

# WHO'S AFRAID OF THE TWELFTH AMENDMENT?

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## I. INTRODUCTION

The Twelfth Amendment is a Rodney Dangerfield of the Constitution: it gets no respect. Indeed, it gets little discernible attention at all. The Amendment is rarely the subject of scholarly analysis<sup>1</sup> or classroom discussion and *never*, prior to this symposium, the focus of

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We originally presented this Essay as part of the Florida State College of Law's symposium "The Law of Presidential Elections: Issues in the Wake of Florida 2000," on March 23, 2001. We are grateful to the College of Law and Jim Rossi for organizing the symposium and inviting us to participate. We have benefited from thoughtful comments by the symposium participants, as well as from Stuart Benjamin, Earl Maltz, H.W. Perry, and Scot Powe, and from the excellent research assistance of Marlyn Robinson and Rajkumar Vinakota. Each of us will of course blame the other for the errors that remain.

1. A preliminary search of the relevant databases reveals that no academic has written a full-scale law review article on the Amendment. *But see* James C. Ho, *Much Ado About Nothing: Dick Cheney and the Twelfth Amendment*, 5 TEX. REV. L. & POL'Y 227 (2000). (It is no denigration of Mr. Ho to point out that he wrote as an associate of Gibson, Dunn & Crutcher and is not (yet?) a legal academic).

On the plus side, David Currie provides an excellent overview of the history of the Amendment in DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, at 39-65 (2001). Tadahisa Kuroda had earlier written an entire book on the subject, TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804* (1994), but that book seems to have been largely ignored in the legal academy save for a review by Michael Les Benedict in 15 LAW & HIST. REV. 205 (1997). Finally, one of us *did* select a feature of the Twelfth Amendment as the "stupidest" aspect of the Constitution. *See* Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMM. 183-86 (1995), reprinted with slight changes in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 61-66 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). That, at least, is the sort of attention with which Mr. Dangerfield could sympathize.

an academic panel. Only professors of constitutional law—and probably not all of them—could even identify the Amendment’s subject matter, at least prior to the recent unpleasantness.

The tumultuous 2000 election, however, *could* have been the occasion for the Twelfth Amendment to finally get its fifteen minutes of fame. George W. Bush’s selection of Dick Cheney to be his running mate presented problems under the Amendment’s “Habitation Clause,” which forbids electors from a given state (here, the Great State of Texas) from voting for both a presidential and vice-presidential nominee from the same state as themselves. And the Amendment’s specific procedures for resolving disputed presidential elections seemed to point toward a political resolution of the Florida crisis by Congress—an option which was ultimately rejected in favor of a judicial resolution in *Bush v. Gore*.<sup>2</sup> Even though the Twelfth Amendment seemed to speak directly to both these issues, the Amendment did not find itself catapulted out of obscurity to provide a resolution to the crisis. The interesting question—to us, at least—is “Why not?” Why was no one concerned that the Texas electors’ votes for Dick Cheney may have been unconstitutional? And why was the possibility that the Twelfth Amendment involves a “textual commitment” of electoral disputes to Congress so readily rejected? In other words: what happened to the Twelfth Amendment’s fifteen minutes?<sup>3</sup>

## II. THE TEXT AND PROVENANCE OF THE TWELFTH AMENDMENT

In case it is necessary to refresh recollection, the Twelfth Amendment reads as follows:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, *one of whom, at least, shall not be an inhabitant of the same state with themselves*; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person hav-

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2. 531 U.S. 98 (2000).

3. One possibility is that most of the Twelfth Amendment’s minutes have been misappropriated by the Eleventh Amendment, whose run seems to go on and on. *See, e.g.*, *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, No 01-46, 2001 U.S. LEXIS 9773 (Oct. 15, 2001) (granting certiorari to consider the relevance of the Eleventh Amendment to proceedings before a federal administrative agency); Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001) (yet another Eleventh Amendment symposium).

ing the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President;—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.<sup>4</sup>

For ease of reference, we will designate the first italicized portion of the Amendment quoted above as the “Habitation Clause,” which we discuss in Part III of this Essay. The second italicized portion encompasses the “Electoral Dispute Procedure,” which we discuss in Part IV.

Congress formally proposed the Amendment on December 9, 1803, when the House of Representatives joined the Senate, which had voted on December 2, in approving the proposal.<sup>5</sup> Given the presence of seventeen states then in the Union, it required ratification by thirteen of them. New Hampshire became the thirteenth state on June 15, 1804.<sup>6</sup>

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4. U.S. CONST. amend. XII (emphasis added).

5. It was not, however, signed by the presiding officers of the House and Senate until December 12. See 2 Stat. 306 (1803).

6. Interestingly enough, New Hampshire’s Governor on June 20 vetoed this act of the legislature, and it did not then receive the two-thirds approval required by the state constitution to override the veto. Given the language of Article V and its specification that amendments shall become effective “when ratified by the legislatures of three fourths of the several States, or by Conventions in three fourths thereof,” it is certainly arguable that the veto was irrelevant and that the June 15 ratification was good. Should one reject this view, then the Amendment did not become operative until Tennessee’s ratification on July 27, 1804. In any event, Secretary of State James Madison, in a circular letter to the governors of the several states dated September 25, 1804, declared that the Amendment had been ratified by three-fourths of the States. 5 THE FOUNDERS’ CONSTITUTION: AMENDMENTS I-XII 447 (Philip B. Kurland & Ralph Lerner eds., 1987). Both Delaware and

This formal history of the Amendment scarcely does justice to the political realities behind its proposal and ratification. The election of 1800, of course, was a fiasco that threatened to become a full-fledged constitutional crisis in a far more serious way than the 2000 election ever did.<sup>7</sup> The earlier election exposed a glaring deficiency of the original 1787 Constitution—the assumption that there would be no party system and, therefore, that a “politics of virtue” would determine the presidential and vice-presidential selections rather than a “politics of party.” Thus, under that Constitution, each elector voted for two candidates, at least one of whom had to be from a state other than the elector’s own.<sup>8</sup> The top candidate, assuming that he received a majority of the electoral votes, became President. The runner-up, even if receiving less than a majority, became Vice President.<sup>9</sup>

It is tempting to view the Habitation Clause as a mild disincentive against an unseemly assertion of power by a large state determined to place two of its own as leaders of the Executive. The eminent historian Jack Rakove has suggested, however, that:

the reason electors have to cast a 2d vote for someone from another state is not to prevent a power grab by one state but to increase the likelihood that the [electoral college] will actually make a decisive choice; i.e., 1st votes will go to favorite sons, 2d votes to more distinguished characters, so as Madison explains at one point in the Convention, electors’ second choices are likely to be the first rank in point of quality.<sup>10</sup>

Whatever the rationale, in 1796 this structure yielded the election of John Adams as President and Thomas Jefferson as Vice President. Adams received only one vote more than the 70 required to achieve a majority of the total of 138 votes, and Jefferson received 68 votes, nine more than the 59 votes received by the South Carolina Federalist Thomas Pinckney.<sup>11</sup> (Aaron Burr trailed with only 30 votes).<sup>12</sup> As Professor Kuroda notes, Jefferson prevailed over Pinckney only because the “Federalists threw so many votes away”<sup>13</sup> from their own vice-presidential candidate in order to make sure that there would be

Connecticut rejected the Amendment, and Massachusetts did not get around to ratifying it until 1961! *Id.* at 448.

7. See BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800* (2000), for an excellent recent retelling of the tale; see also Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 *YALE L.J.* 1959 (1999).

8. See U.S. CONST. art. II, § 1.

9. See generally STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 514 (1993) (discussing the effects of this system).

10. E-mail from Jack N. Rakove, Professor of History and American Studies, Stanford Univ., to Sanford Levinson (November 27, 2000) (on file with Levinson).

11. WEISBERGER, *supra* note 7, at 167.

12. *Id.*

13. KURODA, *supra* note 1, at 108.

no tie for the Presidency that would cause the decision to be thrown into the House of Representatives, which, under the 1787 Constitution, would choose the President from among the five top recipients of electoral votes.<sup>14</sup> One will never know, of course, how the course of American history might have been different had the Federalists been better at strategic voting and caused Jefferson, therefore, to remain a mere private citizen between 1797 and 1801.

Even by 1796, then, it had become clear that political parties were the developing reality of American politics; by the turn of the new century, the President and Vice President of the United States had become the highly antagonistic leaders of the Federalist and Democratic-Republican parties, respectively. Each ran with party compatriots who were to receive the votes of party-oriented electors for the Vice Presidency, thus eliminating, presumably, the possibility of a President and Vice President who headed conflicting political parties. The new scheme would have operated perfectly in 1800 had the Democratic-Republican electors had the wit to withhold at least one vote for their number-two candidate, the New Yorker Aaron Burr, and thus make him unequivocally second, albeit by only one vote, to Jefferson.<sup>15</sup> Instead, they all voted for both candidates, and since the original Constitution did not set up separate tracks for contenders for the Presidency and Vice Presidency, Jefferson and Burr were tied.<sup>16</sup> Because the Electoral College was unable to choose a President, the choice devolved upon the House of Representatives, voting on a one-state, one-vote basis.

The House ultimately—though only after six days and thirty-six ballots—chose Jefferson to be President, with Burr then becoming Vice President.<sup>17</sup> Historians have attributed this result to a mixture of Hamilton's disdain for Burr, whom Hamilton thought to be unscrupulous, and veiled threats by Southern governors to call out the state militias to march on the new capitol in Washington.<sup>18</sup> Not sur-

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14. U.S. CONST. art. II, §1 (amended by Twelfth Amendment). This would have made Samuel Adams, a Democratic-Republican who received 15 electoral votes, the fifth candidate. See U.S. BUREAU OF THE CENSUS, 2 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, BICENTENNIAL EDITION 1074 (1975).

15. As we have recounted, the Federalists of 1796 had the foresight to guard against a tie, but not to withhold only so many votes as needed to avoid that dire fate and still elect their party favorite to the Vice Presidency. The Democrats, on the other hand, apparently (mis)learned from 1796 that it was unsafe to withhold even a single vote.

16. The Federalists had indeed learned the right lesson from 1796, so that in 1800 they gave 65 electoral votes to John Adams, 64 votes to Charles C. Pinckney and one lone vote to former Chief Justice John Jay, thus avoiding the dreaded tie vote. See U.S. BUREAU OF THE CENSUS, *supra* note 14, at 1074.

17. See ELKINS & MCKITRICK, *supra* note 9, at 743-50 (recounting the denouement); see also WEISBERGER, *supra* note 7, at 271-75. Burr's most notable act during his term of office, of course, would be killing his bitter enemy Hamilton in a duel.

18. According to Joanne Freeman, "Republicans spoke seriously about taking arms against the Federalists if they withheld the presidency from Jefferson." Freeman, *supra*

prisingly, Democratic-Republican majorities in Congress proposed the Twelfth Amendment and its establishment of separate votes for the offices of President and Vice President as a means of precluding such embarrassments in the future.<sup>19</sup> Interestingly enough, Federalists opposed the Amendment. They did so because, says Professor Currie, they knew that “they were unlikely to be able to muster a majority of the electors in the foreseeable future” and therefore “did their best to preserve the unholy possibility that they might be able to choose between their opponents in the House.”<sup>20</sup> Among other things, of course, this reminds us that electoral rules are never in fact chosen behind a “veil of ignorance,”<sup>21</sup> but are almost invariably known (or at least sincerely believed) to carry with them specific short-run consequences to the benefit or detriment of a given political party.

Professor Currie also notes the presence of two ways, not chosen by Congress, to solve the dilemmas exposed by the 1796 and 1800 elections. One would have simply required that electors cast only one vote rather than two. “Never again would there be a tie between a party’s presidential and vice-presidential candidates”<sup>22</sup> because there would, in fact, be no such thing as a vice-presidential candidate. As envisioned by the idealistic framers, the Vice President—that is, the person coming in second in the vote, unless a tie had to be broken by

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note 7, at 1987 n.115. Indeed, “two states began to organize their militia to seize the government for Jefferson if Burr prevailed.” *Id.* at 1963 (citing HARRY AMMON, JAMES MONROE: THE QUEST FOR NATIONAL IDENTITY 192-93 (1990); DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 503-04 (1962); DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 7-11 (1970)). These realities of the 1800 election only underscore the fatuity of considering the events of November-December 2000 a political “crisis.”

19. It should not go without mention that there was an extensive and fascinating debate about the consequences of moving to what Senator White of Delaware (one of the two states that in fact rejected the amendment) called a “designating mode of election.” 5 THE FOUNDERS’ CONSTITUTION, *supra* note 6, at 458. Thus, according to White, the initial mode of election was designed “to secure the election of the best men in the country, or at least those in whom the people reposed the highest confidence,” as demonstrated by the fact that the Vice President would be the person “who had been honored with the second largest number of the suffrages of the people for” the Presidency itself. *Id.* Now, however, a political party will in effect make its choice as to the Vice Presidency.

In this angry conflict of parties, against the heat and anxiety of this political warfare, the Vice Presidency will either be left to chance, or what will be much worse, prostituted to the basest purposes; character, talents, virtue, and merit, will not be sought after, in the candidate. The question will not be asked, is he capable? is he honest? But can he by his name, by his connexions, by his wealth, by his local situation, by his influence, or his intrigues, best promote the election of a President. He will be made the mere stepping stone of ambition.

*Id.* at 459. Whether or not the consequences have been quite so dire as suggested by Senator White, it is hard to deny the deep consequences of this aspect of the Twelfth Amendment. There was nothing minor or “technical” about it.

20. CURRIE, *supra* note 1, at 41.

21. See JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

22. CURRIE, *supra* note 1, at 43.

the House—would indeed be a person deemed thoroughly capable of being President.<sup>23</sup> This, suggests Currie, is decidedly not the case with regard to the office as it has historically developed; with some notable exceptions, the office has featured relative lightweights.<sup>24</sup> “The twelfth amendment,” he argues, “is stacked against selection of a Vice-President qualified to take over the Presidency.”<sup>25</sup>

A second alternative is simply the abolition of the office of Vice President.<sup>26</sup> Although recent Vice Presidents seem to have been able to persuade the President to delegate some greater responsibilities, in many instances the Vice President has existed mostly to attend a variety of funerals and fund-raising events that the President does not have time for. And the value of having a Vice President available to assume the Presidency on a moment’s notice depends on the competence of the persons holding the office, a subject treated in the paragraph immediately above. It is certainly unclear, though, why any very able politician would aspire to hold an office whose sole official duty is presiding over the Senate and whose effective power is entirely a matter of presidential grace.

Whatever the merits of these arguments, they were obviously rejected or ignored by the Congress, which preferred to retain the election of both President and Vice President. In so doing, Congress also

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23. The runner-up might, of course, also be a person thoroughly antagonistic to the winner—a situation which would present problems of its own. To the extent that recent Vice Presidents, such as Mr. Gore and Mr. Cheney, have been able to forge a meaningful role in policymaking, that role seems to have depended on a high degree of trust between them and the President. Professor Currie’s first alternative thus might result in a Vice President who is highly qualified to assume the top job in the event of tragedy but who is otherwise thoroughly marginalized in a hostile administration. The Framers of the Twelfth Amendment obviously had the then-recent Adams-Jefferson administration to look back on, and may have rejected this alternative for similar reasons.

24. Would anyone in 1952 have seriously suggested that either Richard Nixon or John Sparkman, the vice-presidential running mates of Dwight Eisenhower and Adlai Stevenson, respectively, was at that time qualified to be President? Nixon was chosen for a variety of reasons, ranging from his providing regional “balance” to his prominence as the chief congressional antagonist of Alger Hiss to, perhaps most importantly, his perceived success in delivering the California delegation to Eisenhower on a key procedural vote at the 1952 Republican convention that was crucial to Eisenhower’s nomination (and assured the demise of any lingering hopes that California’s “favorite son,” Earl Warren, had to receive the nomination himself). See STEPHEN E. AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN 1913-1962*, at 248-61 (1987); IRWIN GELLMAN, *THE CONTENDER: RICHARD NIXON: THE CONGRESS YEARS 1946-1952*, at 441-43 (1999). Sparkman, who had supported the Dixiecrat presidential candidacy of Strom Thurmond in 1948 against Harry Truman, was able to craft a “compromise” plank on civil rights in the 1952 convention, and his selection by Stevenson presumably reassured the then solidly Democratic South that Stevenson was not “irresponsible” on civil rights and could therefore be trusted not to go “too far” in any programs to help Southern African Americans. See the entry on John Sparkman in *20 AMERICAN NATIONAL BIOGRAPHY* 419 (John A. Garraty & Mark C. Carnes eds., 1999).

25. CURRIE, *supra* note 1, at 43. On the other hand, it is hard to deny that many of our recent Vice Presidents clearly had the stature and competence to serve as President.

26. *Id.* at 44-46.

carried over into the new Amendment—without significant discussion—the language of the original constitution that precluded voting for two fellow-inhabitants,<sup>27</sup> as well as devolving to Congress the selection of the two officials should the Electoral College be unable to achieve definitive resolution. This means that, while one might have thought the phrase “obscure provision of the Twelfth Amendment” to be a redundancy, we deal in fact with parts of that Amendment that escaped significant attention even in 1803.

### III. THE CONTEMPORARY (IR)RELEVANCE OF THE HABITATION CLAUSE

Our first task in this paper is to examine the possible application of the Twelfth Amendment’s Habitation Clause<sup>28</sup> to the 2000 presidential election. The question is this: did Texas electors, in casting their votes for both George W. Bush and Richard Cheney, violate the constitutional command that they must “vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves”?<sup>29</sup> Both of us agree that there are plausible—that is, nonfrivolous—arguments that Mr. Cheney, like Mr. Bush, was a Texan and that, therefore, the Twelfth Amendment’s bar meant that the votes of the Texas electors did not count, with the result that either Mr. Bush, Mr. Cheney, or both did not in fact gain a majority of the electoral vote. We are all too aware that most constitutional analysts find this argument almost literally incredible and some, no doubt, would find it covered by the ban of Rule 11 on frivolous arguments. We want to explore whether this disdain is justified and, indeed, to take this section of the Amendment seriously enough to explore what meanings might be given the term “inhabitant” under different modal approaches to the Constitution.<sup>30</sup>

It is important to emphasize that we view our project less as an exercise in normative jurisprudence—that is, what does the Constitution, correctly interpreted, require with regard to certain issues—

27. Professor Currie’s copious analysis of the debates surrounding the Twelfth Amendment includes no discussion of the Habitation Clause. This strongly suggests, of course, that absolutely no notice was taken of it during the debate. The lack of notice might be evidence either of the deep commitment of the generation of 1803 to maintaining what they believed to be an important decision rule or of the sheer thoughtlessness of the members of Congress.

28. Discussion at Tallahassee indicated that we may be the first scholars to “name” this patch of constitutional text. Although Rick Pildes suggested that the better name would be “Cohabitation Clause,” we stick with our original choice in order to preserve the good name of the *Florida State University Law Review* as a family publication.

29. U.S. CONST. amend. XII. This language, as we have said, simply replicates the wording of Article II, Section 1.

30. The use of the term “modal,” of course, is a giveaway that we will be applying some of the approach to constitutional analysis identified with our colleague Philip Bobbitt. See PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3-8 (1982); PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991).

than as an inquiry about the circumstances in which the community of trained constitutional analysts and the surrounding community of commentators and pundits do (or do not) pay attention to one or another constitutional argument. One can, of course, view the “marketplace of ideas” as a perfectly functioning market in which only meritorious ideas will gain credence; as Holmes (or Richard Posner) might have put it, the best way of identifying ideas worthy of respect is to determine which in fact dominate the marketplace. Less happy, though we suspect more true, is the possibility that the marketplace of ideas, like all markets, has its own distortions and blind spots, so that the ignoring of certain arguments by opinion makers within the market says more about the sociology of the market than it does about the quality of the ideas.<sup>31</sup>

We will, it should be noted, be asking similar questions with regard to the other section of the Amendment we will be discussing presently, which involves congressional resolution of electoral college deadlocks. We will ask whether one can legitimately read that section as a “textual commitment” of electoral-vote controversies to Congress, leaving courts with literally nothing to say about such matters. If that reading is possible, then an obvious question is to speculate on why the Supreme Court apparently did not take it seriously when resolving the issues presented in *Bush v. Gore*.<sup>32</sup> Given the fact that the two of us have rather different views about the merits of that decision, we must emphasize yet again that our contribution, such as it is, is analytic rather than normative, whatever problems might obviously be raised by that distinction.

So let us turn to the question at hand, the habitation of Dick Cheney. At the time of his public designation by then-candidate George W. Bush, the Governor of Texas, Dick Cheney was not only the head of the team charged with advising the Governor on his choice of a

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31. Consider an area of contemporary constitutional controversy: whether there exists federalistic limits, appropriate for judicial application, on congressional exercises of power under Article I, Section 8, or Section 5 of the Fourteenth Amendment. Mr. Young believes that the widespread disdain for arguments in favor of such limits between, say, 1945 and 1975, is better evidence of the sociology of the legal academy and judiciary than of genuine merit. Mr. Levinson believes that the present acceptability of such arguments is similarly better explained by sociology than by merit. We may disagree on the specifics of certain decisions. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1995) (striking down the Brady Act’s requirement that state officials conduct federally mandated background checks for handgun purchasers); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act as outside the scope of Congress’s commerce power). What is far more important, however, is our agreement that the intellectual marketplace is scarcely perfect in its working and that one must always credit the possibility that imperfection is present (and therefore needs explanation).

32. 531 U.S. 98 (2000).

running mate,<sup>33</sup> but also the C.E.O. of the Halliburton Company, a multibillion-dollar corporation whose home office was Dallas, Texas. One of us wrote an op-ed piece for *The New York Times*, published under the title “2 Texans, not 1,”<sup>34</sup> and James C. Ho notes that the issue was discussed in a number of public venues, including *The Kansas City Star*, *Denver Post*, and *The Boston Globe*.<sup>35</sup> We can also both testify to the topic’s having generated an active discussion among the constitutional law professors who participate in an internet discussion group.

We, of course, would be the last people to criticize anyone for wanting to become a Texan. But most truly worthwhile things in life have their price, and in Dick Cheney’s case that price seems to be exacted by the Twelfth Amendment’s command that when a state’s electors “vote by ballot for President and Vice-President, one of [those officers], at least, shall not be an inhabitant of the same state with themselves.”<sup>36</sup> Everyone agrees that if Cheney counted as an “inhabitant” of Texas, then the Lone Star State’s electors would have been put to the disheartening choice of voting for *either* George W. Bush for President *or* Richard Cheney for Vice President, but not both. In most elections, such a sacrifice might not matter. But in the hair’s-breadth election of November 2000, removing Texas’s thirty-two electors from the Republican column would have thrown the election to the other side.<sup>37</sup>

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33. The possible conflict of interest between advisor Cheney and candidate Cheney is not of constitutional significance and therefore remains unexamined in this Essay, though it might certainly be of interest to political scientists.

34. Sanford Levinson, *2 Texans, not 1*, N.Y. TIMES, Aug. 4, 2000, at A27.

35. See Ho, *supra* note 1, at 245-46 n.4.

36. U.S. CONST. amend XII. This appears to establish the day the electors meet as the relevant time at which to determine habitation, and for obvious reasons, this is the position taken by Mr. Cheney himself in responding to interrogatories concerning his habitation. Thus he defined the central issue as “will Respondent be an inhabitant of the State of Texas on December 18, 2000 at the time the defendant Texas Electors cast their ballots for President and Vice President.” See Defendant Richard B. Cheney’s Response and Objections to First Combined Set of Interrogatories and Requests for Admission to Defendant Richard B. Cheney at 2, *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex 2000) (No. 3:00-CV-2243-D) [hereinafter *Cheney’s Response to Interrogatories*]. One might wish to argue that a better interpretation would fix habitation at the time of nomination or, possibly, election in order to prevent “strategic” changes of habitation designed to frustrate whatever purposes might underlie the Habitation Clause. (This assumes, of course, that one wishes to give it a purposive rather than a purely formal reading.)

37. It is not obvious *which* election, however. One can imagine at least three options: (1) throw out the thirty-two votes for Cheney, yielding a Bush-Lieberman administration (on the assumption that the Senate would have split 50-50 and that then-Vice President Gore would have been authorized, as President of the Senate, to break the tie by voting for his own running mate); (2) throw out the thirty-two votes for Bush, yielding either a Gore-Cheney administration or, quite possibly, a Bush-Cheney administration with Bush having been chosen by the House of Representatives (given that neither presidential candidate would have received a majority of the 538 electoral votes); or (3) throw out all the Texas votes as simply “miscast,” giving a complete victory to Gore-Lieberman or, once more, re-

Although the Republican ticket's Twelfth Amendment problem thus clearly "matters" in the sense that the error we allege was not harmless, the argument was in fact not taken at all seriously by courts or, if truth be known, by editorial writers and pundits who help to establish the boundaries of public discussion. Musings by law professors or even op-eds in *The New York Times* scarcely demonstrate that a given point is granted the status of a truly serious proposal. One might cite, for example, the widespread dismissal of Professor Bruce Ackerman's 1998 argument that the Twentieth Amendment, deeply understood, prohibited the lame-duck House of Representatives from issuing a Bill of Impeachment that the Senate was bound to accept (and try) in the next session of Congress.<sup>38</sup> Ackerman's status as a Yale professor and, even more importantly, as one of the most creative minds in the legal academy, served as much to discredit as to establish the legitimacy of his argument.<sup>39</sup> A similar fate befell the Twelfth Amendment argument, save that, unlike the Twentieth Amendment argument with regard to impeachment, the matter was actually considered by a judicial opinion issued after a group of Texas voters filed suit in November challenging the legitimacy of a vote by Texas's electors for both Bush and Cheney.<sup>40</sup> Quite significantly, though, that litigation generated very little publicity and the decision that dismissed the suit was distinctly overshadowed by the melodrama occurring in Florida.<sup>41</sup>

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quiring resolution by Congress if one includes Texas's vote in the denominator used to compute the number of votes required to gain a majority. Common-sensically, the correct outcome is most certainly (1), since it would seem obvious that preferences for President should be preferred over preferences for Vice President. (Mr. Levinson will resist the temptation to comment that the 2000 election might present an exception to this generality.) But this answer is hardly the only plausible resolution, and it is certainly not derived from the barebones text.

38. See BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999), which elaborates testimony originally presented to the House Judiciary Committee considering whether to impeach President Clinton. One example of the response to the argument is found in RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 128-30 (1999), where Posner harshly dismisses Ackerman's arguments as "unreasonable." *Id.* at 129. Mr. Levinson, for one, believes that Ackerman's argument is both serious and profound. Mr. Young, on the other hand, has to stifle an urge to check his wallet whenever such "deep understandings" are advanced.

39. Cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1246 (1995) (noting—and criticizing—"the emergence of a distinctive new 'Yale school' of constitutional interpretation").

40. See *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000). The Fifth Circuit summarily affirmed. *Jones v. Bush*, 244 F.3d 134 (5th Cir. 2000). The opinion, in its entirety, reads, "All requested relief is DENIED." *Jones v. Bush*, No. 00-11346 (5th Cir. Dec. 7, 2000). Mr. Levinson participated in the *Jones* litigation on the side of the plaintiffs.

41. Interestingly enough, the *Jones* court determined "that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Cir. R. 47.5., 28 U.S.C.A." *Jones v. Bush*, No. 00-11346 (5th Cir. Dec. 7, 2000). The propriety of such unpublished opinions is discussed in Judge Arnold's bombshell opinion in *Anas-*

Why was the Habitation Clause argument not taken more seriously? We obviously reject one answer—that it is simply frivolous on the merits. To say that an argument is nonfrivolous, however, does not mean that it is correct. We certainly do not insist that it is; indeed, the two of us might well disagree if forced to indicate how each would adjudicate the dispute. Both of us, however, whatever our other differences might be, strongly believe that it is *plausible*—at least as plausible as any number of other constitutional claims that are taken quite seriously,<sup>42</sup> including some in the litigation surrounding the Florida unpleasantness. We thus turn to what we consider more interesting explanations.

A. *The Ontology of Habitation; or, Exactly Where Is Dick Cheney From, Anyway, and Does Anybody Care?*

The plaintiffs who filed suit following the November election, seeking an injunction against the Texas electors voting for both Bush and Cheney, claimed to list twenty facts that ostensibly demonstrated Cheney's status as an "inhabitant" of Texas.<sup>43</sup> Several of them were in fact variations on the fact that his primary residence, purchased for \$1,663,270 on November 3, 1995, was in Highland Park, a wealthy suburb of Dallas, and that he had filed for and received the Texas homestead exemption on his property tax in the years 1995-2000. Moreover, he was registered to vote in Texas and had voted at least twice in one of the Highland Park precincts (though one of the more amusing facets of the 2000 race was the discovery that Cheney had quite regularly not taken the trouble to vote, including, apparently, his skipping the 2000 Republican primary in Texas). Needless to say, Cheney possessed a Texas driver's license and registered his automobiles in that state. And, as he noted in an answer to an interrogatory, all magazines that he subscribed to "have been delivered to Respondent's house in Dallas, former office at Halliburton and to his townhouse in McLean, Virginia."<sup>44</sup>

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*tasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), which was vacated as moot upon settlement of the case. *Anastasoff v. United States*, No. 99-3917EM, 2000 U.S. App. LEXIS 33247 (8th Cir. Dec. 18, 2000) (en banc).

42. For a discussion of whether *any* argument can really be "frivolous" in a post-Realist world of legal indeterminacy, see Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986). Even conceding that the set of "frivolous" arguments exists and that there is some sort of overlapping consensus among most lawyers regarding most arguments within that set, *cf.* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), we doubt that the Twelfth Amendment argument addressed here falls within that category.

43. See Plaintiffs' Response to Defendants' Motion to Dismiss, and Supporting Brief, at 4ff, *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (No. 3:00-CV-2543-D).

44. Cheney's Response to Interrogatories, *supra* note 36, at 6.

All of this was unavailing. Judge Sidney Fitzwater<sup>45</sup> first determined that the plaintiffs had no standing to make their claim.<sup>46</sup> He nonetheless went on to decide it on the merits anyway, “[g]iven the importance of entering a ruling that will assist the parties in obtaining full appellate review” prior to the meeting of the Electoral College on December 18, 2000.<sup>47</sup> Judge Fitzwater argued that determination of the meaning of “inhabitant” in the Twelfth Amendment required

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45. Who, for what it is worth (and, no doubt, opinions will differ on the worth of this observation), is a Republican, appointed to the bench at the age of 33 by President Reagan in 1986. See WHO’S WHO IN AMERICA 2001, at 1655 (2001).

46. *Jones*, 122 F. Supp. 2d. at 717-18. The standing issue warrants a somewhat extended comment because the possibility that no plaintiff would have standing to enforce the Twelfth Amendment’s Habitation Clause is surely related to (if not dispositive of) the “relevance” of that provision. The *Jones* plaintiffs asserted three different interests for standing purposes: (1) “a right, as do all citizens of the United States, for the election for President and Vice-President in the Electoral College to be held in strict accordance with the Constitution of the United States and all laws governing the conduct of elections”; (2) “a right to protect the interests of the non-defendant candidates for President and Vice-President”; and (3) a “right to cast a ‘meaningful vote.’” *Id.* Judge Fitzwater rejected the first two interests on fairly familiar grounds, involving the prudential rules against assertion of generalized grievances and third-party standing. See *id.* at 717-18.

The third interest is more troublesome. Judge Fitzwater said that the alleged injury to the plaintiffs’ right to cast a meaningful vote “is necessarily abstract, and plaintiffs conspicuously fail to demonstrate how they, as opposed to the general voting population, will feel its effects.” *Id.* at 717. As Texas voters, however, the plaintiffs surely had a more specific interest in their votes going to electors who would follow the law than members of “the general voting population” in other states. Moreover, as Pam Karlan has pointed out, it is hard to reconcile such a limited notion with the considerably broader notions presumably underlying contemporary voting rights cases involving so-called racial gerrymandering. For example, the Court in *Shaw v. Reno*, 509 U.S. 630 (1993), granted standing to plaintiffs who by no stretch of the imagination demonstrated “a particularized, palpable injury.” See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in THE VOTE: BUSH, GORE AND THE SUPREME COURT (Cass R. Sunstein and Richard A. Epstein eds., 2001) [hereinafter Karlan, *The Newest Equal Protection*].

Full consideration of the standing problem would require a considerably longer article. In particular, we would want to explore (and perhaps conduct an internal debate) on Mr. Young’s initial view that standing in such cases should be limited to the “best plausible” plaintiff, which in *Jones v. Bush* would have been Vice President Gore or his running mate, Senator Joseph Lieberman. Their failure to sue in Texas—perhaps because they were distracted by the events occurring in Florida—thus works as an operational “waiver” of the electorate’s right to a President chosen in conformity with the commands of the Twelfth Amendment. So, had Governor Bush not chosen to litigate in Florida, then perhaps none of the specific voters who were ostensibly affected by the method of recounting votes would have had standing to sue if Mr. Young’s view were adopted. One should note that his (tentative) proposal is based on prudential considerations and does not claim to be derived from the Constitution itself.

In any event, the lack of a private enforcement mechanism would not render the Twelfth Amendment wholly “irrelevant.” It would remain binding on the conscience of individual electors at voting time, and a violation would presumably have been valid grounds for an objection when the vote tallies were transmitted to Congress. There is no evidence, of course, that any substantial qualms were felt at either of these points in the process.

47. *Jones*, 122 F. Supp. 2d at 715.

ascertaining the intent of the Framers.<sup>48</sup> For information as to such intent, he turned to “dictionaries in use at the time the Twelfth Amendment was adopted and ratified.”<sup>49</sup> One 1792 dictionary defined “inhabitants” of a locality as including “[t]hose who occupy lands within such town or parish, *although they be dwelling elsewhere*. But the word inhabitants doth not extend to lodgers, servants, or the like; but to householders only.”<sup>50</sup> Judge Fitzwater also consulted Noah Webster’s famous *American Dictionary of the English Language*, published in 1828, which defined “inhabitant” as a “dweller, one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor. . . . One who has a legal settlement in a town, city or parish.”<sup>51</sup> According to Judge Fitzwater, “These definitions closely parallel the modern concept of domicile,”<sup>52</sup> which the Supreme Court has held to be established by “physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.”<sup>53</sup> Thus he held “that a person is an ‘inhabitant’ of a state, within the meaning of the Twelfth Amendment, if he (1) has a physical presence within that state and (2) intends that it be his place of habitation.”<sup>54</sup>

According to Judge Fitzwater, Mr. Cheney met this requirement because he “has both a physical presence within the state of Wyoming and the intent that Wyoming be his place of habitation.”<sup>55</sup> To defend this proposition, Fitzwater begins by noting that “he was born, raised, educated, and married in Wyoming and represented the

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48. *Id.* at 718. There is, of course, a well-known distinction between the intent of the Framers, the authors of the particular words being construed, and the understanding of the relevant language held by the initial audience reading the words in question. *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997). On occasion, these can take interpreters in two quite different directions, especially if the “readers” in question are presumed to be a mass rather than a professionally expert audience. *See, for example*, Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000), with regard to the often rancorous debate about the relevance of James Madison’s specific intentions regarding the words of the Second Amendment and the scope of a “right to keep and bear arms.” Judge Fitzwater’s recourse to contemporaneous dictionaries shows a primary interest in the original *understanding* of constitutional text, rather than the subjective intent of the drafters. *See Jones*, 122 F. Supp. 2d at 719; *see also id.* (“The court determines the Framers’ intent from the unambiguous language of the Twelfth Amendment.”). In any event, there is precious little evidence going to any more specific intent that the drafters might have had in mind.

49. *Jones*, 122 F. Supp. 2d at 719.

50. *Id.* (quoting RICHARD BURN & JOHN BURN, LAW DICTIONARY (1792) (emphasis added)). The Burns’ dictionary was published, of course, more than a decade before the Twelfth Amendment was written, though there is no reason to believe that there was a particular linguistic dynamism concerning “inhabitant” that makes it deficient as a source.

51. *Id.* (quoting Charles Wood, *Losing Control of America’s Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 478 (1999)).

52. *Id.*

53. *Id.* (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

54. *Id.*

55. *Id.* at 720.

state as a Member of Congress for six terms.”<sup>56</sup> All of these observations are true, of course, but it is not remotely clear what they have to do with establishing current habitation. Mr. Levinson was born, raised, and educated in North Carolina, and he hopes that he is even now a fine representative of the Tarheel State, but he could not, presumably, plausibly claim to be a present “inhabitant” of that state.<sup>57</sup> More relevant, perhaps, is Cheney’s declaration in late July, 2000, that he intended to return to Wyoming; he “registered to vote there, requested withdrawal of his Texas voter registration, voted in Wyoming in two elections, obtained a Wyoming driver’s license and sold his Texas house.”<sup>58</sup> Upon his designation as the nominee for the Vice Presidency by the Republican Party, he informed the Secret Service that his primary residence was a home he owned in Jackson Hole, Wyoming, and he “also requested that the United States Postal Service rescind a prior order on file in Teton County, Wyoming to forward mail to Dallas, Texas.”<sup>59</sup> Left unmentioned in the opinion was the fact that Cheney and his wife had, according to *The Washington Post*, purchased in January, 2000, a \$1.35 million home in McLean, Virginia.<sup>60</sup> Indeed, when asked to “[i]dentify all real property in which [Cheney] own[ed] an interest,” Cheney replied that he held “interests in a home in Jackson Hole, Wyoming; a house in Highland Park, Texas; a townhouse in McLean, Virginia; and an undeveloped lot in McLean, Virginia.”<sup>61</sup> He was not asked, and therefore did not have to answer, how many nights he had actually spent in his Wyoming “home,” and it is clear that as of November 29, 2000, he had not been successful in selling his Highland Park home.

The blunt fact is that nothing supported Cheney’s assertion that Wyoming was now to be his “primary residence” other than his statement on July 21, 2000, “declar[ing] his intention to return to his home state of Wyoming.”<sup>62</sup> Although Mr. Young is inclined to be a bit more generous in his assessment of Mr. Cheney’s sincerity than is Mr. Levinson,<sup>63</sup> the timing of Cheney’s statement does implicate one

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56. *Id.*

57. Similarly, Mr. Young admits that he hung on to his Texas driver’s license in law school, probably longer than he was legally entitled to do so, mostly because he did not want to admit the fact that he had become an “inhabitant” of Massachusetts.

58. *Jones*, 122 F. Supp. 2d at 720.

59. *Id.*

60. *Names & Faces*, WASH. POST, Sept. 16, 2000, at C3 (referring to the Cheney’s having “knocked down the existing house and filed plans for the construction of a big-time mansion”).

61. Cheney’s Response to Interrogatories, *supra* note 36, at 7. The “undeveloped lot,” presumably, is the acreage on which the “big-time mansion,” *Names & Faces*, *supra* note 60, at C3, is to be built. In the meantime, the Cheney’s could fall back on the “townhouse.”

62. Cheney’s Response to Interrogatories, *supra* note 36, at 3.

63. Mr. Levinson would bet his ranch, if he had one, that Dick Cheney had, at the time of the statement, no intention of “return[ing] to his home state of Wyoming” other

of the central concerns of domicile and residence requirements; that is, to minimize incentives for opportunistic behavior.<sup>64</sup> Whether or not Cheney's resumption of voting, driver registration, and mail delivery in Wyoming comported with a long-term intention to return to his old haunts someday, the fact that these actions were taken immediately surrounding his addition to the Republican ticket strongly suggest an immediate motivation to comply with the formal requirements of the Twelfth Amendment. It seems at least doubtful whether such behavior would be sufficient to allow Mr. Cheney to avail himself of the benefits of Wyoming law for purposes of taxation or family law—issues which also turn on concepts of “domicile.”

It is not at all clear, however, that “domicile” is really the right test. Domicile, after all, is generally a unitary concept; that is, the common law rule holds that “a person must have one domicile, and can have only one.”<sup>65</sup> The 1792 Burns dictionary upon which Judge Fitzwater relied, on the other hand, seems to contemplate multiple places of “inhabitation.”<sup>66</sup> That dictionary clearly seems to establish Cheney as an inhabitant of Texas insofar as he “dwell[s] in a house there,” yet it also includes “those who occupy lands within such town

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than to enjoy respites from his busy cosmopolitan life in the Washington Beltway. Once again, this might simply manifest a difference in our two basic characters—Mr. Young is much less a devotee of what has been labeled the “hermeneutics of suspicion” than is Mr. Levinson—or, alas, it might be just another manifestation of the fact that Mr. Young is a Republican and Mr. Levinson a Democrat and that it is frustratingly impossible, at least when discussing the events of the 2000 election, to reach consensus on the most basic facts, including the good faith of Richard Cheney's declaration of where he intended to go upon leaving Texas. Mr. Levinson also notes that *The New York Times* described Cheney as occupying his McLean “home” when he was rushed to the hospital upon suffering a mild heart attack on November 22, 2000. Lawrence K. Altman, *The Doctor's World: In This Case, the Patient Had a Secret Service Escort*, N.Y. TIMES, Dec. 5, 2000, at F1 (“Mr. Cheney asked Secret Service agents at his home in McLean, Va., to drive him to the emergency room . . .”). Mr. Young would point out that it seems unlikely, under the circumstances, that anyone from the *Times* actually asked Cheney whether he would confirm this characterization of his residence as he was being rushed to the hospital.

64. See, e.g., *Texas v. Florida*, 306 U.S. 398, 426 (1939) (holding that a wealthy man “could not elect to make his home in one place in point of interest and attachment and for the general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation”); *Hagan v. Hardwick*, 624 P.2d 26, 27 (N.M. 1981) (“The purpose of requiring domicile within the state for a specified period of time as a jurisdictional prerequisite to obtaining a divorce is ‘to prevent divorce-minded couples from shopping for favorable residence requirements.’”). Such requirements may serve other governmental interests as well, such as the need to avoid interjurisdictional conflicts or to further specific state regulatory interests. A state may use a unitary concept like domicile, for example, to ensure that only one jurisdiction will assert authority over a divorce proceeding, and that jurisdiction will in fact be the state with substantive interests in regulating related issues such as disposition of the family's property or custody of the children. See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975). These concerns, however, seem to have no direct analog in the context of presidential and vice-presidential elections.

65. *Texas v. Florida*, 306 U.S. at 429 (Frankfurter, J., dissenting); see also *id.* at 427 (majority opinion) (stating that a person's “preeminent headquarters . . . is the essence of technical domicile”).

66. BURN & BURN, *supra* note 50, at 719.

or parish, although they be dwelling elsewhere.”<sup>67</sup> Many persons today have residences in more than one state and, therefore, would seem to be able to claim the status of “inhabitant” of multiple states. It may be that in law one can “inhabit” only one state, just as, in law, one can be a domiciliary of only one state, but that is surely not an analytic truth. Indeed, Dick Cheney might well be regarded, at the time of his election, as an inhabitant of *three* states: Texas, Wyoming, and Virginia.

Webster, writing a full quarter-century after the framing of the Twelfth Amendment (and four decades after the original use of the relevant language in Article II), requires that one “dwells or resides *permanently* in a place or . . . has a *fixed* residence . . .”<sup>68</sup> He was obviously writing in a far different world, vastly removed from the sophisticated, multistate or, indeed, multinational, one in which many of us find ourselves, where the notions of “permanence” or “fixity” are fodder for deconstructive analysis.<sup>69</sup> A person with homes in Wyoming, Virginia, Texas (and, now, the District of Columbia, even if the last one is provided by the United States taxpayers) can as easily be said to be “inhabiting” *all* of these places or *none* of them. (The latter is what is meant by referring to a person as a “rootless cosmopolitan.”) There is certainly no particular reason to pick out only one of these states or places and say that one is an inhabitant only of *that* place and no other.

One might, of course, accept our analysis in its entirety and say that the Twelfth Amendment is best interpreted as requiring that at least one candidate receiving one’s votes be an inhabitant of a state other than the elector’s own, *even if that candidate also inhabits the elector’s (and the other recipient’s) state*. Thus, it could be argued, Texas electors can vote for both Bush and Cheney because Cheney, though an inhabitant of Texas, also inhabits at least one additional state. Or, of course, one might read the Habitation Clause more restrictively and say that the vote is invalid if the second candidate, though an inhabitant of another state as well, also inhabits the first candidate’s (and the elector’s) state.

The text of the Amendment itself seems marginally to favor the more restrictive reading. It says, after all, that the elector’s choice of at least one candidate “shall *not* be an inhabitant of the same state with themselves”;<sup>70</sup> if the drafters had intended to be more permissive, they could have said that one candidate “*must* be an inhabitant

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67. *Id.*

68. *Jones v. Bush*, 122 F. Supp. 2d 713, 719 (N.D. Tex. 2000) (emphasis added).

69. *See, e.g., Texas v. Florida*, 306 U.S. at 429 (Frankfurter, J., dissenting) (“In the setting of modern circumstances, the inflexible doctrine of domicile—one man, one home—is in danger of becoming a social anachronism.”).

70. U.S. CONST. amend. XII (emphasis added).

of a state other than the elector's own."

Surely neither reading is absolutely compelled, and an analysis of the Amendment's underlying purpose (to the extent that we can discern it at all) mostly serves to confirm that the question is very close. If the purpose was to prevent single-state dominance of the Executive, then one might require that electors vote for at least one candidate with no significant ties to their own state. If, on the other hand, the idea is to ensure that at least one vote is cast for a "national character,"<sup>71</sup> then "rootless cosmopolitans" like Dick Cheney, with strong ties to several different states, might be exactly what the Framers were looking for. As we have said, we purport to offer no definitive resolution to this question here, in part because the two of us might well disagree as to that resolution. The important point—upon which we *do* agree—is that the question is a serious and close one.

There certainly appears to be a plausible basis not only for the lawsuit that was filed, but also for an objection by members of Congress when the electoral votes were counted on January 5, 2001, and Texas was announced as having cast its votes for both Bush and Cheney. There was, obviously, no such challenge, and, as noted earlier, there was almost no attention paid to the lawsuit. We now turn to some explanations for this "Dangerfieldian" lack of respect.

#### *B. Is the Twelfth Amendment Too Technical?*

If we assume that the argument for a Twelfth Amendment violation is at least *plausible*—and the rest of this Part won't be very interesting if we don't—then what explains the lack of public outcry over Mr. Cheney's candidacy and election to the Vice Presidency? Consider, for example, the likely reaction if the Texas electors had been chosen pursuant to a state law providing that "[n]o candidate for the office of presidential elector shall be a member of the African-American race." Would we treat a claim that the Texas electors should be thrown out under the Equal Protection Clause the way we have treated the Twelfth Amendment argument? We doubt it. An obvious reason for this is that almost everyone—including most lawyers—believes that equal protection concerns are simply more impor-

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71. Madison argued in Federalist 10, for example, that one advantage of the extended republic would be to encourage voters "to centre on men who possess the most attractive merit and the most *diffusive and established characters*." THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). According to Garry Wills, "Madison is saying that escape from local prejudice will allow men to vote for those whose reputation is not only established but reaches out across larger stretches of the extended republic." GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 232 (2d ed. 2001). Gordon Wood describes the Federalist theory of representation in a large republic as being designed to filter out people of narrow parochial interests. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 506-18 (1969).

tant than Twelfth Amendment concerns. Persons who evoke the Fourteenth Amendment are *serious*; advocates of the relevance of the Twelfth Amendment, instead, are merely *cranks*.

Why that would be so presents a series of questions that we think should interest anyone interested in the practices of constitutional argumentation, including, of course, the practices by which some arguments are taken seriously while others are subject to disdainful dismissal. There are certainly some plausible reasons to treat all constitutional violations as equally worthy of concern.<sup>72</sup> One of the more awkward realities of the Constitution is that it contains no listing of priorities—no set of rules providing that, for example, one constitutional provision should trump another in the event of a conflict.<sup>73</sup> One might take the decision to include a particular provision in the Constitution itself, rather than simply in a statute, as evidence that the People view the provision as having surpassing—and enduring—importance.<sup>74</sup> And powerful rule-of-law concerns militate against the proposition that state actors ought to be able to ignore some parts of the Constitution on the ground that those parts really aren't all that important. The very point of a written constitution, one might think, is to put such arguments off limits to the governmental officials who are bound by the document's requirements. Indeed, as Marshall

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72. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 267 (1992) (“[W]e should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced.”).

73. The closest the Constitution even arguably comes to that is the relationship between the Reconstruction Amendments and certain constitutional guarantees of state autonomy, such as the Eleventh Amendment. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (recognizing Congress's authority to abrogate the States' Eleventh Amendment immunity pursuant to Congress's power under Section Five of the Fourteenth Amendment). Some scholars have suggested that the Fourteenth Amendment simply makes individual rights more “important” than federalism. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 544 (1985). But the effect of the Fourteenth Amendment on preexisting federalism guarantees is usually explained in terms of its ratifiers' intent to *amend* prior constitutional provisions. See *Fitzpatrick*, 427 U.S. at 456 (noting that the Fourteenth Amendment's provisions “themselves embody significant limitations on state authority”). No one has suggested, to our knowledge, that subsequent constitutional provisions have *amended* the Twelfth Amendment. And although we will suggest later on that the Twelfth Amendment is in fact a federalism provision, see *infra* text accompanying notes 111-14, it is one that limits *state* power. It would thus be strange to say that the Twelfth Amendment is one of the constitutional provisions subordinated by the Reconstruction Amendments.

74. But see Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 920-21 (1986) (observing that certain pillars of our federal system, such as the rule of *Murdock v. Memphis*, 87 U.S. 590 (1874) (establishing state court control over the substantive content of state law), may be statutory rather than constitutional in nature). One might similarly argue that certain federal statutory rights—such as the right to equal treatment by private actors regardless of race or gender enshrined in the 1964 Civil Rights Act—have become more central to the lives of the citizenry than many constitutional rights. Nonetheless, no one would suggest that these statutes could actually supersede constitutional text.

thundered in *Marbury v. Madison*, it is precisely because the limits established by the Constitution “not be mistaken, or forgotten, [that] the constitution is written.”<sup>75</sup> And, he asks, “[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”<sup>76</sup>

And yet, as we all know, constitutional provisions are like the animals in George Orwell’s barnyard: some are considerably more equal than others.<sup>77</sup> Those deemed legal adepts view constitutional violations as serious in some areas, less so in others.<sup>78</sup> Or, perhaps more to the point, these adepts interpret possibly embarrassing provisions in ways that “neutralize” their potentially discomforting impact.<sup>79</sup> So what is it about the Twelfth Amendment that makes it a “second class” constitutional provision?

One possibility is that it is too technical. We are used to speaking, after all, of the “grand generalities” of the Constitution—ringing phrases like “equal protection of the laws” or “due process of law.” Perhaps our most closely cherished constitutional restrictions on government—the free speech, press, and religion clauses of the First Amendment—are combined in a single textual sentence. Indeed, some of the other basic rights that would surely figure on most citi-

75. 5 U.S. (1 Cranch) 137, 176 (1803).

76. *Id.*

77. See GEORGE ORWELL, *ANIMAL FARM* (Martin Secker & Warburg Ltd. 1945).

78. We acknowledge a connection here to claims that, in many areas, our legal culture has been overlooking blatant constitutional violations for years. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the modern administrative state violates any number of basic structural restraints on government). The response to such claims—under the delegation doctrine, for example—has typically been to construe the relevant constitutional constraints in such a way as to give the government broad latitude. See, e.g., *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457 (2001). Whether or not such interpretations are persuasive, we see two important differences from the Twelfth Amendment situation. First, constitutional arguments such as the nondelegation challenge to the administrative state are often acknowledged to be *serious*, even if most would agree that it is too late to do anything about them. *But see id.* at 487 (Stevens, J., concurring in part and in the judgment) (suggesting that the nondelegation concern should be frankly jettisoned by the courts). Second, we think there is a difference between a willingness to interpret constitutional restrictions in a strained way in order to reject a constitutional challenge, on the one hand, and a refusal, on the other, to engage in such interpretation in the first place on the ground that the constitutional challenge simply isn’t very important. We think it is more accurate to characterize the *general* reaction to the Twelfth Amendment problem arising out of Mr. Cheney’s candidacy in the latter way, even though the courts and scholars that have actually been willing to focus on the issue have generally taken the former approach. The interesting problem, as we see it, is precisely that so few courts and commentators have bothered to take the problem seriously at all.

79. Perhaps the clearest example of this phenomenon is the “neutralization” of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000).

zens' "top ten" list—the right to privacy,<sup>80</sup> "one man, one vote,"<sup>81</sup> the right not to be convicted of a crime absent proof of guilt beyond a reasonable doubt<sup>82</sup>—take up no textual space at all. The phrases of the Twelfth Amendment, on the other hand, hardly roll trippingly off the tongue. It took nearly a full page of this Essay to reproduce the Amendment in its entirety, and in all that text there are no memorable phrases. One can hardly imagine schoolchildren reciting how "[t]he Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves."<sup>83</sup>

We suspect that, while it's easier for a catchy phrase like "free speech" to stick in the public memory, the underlying problem is not really one of linguistic structure at all. Rather, the trouble goes to what the different provisions purport to *do*. The provisions of the Bill of Rights, for example, articulate basic individual liberties. The Twelfth Amendment, by contrast, offers a laundry list of technicalities for administering presidential and vice-presidential elections. It is tempting to assume that it has almost no connection with realizing the inspiring purposes of the Constitution outlined in the Preamble and, for many analysts, instantiated in the Bill of Rights. This is mistaken.

*Both* the Twelfth Amendment and the First Amendment, for example, are ultimately designed to safeguard liberty, but there are obvious differences in the ways that the two provisions go about it. The First Amendment identifies a core freedom and bans government interference directly, while the Twelfth Amendment contributes to a complex scheme of institutional checks and balances which, by indirection, seek to establish the conditions for liberty. It is not surprising that the former is easier to comprehend, and therefore to feel strongly about. The interesting thing about this reaction, however, is that it is diametrically opposed to the strategy employed by the Framers. The Federalists envisioned a structure of separated powers, checks and balances, and federalism—a complex web of political and institutional checks—with virtually no explicit protection for specific individual rights.<sup>84</sup> Get the structure right, the Federalists thought, and you foreclose the *ability* of government to behave in a tyrannical way. The Framers' central concern was thus, as Madison

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80. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

81. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

82. See *In re Winship*, 397 U.S. 358 (1970).

83. U.S. CONST. amend. XII.

84. See generally Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) [hereinafter Young, *Two Cheers*] (sketching the political theory of Federalist 10 and 51); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) (explaining how the institutional safeguards of federalism protect individual liberty).

explained in Federalist No. 51, to “contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>85</sup> Thus the Framers devised a “policy of supplying, by opposite and rival interests, the defect of better motives,” that is, a government “where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.”<sup>86</sup> Direct limitations on the powers of government, by contrast, stood as mere “parchment barriers” to usurpation.<sup>87</sup>

The Twelfth Amendment is just the sort of provision one would expect in a Constitution predicated on institutional and political checks. The Electoral College, which the Amendment reaffirms, was designed as a filtering mechanism to moderate the influence of popular democracy in the selection of the Chief Executive. The College, as well as the dispute resolution procedures set forth in the Amendment for close elections, preserved a role for the States in the selection of the Chief Executive.<sup>88</sup> And the Habitation Clause’s prohibition on electors voting for two persons from their same state most plausibly seems designed not only to make it substantially more difficult for any single state to dominate the Executive Branch, but also to forestall the constitutional crises that might arise were the Electoral College unable to make a decisive choice.<sup>89</sup> Each of these aspects of the Amendment—like the Constitution’s other structural safeguards of federalism and separation of powers—protects freedom by indirection; that is, by creating the conditions for limited government rather than prescribing particular things that government may not do.

To be sure, the Twelfth Amendment’s contribution to the Constitution’s structure of institutional checks and balances is less familiar than that made by other provisions, such as Article V’s guarantee of equal state suffrage in the Senate or Article I’s provisions governing how a bill becomes a law. And we will ask in Part III.C., below, whether the particular structural concerns addressed by the Amendment’s “different states” requirement have any continuing relevance today. Our point is simply that the “technical” nature of the “different state” requirement is quite consistent with the Framers’ more general emphasis on protecting liberty through institu-

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85. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

86. *Id.* at 322.

87. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

88. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 557 (1954).

89. *Id.*

tional mechanisms rather than explicit recognition of particular rights.

Does the widespread lack of concern over Dick Cheney's potential unconstitutionality signal a more general shift away from the Framers' structural vision? It's hard to say for sure, of course, but there is plenty other evidence of the ascendancy in recent decades of "rights talk" over "structure talk" in much of our constitutional discourse. The leading casebooks on constitutional law, for example, devote dramatically more pages to the Constitution's individual rights provisions than they do to constitutional structure,<sup>90</sup> notwithstanding the resurgence of aggressive judicial review on the structure side in recent years. The Supreme Court's record is more mixed, of course; the Court has been willing to enforce the "technical" procedural rules for Congressional lawmaking with some vigor,<sup>91</sup> and in recent years it moved to reinvigorate federalism-based limitations on the national legislative power as well.<sup>92</sup> The vehement criticism of the latter set of decisions from most academics, especially those identified as political liberals reflects, among other things, the continuing domination in the legal academy of the belief that constitutional law, especially if defined in terms of judicial handiwork, ought primarily to be about the direct protection of individual rights rather than the maintenance of particular governmental structures.<sup>93</sup>

It is not our brief to commend or criticize this view today (even if the two of us could agree on the issue, which seems unlikely).<sup>94</sup> We

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90. For example, the STONE ET AL. casebook, which is said to be the most widely used casebook in American law schools, devotes approximately 1,200 pages to individual rights, compared to almost 500 pages on structure. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3d ed. 1996). Nor is the apparent runner-up, the Gunther & Sullivan casebook, very different. See GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997) (Part III, "Individual Rights," is 838 pages long; Part II, "The Structure of Government," takes up only 327 pages).

91. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (striking down the line-item veto as contrary to the lawmaking procedure set out in Article I); *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto for similar reasons).

92. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as outside Congress's authority under the Commerce Clause and Section Five of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act as outside the commerce power).

93. For a classic statement of this theme, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) (urging that the Court abandon judicial review of federalism and separation of powers issues and conserve its political capital for enforcing guarantees of individual rights).

94. Mr. Levinson's fulminations against the Court's recent federalism jurisprudence are primarily confined to his contributions to an Internet discussion group among professors of constitutional law. It may be worth noting, incidentally, that although Mr. Young applauds *Lopez*, see Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 2, both Mr. Levinson and Mr. Young agree that the Court's current set of doctrines concerning federal jurisdiction, the reach of the Commerce Clause, conditional federal spending, and preemption makes little sense if one sees them as at-

do, however, want to make one observation about the relationship between this shift in the emphasis of constitutional law and the institution of judicial review. The Constitution's structural provisions are primarily directed toward establishing a system that allows different parts of the political branches to check one another. The aim, as Madison said, is to "oblige [the government] to control itself."<sup>95</sup> Judicial review in this context focuses on whether the procedural and structural mechanisms built into the framework have been obeyed—that is, whether a legislative enactment has been presented to the President, or whether candidate Cheney is really an inhabitant of Wyoming. And while the instances of judicial review in this context tend to be big, important cases, they happen relatively infrequently. The structure is designed, after all, to be generally self-enforcing.<sup>96</sup>

Structural judicial review generally does not put particular policies off limits to political actors. Instead, it decides *which* political actors can pursue a particular policy, or requires those actors to follow certain procedures. As Judge Wilkinson has observed of federalism litigation:

[O]ur role . . . is not as substantive adjudicators, but as structural referees. The due process decisions of the *Lochner* and Warren Court eras, as well as the individual rights rulings of the latter, attempted to remove the subject matter of those cases from political debate altogether. Those decisions prevented the people from seeking resolutions of their differences through their popularly elected representatives—federal and state. By contrast, the present jurisprudence of federalism is purely allocative. . . . This jurisprudence removes no substantive decision from the stage of political debate.<sup>97</sup>

Judicial review on ultimate questions of rights strikes us as somewhat different. The doctrinal formulations in many of these areas explicitly call for an evaluation of the government's interest in pursuing a particular measure in comparison with the impact of the measure on individual liberty.<sup>98</sup> And decisions under the Constitution's rights provisions frequently put particular policies off limits to government, no matter which institutions pursue them or what pro-

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tempting genuinely to create a coherent vision of the role of states in the modern United States. See Young, *Two Cheers*, *supra* note 84.

95. THE FEDERALIST NO. 51, *supra* note 85, at 322.

96. See Young, *Two Cheers*, *supra* note 84.

97. *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 895 (4th Cir. 1999) (en banc) (Wilkinson, J., concurring), *aff'd*, *United States v. Morrison*, 529 U.S. 598 (2000).

98. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (evaluating what state interests "count" in restricting abortion and which restrictions impose an "undue burden" on the abortion right); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that the state had no "legitimate" interest in restricting enactment of pro-gay civil rights measures at the local level).

cedures are employed.<sup>99</sup> Rights decisions thus set the federal courts up as the final arbiters of government policy in a way that structural decisions generally do not.

It would be easy, of course, to overstate the contrast we have just described. Certainly some forms of structural review—most obviously, efforts to enforce the nondelegation doctrine or the limits of the Commerce Clause—may require the courts to pass directly on particular governmental policies.<sup>100</sup> And not all claims of individual right have the effect of putting a particular government policy off-limits. Equal protection claims, for instance, typically give the government a choice between imposing a particular restriction on all similarly situated persons or not imposing the restriction at all. We nonetheless think it is fair to suggest that structural review—especially under the more “technical” of the Constitution’s structural provisions—takes place at a further remove from the policy choices underlying a governmental act than is the case in litigation focused on individual rights. Nothing in the arguments we have sketched concerning Mr. Cheney, for example, legitimates considering the sort of policies he would pursue once he assumed office.

We thus think modern constitutional law’s preference for rights over structure as the primary safeguard of liberty entails a view about the relative importance of judicial review in the overall scheme. Courts no longer sit merely to enforce governmental rules of the road that, in turn, require governmental institutions to control

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99. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (striking down federal statute barring flag burning that was passed in an effort to respond to constitutional concerns expressed in a prior court decision); cf. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1594 (2000) (observing that most constitutional review takes the form of “invalidation norms” that act as absolute prohibitions on certain sorts of government action). Even in these areas, however, judicial invalidation merely states which actors can pursue a policy—not which policies may be pursued. In *Loving v. United States*, 517 U.S. 748 (1996), for example, the Court entertained a nondelegation challenge to the military death penalty. The question was whether Congress must specify the “aggravating factors” upon which a court martial could sentence a convicted murderer to death or whether Congress could delegate that task to the President; importantly, however, the case involved no inquiry as to what sort of factors were permissible as a matter of substantive constitutional law. Similarly, the Court’s invalidation of the federal Gun Free School Zones Act in *United States v. Lopez*, 514 U.S. 549 (1995), did not prevent the states from forbidding gun possession at school, see *id.* at 581 (Kennedy, J., concurring) (observing that “over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds”), or even prevent Congress from regulating the same conduct through other means, see, e.g., Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) (discussing how Congress could use the Spending Power to evade the limits imposed by the Court in *Lopez*).

100. See, e.g., *Lopez*, 514 U.S. at 607 (Souter, J., dissenting) (likening Commerce Clause review to the substantive policy judgments involved in *Lochner*-era economic substantive due process cases); *Mistretta v. United States*, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (suggesting that the nondelegation doctrine is not enforceable by courts because enforcement would involve the courts in policy judgments).

*each other*; rather, courts seek to control the government directly through judicial enforcement of individual rights. If this is right, then judicial enforcement of provisions like the Habitation Clause would be less an example of judicial activism than a look back toward a theory of government in which such activism is less central to the constitutional scheme.<sup>101</sup> And, of course, one need not speak only of judicial enforcement; even if, as will be discussed below, one thinks that courts have little useful role to play in adjudicating electoral college disputes, that still leaves Congress with its own duties of constitutional fidelity, including adherence to the Habitation Clause.

### C. *Does the Habitation Clause Serve Any Worthwhile Values?*

Even if we are not willing to junk the idea of structural protections altogether, one might argue that certain structural provisions—like the Habitation Clause—no longer protect, or guard against, anything particularly significant. The Clause is, if not a “stupid” part of the Constitution, a hopelessly irrelevant one in today’s cosmopolitan world, and only a fanatic would want it taken seriously today. Dick Cheney (and Judge Fitzwater) demonstrated how to neutralize any practical import it might have, and, from this perspective, they might be performing a public service in having done so. One would think, after all, that the response of the mass public to the invalidation of Texas’s vote on Habitation Clause grounds would have been outraged disbelief, if not indeed rioting in the streets.<sup>102</sup> People care about who they want for President (and Vice President),<sup>103</sup> while we suspect that almost no one today believes that the Habitation Clause serves any important value.

This sort of obsolescence is, as we have already suggested, scarcely unprecedented in our constitutional history. The Constitution, for example, seems quite clearly to prohibit any and all “impairments” of contract by states.<sup>104</sup> This textual detail—or the rich historical evidence that the Framers indeed intended that states be

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101. Of course, “judicial activism” is itself notoriously hard to define. *See generally* William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 COLO. L. REV. (forthcoming 2002); Ernest A. Young, *Activism, Conservatism, and the Federalist Revival*, 73 COLO. L. REV. (forthcoming 2002).

102. Mr. Young is, in general, less worried about the likelihood of rioting in the streets or other forms of political violence than is Mr. Levinson. As we have suggested earlier, the context of the 2000 election is quite different from that of 1800, when state officials threatened to use force to ensure the acknowledgment of Thomas Jefferson as President. *See* Freeman, *supra* note 7, at 1963. *But cf.* Bob Herbert, *In America: Riots, Then and Now*, N.Y. TIMES, Apr. 19, 2001, at A25 (discussing recent riots in Cincinnati).

103. As a matter of fact, one might omit the parenthetical, given that “there is little evidence to suggest that vice presidents add greatly to or detract severely from the popularity of presidential candidates with the voters.” NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS* 156 (10th ed. 1988).

104. U.S. CONST. art. I, § 10, cl. 1.

strongly restrained in their ability to pass debtor-relief legislation—proved unavailing in the *Blaisdell* case,<sup>105</sup> where Chief Justice Charles Evans Hughes, for a five-Justice majority, upheld the so-called Minnesota mortgage moratorium that was a conceded impairment of contract. The reasoning seemed, at the end of the day, prudential: the United States Supreme Court simply could not afford, at the height of the Great Depression, to treat the Contract Clause as if it really meant what a dictionary might suggest it said. (“What part of ‘no’ do you not understand?,” as we might put it today, in a decidedly different context.) And so the Court offered a more flexible reading of the Contract Clause that allowed Minnesota’s action.

One might object that *Blaisdell* hardly found the economic values of commercial stability embodied in the Contract Clause *irrelevant*; rather, the Court in effect found that the Framers were profoundly mistaken as to the relationship between prohibiting all debt relief and preserving economic stability.<sup>106</sup> One might make a similar argument about the Second Amendment: The problem is hardly that private gun ownership is *irrelevant* these days—just that it’s too dangerous for many of us to condone, constitutionally protected or not.<sup>107</sup> Both the relevance and dangerousness arguments share a common feature, however. They both rely on an argument that the constitutional value is profoundly out of step with modern concerns.

Do we really think the Habitation Clause is similarly out of step with the times? We have suggested that the Clause was designed to serve two important functions—preventing single-state dominance of the Electoral College and helping to ensure that the College will be able to make a decisive choice. These concerns hardly seem relics of a hazy past. Concerns about dominance of a particular issue by a single state continue to crop up in our discourse. We sometimes worry, for instance, that elimination of the Electoral College would lead to large-state dominance of presidential elections;<sup>108</sup> that Delaware has

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105. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

106. The Court in *Blaisdell* stated that:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved [with regard to debt relief], and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

*Id.* at 442.

107. See, e.g., Rakove, *supra* note 48, at 103.

108. See, e.g., Ken Gormley, *Should the Electoral College Stay or Go? It Has Served Us Well by Giving All States a Voice and Should Be Retained*, THE BUFFALO NEWS, Nov. 19, 2000, at 1H (arguing that abolition of the Electoral College would lead to dominance by large states).

achieved an unhealthy dominance of corporate law;<sup>109</sup> or that California cases unfairly dominate the Ninth Circuit Court of Appeals.<sup>110</sup> And in the context of the 2000 election itself, it is hard to describe as completely unreasonable the worry that electing both a President and a Vice President from the same oil-producing state would lead to untoward influences on energy policy. So although the risk that a single state might dominate all aspects of our national life seems remote today, the sorts of concerns embodied in the Habitation Clause seem to have some continuing currency.

Likewise with the concern for decisive electoral choice. Does anyone want to go through the month of November 2000 again, regardless of how one feels about the outcome? We didn't think so. To the extent that the Habitation Clause is designed to prevent similar sorts of indecision—albeit at a later point in the process—it surely promotes values that continue to be relevant today.

Given the continuing significance of these concerns, we suspect that lack of interest in the Habitation Clause stems from a view that the Clause itself does relatively little, under current conditions, to prevent single-state dominance or to ensure decisive choice. The reason may be a general decline, or at least *perceived* decline, in the significance of loyalties to one's home state. It's not, in other words, that we don't worry about large-state hegemony; it's just that we don't expect the election of public officials who happened to live in a particular state to bring about that result. Similarly, we don't tend to worry about the "favorite son" phenomenon posing an obstacle to decisive electoral choice in the same way that the Framers did two centuries ago. More generally, we tend to view a figure like Dick Cheney at the beginning of the twenty-first century as a "citizen of the Nation" rather than a particular state; we worry much more about what he's for than where he's from.

If this hypothesis about a decline in home-state loyalties is correct—it would be awfully hard to test empirically in a meaningful way—then it might have interesting implications for broader debates in constitutional law. In particular, Mark Tushnet has suggested that the Cheney episode calls into question the value of federalism, which the Supreme Court has been busily protecting in recent years.<sup>111</sup> If people don't care about the states enough to favor them

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109. *E.g.*, Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 841-52 (1995) (suggesting that Delaware's dominance of corporate law may be unhealthy).

110. *E.g.*, Book Note, *Will a Split in Time Save the Ninth?*, 104 HARV. L. REV. 794, 799 n.21 (1991) (noting recurring concerns about California's dominance of Ninth Circuit case law).

111. See E-mail from Mark Tushnet, Professor of Constitutional Law, Georgetown University Law Center, to Sanford Levinson (Oct. 7, 2001) (on file with authors) (confirming position taken in earlier correspondence).

when elected to national office, Professor Tushnet suggests, why should the Court care about the states either? If we are all “citizens of the nation,” why impose federalism limits on national power?<sup>112</sup>

Interestingly enough, however, the argument can also run the other way. One might answer Professor Tushnet by insisting that the states exist not for their own sake, but rather to protect individual liberty by standing as an “intermediary body” between the individual and the national government.<sup>113</sup> On this view, we need the states to fulfill their institutional role whether people feel, as an individual matter, strong loyalty to them or not. At that point, a judgment that federal officials do not generally feel loyalty to their home states would serve primarily to discredit reliance on the “political safeguards of federalism,” which generally posits that the loyalty of federal representatives to their home states makes *judicial* protection of the states’ interests unnecessary.<sup>114</sup>

It might be, however, that lack of interest in the Habitation Clause stems from a less basic source. That is, one might accept that state loyalties continue to play a role in national politics, and yet still believe that there are sufficient *political* incentives to avoid the same-state tickets that the Habitation Clause seeks to prevent. Mr. Bush’s selection of Mr. Cheney, after all, raised some eyebrows by seemingly ignoring the conventional wisdom that a running mate should be chosen primarily on his ability to deliver an important state other than that of the presidential nominee.<sup>115</sup> If such political incentives tend, by and large, to check same-state candidacies, then one might not worry so much if those incentives were overcome in particular cases.

In any event, we seek only to raise these questions—not to resolve them. It ought to be clear, however, that the Twelfth Amendment and its nonenforcement raise issues that sweep much more broadly than the controversy over Dick Cheney’s candidacy. The episode requires us to ask ourselves what we actually value in the Constitution, and why. The answers to those questions are likely to perva-

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112. One might call this the “Tinkerbell” argument. That is, if the states are fading away—like Tinkerbell—because no one believes in them anymore, then the protection of federalism is hardly a worthwhile concern for the federal courts.

113. See, e.g., Baker & Young, *supra* note 84.

114. See, e.g., Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Wechsler, *supra* note 88, at 543.

115. See David Von Drehle, *A Selection That Signals Caution and Confidence: Old Hand, Not a New Direction*, WASH. POST, July 26, 2000, at A12. The article stated, “[i]t’s true that Cheney makes little sense as a running mate according to most of the conventional ways of sizing up the pick. His political base is in Wyoming, whose measly three electoral votes are dependably Republican already. . . . [Bush] said as much in introducing his running mate yesterday in Austin. ‘I didn’t pick Dick Cheney because of Wyoming’s three electoral votes.’” *Id.*

sively shape our views across the entire universe of constitutional questions.

IV. TEXT, PRUDENCE, AND THE ONTOLOGY OF THE “POLITICAL QUESTION”; OR, WHY, EXACTLY, IS THE SUPREME COURT BETTER SUITED THAN CONGRESS TO PICK PRESIDENTS?<sup>116</sup>

As a matter of fact, both of us became interested in the Habitation Clause issue last summer, and we resolved then to write something about it together. Needless to say, we did not act on that resolution because, inevitably, other commitments took precedence. Our invitation to this symposium then gave us the perfect occasion for writing the piece as initially envisioned, and you have just read it. But, of course, what generated this symposium is not the arcana of the Habitation Clause, but, rather, a host of issues raised by the 2000 election, of which Dick Cheney’s habitation was almost literally the least significant. The Twelfth Amendment is scarcely irrelevant to these other issues, and we thus find ourselves going on from our original subject to *three* others presented by the Amendment. First, as suggested by the title to this section, should it be read as a “textually demonstrable commitment” to Congress to resolve any disputes linked with selecting the President or Vice President? Second, assuming that the House of Representatives, instead of the Supreme Court, gets to choose the President, is there anything to be said for the one-state, one-vote rule that structures the choice? That in turn suggests a third question, linked with a different part of the Constitution: is there any reason to believe that the Twelfth Amendment’s dysfunctional features can be successfully amended, or does Article V doom us to a political life permanently lived under its shadow?

A. *Textual Commitment, Manageable Standards, and the “Political Question” Doctrine*

Even the most ardent proponents of judicial review must acknowledge, as a descriptive matter, that not every constitutional controversy is subject to judicial resolution. As Mark Graber is in the process of demonstrating,<sup>117</sup> Alexis de Tocqueville was simply wrong when he suggested that “[t]here is hardly a political question in the

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116. It should be noted that the formulation of Part IV’s question stated in the text is Mr. Levinson’s. There is, of course, a certain tendentiousness to the formulation. Mr. Young would prefer “resolve electoral disputes,” but tenure ought to count for *something*. The difference between the two formulations, of course, illustrates the difficulties presented by trying to develop a “neutral and detached” vocabulary with regard to the events of November and December 2000.

117. See Mark Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville’s Thesis Revisited*, Address before the American Political Science Association, Washington D.C. (Sept. 2000). This is part of a larger work in progress by Graber.

United States that does not sooner or later turn into a judicial one.”<sup>118</sup> The Supreme Court decided relatively little of genuine importance in the first years of the new nation, though, obviously, it grew to play a considerably more significant role in American political life in the twentieth (and now the twenty-first) century. Still, there are a variety of crucial issues about which the Court maintains a more-or-less determined silence insofar as they are deemed “nonjusticiable.” In *Marbury* itself, the Court acknowledged 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.”<sup>119</sup> Likewise, the Court has acknowledged that some political questions are constitutionally dedicated to the legislative branch and similarly nonjusticiable in a federal court.<sup>120</sup>

The obvious “political question” argument in *Bush v. Gore* is exemplified (albeit with the benefit of hindsight) by the famous (or infamous) broadside signed by over 600 legal academics and published in *The New York Times*.<sup>121</sup> That missive accused the Justices of having behaved like a “political body,” not a court, in determining the outcome of the election. The text of the Twelfth Amendment, however, provides a more specific argument against the Court’s decision

118. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer & Max Lerner eds., 1966). A NEXIS search for this quotation between November 8, 2000, and December 31, 2000, found twenty-eight citations. See, e.g., Adam Cohen, *How We Got Here; The Votes Are All In, but the Campaign Has Shifted Into the Courts. Now They Can Tell Us Who Won*, TIME, Nov. 27, 2000, at 48; K.A. Dilday, *The Election; De Tocqueville Saw it Coming*, N.Y. TIMES, Nov. 26, 2000, at 4; Toby Harnden, *Split in Supreme Court Reflects Divided Nation*, THE DAILY TELEGRAPH, Dec. 11, 2000, at 10; *Impasse: Courts Play Critical Role*, THE BOSTON GLOBE, Nov. 17, 2000, at A26; *The Supreme Court Issue, the Nation*, 271 THE NATION 10 (Oct. 9, 2000).

119. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

120. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the Court could not review the constitutionality of procedures employed by the Senate to try a judicial impeachment).

121. Mr. Levinson was a signatory of that letter. Mr. Young (who definitely did *not* sign) is confident that Mr. Levinson’s many other good works, kindness to children, and friendliness to dogs and cats, will spare him from eternal torment on account of that single unfortunate act. Mr. Levinson’s current views about that letter are spelled out in Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 73 (2001). Suffice it to say that what most troubles him about the letter is *not* its accusatory tone with regard to the Supreme Court. But see Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 911 (2001) (taking academics to task for their own appearances of partisanship in reacting to *Bush v. Gore*), but, rather, the last sentence of the letter, in which its signatories professed to base their views on their “dedicat[ion] to the rule of law.” Levinson has significant problems in knowing either precisely what “the rule of law” entails or, even more importantly, precisely why one would necessarily be dedicated to it. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (discussing tension between constitutional and moral norms); see also *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 1, a book predicated on the assumption that mindless admiration for every constitutional norm makes no sense. Needless to say, these latter sentiments are the sort of thing that make Mr. Young need to take a quiet walk around the block.

to decide the case. That Amendment provides a detailed procedure for resolving disputed presidential elections, and nowhere does it mention courts.

In discussing the justiciability of *Bush v. Gore*, it will help to distinguish between a “strong” and a “weak” version of the political question doctrine. The strong version holds that certain challenges to government action simply cannot be heard by the courts, whether or not those challenges have merit. The weak version, on the other hand, stems from Louis Henkin’s assertion that no “political question” doctrine per se exists.<sup>122</sup> In Professor Henkin’s view, most refusals to adjudicate based on “political question” grounds really rest on the conclusion that the substantive provisions of the Constitution have simply not been violated in the given case. The judgment that a claim under a particular provision involves a “political question,” in other words, is more accurately described as a judgment that that provision grants sufficiently broad discretion to the governmental actors involved that no constitutional violation can be made out.<sup>123</sup>

At least until the Court’s recent decision in the *Nixon* case, it would have been hard to find applications of the political question doctrine that could not be explained under the weak theory. Nonetheless, the Supreme Court has insisted—at least as a matter of rhetoric—on a sharp distinction between these two approaches. Justice Stevens, for example, recently wrote that “[i]n invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.”<sup>124</sup> The facts of *Bush v. Gore* provide a ready context for getting at whether this distinction actually holds up.

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122. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).

123. More specifically, Professor Henkin argued that:

The ‘political question’ doctrine . . . is an unnecessary, deceptive packaging of several established doctrines . . . 1. The courts are bound to accept decisions by the political branches within their constitutional authority. 2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any. 3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties. 4. The courts may refuse some (or all) remedies for want of equity. 5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part ‘self-monitoring’ and not the subject of judicial review. (But the only one courts have found is the ‘guarantee clause’ as applied to challenges to state action, and even that interpretation was not inevitable.)

*Id.* at 622-23.

124. *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992) (footnote omitted).

The Court generally traces its doctrinal analysis of “political questions” to *Baker v. Carr*,<sup>125</sup> in which Justice Brennan collected the various factors that determine justiciability. “Prominent on the surface of any case held to involve a political question,” Justice Brennan said, is:

[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.<sup>126</sup>

“Unless one of these formulations is inextricable from the case at bar,” Justice Brennan concluded, “there should be no dismissal for non-justiciability on the ground of a political question’s presence.”<sup>127</sup>

The Court’s shifting emphasis on these various factors can tell us a great deal about the political question doctrine itself. The first factor—textual commitment—has to do with the court’s *authority* to decide the case and, at least as formulated, seems to have no prudential component at all. The second and third criteria—judicially manageable standards and nonjudicial policy determinations—are more prudential in nature but focused firmly on the *Court’s* ability to do a good job deciding the case.<sup>128</sup> The final three criteria, by contrast, are also prudential but directed *outward*, toward the potential effects of a judicial decision in the broader political arena. The need to avoid disrespecting the other branches, to adhere to political decisions already made, and to avoid undermining the government’s ability to speak with one voice—all are directed at the institutional consequences of decision for the Court *vis a vis* other political actors.

Although *Baker’s* catalogue included these outward-looking prudential considerations, its narrow description of them is striking.

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125. 369 U.S. 186 (1962).

126. *Id.* at 217.

127. *Id.*

128. In this sense, these criteria are closely related to many of the Court’s justiciability criteria under the advisory opinion doctrine and more specific doctrines of standing, ripeness, and mootness. These criteria, which tend to insist primarily on concrete factual settings and adversary presentation of the issues, are likewise designed to force parties to frame issues in such a way that a court can competently decide them. *See, e.g.*, RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81-82 (4th ed. 1996); Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51 (1984).

Alexander Bickel, by contrast, insisted that “[t]he political-question doctrine simply resists being domesticated” by turning it “into an act of constitutional interpretation governed by the general standards of the interpretive process.”<sup>129</sup> For Bickel, the doctrine embodied “something greatly more flexible, something of prudence, not construction and not principle.”<sup>130</sup> Bickel thus grounded the doctrine in:

The Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (‘in a mature democracy’), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.<sup>131</sup>

*Baker* itself signaled a shift away from these outward-looking considerations by rejecting admonitions not to enter the “political thicket” of apportioning electoral districts.<sup>132</sup> Insisting that “[t]he doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases,’” Justice Brennan seemed to reject any suggestion that the Court should withhold judgment solely out of prudential concern for its own legitimacy.<sup>133</sup> That judgment, reflected in a substantial line of cases since *Baker*,<sup>134</sup> would seem to refute the most basic “political

129. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 125-26 (1962).

130. *Id.*

131. *Id.* at 184. As we discuss further in Part IV.B., Bickel’s view drew a good bit of critical fire. Herbert Wechsler, for example, insisted that:

[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely . . . what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.

HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 13-14 (1961).

132. *See, e.g., Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting) (warning that disregard “of inherent limits in the effective exercise of the Court’s ‘judicial Power’ . . . may well impair the Court’s position as the ultimate organ of ‘the supreme Law of the Land’ in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce”).

133. *Id.* at 217 (majority opinion).

134. In *Davis v. Bandemer*, 478 U.S. 109, 126 (1986), for example, the Court explicitly rejected the argument that justiciability should turn on “the perceived need for judicial review and on the potential practical problems with allowing such review.” *See also, e.g., United States v. Munoz-Flores*, 495 U.S. 385 (1990) (rejecting argument that the Court should not review a challenge to a financial assessment feature of the Victims of Crime Act under Article I’s Origination Clause on the ground that invalidation of the law would indicate a “lack of respect” for the House of Congress that passed the bill); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (unanimously rejecting the argument that the Court should not review whether the Secretary of Commerce properly refused to certify that Japan’s whaling practices undermined international conservation pro-

question” arguments against deciding *Bush v. Gore*—that is, that the case was simply too “hot” for a court to handle.<sup>135</sup>

But what about a more specific argument, couched in terms of the post-*Baker* doctrine? That doctrine has emphasized the first two of *Baker*’s considerations—that is, whether there is “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.”<sup>136</sup> In terms of the first criterion—textual commitment—it certainly seems arguable that the Twelfth Amendment commits the kinds of controversies that presented themselves in Florida to Congress. The Amendment, after all, seems to contemplate the final resolution of contested presidential elections by a voting procedure in the House of Representatives.

“Textual commitment,” of course, has always been a problematic concept; it requires, one might say, its own interpretation. In a government of limited powers, after all, we usually think no government actor is empowered to act without some kind of “textual commitment” of authority to that actor.<sup>137</sup> A textual grant of authority to act thus cannot be sufficient to show that disputes concerning the use of that authority are nonjusticiable.<sup>138</sup> Does Article II’s textual commitment of authority to the President to “take Care that the Laws be

grams on the ground that “our decision may have significant political overtones” bearing on foreign relations with Japan); *Powell v. McCormack*, 395 U.S. 486 (1969) (rejecting nonjusticiability arguments against reviewing the validity of the House of Representatives’ exclusion of Adam Clayton Powell). As we will discuss further shortly, some of the prudential concerns behind the political question arguments in cases like these may now be reflected in more specific doctrines of justiciability, *see, e.g.*, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (rejecting a political question bar to adjudicating the constitutional authority of the President to initiate the Gulf War without congressional authorization, but dismissing the suit on ripeness grounds), or in the discretionary decision whether to grant certiorari, *see infra* Part IV.B.

135. An even more telling set of cases than those in the previous note may be those well-known instances in which the Court decided immensely controversial issues—sometimes in the face of significant opposition from the other federal political branches—without so much as a nod at the political question doctrine. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Other decisions under equally momentous circumstances have decisively rejected political question arguments. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 692-97 (1974).

136. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217). The *Nixon* majority did not quote any of the other *Baker* factors.

137. *But see* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (suggesting that the President has inherent authority to act in some foreign affairs contexts). *Curtiss-Wright*’s dictum on this point has been subject to considerable criticism. *See, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973) (Sutherland’s history is “shockingly inaccurate”).

138. *See* Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031 (1984).

faithfully executed”<sup>139</sup> mean that executive action is not subject to judicial review? Surely not.<sup>140</sup>

We’re looking, then, for something more before we can say that a particular constitutional grant of authority to a nonjudicial actor renders that authority immune to second-guessing by the courts. What that “something more” consists of is, of course, the problem. In *Nixon*, the Court found it in words of exclusion in the relevant constitutional text. Article I provides that “[t]he Senate shall have the sole Power to try all Impeachments,”<sup>141</sup> and the *Nixon* majority found “considerable significance” in the word “sole.”<sup>142</sup> The Twelfth Amendment includes no similar words of exclusion. One might argue, further, that the Amendment says nothing at all about how electors should be chosen in the first place. On this view, any nonjusticiability bar to challenges to the initial selection process (on the ground, say, that the state certified the wrong slate of electors) would have to come from somewhere other than the Twelfth Amendment.

Another potential “something more” comes from the Court’s second criterion—the lack of judicially manageable standards. As the Court noted in *Nixon*:

The concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the

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139. U.S. CONST. art. II, § 3.

140. Likewise, Article I, Section 8 contains a “textual commitment” to Congress of the authority to regulate interstate commerce. Whatever our other disagreements concerning the federalism cases, the two of us do agree that the Court is not to be faulted for finding cases like *Lopez* and *Morrison* justiciable, notwithstanding this textual commitment. Mr. Levinson has recently become tempted to agree with Mark Tushnet’s call for the Court to abandon judicial review, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1998), but it is clear that until judicial review itself is jettisoned, cases like *Lopez* and *Morrison* easily merit a place on the Court’s docket. After all, the contrary argument would extend to cases raising not only the limits of the commerce power itself, but also First Amendment challenges to legislative actions taken pursuant to that power. See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (rejecting on the merits a claim that Department of Agriculture regulation concerning commercial advertising of agricultural products violated the First Amendment).

141. U.S. CONST. art. I, § 3, cl. 6.

142. *Nixon v. United States*, 506 U.S. 224, 230 (1993); see also *id.* at 231 (“The commonsense meaning of the word ‘sole’ is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted.”). There are—aren’t there always?—problems with the argument. As Judge Nixon pointed out, “sole” might signify merely that “the Senate—not the courts, not a lay jury, not a Senate Committee—shall try impeachments.” *Id.* at 232 (quoting Brief for Petitioner at 42). The Court ultimately had to fall back on the broader “history and contemporary understanding of the impeachment provisions” in order to refute this alternative reading, see *id.* at 233-35, showing that the plain text can only take one so far.

conclusion that there is a textually demonstrable commitment to a coordinate branch.<sup>143</sup>

Again, however, the Court's criterion may itself be, well, unmanageable. Did *Roe v. Wade*<sup>144</sup> announce "judicially manageable" standards? *Miller v. California*?<sup>145</sup> *BMW v. Gore*?<sup>146</sup> *United States v. Lopez*?<sup>147</sup>

We have to confess that the "judicially manageable standards" criterion becomes more and more confusing the more we think about it. It simply *can't* mean that the Court should abstain on justiciability grounds in any or all areas in which it has arguably done a poor job of doctrinal elaboration.<sup>148</sup> The Court seems to have in mind some sort of *prospective* evaluation of whether workable doctrine is likely to emerge in a given area; one does not see, for example, the Court surveying the shambles of its government funding for religion doctrine and retroactively declaring the whole thing nonjusticiable based on the failure of convincing doctrine to emerge over the years. In particular, the Court seems to ask whether the particular constitutional *text* is suggestive of particular rules. The *Nixon* Court thus concluded that "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks *sufficient precision* to afford any judicially manageable standard of review of the Senate's actions."<sup>149</sup>

Fair enough, but what does it *mean*, really? There are not many points in constitutional law where the actual doctrine emerges directly from the text. The Equal Protection Clause, for example, does not begin to indicate precisely what it means by "equal,"<sup>150</sup> let alone posit that courts should use three different tiers of judicial scrutiny when evaluating different sorts of equal protection claims.<sup>151</sup> Where the text *does* prescribe a standard, it is frequently so commodious

143. *Id.* at 228-29.

144. 410 U.S. 113 (1973).

145. 413 U.S. 15 (1973).

146. 517 U.S. 559 (1996).

147. 514 U.S. 549 (1995).

148. If it does, Mr. Levinson will happily declare all federalism disputes off limits to judicial review, while Mr. Young will cheerfully argue nonjusticiability in most free speech cases. But neither of us will necessarily expect the other—or perhaps many other people, either—to agree with us, and therein lies the obvious rub.

149. *Nixon v. United States*, 506 U.S. 224, 230 (1993) (emphasis added).

150. Indeed, see DOUGLAS RAE, DOUGLAS YATES, JENNIFER HOCHSCHILD, JOSEPH HORONE, & CAROL FESSLER, *EQUALITIES* (1981), for a lovely demonstration that the concept of "equality" includes no fewer than 128 logical possibilities. The very multiplicity of candidates as to what "equality" might "really" mean helps to explain why arguments often become so nasty, as one set of "egalitarians" committed to version #32 simply don't understand that those committed to a contradictory version #53 can, with perfect sincerity, also claim the mantle of "egalitarian."

151. It would be like shooting ducks in a barrel to point to similar problems presented by defining "due process," especially in its "substantive" form, or delimiting the precise latitude allowed states when regulating matters that touch on interstate commerce.

that none of the operative doctrine—the points lawyers and judges actually argue and fret about in individual cases—can be gleaned from that textual directive. The Fourth Amendment, for instance, says searches must be reasonable.<sup>152</sup> What’s “reasonable?” Ask a criminal defense expert, because the constitutional text is not going to help you. And even worse, we have sometimes had to *ignore* particular implementing rules mandated directly by the Constitution, precisely because those rules were not “manageable.” The obvious example here is the First Amendment’s relatively “clear” directive that “Congress shall make *no law* . . . abridging the freedom of speech,”<sup>153</sup> which we have of course had to replace with a Byzantine set of doctrines that accommodate the more realistic needs of a civilized society.

In any event, the interconnection of the “textual commitment” and “judicially manageable standards” ideas will, in many situations, suffer from an even more fundamental difficulty. Textual commitment generally refers to the exercise of governmental authority in question; manageable standards, on the other hand, has to do with the constitutional *challenge* to that exercise. Sometimes, we are talking about the same constitutional provision on both counts. In *Nixon*, for example, the Judge’s argument was that the Senate had violated the Impeachment Trial Clause itself by failing to “try” him within the meaning of that clause.<sup>154</sup> It thus made sense to suggest that that Clause “commits” such issues to the Senate because the text suggests no standards under which a court might second-guess the Senate’s actions.

Political question cases, however, will often have a quite different structure. Around the same time it impeached Judge Nixon, the Senate also impeached Judge Alcee Hastings, who had the distinction of being the first black federal judge in Florida. Hastings argued that his impeachment was motivated by racism,<sup>155</sup> that his real offense, from the perspective of his accusers, was being an “uppity Black.” If he had possessed sufficiently good evidence that this was so, Judge Hastings might have sought judicial review of his impeachment, not under the Impeachment Trial Clause as Judge Nixon did, but rather under the Equal Protection Clause of the Fourteenth Amendment. In

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152. More precisely: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. CONST. amend. IV.

153. U.S. CONST. amend. I (emphasis added).

154. The problem arose from Judge Nixon’s trial under Senate Rule XI, “which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate,” which then votes on the impeachment. *Nixon*, 506 U.S. at 226.

155. See William Raspberry, *Race and Judge Hastings*, WASH. POST, July 29, 1988, at A19.

that scenario, the textual commitment and manageable standards inquiries would presumably have to focus on different constitutional provisions. The textual commitment arguments would again focus on Article I, but the manageable standards inquiry would have to evaluate whether the Equal Protection Clause jurisprudence on discriminatory prosecutions can be applied in the context of impeachment in a manageable way. In any event, the “precision” of the standards embodied in the Impeachment Trial Clause would no longer be the issue, as Judge Hastings’ claim would not have been brought under those particular standards.

If all this is correct, then it suggests that the justiciability of challenges to various aspects of presidential elections turns not only on the Twelfth Amendment itself and whether it embodies a “textual commitment” of election disputes to Congress, but also on the particular nature of the constitutional arguments involved in those disputes. The arguments—and sensible outcome—might be different, for example, from the different sets of arguments advanced by the per curiam and concurring opinions, respectively, in *Bush v. Gore*. On this view, Article II might be read as a textual commitment of disputes concerning the appointment of electors to the state legislature, given that the text provides no standards for judicial evaluation of a state’s selection procedure.<sup>156</sup> On the other hand, equal protection doctrine does contain any number of standards relevant to the apportionment and counting of votes. The relevant question on the equal protection side, then, is whether the doctrines that the Court has been developing in terms of one-man, one-vote,<sup>157</sup> vote dilution,<sup>158</sup> re-

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156. The Article II argument was that the barebones text of Article II, Section 1 gave to the Florida Legislature plenary authority with regard to naming electors and that the Florida Supreme Court could not even make reference to its own state constitutional norms in construing Florida legislation. This argument, originally presented by Harvard law professors Charles Fried and Einer Elhauge while representing the Florida Legislature, was, of course, the brunt of the argument made by Chief Justice Rehnquist and Justices Scalia and Thomas in their concurring opinion in *Bush v. Gore*. For a sophisticated discussion of the Article II argument, see Dean M. Munyon, *The Florida Election Controversy and the “Scope of Delegation” Theory of the Elector Appointment Clause* (2001) (unpublished manuscript, on file with authors). Mr. Levinson wishes to state that he continues to find the Article II argument a mixture of unpersuasive and offensive, in part because its proponents fixate on the text of the 1787 Constitution and totally ignore the text of Section 2 of the Fourteenth Amendment—“But when the right to vote at any election for the choice of electors for President and Vice President of the United States. . .”—as well as the implications of the Seventeenth Amendment requiring that senators be elected by popular election. It is, he believes, inconceivable that anyone in 1913 imagined that legislatures could continue to select electors—the last such episode was by Colorado in 1876—and that the proponents of the Amendment would not have added electors to the text of the amendment had the possibility of such legislative action been brought to their attention. Furthermore, he would emphasize the meaning of the “Republican Form of Government” guaranteed to the people of the States by Article IV.

157. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

158. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997).

districting,<sup>159</sup> and, perhaps, more aggressive rationality review,<sup>160</sup> can be manageably extended to the context of non-race-based disparities in the counting of votes.

Our conclusion that nonjusticiability turns not only on the constitutional power that authorized the act in question but also on the constitutional theory under which the act is challenged has implications, we think, for the choice between “strong” and “weak” theories of the political question doctrine. In cases like *Nixon*, the Court finds a textual commitment to the political branches in part because the relevant constitutional text provides no basis for saying that what the political branch did was unconstitutional; in other words, *Nixon* can be read consistently with Professor Henkin’s suggestion that “nonjusticiable” frequently means simply that the relevant political actors did not cross the bounds of the broad discretion granted by the Constitution in particular areas. Nothing in that case suggests, however, that were the relevant actors to use their discretion in a way that the Constitution plainly prohibits—such as impeaching Judge Hastings on account of his race—that the courts would lack power to intervene.

One can make a similar argument about Florida. We would not expect a nonjusticiability argument, for example, if Florida had formally excluded black voters from the presidential election.<sup>161</sup> The Courts would have well-established standards for judging such discrimination, and the availability of such standards would militate strongly against finding a textual commitment of the dispute to Congress (much less the state legislature) in Article II or the Twelfth Amendment. Perhaps one can explain the *Bush v. Gore* Court’s total lack of interest in the political question doctrine in similar terms, given the prominence of the equal protection theory in the per curiam opinion. This requires, of course, that one takes seriously the majority’s embrace of equal protection theory—and what counts as a remedy for violation of equal protection—a topic about which the two authors would offer sharply conflicting analyses.

*B. Institutional Prudence and the Fateful Grant of Certiorari:  
What’s a Nice Court Like You Doing with a Case Like This?*

Even if this (highly tentative) doctrinal analysis of nonjusticiability is correct, it is hard to resist the following question: if the political

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159. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993).

160. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

161. We acknowledge that some have claimed that Florida informally excluded black voters, but those claims face somewhat more difficult hurdles than in our hypothetical. See, e.g., *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (holding that equal protection plaintiffs must prove purposeful discrimination on behalf of public actors in order to trigger strict scrutiny).

question doctrine can't save the Court from a mess like *Bush v. Gore*, then what good is it? The institutional damage that the Court seems to have incurred<sup>162</sup>—although very hard to measure, both in terms of magnitude and likely duration—prompts us to wonder whether the prudential concerns of which Professor Bickel spoke were so wisely abandoned. One answer, of course, is to say that prudence has not become irrelevant at all; rather, the interests that Professor Bickel relied upon the political question doctrine to guard have simply migrated to other mechanisms, particularly the discretionary decision to grant or deny certiorari.<sup>163</sup>

That, of course, begs a further question: why in the world take this case? One of us, trying to be particularly circumspect about the election mess in mid-November 2000, refused to make any substantive predictions for his Federal Courts class other than to say that the Supreme Court would never—in a million years!—hear this case.

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162. See, e.g., Mary J. Mullarkey, *Courting Our Trust*, THE DENVER POST, Feb. 4, 2001, at J1 (recounting results of a Colorado poll showing that 49% of respondents thought the decision in *Bush v. Gore* had undermined public confidence in the courts). Mr. Levinson is increasingly inclined to view the Court's decision as a remarkably successful roll of the dice whereby it maximized its own power to shape the political agenda at the almost trivial cost of becoming the object of contempt from liberal law professors like himself and receiving relatively less diffuse support from Democrats (which would be made up for by enhanced support from Republicans). Consider that around Labor Day, 2000, 62% of the public approved of the "way the Supreme Court is handling its job"; only 25% disapproved. Democrats were more enthusiastic about the court (70%) than were Republicans (60%), an interesting factoid in itself given the increasingly conservative drift of the Court in many areas other than abortion. *But see* Young, *supra* note 101 (noting many other areas of "liberal" Rehnquist Court activism other than abortion). In mid-January 2001, the overall approval rate had declined a mere three percentage points, from 62% to 59%, though disapproval jumped by a third, from 25% to 34%. Not surprisingly, Republican approval had skyrocketed, while Democratic support went down to 42%, with a full 50% disapproving. The most recent polling was done in June 2001, and the overall approval-disapproval figures are now identical to what they had been almost the year before, 62% to 25%. Democrats are clearly learning to live with, if not to love the Court, as 54% now approve; the 50% who had registered disapproval in January are now reduced to a mere 32%. Republican enthusiasm has diminished a bit, though it is still a robust 74%, and independents are actually at their peak of regard, with 59% approving and only 26% disapproving. See Herbert M. Kritzer, *Into the Electoral Waters: The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, JUDICATURE, July-Aug. 2001, at 32. All of this supports the proposition that Democratic members of Congress will be hesitant to engage in retaliatory measures against the Court, even if they had the inclination to do so, given that the majority of their constituents continue to give strong support to the Court as an institution. Cf. Neal Devins, *The Federalism/Rights Nexus: Why Senate Democrats Tolerate Rehnquist Court Decisions but Not the Rehnquist Court*, 73 COLO. L. REV. (forthcoming 2002) (arguing that Democrats are unlikely to retaliate against the Court other than by scrutinizing future appointments).

163. Professor Bickel himself urged use of the Court's discretion to deny review as an avoidance device, BICKEL, *supra* note 129, at 141-43. When Bickel wrote, however, much of the Court's jurisdiction was still nondiscretionary. See HENRY M. HART, JR. & HERBERT WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1636-41 (1st ed. 1953) (describing the evolution of the Court's discretionary jurisdiction). By 1996, the Hart & Wechsler casebook was able to describe the certiorari mechanism as "[p]erhaps the most important of the avoidance devices." FALLON ET AL., *supra* note 128, at 1711.

And in fact there seems to have been substantial opposition on the Court to the grant of certiorari, a view that found expression in several of the dissents from the Court's ultimate resolution of the dispute.<sup>164</sup>

In approaching the Court's decision to take the case, it may help to start with the traditional criteria in Supreme Court Rule 10.<sup>165</sup> That rule has traditionally emphasized conflicts— among the federal circuits<sup>166</sup> or the state supreme courts,<sup>167</sup> and between decisions of those courts and decisions of the Supreme Court<sup>168</sup>—and the Justices have long insisted that it sits to resolve conflicts rather than correct errors.<sup>169</sup> Many observers thus predicted that the Court would deny certiorari in *Bush v. Gore* on the ground that the Florida Supreme Court's decision was unlikely to create any ongoing conflict in federal law. The case, after all, had a certain *sui generis* quality to it, and the Florida Supreme Court's decision seemed likely to be of continuing significance primarily for purposes of interpreting the relevant state election laws.

The Court's rules, however, have an important catch-all provision for cases in which "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court," even in the absence of a conflict.<sup>170</sup> "Importance," moreover, does not indicate merely the continuing importance of the legal issue presented by the case. As our colleague H.W. Perry has observed, some cases "are important in and of themselves; that is, it is the resolution of the particular case, not

164. See the first line of Justice Souter's opinion (joined by Justices Breyer, Stevens, and Ginsburg) in *Bush v. Gore*: "The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.*, or this case . . ." 531 U.S. 98, 129 (2000) (Souter, J., dissenting). Similarly, Justice Breyer begins his opinion by writing "The Court was wrong to take this case." *Id.* at 144 (Breyer, J., dissenting).

165. The Court has always insisted, however, that the considerations listed in Rule 19 are illustrative rather than exhaustive. *E.g.*, *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955).

166. SUP. CT. R. 10(a).

167. *Id.* 10(b).

168. *Id.* 10(c).

169. See, e.g., Hon. Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), in 69 S. Ct. v, vii:

The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the Supreme Court is . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts.

See also H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.")

170. SUP. CT. R. 10(c).

necessarily the legal issue, that is important.”<sup>171</sup> This general “importance” criterion has supported review in any number of cases simply based on their significance to the nation or to the operations of the federal government. In *United States v. Winstar Corp.*,<sup>172</sup> for example, the Court seems to have granted certiorari mostly because the decision of the federal circuit below, holding that the United States was liable for contract damages to various participants in the savings and loan debacle, put the government on the hook for tens of billions of dollars. As one of us has observed elsewhere, it is “difficult indeed to read the Court’s own Rule 10 as anything other than an invitation . . . to the making of ‘political choice(s)’ about what is ‘important’ enough to demand the overt, highly visible intervention of the United States Supreme Court.”<sup>173</sup>

To say that “importance” is a political criterion, however, is not to suggest that it is unbounded by principle. As Professor Perry has demonstrated, it is frequently possible for the Court to determine that an issue is important independent of any views as to what should prove the proper outcome.<sup>174</sup> We thus find it hard to believe that any Supreme Court Justice—especially one sitting behind a veil of ignorance as to the parties and posture of the case—could seriously maintain that a nonfrivolous argument that the President of the United States was being elected in a manner that violated the Equal Protection Clause and/or Article II was not sufficiently “important” to justify a spot on the Court’s docket.<sup>175</sup> If anything, the argument against certiorari seems to be almost that the case was *too* important to decide.

This last point, of course, returns us to the prudential argument, that is, that the Court should have avoided a decision in the case in

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171. PERRY, *supra* note 169, at 253.

172. 518 U.S. 839 (1996).

173. Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 736 (1993) (reviewing PERRY, *supra* note 169).

174. See PERRY, *supra* note 169, at 260 (observing that “[m]ost issues of societal importance, and many of legal importance, are ones where the justices would agree that the issue is important”).

175. As noted earlier, *supra* note 156, Mr. Levinson is inclined to argue that the Article II arguments, unlike the Equal Protection argument (or, as Pam Karlan points out, what may be in fact a Due Process argument, see Karlan, *The Newest Equal Protection*, *supra* note 46), are frivolous on the merits, though this runs up against the obvious problem that three Justices, not to mention a former Solicitor General of the United States, found the Article II arguments meritorious; see also Munyon, *supra* note 156 (concluding that the concurrence’s argument was incorrect but not frivolous). In any event, for purposes of evaluating the case for certiorari, he has no difficulty stipulating that an equal protection argument that at least six Justices were willing to endorse as meritorious (and a seventh, Justice Breyer, took seriously without ultimately committing himself), is sufficiently nonfrivolous to warrant a decision on the merits by the Court unless there are dispositive reasons to interpret the Constitution as assigning to another institution, such as Congress, the responsibility for deciding any such claims. See *Bush v. Gore*, 531 U.S. 98 (2000).

order to avoid institutional damage to its legitimacy. Both commentators and individual Justices have attacked the Court's reliance on prudential considerations precisely because any defense of such behavior seems almost to celebrate what Gerald Gunther criticized as "manipulative dissimulation" and "intervention in the political process" in his notable attack on Alexander Bickel's enthusiastic exhortation that the Court self-consciously use its certiorari discretion to avoid issuing rulings that might detract from the Court's legitimacy.<sup>176</sup> Similarly, Justice Rehnquist has argued that the Court's discretion to deny review "does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases."<sup>177</sup> On the other hand, the certiorari decision may be the best point in the process to exercise unprincipled, prudential judgment—as opposed to holding a case nonjusticiable on political question, standing, ripeness, or mootness grounds—precisely because the certiorari decision need not be explained or justified by the Court. The Court therefore need not mask its overtly prudential motivations for denying review by constructing apparently principled rationales that it is not in fact prepared to apply faithfully in the next case.<sup>178</sup>

We are unlikely to resolve this perennial debate over principles and prudence in this Essay, and in any event we have a somewhat different question: assuming that the Court can deny review on prudential grounds, how broad should its frame of reference be? We have in mind the argument advanced, most notably by Judge Richard Posner, that the Court should take into account not only the threat to its *own* legitimacy from deciding the case, but also the threat to the broader legitimacy of the government *as a whole* posed by a failure to decide.<sup>179</sup> On the weekend prior to the Supreme Court's final decision,

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176. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 14 (1964). Professor Gunther went on to argue that "Bickel's approach to certiorari . . . undercuts his goal of a principled, candid evolution of constitutional interpretation. Expediency as to avoidance devices is contagious; the effort to shield the integrity of adjudication on the merits from infection fails." *Id.*

177. *Ratchford v. Gay Lib*, 434 U.S. 1080, 1081 (1978) (Rehnquist, J., dissenting from denial of certiorari). Indeed, Edward Hartnett has gone so far as to argue that the existence of discretion to "duck" cases through the certiorari mechanism calls into question the classic justification for judicial review as "the byproduct of a court's obligation to decide a case." Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643, 1714 (2000); see also BICKEL, *supra* note 129, at 127 (noting "the difficulty of reconciling the discretionary certiorari jurisdiction with *Marbury v. Madison* and *Cohens v. Virginia*").

178. See, e.g., Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1462 (1995) (arguing that the Court's standing holdings sometimes mask unwillingness to decide particular sorts of claims for other reasons).

179. See Richard A. Posner, *Florida 2000: The Election Deadlock and the Litigation that Ensued*, 2000 SUP. CT. REV. 1, 54.

sixty-one percent of respondents in a nationwide Gallup poll said that they trusted the Court to decide the election controversy, as opposed to seventeen percent for Congress.<sup>180</sup> Although we doubt that the Court was paying much attention to poll numbers that weekend, the numbers would surely lend support to an intuitive judgment, on the part of the Justices in the majority, that the government as a whole would take a lesser legitimacy “hit” if the election was ultimately resolved by the Court than, say, by Tom Delay’s House of Representatives. Under those circumstances, would a denial of certiorari on prudential grounds have amounted to admirable judicial “restraint” or institutional selfishness, with the Court hoarding its own legitimacy at the expense of the system as a whole?<sup>181</sup>

These concerns about the legitimacy of a nonjudicial resolution to our troubled election do, as suggested by University of Chicago professor Elizabeth Garrett, appear to exhibit a distrust of politics and of the messiness that the political process is thought to engender.<sup>182</sup> It was up to the Court to “save” the public from such messiness or, even more, the purported “crisis” presented by the prospect of lingering uncertainty as to the identity of the next Chief Executive.<sup>183</sup> Indeed, Professor Pildes argues that the best way of understanding a number of recent decisions by the Supreme Court is in terms of its

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180. Will Lester, *Americans Split on Recount, Polls Say; Big Majority Trusts Court to Decide Fairly*, THE TIMES-PICAYUNE, Dec. 12, 2000, at 23. Nine percent of respondents preferred the Supreme Court of Florida, and seven percent preferred the Florida Legislature. *Id.* Asked simply whether they thought the U.S. Supreme Court would decide the case fairly, almost three-fourths of respondents said yes. *Id.* Polls conducted by NBC News/Wall Street Journal and ABC News/Washington Post yielded “generally consistent” results on these questions. *Id.*; see also Michael Tackett, *Nation Waits on Supreme Court; Justices Caught at Intersection of Law and Presidential Politics*, CHI. TRIB., Dec. 12, 2000, at 1 (“The closest thing to unanimity is that the American people trust the U.S. Supreme Court more than any other institution to make the final call about how to proceed.”).

181. It may be relevant to note that some of the same post-decision polls showing a decrease in public confidence in the Court also indicate a majority belief that the Court reached the right result. See Mullarkey, *supra* note 162, at J1. It may also be the case that liberals who championed such decisions as *Powell v. McCormack*, 395 U.S. 486 (1969), may be without authority to castigate the Court for its inability to resist the temptation to adjudicate the Florida controversies.

182. See Elizabeth Garrett, *Institutional Lessons From the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 983 (2001).

183. Perhaps the most significant “crisis” has to do with the delay in the new President’s being able to pick a Cabinet and, in this age of the hypersecurity state, to have his choices undergo requisite FBI vetting prior to Senate hearings. Elsewhere, Mr. Levinson has castigated the long hiatus between election and inauguration as a particularly stupid feature of our political system, not least because it means that voters make their choice with no real knowledge of who in fact will staff a new Administration. See Levinson, *supra* note 1, at 183-84. As it happens, the hiatus was functional in the situation of the 2000 election—just imagine what might have happened if the United States followed the British practice, which is to install a new prime minister almost literally the next day following an election. Mr. Levinson, however, remains convinced that, overall, this is ultimately more evidence as to how the present system of choosing (and then inaugurating) Presidents is seriously dysfunctional to the operation of a modern, complex democratic polity.

fundamental fear of democratic “disorder.”<sup>184</sup> Even if this were the case, of course, it would not necessarily be such a bad thing. Just as we do not tend to fault an umpire at a baseball game for refusing to permit the “messiness” that would result from political appeals to the spectators in the stands concerning whether a runner was safe or out, so, too, it may be the Court’s legitimate role to enforce certain ground rules of political competition. The mere suggestion that such a role exemplifies “distrust” of democratic politics serves merely to *begin* a conversation about whether that distrust is appropriate under the circumstances.<sup>185</sup>

We conclude our discussion by focusing on one particular aspect of the potential “messiness” that may have given the Court potential concern and, even more to the point, *should* worry any thoughtful citizen. That is the particular voting rule articulated in the Twelfth Amendment, which may cast particular doubt on the legitimacy of congressional resolution of presidential elections.

### C. *The Ultimate Stupidity of the Twelfth Amendment*

The Twelfth Amendment not only provides a procedure for resolving disputed elections but also articulates a special voting rule that views the House of Representatives, like the Senate, as consisting of equally empowered state delegations with votes to be cast when picking the President on a one-state, one-vote basis. As a matter of fact, the new House of Representatives has a Republican majority, and Republicans control a majority of the delegations. Still, had the House ultimately been charged with the duty to select the President, it is at least thinkable that it might matter a great deal whether the voting rule were one-member, one-vote or one-state, one-vote. If the former obtained, one might well imagine that half-a-dozen Republican representatives might have cast their ballots for Al Gore, especially if there was good reason to believe that he had in fact won Florida in addition to the incontrovertible fact that he gained more votes throughout the nation than did George W. Bush.<sup>186</sup> That result would

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184. See Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001), reprinted in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Richard Epstein & Cass Sunstein eds., 2001). One might similarly interpret the Court’s decision in *Bush v. Gore* as reflecting the concern for finality evident in the Court’s habeas corpus jurisprudence. See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (affirming lower courts’ denial of habeas corpus petition); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (remanding with instructions to dismiss habeas corpus petition).

185. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

186. It should go without saying that Mr. Levinson believes that Gore “really” won Florida. Mr. Young, on the other hand, sees no reason to reject the decisions made by authorized Florida officials that the “real” winner was George W. Bush. See also Dennis Cauchon & Jim Drinkard, *Florida Voter Errors Cost Gore the Election; Bush Still Prevails in Recount of All Disrupted Ballots, Using Two Most Common Standards*, USA TODAY, May 11, 2001, at 1A (reporting results of comprehensive examination of Florida ballots by major

probably be much less likely under the constitutionally ordained voting rule.

One can well imagine scenarios whereby selection by the House would produce a “crisis.” Even if we would not have celebrated the bicentennial of the 1801 election by issuing similar threats to pick up arms and march on Washington, one can still envision mass marches and probable riots that would make even the election dispute of 1876 look a bit tame. So, given the probability that George W. Bush was destined to become the new President regardless, as Judge Posner argues, the Court did the country a favor by heading off any such possibility.<sup>187</sup>

What is most interesting about this argument is that it appears to accept the premise that the constitutionally ordained resolution is seriously dysfunctional (a more polite word than “stupid”) in today’s world and, therefore, must, as with the Habitation Clause, be ignored or neutralized. There is, as suggested earlier, nothing radical in this suggestion: it explains not only such decisions as *Blaisdell* but also the more general development of the “compelling interest” doctrine, which is best understood as a way of avoiding the impact of what otherwise would be categorical prohibitions of certain kinds of governmental activity.<sup>188</sup> Or, to offer yet another example, the practical irrelevance of the Declaration of War Clause<sup>189</sup> is surely evidence of a widespread belief that the country can no longer afford to pay the price of a full executive/congressional partnership with regard to many decisions involving the use of American armed force.

Still, unlike these other examples, where full neutralization may be feasible, the Twelfth Amendment continues to have potential bite in the case of a true Electoral College deadlock, such as occurred in 1824 or could quite easily have occurred in 1948 and 1968, when both Strom Thurmond and George C. Wallace gained thirty-nine and forty-six electoral votes, respectively, in regionally based racist

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newspapers). More recently, *The New York Times* and other newspapers that were engaged in their own recount have apparently decided to “hold indefinitely” from the public any information as to what the results were. See Richard Berke, *It’s Not a Time for Party, But for How Long?*, N.Y. TIMES, Sept. 23, 2001, at § 4, p. 3. The truth about the Florida vote presumably no longer comes within the motto emblazoned on the front page of every issue of *The New York Times*: “All the News That’s Fit to Print.” One obvious implication, for those committed to a “hermeneutics of suspicion,” is that the information, if released, would not be conducive to the post-September 11 spirit of rallying around Mr. Bush. Mr. Young, for his part, is far too busy rallying to speculate on these matters.

187. See Posner, *supra* note 179, at 46.

188. See Young, *supra* note 99, at 1594-95 (describing balancing tests like “compelling interest” as “resistance norms” that make particular government actions more difficult but not impossible).

189. U.S. CONST. art. I, § 8, cl. 2.

candidacies.<sup>190</sup> It is only blind luck that the extremely close Truman-Dewey and Nixon-Humphrey campaigns in fact generated electoral vote majorities. In 1968, for example, Richard Nixon prevailed in the race for California's then-forty electoral votes by approximately 224,000 out of 7.5 million votes.<sup>191</sup> Had, therefore, only 115,000 persons voted for Humphrey instead of Nixon, there would have been no majority winner in the Electoral College, as Nixon would have had only 261 of the 270 votes necessary for election.

Similarly, in 1948, Harry Truman carried California, which then had twenty-five votes, by only 18,000 votes and Illinois, which had twenty-eight votes, by 34,000 votes.<sup>192</sup> Democrats had significant majorities in the House of Representatives in both the eighty-first and ninety-first Congresses,<sup>193</sup> but would anyone argue that the country at large would have easily accepted the designation by the House of Harry Truman, or, even more so, Hubert Humphrey? The latter after all, would, even with the hypothetical redistributions, have lagged well behind the combined national vote of Richard Nixon and George Wallace and even Nixon alone had the hypothetical redistribution of voters been limited to the California 115,000. And consider the fact that the House delegations in those states that went for Wallace might well have been tempted to choose Nixon, perhaps as the result of 1824-like deals between Nixon and Wallace.

There is no reason to believe that the United States will necessarily be spared further regionally based third parties and, therefore, an electoral vote deadlock, which would require the House of Representatives to choose the President. If one agrees that the one-state, one-vote rule is dysfunctional in the modern world, then, at the very least, a constitutional amendment could replace it with a presumably far more acceptable one-member, one-vote rule. That is, the aftermath of the 2000 Election could mimic that of the Election of 1800 insofar as the present system of choosing Presidents and Vice Presidents would be the subject of formal constitutional amendment, even if the most important features of the present system, including the Electoral College itself and the assignment to Congress of formal responsibility to break deadlocks, remain in place.

An obvious question is whether the 2000 Election will in fact lead to any systematic discussion of the adequacy of our formal institutional structure. Although many pundits predicted in the immediate aftermath that the country might be amenable to such discussion, there has been precious little of it occurring. Quite remarkably, the

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190. See 2 HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, *supra* note 14, at 1073.

191. *Id.* at 1077.

192. *Id.*

193. *Id.* at 1083.

one proposal for constitutional amendment that is receiving substantial attention, at least as of mid-February, concerns the presidential pardoning power;<sup>194</sup> there are, so far as we know, no serious proposals to modify the way we choose Presidents, at least beyond the search for technological fixes with regard to the voting machinery itself.<sup>195</sup> This may reflect an overall level of satisfaction with our basic structure; it could, more ominously, reflect a feeling of despair about the practical likelihood of achieving even the most limited formal change, given the requirement of surmounting the obstacles placed in the way by Article V.<sup>196</sup>

#### CONCLUSION

Part of our project in co-authoring this Essay has been to see if two colleagues with widely varying views on matters both jurisprudential and political can, nonetheless, come to some measure of agreement concerning significant issues facing constitutional scholars. This project is especially interesting, at least to us, with regard to the events of the past winter, about which feelings continue to be deep and, on occasion, tempers raw. We think we have demonstrated that collaboration is possible<sup>197</sup> and, we hope, fruitful. At the very least, the strange case of the Twelfth Amendment raises substantive issues that go well beyond, and much deeper—if this is not to mix metaphors—the particular difficulties posed by the Florida vote. (Indeed, as we noted at the outset, our initial interest in the Amendment, and in the prospect of collaborating, arose with regard to the selection of Dick Cheney to be Governor Bush's running mate, and surprisingly little of this paper depends for its force of argument on the particularities of the Florida fiasco.) The Amendment stands witness, after all, that the Constitution both raises particular issues and provides processes for their resolution that stand outside the mainstream of contemporary judicial review—that is, court-centered decisionmaking focused on the vindication of individual rights. Our understanding of the Constitution will be the richer, we think, if we both question our substantive constitutional priorities and recognize that these issues are frequently too important to be left exclusively to courts.

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194. U.S. CONST. art. II, § 2, cl. 1.

195. See, e.g., *Palm Beach Opts for Touch-Screen Ballots*, N.Y. TIMES, Sept. 26, 2001, at A14.

196. As we go to press in the late Fall of 2001, the prospect of far-reaching reform of the electoral process at the federal level seems even more remote, swept from the national agenda by the events of September 11, 2001.

197. Mr. Young is happy to report that no junior faculty member was harmed in the production of this Essay.