoning Calls* Anderson-Burdick *into Question*

The Court's reasoning in *Rucho* undermines *Anderson-Burdick* in three ways. First, the Court noted that Congress has oversight over most electoral issues implicated by the Elections Clause (apart from one-person, one-vote and racial gerrymandering)—just as the Framers constructed the original constitutional design.[142] Second, the Court emphasized the difficulty of assessing the "fairness" of an election procedure and the impossibility of determining how much politicking is too much. Third, the Court prudentially focused on the consequences of

138. *See* Nelson v. Warner, No. 20-1860, 2021 WL 3889280 (4th Cir. Sept. 1, 2021).

139. *Id.* at *11.

140. Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 191–92 (M.D.N.C. 2020).

141. *See id.* at 239–40 (enjoining the rejection of absentee ballots that have material errors subject to remediation and provisions of North Carolina law related to witnessing and providing assistance with absentee ballots).

142. Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019).

increased intervention in partisan gerrymandering cases, solidifying that the modern political question doctrine is both jurisdictional and prudential. Each of these conclusions implicitly pushes back against the assumptions and reasoning underlying *Anderson-Burdick*'s outsized role in election law.

First, the Court noted in *Rucho* that "[t]he Framers addressed the election of Representatives to Congress in the Elections Clause . . . [t]hey settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress."[143] But nowhere did the Framers suggest that federal courts had a role in regulating elections,[144] let alone the central one that *Anderson-Burdick* contemplates. The *Rucho* court also noted that Congress "has regularly exercised its Election Clause power" throughout American history.[145]

The *Burdick* court quoted the Elections Clause in adjudicating a constitutional challenge to Hawaii's prohibition on mail-in voting.[146] And, somewhat ironically, it observed that "the Court therefore has recognized that States retain the power to regulate their own elections . . . [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."[147] By "government" the Court apparently meant itself. It went on to analyze the burdens imposed by the election law without once quoting the second half of the Elections Clause—which specifically names *Congress* as the federal government actor assigned to play the active role in structuring elections. *Rucho*'s reasoning casts doubt on this exercise of judicial supremacy. The Framers specifically entrusted Congress—not federal courts—with oversight over state election laws. State legislatures, in the first instance, and Congress in the second, must weigh the "burden upon individual voters" that "[e]lection laws will invariably impose."[148]

Second, the *Rucho* Court emphasized the difficulty of assessing the "fairness" of legislative redistricting. Fairness is not a judicially manageable standard, according to the Court, because it is difficult to settle on a "clear, manageable and politically neutral" test to determine it.[149] Fairness in the legislative districting context could mean any number of things—from drawing districts so they are more competitive to "cracking" and "packing" districts so that each party has an "appropriate share of safe seats."[150] As the Court explained, "[d]eciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal . . . Any judicial decision on what is 'fair' in

143. *Id*. at 2495–96.
144. *Id*. at 2496.
145. *Id*. at 2495.
146. Burdick v. Takushi, 504 U.S. 428, 433 (1992).
147. *Id*. at 433.
148. *Id*.
149. Rucho v. Common Cause, 139 S. Ct. 2484, 2498–2500.
150. *Id*. at 2500 (citation omitted).

this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts."[151]

Yet, deciding among competing visions of fairness is exactly the type of inquiry *Anderson-Burdick* counsels. It "affords judges a veneer of neutral calculus to disguise the immense power first to pick several variables, and then to pick how to weigh them, with each step constrained only by a judge's self-perceived wisdom about the merits of a state's political choices."[152] Inherent in this exercise is the difficult determination of how much politicking is too much—which *Rucho* emphasized is not appropriate. If judges are tasked with analyzing whether a state's election law is "necessary," they are implicitly choosing among competing visions of fairness to decide whether the state legislature has politicked too much.[153]

An example helps illustrate the point. In *Nelson v. Warner*, the Fourth Circuit adjudicated a challenge to West Virginia's ballot-order statute, which required that the candidates of the party that won the most recent Presidential election in the state be listed first.[154] Individuals and organizations associated with the Democratic Party brought an Equal Protection Clause challenge, contending that the statute treated candidates differently so as to give "the favored party 'an unfair and arbitrary electoral advantage.'"[155] Despite this claim turning essentially on a threshold determination of fairness and a decision of how much politicking is too much, the Fourth Circuit adjudicated it under *Anderson-Burdick*.[156] Such reasoning abounded prior to the 2020 election. Courts decided, *inter alia*, whether polling places were open long enough and on weekends, whether one or two witnesses were required for an absentee ballot, whether ballot drop-box voting was permissible (or if it could be banned), and whether the receipt deadline for mail-in ballots was adequate. At bottom, these cases were about fairness, and fairness in the context of the COVID-19 pandemic specifically. *Rucho*'s reasoning calls into question the rampant application of *Anderson-Burdick* to such cases.

Third, the *Rucho* court expressed prudential concerns about the consequences of increased intervention in partisan gerrymandering cases. It feared that its entanglement would be "unlimited in scope and duration" were it to adjudicate such questions.[157] In particular, the Court noted that challenges could be brought after every new round of redistricting in every state.[158] The same prudential concerns apply in other areas of election law, too. Prior to every election, would federal courts have to decide what hours polling places must stay open, where individuals may vote, how they may vote, how candidates may appear on a ballot,

151. *Id.* (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012)).
152. Daunt v. Benson, 999 F.3d 299, 326 (6th Cir. 2021) (Readler, J., concurring in judgment).
153. *See, e.g.*, Luft v. Evers, 963 F.3d 665, 671 (7th Cir. 2020).
154. Nelson v. Warner, 12 F.4th 376, 379 (4th Cir. 2021).
155. *Id.* at 381.
156. *See id.* at 386.
157. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).
158. *Id.*

and more? Such a result would permit "the unelected and politically unaccountable branch . . . [to] assum[e] such an extraordinary and unprecedented role."[159] Because *Anderson-Burdick* essentially denies the existence of prudential considerations altogether, its logic should be reconsidered after *Rucho*.

B. Baker*'s Factors Should Be Revived, Especially Its First Factor*

A reader of modern election law decisions would think that *Baker* has only one factor: judicially discoverable and manageable standards.[160] And, as discussed at length, the *Anderson-Burdick* doctrine has pledged to supply these standards such that the political question doctrine almost never applies. *Baker* has not one factor, but six—and only one need be met for a court to decline jurisdiction. A more rigorous application of *Baker*'s other factors is warranted if the political question doctrine is to mean anything at all in election law. To be sure, *Baker*'s flexible, multi-factor inquiry is not a paragon of originalist reasoning and therefore may appear unpalatable to the modern Court. Yet, *Baker*'s first factor is quite grounded in the text of the Constitution and structural separation of powers principles—it warrants special attention today.

Baker's first factor asks courts to consider whether a "textually demonstrable constitutional commitment of the issue to a coordinate political department" exists.[161] And, in the area of election law, one does. The Elections Clause 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."[162] Thus, the Constitution delegates the primary power over elections to states.[163] This power is not an unlimited one, however, as the Framers recognized that "[a]mbition must be made to counteract ambition" and that "devices should be necessary to control the abuses of government."[164] Thus, the Elections Clause also provides that: "the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing [sic] Senators."[165]

The Framers debated at length whether Congress was the appropriate entity to check state legislatures' election laws.[166] On the one hand, the Antifederalists feared that Congress could make itself "omnipotent," controlling every aspect of state elections.[167] Conversely, the Federalists argued that a strong Federal

---

159. *Id.*

160. *See, e.g.*, *id.* at 2496 (noting that *Baker* set out "various considerations," but relying on only the judicially discoverable and manageable standards factor in deciding the case); *Cf.* Zivotofsky v. Clinton, 566 U.S. 189, 212–13 (2012) (Breyer, J., dissenting) (critiquing the majority opinion for relying only on two of *Baker*'s six factors in the foreign affairs context).

161. Baker v. Carr, 369 U.S. 186, 217 (1962).

162. U.S. CONST. Art. I, § 4, cl. 1.

163. *See also* Calvary Chapel Dayton Valley v. Sisolak, 149 S.Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting) ("[S]tate and local governments, not the federal courts, have the primary responsibility for addressing . . . [the] adjustment of voting and election procedures.").

164. THE FEDERALIST NO. 51 (James Madison).

165. U.S. CONST. Art. I, § 4, cl. 2.

166. *Rucho*, 139 S. Ct. at 2495.

167. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., 1937)).

congressional check was necessary to prevent state legislatures from undermining fair representation in elections.[168] As Hamilton wrote, "a discretionary power over elections ought to exist somewhere . . . [either] lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former."[169] *Baker*'s first factor acknowledges that the Constitution expressly delegates certain powers to the different branches. Invoking it would place the initial onus on Congress to legislate if it disapproved of the states' policy choices, rather than on the courts.

To be sure, a strict application of *Baker*'s first factor would pose a high jurisdictional bar to many modern election law challenges. Because a textually demonstrable commitment to a coordinate political branch over the "times" and "places" of elections exists, challenges to laws regulating polling place hours, the receipt date for absentee ballots, or the location of polling places would be jurisdictionally barred. Similarly, the Court has noted that "manner" in the Elections Clause "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'"[170] Such broad phrases would bar most—if not all—of the pre-2020 election law claims.

Baker's other factors would seem to counsel judicial abstention in such cases as well—assuming the Court also considers prudential concerns. *Baker*'s second factor has special relevance given the way the Court framed it in *Rucho*. A lack of "judicially discoverable and manageable standards" exists when the Court is faced with deciding a threshold question of fairness.[171] Many garden-variety election law challenges task courts with such an inquiry. Is it fair that there is no curbside voting in a state for the elderly? Is it fair that a state prefers to require that voters vote in person rather than absentee? Is it fair that there is only one polling place in a precinct? These questions—and others—are properly addressed to the peoples' elected representatives.

Baker's third factor—"the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"—also merits consideration on prudential grounds, especially in light of the problems with *Anderson-Burdick*. [172] The third factor counsels courts *not* to do what *Anderson-Burdick* requires of them. Under *Anderson-Burdick*, courts must determine the wisdom of a state's policy choice to weigh it against the alleged burdens on the right to vote.[173] Legislatures, not courts, engage in such nitty-gritty debates as to whether and why a particular law is necessary and how exceptions to it should be framed.

---

168. *Id.*

169. THE FEDERALIST NO. 59 (Alexander Hamilton).

170. Cook v. Gralike, 531 U.S. 510, 523–24 (2001) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

171. Baker v. Carr, 369 U.S. 186, 226 (1962).

172. *Id.* at 217.

173. *See, e.g.*, Luft v. Evers, 963 F.3d 665, 671 (7th Cir. 2020).

Courts would no longer be permitted to second guess these state legislative decisions, especially under such an ad hoc test as *Anderson-Burdick*.[174]

Baker's fourth and sixth factors—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and the potential for embarrassment—are invoked in other contexts related to the political question doctrine.[175] They should at least be considered in election law, too. If federal courts continue to inject themselves into the center of election law disputes (primarily undoing the legislature's handiwork with a standardless balancing test), this would seem to display a lack of respect.

Finally, *Baker's* fifth factor also continues to have relevance. It references "an unusual need for unquestioning adherence to a political decision already made."[176] This factor could be viewed as already enshrined in another generally accepted prudential principle: *Purcell*.[177] In *Purcell v. Gonzalez*, the Supreme Court held that courts should not change the rules of a federal election "weeks before" it is set to occur.[178] In the 2020 context, courts invoked *Purcell* far more often than the political question doctrine.[179] Like the political question doctrine, this prudential principle keeps courts in their proper lane when dealing with elections. It arguably counsels something like *Baker*'s fifth factor—unquestioning adherence to political decisions surrounding voting are unusually necessary just before an election to ensure its orderly and predictable administration.

The more "bloodthirsty originalists"[180] may agree that the revival of *Baker* described above—especially its first factor—is the Constitutionally-required approach if the political question doctrine is to mean anything in election law.[181]

---

174. As Vikram David Amar and Jason Mazzone noted in their analysis of a pre-2020 challenge to Wisconsin's ballot receipt deadline: "the [district] court simply laid out an unguided balancing test from cases involving voter qualifications and ballot access and determined that Wisconsin could ignore its state-law requirements without losing too much." Amar & Mazzone, *supra* note 86.

175. *See, e.g.*, Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717, 724 (D. Md. 2014) (referencing both the fourth and sixth *Baker* factors in a foreign relations political question suit).

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

177. *See* Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam).

178. *Id.* at 4; *see also* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("Extending the date by which ballots may be cast by votes . . . for an additional six days after the scheduled election day fundamentally alters the nature of the election.").

179. A Westlaw search of opinions issued between January 1, 2020, and November 3, 2020, (election day) reveals that *Purcell* appears in five cases decided by the U.S. Supreme Court, twenty-nine cases decided by Federal Courts of Appeals, and seventy-nine cases decided by Federal District Courts. *See also* Muller, *supra* note 57 ("The *Purcell* principle has been a way of avoiding the merits of [*Anderson-Burdick*] cases while simultaneously bringing [them] to the Court on a routine basis, which likely makes many members of the Court wary about [*Anderson-Burdick*'s] continued implementation.").

180. Justice Scalia characterized Justice Thomas as such, according to a recent documentary. *See* CREATED EQUAL: CLARENCE THOMAS IN HIS OWN WORDS (Manifold Productions Inc. 2020).

181. *See, e.g.*, Republican Party of Pa. v. Degraffenried, 141 S. Ct. 732, 735 (Mem.) (2021) (Thomas, J., dissenting from denial of certiorari) ("Changing the rules in the middle of the game is bad enough. Such [election] rule changes by officials who may lack authority to do so [here, the Pennsylvania Supreme Court] is even worse. When those changes alter election results, they can

The Court has already recognized that "[s]tates have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'"[182] And it is not unrealistic to suggest that Congress could assume oversight over states' voting legislation. Just under twenty years ago, Congress passed sweeping reforms to voting procedures in the Help America Vote Act (HAVA) in 2002, following the contentious 2000 election and *Bush v. Gore*.[183] And the House of Representatives recently passed H.R. 1, the For the People Act—which would overhaul state election procedures in no fewer than 800 pages—though the measure has since stalled in the Senate.[184]

Yet, even the current, sometimes originalist Court may find that barring most challenges under *Baker* would be a bridge too far.[185] A cynic can imagine myriad unfair laws states could pass: locating the only polling place in a precinct far away from low-income residents, limiting polling place hours so day laborers do not have time to vote, and the like. Arguing that federal courts shouldn't have a role in assessing such laws seems to strike at basic notions of fairness and perhaps underestimates judicial competence, as Justice Kagan forcefully argued in her *Rucho* dissent. Yet, the argument for a revived political question doctrine in election law nonetheless has some purchase. The current Court signaled in *Rucho* that it is willing to draw lines and pronounce carve-outs. It has similarly continued to do so in other cases invoking the political question doctrine.

Thus, the Court could say it will not entertain certain types of election law cases (perhaps those pertaining to the times and places of elections), while continuing to adjudicate others (perhaps those pertaining to manner) where courts have previously found discriminatory intent. Two such examples are poll tax laws and voter ID laws in states that have racial disparities in ID possession. The Court could therefore decline to adjudicate suits challenging the timing of states' absentee ballot processes, or the number and type of polling places, or whether a state can require witnesses for absentee voting, or how a state chooses to order its ballots, while continuing to adjudicate suits that have historically raised concrete equal protection concerns. Similarly, the Court could continue to entertain

---

severely damage the electoral system on which our self-governance so heavily depends. If state officials have the authority they have claimed, we need to make it clear."). *Cf.* King v. Burwell, 576 U.S. 473, 516 (2015) (Scalia, J., dissenting) ("The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.").

182. Shelby Cnty. v. Holder, 570 U.S. 529, 543 (2013) (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)).

183. *See* 42 U.S.C. § 146 (2002).

184. For the People Act, H.R. 1, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1/text.

185. Further information about the Court's willingness to apply the text and original meaning of the Elections Clause may be resolved sooner, rather than later. An emergency application for stay pending petition for a writ of certiorari raising this question is currently pending. *See* Moore v. Harper, No. 21A455 (U.S. filed Feb. 25, 2022). The emergency application argues that the Elections Clause confers authority over election rules to state legislatures, not state courts. *Id.* at 12. As such, state court invalidation and revision of a legislatively chosen map violates the U.S. Constitution, because Congress is the proper check on such decisions. *Id.* at 19.

lawsuits alleging a voting procedure is unconstitutionally racially discriminatory, while declining cases alleging a voting procedure *unduly burdens* the right to vote. Though pronouncing such bright lines is unquestionably difficult,[186] and some may say unfair, the Constitution does not have a fairness clause. Constitutional legitimacy derives instead from the reaffirmation that certain powers rest with different branches of government for good reason.

VI. CONCLUSION

If "[t]he nonjusticiability of a political question is primarily a function of the separation of powers,"[187] then the doctrine must have some applicability in election law to achieve its stated purpose. The *Anderson-Burdick* test has exploded *Baker*'s Equal Protection Clause loophole such that the political question doctrine is scarcely even referenced in modern-day election law. In a post-*Rucho* world, courts should revive the political question doctrine to return the judiciary to its proper—backseat—role in election disputes, leaving the primary power to the people's elected representatives at the state and federal levels.

186. Despite this difficulty, the Court draws such lines all the time in constitutional law. *See, e.g.*, Brown v. Ent. Merch. Ass'n, 564 U.S. 786 (2011) (recognizing restrictions on certain categories of speech, including obscenity, incitement, and fighting words).

187. Baker v. Carr, 369 U.S. 186, 210 (1962).