

# Rules, Standards, and *Bush v. Gore*: Form and the Law of Democracy

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## INTRODUCTION

The different judicial opinions in *Bush v. Gore*<sup>1</sup> expose a long-standing but escalating conflict. Clear, uniform rules limit arbitrary or partisan actions by election supervisors, canvassing boards, courts, and other decisionmakers who manage and adjudicate the political process. At the same time, mechanical rules ignore important factors and can lead to the suppression of fundamental political rights. More flexible standards give decisionmakers the discretion to protect political participation in particular contexts, but this discretion may also allow a decisionmaker's biases to enter the political process.

Conflicts over form—the choice between rules and standards—permeate the law that governs the political process,<sup>2</sup> from the Supreme Court's landmark recognition of the one-person, one-vote principle<sup>3</sup> to *Bush v. Gore*. Although the struggle between rules and standards has been carefully examined in many other areas of the law,<sup>4</sup> commentators have generally overlooked this conflict in the law that governs the political process.<sup>5</sup> As a result, they have failed to recognize the critical impli-

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<sup>1</sup> 531 U.S. 98 (2000).

<sup>2</sup> This Article uses “the law that governs the political process,” “election law,” “the law of democracy,” and similar phrases interchangeably to mean statutes, judicial decisions, regulations, and other legal directives that govern the political process.

<sup>3</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that “an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 of the Constitution requires that “as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's”).

<sup>4</sup> See *infra* Part I.B.

<sup>5</sup> The absence of scholarship that examines rules and standards in the law of democracy may be coming to an end. In a forthcoming article, Professor Richard Hasen touts the benefits of flexible standards. Hasen observes that rule-like judicial holdings “enshrine the

cations of crafting legal directives in the political context in the form of rules or standards. This Article seeks to illuminate the unique nature of the conflict in the political realm.

The decision in *Bush v. Gore* and the lawsuits filed in the aftermath of this landmark case highlight the importance of form in the law of democracy. The majority's novel holding in *Bush v. Gore* revolved around the inadequacy of the form of an election procedure, and has invited a continuing onslaught of equal protection challenges to election laws in jurisdictions throughout the United States. The Court in *Bush v. Gore*, however, failed to provide a clear test to be used in considering other claims, and thus the numerous filings will result in judicial confusion and inconsistent rulings among different courts.<sup>6</sup> Further, almost all election reforms proposed in the aftermath of the presidential election are woefully inadequate in that they ignore the form of the legal directives that would implement electoral change.<sup>7</sup> The approach presented in this Article seeks to help resolve impending litigation and develop sound reforms.

In the aftermath of the 2000 presidential election, many questioned the fairness and impartiality of particular decisionmakers, including county canvassing boards and election supervisors, the Florida Secretary of State, the Florida Legislature, the Florida Supreme Court, and the U.S. Supreme Court. Allegations of bias raise questions as to how much and by what means the law should check the discretion of decisionmakers who manage and adjudicate the process of elections. The amount of discretion enjoyed by a decisionmaker is controlled, in part, by whether a legal directive that binds the decisionmaker is articulated in the form of a detailed rule or a general standard. Supporters of rules argue that rules give the decisionmaker less discretion than a standard, and minimize possibilities for arbitrary decisions and decisions influenced by political self-interest.<sup>8</sup> For example, a standard providing that "ballots that reveal

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current Court majority's political theory," and proposes that "the more controversial the Court's normative political theory underlying the claim in a particular case, the more it should strive to articulate legal standards that leave wiggle room for future Court majorities to modify." Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. (forthcoming 2002).

<sup>6</sup> See *infra* Part II.B.2.

<sup>7</sup> See, e.g., Katharine Q. Seelye, *Liberals Discuss Electoral Overhaul*, N.Y. TIMES, Jan. 21, 2001, at A27 (describing electoral reforms proposed by activists in the wake of events in Florida following the 2000 election, including extended voter registration, campaign finance reform, restoration of voting rights for ex-felons, ballot access, and use of independent election administrators); *Election Panel Calls for More Money for Equipment and Training*, N.Y. TIMES, Jan. 11, 2001, at A21 (reporting that the National Commission on Election Standards and Reform, a panel of twenty-one county officials, academics and civil rights leaders, urged that "more money be dedicated to voting equipment, training and education").

<sup>8</sup> See, e.g., FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-73 (1944); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976); cf. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINA-*

the clear intent of the voter may constitute a vote” gives a decisionmaker more discretion than a rule stating that “detachment of two or more corners of a chad constitutes a vote.”<sup>9</sup> Thus, rules result in more objective, uniform, efficient, clear, and legitimate decisions.

At the same time, rigid rules can prevent decisionmakers from protecting the sanctity of voting and other types of political participation in particular contexts. The political rights of each citizen deserve serious respect and protection, some argue, and should not be “sacrificed on the altar of rules” in the interest of expediency.<sup>10</sup> For example, a rule that “all absentee ballots must be postmarked” might be designed to deter fraud, but might fail to account for the difficulties of obtaining a postmark outside of the United States. Thus, a strict application of the rule might invalidate a number of absentee votes that are legitimate but for the postmark requirement. Legal directives in the form of standards give decisionmakers the discretion to consider context-specific factors and the principles that gave rise to the legal directive. This consideration, in turn, allows the decisionmaker to avoid errors that the mechanical application of rules may cause.

This Article examines *Bush v. Gore* in order to initiate a discussion regarding the importance of rules and standards in the political context. Essentially, the majority in *Bush v. Gore* reasoned that Florida’s clear intent standard for counting ballots was not sufficiently rule-like to satisfy constitutional principles. This Article contends that an analysis of form is crucial to a more complete understanding of the legal structure that shapes the democratic process, and proposes that the choice between rules and standards is motivated, in part, by assumptions about democracy. Individuals harbor different conceptions of how democracy is supposed to work, and about which actors are least biased, most competent, and generally best positioned to make decisions about the workings of democracy. Based on these assumptions, lawmakers and decisionmakers sometimes choose to formulate and interpret legal directives as more rule-like or more standard-like as a means of allocating what they consider to be an appropriate amount of discretion to a particular actor.<sup>11</sup> The

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TION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 149–55 (1991) (arguing that errors from rules are better than errors from standards because rules minimize decisionmaker error and reduce abuse that results from bias, ignorance, incompetence or confusion).

<sup>9</sup> See FLA. STAT. ch. 101.5614(5) (2000) (“No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”), *interpreted in* *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000).

<sup>10</sup> Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992).

<sup>11</sup> This Article uses the term “lawmakers” to include legislators, judges, administrators, and other officials who craft statutes, judicial tests, regulations, and other types of legal directives in the form of rules or standards. The term “decisionmakers,” as used, includes legislators, judges, administrators, and others who are bound by and/or attempt to implement statutes, judicial tests, regulations, and other types of legal directives in the

choice between rules and standards is important in dividing authority not only between legislative, judicial, and executive institutions, but also among particular actors within these institutions, such as canvassing boards and secretaries of state, or appellate judges and trial court judges. Form governs the amount and type of responsibility delegated, and thus serves an essential function in the legal structure that regulates democracy. Cohesive doctrine and prudent electoral reforms must be built upon an understanding of how preferences about the allocation of discretion in democracy influence choices about whether to employ rules or standards in a given context.

Some might argue that raw power politics, rather than notions about how democracy should and does work, explain the Court's decision in *Bush v. Gore*. This Article, however, does not claim that political incentives were absent in *Bush v. Gore*. Rather, it asserts that simple political biases may not always determine the choice of legal form and that sometimes conceptions of how democracy works, or how it should work, also influence the choice of form.<sup>12</sup>

Part I of this Article reviews the judicial opinions in *Bush v. Gore*, typical arguments favoring rules and standards, and the several ways in which the rules versus standards debate manifested itself in *Bush v. Gore*. Part II proposes that the choice between rules and standards is influenced by conceptions of democracy, and analyzes *Bush v. Gore* in light of this assertion. Part III asserts that form is especially important with regard to the law of democracy because it yields a better understanding of the legal structures that shape the outcome of elections. A primary lesson to take from *Bush v. Gore* is that scholars, legislators, judges, and administrators must consider more consciously the advantages of both forms of legal directives in the context of elections.

Although this Article uses *Bush v. Gore* as an illustrative platform, the rules versus standards debate provides a valuable framework for analyzing various types of statutes, regulations, judicial tests, and other legal directives that regulate the political process. Focusing on form yields important insights both for reflecting upon the 2000 presidential election and for examining other aspects of the law of democracy.

## I. OBSERVING FORM IN THE LAW OF DEMOCRACY

This Part reviews the various opinions in *Bush v. Gore*, and examines the Justices' preferences for certain legal directives in light of the traditional debates over the merits of rules and standards. In addition to *Bush v. Gore*, this Part explores legislative redistricting as an example of an

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form of rules or standards.

<sup>12</sup> See *infra* Part II.C (discussing the interaction between power politics and assumptions about democracy in the selection of rules and standards).

other important division within the law of democracy that has tracked the rules versus standards debate.

A. *An Overview of the Opinions in Bush v. Gore*

On December 8, 2000, with the November 7 presidential election still undecided and Republican presidential candidate George W. Bush ahead by only a few hundred votes, the Florida Supreme Court ordered a statewide manual recount. The order required a manual recount of approximately 42,000 “undervotes”; that is, ballots on which automatic machine recounts had failed to detect a vote for President and which had not yet been manually recounted.<sup>13</sup> The manual recount was needed, it was argued, because machines sometimes miss votes that voters intended to cast.<sup>14</sup> For example, a counting machine may fail to register a vote when it accidentally pushes a clinging chad back into the ballot card. In ordering a manual recount of the undervotes, the Florida Supreme Court embraced phrasing established by the Florida Legislature. The court required canvassing boards and officials to count a vote if there was a “clear indication of the intent of the voter” on the ballot, unless it was “impossible to determine the elector’s choice.”<sup>15</sup> This became known as the “clear intent standard.”

A day later, the U.S. Supreme Court stayed the manual recount. After considering written briefs and oral argument, on December 12 the Court reversed the Florida Supreme Court. In a majority per curiam joined by Chief Justice Rehnquist and Justices Kennedy, O’Connor, Scalia, and Thomas, the Court held that the use of the clear intent standard in manually recounting the undervotes would result in arbitrary and disparate treatment of voters. Thus, the clear intent standard violated the

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<sup>13</sup> See *Gore v. Harris*, 773 So. 2d 524, 534 (2000); cf. *What Counts?*, TIME, Dec. 18, 2000, at 36 (finding that “[o]f the 42,000 undervotes yet to be examined, more than 35,000 come from the 25 punch-card counties”).

<sup>14</sup> See *Gore v. Harris*, 772 So. 2d 1243, 1247–48 (2000), cert. and stay granted sub nom. *Bush v. Gore*, 531 U.S. 1046 (2000), rev’d sub nom. *Bush v. Gore*, 531 U.S. 98 (2000) (stating that the basis of the appellant’s election contest was “the refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed”).

<sup>15</sup> *Gore*, 773 So. 2d at 526 (construing FLA. STAT. ch. 101.5614(5) (2000) (providing that “[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board”). The Florida Supreme Court may have relied solely on the statutory “clear indication of the intent” language and refrained from providing a more specific test due to an earlier opinion by the U.S. Supreme Court that questioned whether the Florida Supreme Court, through interpretation, “changed” the statutory scheme in violation of Article II, Section 1, clause 2 of the U.S. Constitution. See *Bush v. Gore*, 531 U.S. 98, 145 (2000) (Breyer, J., dissenting) (“In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II.”).

Equal Protection Clause of the Fourteenth Amendment.<sup>16</sup> The Court concluded that the recount procedures did “not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right” of voting, because the clear intent standard lacked the specificity that would ensure its equal application.<sup>17</sup> Some counties might count a ballot with an indentation but no separation of the chad from the card, whereas other counties might not count a similar indentation.<sup>18</sup> Although the Court described the clear intent standard as “unobjectionable as an abstract proposition and a starting principle,”<sup>19</sup> the Court wanted to confine the “search for intent . . . by specific rules designed to ensure uniform treatment” in various counties.<sup>20</sup> In other words, while the Florida Supreme Court’s clear intent directive was closer to the standard end of the spectrum, the Court was looking for a “formulation of uniform rules to determine intent.”<sup>21</sup> A formulation that might have sufficed would have stated, for example, that detachment of two or more corners of a chad constitutes a vote.<sup>22</sup> Due to the complexities of equal protection in

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<sup>16</sup> While the Court acknowledged claims had been brought under both the Equal Protection and Due Process Clauses, its clearest articulation of the constitutional problem is phrased as an equal protection violation. *See* *Bush v. Gore*, 531 U.S. at 103 (“With respect to the equal protection question, we find a violation of the Equal Protection Clause.”). Nevertheless, near the end of the majority opinion, the Court suggested that the manual recount procedures fail to satisfy both equal protection and due process concerns. *Id.* at 110 (“[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”). Commentators have interpreted this language to mean that the Court concluded that procedural and substantive due process require “*substantive specificity* as to what counts as an actual vote” and have asked “What does it mean for a legal norm to be sufficiently precise?” SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD* 93 (2001). This question necessarily implicates the rules versus standards debate, essentially inquiring at what point a legal directive becomes sufficiently rule-like along the continuum between rules and standards to satisfy due process. While debate over rules and standards in the due process context is worthy of further discussion, this Article focuses on the constitutional provision emphasized by the Court’s majority per curiam opinion in *Bush v. Gore*—the Equal Protection Clause—to illustrate the importance of rules and standards in the law of democracy.

<sup>17</sup> *Bush v. Gore*, 531 U.S. at 105.

<sup>18</sup> *See id.* at 106 (“[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The development of rules to assign undervotes into “vote” and “nonvote” designations could also be seen as categorization, which is more “rule-like” than “standard-like.” *See* Sullivan, *supra* note 10, at 59 (observing that “[c]ategorical style is rule-like” because it “defines bright-line boundaries and then classifies fact situations as falling on one side or the other”).

<sup>21</sup> *Bush v. Gore*, 531 U.S. at 106.

<sup>22</sup> *Cf.* Henry Weinstein, *Justices Find the Devil Is in the Details*, L.A. TIMES, Dec. 12, 2000, at A1 (describing oral argument of the case, and observing that in response to questions about what would constitute an acceptable standard for counting votes, Bush’s lawyer stated, “certainly as a minimum, the penetration of the ballot card would be required,” whereas Gore’s lawyer simply stated, “I think that’s a very hard question.”).

the election law context, the Court explicitly limited the precedential value of its analysis.<sup>23</sup>

In addition to finding that the clear intent standard violated the Equal Protection Clause, the majority permanently discontinued the manual count of undervotes. Based upon a reading of a Florida Supreme Court opinion,<sup>24</sup> the majority maintained that the Florida Legislature preferred to conclude the vote tabulation process by December 12, in order to secure a federal statutory guarantee that Congress would not challenge its election results.<sup>25</sup> The majority reasoned that Florida could not possibly tabulate the votes in accordance with minimal constitutional requirements by the deadline, and thus reversed the Florida Supreme Court's manual recount order.<sup>26</sup>

Chief Justice Rehnquist, in a concurrence joined by Justices Scalia and Thomas, wrote that there were additional grounds upon which to reverse the Florida Supreme Court. According to Chief Justice Rehnquist, the Florida statutory scheme contemplated a bright-line rule that required counting only ballots on which chads had been completely removed.<sup>27</sup> He reasoned, therefore, that the clear intent of the voter was irrelevant, and that the Florida Supreme Court's flawed interpretation had changed Florida election law in violation of Article II of the U.S. Constitution.<sup>28</sup>

Justices Ginsburg and Stevens, in dissent, concluded that the clear intent standard did not violate equal protection principles. Justice Stevens noted that fourteen other states use a standard focusing on intent.<sup>29</sup> Further, he wrote, standards in other areas of the law, such as the "beyond a reasonable doubt" standard, are "employed everyday by ordinary citizens in courtrooms across this country" without concerns about uniformity.<sup>30</sup> Rules insisting upon rigid uniformity might also invalidate decisions by Florida and other states that allow local officials the discretion to make decisions regarding voting systems and ballot design, "despite enormous

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<sup>23</sup> *Bush v. Gore*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

<sup>24</sup> *Gore v. Harris*, 773 So. 2d 524, 533 (Fla. 2000) (Pariente, J., concurring); *see also* *Gore v. Harris*, 772 So. 2d 1243, 1261 (Fla. 2000); *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000).

<sup>25</sup> *See* *Bush v. Gore*, 531 U.S. at 109–10 ("[3 U.S.C. § 5] requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place . . . that comports with minimal constitutional standards.").

<sup>26</sup> *Id.* at 110.

<sup>27</sup> *See id.* at 118–22 (Rehnquist, C.J., concurring) ("[T]here is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots . . .").

<sup>28</sup> *Id.* at 115 (Rehnquist, C.J., concurring) ("[T]he Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.").

<sup>29</sup> *Id.* at 124 n.2 (Stevens, J., dissenting).

<sup>30</sup> *Id.* at 125 (Stevens, J., dissenting).

differences in accuracy” between counties.<sup>31</sup> For example, Justice Stevens explained, the percentage of nonvotes in Florida counties using a punch-card system was 3.92%, compared to only 1.43% in counties using more modern optical-scan systems.<sup>32</sup> In further defense of the clear intent standard, he asserted that problems with uniformity during the manual count would be alleviated by a single magistrate who would eventually review all objections arising from the process.<sup>33</sup> Justice Stevens stated that the majority had demonstrated a “lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed.”<sup>34</sup>

Justices Breyer and Souter joined Justices Ginsburg and Stevens in dissent from the majority’s interpretation that the December 12 statutory deadline was a bright-line rule that prevented the manual recount of any of the undervotes. Stevens wrote that the majority’s interpretation

effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law . . . . [N]othing prevents the majority . . . from ordering relief . . . without depriving Florida voters of their right to have their votes counted. As the majority notes, “[a] desire for speed is not a general excuse for ignoring equal protection guarantees.”<sup>35</sup>

In her dissent, Justice Ginsburg pointed out that a total that does not include the undervotes is no more fair or precise than a total based on a recount using the clear intent standard.<sup>36</sup> Similarly, Justice Breyer equated inequities flowing from use of the clear intent standard with inequities arising from different voting systems in different counties.<sup>37</sup>

The four dissenters also stated that the Court should have refrained from hearing the case. Justice Ginsburg emphasized that principles of

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<sup>31</sup> *Id.* at 126 (Stevens, J., dissenting).

<sup>32</sup> *Id.* at 126 n.4 (Stevens, J., dissenting) (observing that “for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems”).

<sup>33</sup> *See id.* at 126 (Stevens, J., dissenting).

<sup>34</sup> *Id.* at 128 (Stevens, J., dissenting).

<sup>35</sup> *Id.* at 127 (Stevens, J., dissenting).

<sup>36</sup> *See id.* at 143 (Ginsburg, J., dissenting) (“I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount.”).

<sup>37</sup> *See id.* at 147 (Breyer, J., dissenting) (observing that “voters already arrive at the polls with an unequal chance that their votes will be counted,” and that it is unclear “how the fact that this results from counties’ selection of different voting machines rather than a court order makes the outcome any more fair”). Note, however, that unlike Justices Stevens and Ginsburg, Justices Breyer and Souter found that the clear intent standard raised equal protection concerns. Unlike Rehnquist, Scalia, Thomas, O’Connor, and Kennedy, however, Breyer and Souter would not interpret the statutory deadline of December 12 as a firm rule that prohibited further consideration of the undervote with “uniform standards.” *Id.* at 134–35 (Souter, J., dissenting); *see also id.* at 158 (Breyer, J., dissenting).

federalism dictate that federal courts defer to state courts on state law,<sup>38</sup> and Justice Breyer noted that principles underlying a republican model of government dictate that the matter at issue was one for Congress rather than the Court.<sup>39</sup>

Various aspects of the opinions in *Bush v. Gore*, such as discussion regarding the merits of using the clear intent standard or more uniform rules to count ballots, invite analysis in light of debates regarding the competing advantages of rules and standards. Before conducting such an analysis, however, it may be helpful to review the framework of the rules versus standards debate.

### B. *The Rules and Standards Framework*

The amount of discretion that a decisionmaker can exercise in applying a legal directive is governed by whether the legal directive is more rule-like or more standard-like. Rules, it is argued, give the decisionmaker less discretion than standards because rules bind an actor's choices to a set of predetermined triggering facts.<sup>40</sup> Rules thus limit possibilities for abuse arising from a decisionmaker's bias. For example, a rule might be that "detachment of two or more corners of a chad constitutes a vote." Standards, on the other hand, allow decisionmakers to consider context-specific factors as well as principles that motivated the legal directive; they also avoid errors that may arise from a mechanical application of rules. For example, a standard might be that a ballot must be counted as a vote if there exists a "clear indication of the intent of the voter" on the ballot.<sup>41</sup> While this Article uses the terms "rules" and "standards" for purposes of analysis, the form that legal directives may take is actually relative: directives may fall anywhere on a graduated continuum between the extreme poles of rule-like and standard-like.<sup>42</sup>

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<sup>38</sup> See *id.* at 135–36 (Ginsburg, J., dissenting).

<sup>39</sup> See *id.* at 155 (Breyer, J., dissenting) ("The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear."); see also *id.* at 129 (Souter, J., dissenting) ("The Court should not have reviewed . . . this case . . ."); cf. *id.* at 123 (Stevens, J., dissenting) ("On rare occasions . . . either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion:").

<sup>40</sup> See Sullivan, *supra* note 10, at 26 ("The general debate over legal form in jurisprudence and private law characterizes rule-like directives as affording less discretion than standards.").

<sup>41</sup> See FLA. STAT. ch. 101.5614(5) (2000) (providing that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board"), construed in *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000).

<sup>42</sup> See Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991). Although individuals may state that "we need more uniform standards" in calling for more precise legal directives, they are, under the terminology employed in the rules versus standards debate, calling for more rule-like legal directives.

Jurisprudential debates over the merits of framing judicial tests, statutes, regulations, and other types of legal directives in the form of rules or standards have occurred with regard to legal analysis generally.<sup>43</sup> Scholars have also debated the relative advantages of rules and standards in specific areas of the law, including property,<sup>44</sup> speech,<sup>45</sup> civil procedure,<sup>46</sup> torts,<sup>47</sup> administrative law,<sup>48</sup> and law and economics.<sup>49</sup>

Throughout the numerous contexts, conventional arguments have emerged about the value of adopting legal directives in the form of rules or standards.<sup>50</sup> On one hand, clear rules force decisionmakers to act in a certain way in response to certain facts, and thus promote uniform, consistent, efficient, fair, and neutral decisions.<sup>51</sup> Actors are able to understand and comply with bright-line rules, and thus are able to act in predictable, productive ways.<sup>52</sup> Further, by clearly allocating responsibilities

<sup>43</sup> This Article does not attempt to exhaustively discuss the various intricacies of the rules versus standards debate. Rather, it aims to promote discussion of the form of laws governing democracy. For a more extensive analysis of the rules versus standards debate, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15–63 (1987); SCHAUER, *supra* note 8; Kennedy, *supra* note 8; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Sullivan, *supra* note 10.

<sup>44</sup> See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

<sup>45</sup> See, e.g., David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829 (1993).

<sup>46</sup> See, e.g., *Burnham v. Sup. Ct. of Cal.*, 495 U.S. 604, 623–27 (1990) (Scalia, J., plurality holding) (asserting that Justice Brennan’s proposed “contemporary notions of due process” test to determine personal jurisdiction “does not establish a rule of law at all,” but rather an uncertain standard that invites subjective applications by judges); *id.* at 629–39 (Brennan, J., concurring in the judgment) (arguing that a rule relying solely on historical pedigree fails to consider relevant factors, and that “all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process”).

<sup>47</sup> See, e.g., Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

<sup>48</sup> See, e.g., Book Note, *The Bureaucrats of Rules and Standards: Responsive Regulation*, 106 HARV. L. REV. 1685 (1993).

<sup>49</sup> See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101 (1997); Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

<sup>50</sup> See Schlag, *supra* note 43, at 383–84 (“The possibility of casting or construing directives as either rules or standards has given rise to patterned sets of ‘canned’ pro and con arguments about the value of adopting either rules or standards in particular contexts.”).

<sup>51</sup> See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72–73 (1944); Kennedy, *supra* note 8, at 1688; cf. SCHAUER, *supra* note 8, at 145–55; SCHAUER, *supra* note 8, at 145–49 (observing that rules minimize decisionmaker error and reduce abuse that result from bias, ignorance, incompetence or confusion, and that rules are efficient since they help allocate limited judicial resources by streamlining proceedings and reducing duplication of effort); Sullivan, *supra* note 10, at 63 (noting the argument that rules reduce the “elaborate, time-consuming, and repetitive application of background principles to facts”).

<sup>52</sup> See Kennedy, *supra* note 8, at 1688–89 (“Certainty [of rules] increases the likelihood that private activity will follow a desired pattern.”); Rose, *supra* note 44, at 599

among competing decisionmakers such as legislatures, regulators, judges, and juries,<sup>53</sup> the power of these decisionmakers appears more legitimate when it is exercised.

On the other hand, arbitrariness and unfairness can also flow from the mechanical application of a cookie-cutter rule.<sup>54</sup> More flexible standards can promote fairness by allowing a decisionmaker to consider relevant factors overlooked by a rule, to adapt to unforeseen contexts,<sup>55</sup> and to treat substantively similar cases alike.<sup>56</sup> Additionally, standards can promote clarity, as rules often degenerate into confusing and complex schemes of detailed subrules and exceptions,<sup>57</sup> decipherable only by those with extensive expertise or resources.<sup>58</sup> Further, decisionmaking is often more legitimate using standards: rather than hiding behind a mechanical application of a rule, standards force a decisionmaker to explain the reasons for a decision and take responsibility for it.<sup>59</sup>

### C. *Emergence of Rules and Standards in Bush v. Gore*

The opinions in *Bush v. Gore* manifested the choice between rules and standards in three important ways. The Court had options in determining: whether equal protection required the development of more rule-

(“[c]rystalline property doctrines yield fixed consequences, and their predictability makes these doctrines attractive”).

<sup>53</sup> See Sullivan, *supra* note 10, at 64.

<sup>54</sup> See SCHAUER, *supra* note 8, at 112–18 (observing that rules are unable to include all of the possible exceptions the rulemakers would desire); Sullivan, *supra* note 10, at 58 (“[A] rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness.”).

<sup>55</sup> Sullivan, *supra* note 10, at 66 (noting the argument that rules “tend toward obsolescence” whereas standards “are flexible and permit decisionmakers to adapt them to changing circumstances over time”).

<sup>56</sup> See SCHAUER, *supra* note 8, at 135–66; Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 377–91 (1973) (arguing that rule application often produces results that are arbitrary in relation to the substantive ends sought); Sullivan, *supra* note 10, at 66.

<sup>57</sup> For example, in attempting to more accurately implement the background principle of recording votes that reveal the clear intent of the voter, a legion of complex rules might develop that take into account whether punchcards are thin, thick, recently manufactured, stored for years, extensively handled, or used in humid or dry climates.

<sup>58</sup> See Rose, *supra* note 44, at 578 (observing that “over time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing”).

<sup>59</sup> See Sullivan, *supra* note 10, at 67 (noting the argument that “rules favor the judicial abdication of responsibility, while standards make the judge face up to his choices—he cannot absolve himself by saying ‘sorry, my hands are tied’”); cf. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 35 (1986) (arguing that balancing tests commit judges and parties to “practical reason” by “affirming rather than denying” judicial responsibility, making the judge “confront the parties in the flesh” and denying the judge “the refuge of objective determinacy lodged in some force other than herself”). But see SCHAUER, *supra* note 8, at 162 (suggesting that when following a rule, “[a]n agent who says, ‘This is not my job’ is not necessarily abdicating responsibility” because the agent may be taking responsibility “for leaving certain responsibilities to others”).

like legal directives in manually counting ballots or if a clear intent standard would suffice; whether the legislative preference to conclude the vote tabulation process by December 12 should be interpreted more like a rule or a standard; and whether the Court should craft its holding in the form of a rule or a standard to bind future judicial deliberations.<sup>60</sup>

Consistent with traditional criticisms of standards, the majority per curiam opinion argued that an application of the clear intent standard to counting votes would result in arbitrary and inconsistent treatment of voters because similarly perforated ballots could be counted differently.<sup>61</sup> While the majority did not explicitly state that local judges appointed to count the ballots would likely manipulate “clear intent” in a way that advanced their own political preferences, Justice Stevens did argue that the position of the majority could be explained only by its lack of confidence in the impartiality of the ballot counters.<sup>62</sup> Articulating conventional justifications for the adoption of rules, the majority found that more precise rules were needed to ensure a more uniform, consistent, fair, and neutral counting of the ballots.<sup>63</sup> The majority also interpreted Florida law as imposing a rule-like deadline to stop the counting of the undervotes.<sup>64</sup>

The concurrence of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, asserted that the Florida Supreme Court had impermissibly changed the election rules. These concurring Justices would

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<sup>60</sup> Cf. Sullivan, *supra* note 10, at 69 (“[T]he Justices divided over rules and standards at three different levels: first, whether the Court’s own constitutional precedents ought to be construed as rules or standards; second, whether the Constitution’s provisions should be interpreted as rules or standards; and third, whether the Court, in fashioning the operative doctrines (that is, tests and levels of scrutiny that will guide the lower courts and the Court itself in future cases), ought to formulate rules or standards.”).

<sup>61</sup> See *Bush v. Gore*, 531 U.S. 106 (“[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”).

<sup>62</sup> See *id.* at 128 (Stevens, J., dissenting) (asserting that the majority endorsed “an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed”).

<sup>63</sup> See *id.* at 106 (“The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.”).

<sup>64</sup> See *id.* at 110 (finding that Florida law “requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12”). An argument could be made that the Justices in the majority used the law to advance a political agenda, running down the clock and using the December 12 deadline rule to shield the result in order to avoid responsibility for a partisan act that determined the winner of the election. See *infra* Part II.C. Cf. Michael C. Dorf, Editorial, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11 (observing that by refusing to answer whether the manual recounts violated the Fourteenth Amendment when the issue first arose in November, “and then ruling against Gore three weeks later, the Supreme Court ruined his chances of obtaining a fair recount”). One might also assert that the majority selectively applied rules to favor one party by applying equal protection principles *within* counties to require uniform rules for manually counting the undervotes, but not *between* counties by requiring uniform rules of voting in the first instance.

have interpreted Florida statutes to provide for a bright-line rule that counts only ballots with completely punched chads.<sup>65</sup>

Justices Ginsburg and Stevens would have tolerated the use of the clear intent standard and would not have allowed the application of a rigid rule to halt counting of the undervotes. Although Justices Breyer and Souter would have rejected the clear intent standard in favor of more uniform manual recount rules, they also would not have permitted the application of a rigid rule to stop the counting of the undervotes. Justice Ginsburg employed traditional arguments against rules, arguing that the application of the statutory deadline, which resulted in a failure to count the undervotes, would be more arbitrary than a full count using the clear intent standard.<sup>66</sup>

It might initially appear as though the dissenters favored standards, while those in the majority favored rules. This initial reading, however, is incomplete. Kennedy, O'Connor, Rehnquist, Scalia, and Thomas all perceived some constitutional doctrines to be more standard-like, whereas Breyer, Ginsburg, Souter, and Stevens all perceived them to be more rule-like. For example, those Justices in the majority—carefully noting that the Court was not announcing a clear rule because equal protection in the election context presents “many complexities”—limited their analysis to the “present circumstances” in a very context-specific, case-by-case, standard-like manner.<sup>67</sup> The dissenters interpreted the political question provisions of the Constitution and federal statutory law as more rule-like, which would have prevented the Court from hearing the case.<sup>68</sup> Justices in both the majority and the dissent, therefore, employed traditional rules and standards arguments in analyzing the legal issues in the case.

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<sup>65</sup> The debate between imperfect technology and imperfect human judgments about what constitutes a vote tracks the rules versus standards debate. Like bright-line rules, voting machines arguably minimize arbitrary and subjective value choices, thus promoting uniformity, consistency, predictability, and efficiency. Machines, however, have a certain degree of rigidity that results in a failure to count some intended votes. Manual recounts allow decisionmakers to implement certain underlying principles—such as an inclusionary theory of democracy—more uniformly, consistently, and fairly than machines in a number of different contexts.

<sup>66</sup> See *Bush v. Gore*, 531 U.S. at 143 (Ginsburg, J., dissenting) (“I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount.”).

<sup>67</sup> See *id.* at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

<sup>68</sup> See, e.g., *id.* at 155 (Breyer, J., dissenting) (observing that “[t]he decision by both the Constitution’s Framers and the 1886 Congress to minimize this Court’s role in resolving close federal presidential elections is as wise as it is clear”).

*D. An Earlier Emergence of Form in the Law of Democracy:  
Legislative Districting*

*Bush v. Gore* is not the only election law case highlighting the significance of rules and standards. The form of legal directives plays an important role with regard to the law regulating politics generally, and has most often been discussed regarding the form of judicial tests used to review the political process.<sup>69</sup> In particular, the arguments favoring rules or standards framed one of the most contentious foundational debates regarding the law of democracy: judicial review of legislative districting.

In 1962, the Court in *Baker v. Carr* determined that the composition of legislative districts, known as apportionment, was a justiciable issue.<sup>70</sup> Following World War II, shifts in population caused great disparities among state legislative electoral districts, with large numbers of people living in urban districts and smaller numbers living in rural districts.<sup>71</sup> In *Baker v. Carr*, plaintiffs brought suit to compel the Tennessee state legislature, comprised predominantly of representatives from less populated rural districts reluctant to surrender political power, to revise the electoral boundaries and create more evenly populated districts.<sup>72</sup> The Court distinguished apportionment from nonjusticiable political questions that could not be resolved through “judicially discoverable and manageable” criteria,<sup>73</sup> and held that judges could review apportionment using “well developed and familiar” judicial “standards under the Equal Protection Clause,” which allow courts to invalidate laws that reflect “no policy, but simply arbitrary and capricious action.”<sup>74</sup>

Two years later, in *Reynolds v. Sims*,<sup>75</sup> the Court announced a more definitive one-person, one-vote rule that essentially required that legislative districts be drawn so that they contained an equal number of residents.<sup>76</sup> One objective of the one-person, one-vote rule was to limit ex-

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<sup>69</sup> See *infra* Part II.B.2 (discussing the standard-like nature of judicial tests used to determine excessive partisan gerrymandering, wrongful creation of predominantly minority districts, and excessively low campaign contribution limits); Spencer Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1299 (2000) (analyzing the advantages of rule-like and standard-like judicial tests for review of campaign finance regulations).

<sup>70</sup> 369 U.S. 186, 209 (1962).

<sup>71</sup> See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 128 (1995) (“Population shifts after World War II exacerbated population disparities in local, state, and federal electoral districts, with booming urban and suburban areas greatly underrepresented and rural areas overrepresented.”).

<sup>72</sup> 369 U.S. at 194–95.

<sup>73</sup> *Id.* at 217.

<sup>74</sup> *Id.* at 226.

<sup>75</sup> 377 U.S. 533 (1964).

<sup>76</sup> Essentially, this principle prohibited apportionment that featured substantial population deviations. See *id.* at 568 (holding that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population

tensive partisan gerrymandering.<sup>77</sup> The exchange regarding the benefits and shortcomings of the one-person, one-vote rule relative to the previous equal protection standard mirrors the general debate between rules and standards.

### *I. Arguments in Favor of the One-Person, One-Vote Rule*

In support of the one-person, one-vote rule, various courts and commentators have employed arguments reflecting the advantages of rules and the shortcomings of standards. The one-person, one-vote rule promotes uniformity, consistency, fairness, and neutrality in decisions about apportionment by limiting judicial discretion to one simple question: Do all districts have the same number of residents?<sup>78</sup> By limiting judicial discretion, the one-person, one-vote rule, the argument goes, prevents judges from substituting their own political inclinations for those of other branches and from becoming hopelessly entangled in the “political thicket.”<sup>79</sup> Confinement of judicial oversight to a neutral rule thus fortifies the legitimacy of an independent judiciary.

The clarity and predictability of the one-person, one-vote rule allows it to be understood easily and followed precisely by those drawing dis-

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basis” and that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 requires that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”). The doctrine eventually evolved to tolerate moderate population deviations in state legislative districts, yet to demand that congressional apportionment comply with a strict population equality rule. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (characterizing state legislative population deviations of less than ten percent as “minor deviations” from mathematical equality that do not sufficiently threaten equal protection provisions so as to require justification by the state); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (holding that Article I, Section 2 requires “absolute population equality” and invalidating population deviations among congressional districts in New Jersey of 0.7%).

<sup>77</sup> *See Reynolds*, 377 U.S. at 578–79 (“indiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering”); *see also*, T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 622 (1993) (observing that “the Court intended the equi-population rule only to impose an external discipline on state redistricting authorities, forcing them to rationalize the reapportionment process”).

<sup>78</sup> *See JOHN HART ELY, DEMOCRACY AND DISTRUST* 124–25 (1980) (explaining that the Court adopted a one-person, one-vote rule “precisely because of considerations of administrability”).

<sup>79</sup> SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 175 (2d ed. 2001) (suggesting that “the one-person, one-vote rule based on strict population equality could be readily managed by the courts and thus allowed a justiciable standard for judicial immersion into the ‘political thicket’ of elected institutions”). *But cf.* *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., plurality opinion) (arguing that principled judicial review in the political context is often impossible and thus “[c]ourts ought not to enter this political thicket”).

strict lines.<sup>80</sup> Such clarity also minimizes the frequency and complexity of reapportionment litigation, allowing for quick, efficient, and consistent determinations by judges ill-equipped to apply vague equality principles to elaborate evidentiary records of political matters.<sup>81</sup> Indeed, the Court's retreat from the earlier application of general equal protection principles in favor of the one-person, one-vote rule reflects the failure of anything less than a strict rule.<sup>82</sup>

## 2. Arguments in Favor of an Apportionment Standard

Those who have analyzed the problems with the one-person, one-vote rule have often advanced arguments that focus on the shortcomings of rules and the benefits of standards. While the *Baker* standard allowed courts to make a case-by-case assessment of the political environment in a given jurisdiction, a rigid one-person, one-vote rule ignores important, context-specific issues. At least as relevant to apportionment as formal equality are a host of other factors: the promotion of political competition,<sup>83</sup> the unique workings of different legislative bodies, adherence to political and natural boundaries,<sup>84</sup> compactness, contiguity, and equal respect for varied communities defined by actual shared interests.<sup>85</sup> An

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<sup>80</sup> See *Gaffney v. Cummings*, 412 U.S. 735, 779 (1973) (Brennan, J., dissenting) (“[I]t is clear that the state legislatures and the state and federal courts have viewed [absolute equality] as controlling on the issue of legislative apportionment, and the outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate.”).

<sup>81</sup> Cf. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 247 (1968) (arguing that “requiring the Court to canvass . . . [t]he details of . . . petty corruption and networks of personal influence” is not a “demand we can reasonably make of our courts”).

<sup>82</sup> See Pamela S. Karlan, *Still Hazy After All of These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 298–99 (1996) (asserting that “*Baker* . . . saw ‘well developed and familiar’ standards under the equal protection clause that would protect courts from becoming embroiled in judicially unmanageable questions” but that the Court in *Reynolds* “recognized that its general equal protection jurisprudence was insufficient for the task and announced an increasingly rigid, simple to apply, voting-specific mandate of equipopulousity”).

<sup>83</sup> See Paul S. Edwards & Nelson W. Polsby, *The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 YALE L. & POL’Y REV. 190, 200 (1991) (stating that “[t]here are many other factors . . . that courts could consider in apportionment” including “the appropriateness of a legislative decision to protect incumbents in order to preserve the state’s political power at the national level [and] the need to create more competitive elections in order to increase legislative ‘responsiveness’” which are often impossible to consider “if courts are required to attend only to ‘one person, one vote’”).

<sup>84</sup> See *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 749–51 (1964) (Stewart, J., dissenting) (“I do know enough to be aware that a system of legislative apportionment which might be best for South Dakota, might be unwise for Hawaii with its many islands, or Michigan with its Northern Peninsula.”).

<sup>85</sup> See *Davis v. Bandemer*, 478 U.S. 109, 167, 173 (1986) (Powell, J., concurring in part and dissenting in part); see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (arguing that race cannot be the predominant factor in redistricting that subordinates other factors such as “compactness, contiguity, and respect for political subdivisions or communities

absolute equality rule subordinates these relevant concerns,<sup>86</sup> and fails to acknowledge that formal equality is not identical to meaningful political equality.<sup>87</sup>

Under the one-person, one-vote rule, shrewd and calculating legislators have the ability to game the system<sup>88</sup> by drawing districts of equal population that minimize the political strength of rival political groups, since these legislators know their actions will be upheld by courts.<sup>89</sup> If, however, judges reviewing legislative apportionments instead applied a standard that balanced a number of factors related to representation, blatant attempts to dilute the political strength of a rival political group would be chilled.<sup>90</sup> The one-person, one-vote rule also allows judges to

defined by actual shared interests,” and acknowledging that such a determination is “difficult” and requires that courts “exercise extraordinary caution”).

<sup>86</sup> See *Davis*, 478 U.S. at 168 (Powell, J., concurring in part and dissenting in part) (arguing that a focus on one-person, one-vote may cause legislatures to “place undue emphasis on mathematical exactitude, subordinating or ignoring entirely other criteria that bear directly on the fairness of redistricting”); *Gaffney v. Cummings*, 412 U.S. 735, 748–49 (1973) (asserting that “representation does not depend solely on mathematical equality” among districts, and that an “unrealistic overemphasis on raw population figures [may] itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement”).

<sup>87</sup> See MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 244–45 (1964) (arguing that the Court in *Baker* “avoided binding itself to precise standards of representation, any one of which would be theoretically incorrect because democratic theory does not contain any such precise standards”). Even if one accepted formal equality as a meaningful objective, the one-person, one-vote rule could be described as insufficient, as many applications of the rule arbitrarily select total population as the baseline. Thus a vote cast in a district with a lower percentage of registered voters carries more weight than a vote from a district with a higher percentage of registered voters. See *Gaffney*, 412 U.S. at 746 (“[I]f it is the weight of a person’s vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because ‘census persons’ are not voters.”); *Garza v. County of Los Angeles*, 918 F.2d 763, 779–88 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part) (arguing that apportionment by population and apportionment by number of voters “are based on radically different premises and serve materially different purposes”); cf. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (“[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”).

<sup>88</sup> See Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561, 566 (1977) (book review) (concluding that “the rule of law . . . enables . . . the wealthy to manipulate its forms to their own advantage”).

<sup>89</sup> Clear rules limit a legislator’s discretion to interpret legal directives or shape the political process in a way that entrenches her power, but at the same time tell an entrenchment-minded legislator exactly how much anti-competitive behavior she can engage in without penalty. For discussions regarding the problems of entrenchment, see ELY, *supra* note 78, at 106; Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 *SUP. CT. REV.* 331; Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 644 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491, 498 (1997).

<sup>90</sup> See Rose, *supra* note 44, at 600 (“The very knowledge that one cannot gull someone else, and get away with it, makes it less likely that anyone will dissipate time and effort in

abdicate the important role of policing the political process and providing reasoned, context-specific explanations for their decisions. In short, equality principles are not fully advanced—and indeed may be thwarted—by what Justice Stewart once called the “uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.”<sup>91</sup> Supporters of applying an equal protection standard argue that greater arbitrariness and unfairness flow from the mechanical application of a cookie-cutter one-person, one-vote rule than from judicial review of apportionment on a case-by-case basis that considers a number of factors.<sup>92</sup>

## II. UNDERSTANDING THE CHOICE OF FORM

After observing the rules versus standards framework in the law of democracy, the question arises: Why are rules or standards preferred in a particular context? Some have argued that those with particular substantive political philosophies are attracted to certain forms of legal directives.<sup>93</sup> Liberals are said to favor standards, whereas conservatives are said to favor rules.<sup>94</sup> Other commentators reject the absolute connection

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trying to find the gullible.”); Schlag, *supra* note 43, at 385 (“Because the distinction between permissible and impermissible conduct is not fixed, but is case-specific, persons will be deterred from engaging in borderline conduct and encouraged to substitute less offensive types of conduct.”); *see also* Aleinikoff & Issacharoff, *supra* note 77, at 650 (explaining that one potential reading of the vague wrongful redistricting holding in *Shaw v. Reno* is a judicial warning to states not to go “too far” in creating majority African American districts).

<sup>91</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 749–51 (1964) (Stewart, J., dissenting). One could also argue that the clarity of the one-person, one-vote rule has been undermined by attempts to address the inadequacies of the rule. *Cf.* Rose, *supra* note 44, at 578 (“[O]ver time, the straightforward common law crystalline rules have been muddled repeatedly by exceptions and equitable second-guessing.”). A host of elaborate and inconsistent doctrines have evolved to guard against the dilution of the political strength of racial minorities, political minorities, and racial majorities. *See* 42 U.S.C. § 1973 (1994) (the Voting Rights Act); *Miller v. Johnson*, 515 U.S. 900 (1995) (prohibiting the use of race as the “predominant” factor in drawing a district); *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Davis v. Bandemer*, 478 U.S. 109, 133 (1986); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (adopting a three-factor test for establishing a violation of section 2 of the Voting Rights Act); *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>92</sup> *Cf.* Sullivan, *supra* note 10, at 62 (“A decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules.”).

<sup>93</sup> *See* Kennedy, *supra* note 8, at 1741–51 (observing that rules favor allocational efficiency and the distributive status quo, whereas standards favor redistribution and paternalism). *But see* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 17–19, 199–206, 225–30 (1992) (describing the relationship between political ideology and rules and standards as contingent upon context); Kennedy, *supra* note 8, at 1777 (acknowledging that “the political tendency of the resort to standards, as it occurs in the real world, cannot be determined a priori”).

<sup>94</sup> *See* Linda Chavez, *Fairness An Elusive Standard*, DENVER POST, Dec. 14, 2000, at B11 (explaining that “for the Democrats, fairness is an elusive standard,” whereas “Republicans . . . define fairness in the rules themselves”); Noemie Emery, *First Principles in Florida: Conservatives Believe in Rules; Liberals Want to be “Fair,”* WEEKLY STANDARD, Dec. 11, 2000, at 24 (arguing that “Democrats are the party of malleable standards, in the

between political philosophy and a consistent preference for either rules or standards, but do assert that individual decisionmakers, regardless of their politics, can be characterized as predisposed to rules or standards.<sup>95</sup> Many Justices in *Bush v. Gore* employed both rules and standards, however, supporting the proposition that political ideology or predisposition toward one form of law does not always explain one's preference for rules or standards in the context of the law of democracy.<sup>96</sup> While political ideology and predisposition may be factors, they are not always determinative.

This Part argues that one's assumptions about how democracy works or should work may explain, in part, one's choice between rules or standards in interpreting or promulgating legal directives governing the democratic process. While most individuals want a skillful and fair execution of the democratic process, individuals have different ideas about particular actors' competencies and incentives and how the democratic process should function. In short, individuals disagree as to which actors should make particular decisions about democracy and as to how much discretion each actor should wield. As a consequence, individuals disagree about the form of legal directives that structure various aspects of the democratic process. This Part proposes that the Justices' different understandings about the workings of democracy influenced their interpretation and promulgation of rules and standards in *Bush v. Gore*. Similarly, conceptions held by individual judges, legislators, and administrators regarding who should make which decisions shape their choices of rules and standards in the election law context.

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interests of what they think of as just" while "Republicans are the party of bright lines and hard and fast rules, in the interests of what they think of as just").

<sup>95</sup> See Sullivan, *supra* note 10, at 88, 92 (observing that "Justice Scalia leads the charge for rules on the current Court," and that "Justices O'Connor, Kennedy and Souter demonstrated an affinity for standards").

<sup>96</sup> Democrats sometimes argue in favor of rules, while Republicans sometimes favor standards. For example, in Florida the Democrats favored application of rules that would discard absentee military ballots that lacked postmarks. See Richard Perez-Pena, *Bush Files Suit to Restore the Rejected Military Ballots*, N.Y. TIMES, Nov. 23, 2000, at A36 (reporting that "[t]he reason Democrats cited most often in trying to disqualify [absentee] ballots was that they had no postmarks, as required by Florida law"). Also, in 1980 the conservative branch of the Court instituted a more subjective standard that required a showing of racially discriminatory intent to establish a legally cognizable claim regarding apportionment. See *Mobile*, 446 U.S. at 55. Two years later, a bipartisan coalition in a Democratically controlled House and Republican-controlled Senate amended Section 2 of the Voting Rights Act to establish a more rule-like results test, effectively overruling *Mobile v. Bolden*. See 42 U.S.C. § 1973 (1994); *Mobile*, 446 U.S. at 134 (Marshall, J., dissenting) ("[A] standard based solely upon the motives of official decisionmakers . . . forces the inquiring court to undertake an unguided, tortuous look into the minds of officials . . ."); ESKRIDGE & FRICKEY, *supra* note 71, at 149 ("A bipartisan coalition voted to amend the Voting Rights Act in 1982 to overrule, in effect, the *Bolden* decision.").

*A. Conceptions of Democracy and Form*

In a politically diverse society, no single, universally accepted understanding of democracy exists.<sup>97</sup> Some individuals harbor democratic ideals that focus on broad participation, and look at politics as an inclusive, deliberative process in which actors are largely motivated by the public good.<sup>98</sup> Others view democracy as a competitive, self-serving system in which private interests attempt to use government action to maximize their private gain and government officials make decisions in an attempt to maintain power.<sup>99</sup> Conceptions of democracy often purport to answer certain questions about democracy: What is the relationship between citizens and representatives, majorities and minorities, and public and private interests? Who should be included in the process, and what efforts should be made to include them? Who is competent and trustworthy to make certain decisions? Democratic theories are often painted in broad, categorical strokes when articulated as academic philosophies; however, judges, legislators, administrators, and other officials generally develop their own individualized understandings of democratic functions and aspirations. Thus it is unlikely that all will settle on a single, comprehensive conception of democracy.<sup>100</sup>

Other commentators have recognized that choices made by a judge, legislator, executive, or scholar regarding the law of the political process are shaped by her assumptions about democracy, which reflect her understandings about particular cultural, professional, and social realities of politics.<sup>101</sup> For example, some underlying conception of effective partici-

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<sup>97</sup> Cf. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 1 (1956) (“[T]here is no democratic theory—there are only democratic theories.”); ESKRIDGE & FRICKEY, *supra* note 71, at 43–66, 123–24 (describing various theories of democracy and representation); DAVID HELD, MODELS OF DEMOCRACY (1987) (detailing the various theories of democracy); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence*, 145 U. PA. L. REV. 893, 901 (1997) (“Western political thought is well-stocked with diverse theories of democracy.”).

<sup>98</sup> See Frank I. Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1493–1507 (1988); Michelman, *supra* note 59, at 17–36; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58 (1988).

<sup>99</sup> See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890–901 (1987).

<sup>100</sup> Cf. Michael A. Fitts, *The Hazards of Legal Fine Tuning: Confronting the Free Will Problem in Election Law Scholarship*, 32 LOY. L.A. L. REV. 1121, 1139 (1999) (“We also are unlikely to achieve a normatively precise theory of democracy that will instruct and resolve all of the heated normative debates over the regulation of the electoral process.”); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 376 (2000) (“Democracy does not have an ideal archetype . . . . [T]here is no clear guidepost from which to evaluate whether democracy is, or is not, working.”).

<sup>101</sup> See Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 444 (1989) (observing that with regard to

pation in representative government is needed to determine the legitimacy of a particular apportionment plan or of restrictions on the contribution of money to political campaigns.<sup>102</sup> Some scholars have suggested that most election law controversies arise not from inconsistencies in legal doctrine, but rather from inconsistent understandings of democracy.<sup>103</sup>

Contextual assumptions about how politics really works or should work not only influence substantive determinations about democracy, such as whether a particular apportionment plan or campaign finance restriction promotes or diminishes effective participation in representative government, but they also affect decisions regarding the appropriate jurisdictional roles of political actors. An individual's theory of democracy provides insight into which political actors she believes are best positioned to make informed decisions, which interests are proper for actors to consider in their decisionmaking, and which actors are most likely to base their decisionmaking on these interests.<sup>104</sup> Questions about competency also relate to the nature of the problem, the actor's expertise, and the vantage point of the actor. Is the problem one in which it is better to see the whole forest, or to examine one tree closely?

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issues “soaked with political interest . . . legal argument and judicial explanation . . . unselfconsciously reflect underlying assumptions about actual and potential social relations, and about the institutional arrangements and forms of political life fit for those relations as they are and as they are capable of becoming”); Richard Pildes, *Democracy and Disorder*, 68 U. CHI. REV. 695, 696 (2001) (describing judicial culture as “the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy”); cf. Heather Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on Bush v. Gore*, 28 FLA. ST. U. L. REV. (forthcoming 2001) (observing that claims that the Court is agnostic with regard to the workings of democracy are implausible because “[w]henver the Court inserts itself into the democratic process, it is making a judgment about how that process should work”); see, e.g., Lillian R. BeVier, *The Issue of Issue Advocacy*, 85 VA. L. REV. 1761, 1764–65 (1999) (explaining that her position on one area of the law of democracy, campaign finance reform, is not “driven by the assumption ‘that voters are largely engaged, thoughtful, and civically responsible’” but rather by the democratic assumption that “[v]oters are far more likely to be ‘rationally ignorant’” and that “special interest groups . . . are . . . inclined to hijack campaign finance ‘reform’”) (citations omitted).

<sup>102</sup> See Gardner, *supra* note 97, at 897 (“We can hardly expect to figure out what voting—or ‘fair’ voting, or ‘meaningful’ voting—means without some conception of what voting is *for*, what purpose it serves within a larger regime of democratic self-government.”); Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 124 (1994) (“[V]ote dilution claims require the federal judiciary to develop theories of the basic principles of democratic self-government. The question of defining minority vote dilution can only be answered by reference to a theory that defines effective participation in representative government.”).

<sup>103</sup> See Michelman, *supra* note 101, at 477 (observing that disagreements in political cases often depend on different “normative conception[s] of ‘political community’”); cf. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (arguing that the apportionment case required the Court to “choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government”).

<sup>104</sup> Cf. SCHAUER, *supra* note 8, at 159 (“In political decision-making, for example, questions of role allocation are often determined by issues of legitimacy.”).

Rules and standards allow lawmakers to respond to their contextual assumptions about jurisdictional roles. Through more rule-like legal directives, lawmakers can limit the range of factors a political actor may consider, thereby constraining a political actor's discretion.<sup>105</sup> More standard-like legal directives, on the other hand, allow lawmakers to grant a political actor broader discretion. Rules and standards in the context of democracy, therefore, necessarily require a contemplation of what kinds of decisions need to be made, what incentives an actor will have, and ultimately, who should have discretion to do what. Democratic politics operates within a legal structure of laws and procedures. Rules and standards determine jurisdictional roles by allocating and limiting discretion within this legal structure, effectively organizing the institutions of democratic decisionmaking.<sup>106</sup>

For example, if Legislator Smith assumes that voter fraud is a major challenge confronting democracy, he may support strict rules designed to combat the problem, such as prohibiting county election supervisors from sending absentee ballots to voters who failed to personally record their voter identification number on their application for an absentee ballot.<sup>107</sup> In contrast, if Legislator Rodriguez assumes that widespread inclusion is more important than fighting voter fraud, she may object to these rules. Instead, Legislator Rodriguez may favor a standard that gives county election supervisors the discretion to send an absentee ballot to a citizen who failed to include her voter identification number on the absentee ballot application.

The preference of Legislator Smith for rules and Legislator Rodriguez for standards may change, however, depending upon their respective opinions about county election supervisors. If Legislator Smith trusts that the county election supervisors will fight voter fraud, Legislator Smith may support a standard giving the county election supervisors broad discretion to deny absentee ballot applications on a case-by-case basis. Similarly, Legislator Rodriguez may distrust the election supervisors and assume they will misuse their discretion and send absentee ballots to vot-

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<sup>105</sup> See SCHAUER, *supra* note 8, at 231–32 (“[T]he essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, ‘This is the basis of our decision,’ I not only constrain lower courts, I constrain myself as well.”).

<sup>106</sup> Cf. SCHAUER, *supra* note 8, at 169 (stating that “[i]t is hard to conceive of a legal system without jurisdictional rules, since otherwise nothing would establish the *system* in the first place” and that “any legal system would need jurisdictional rules to create and organize the institutions of decision-making”); Sullivan, *supra* note 10, at 64 (“[R]ules allocate roles or power among competing decisionmakers.”).

<sup>107</sup> Cf. *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000) (holding that a county supervisor's decision to allow representatives of one political party to add information to absentee ballot request forms did not invalidate the requests).

ers affiliated with one political party while rejecting absentee ballot applications of voters affiliated with an opposing political party. Legislator Rodriguez may therefore support a bright-line rule that requires election supervisors to send out absentee ballots in response to all applications, even those missing a voter identification number.<sup>108</sup> The preference of the legislators for rules or standards depends upon the priorities that they place on various democratic ideals, such as widespread inclusion and the prevention of fraud. Their preference also depends upon their assumptions about the competencies, motivations, and trustworthiness of various actors in the political process, such as voters and county election supervisors.

Choices between rules and standards are not based on the expertise and biases of a single autonomous political actor, but are made in consideration of the relative characteristics of various political actors. When a lawmaking body limits an actor's discretion through rules, that body necessarily reserves more decisionmaking power for itself.<sup>109</sup> For instance, the Court's prioritization of its own equipopulous rule above the other apportionment considerations transferred decisionmaking authority from state legislatures to courts.<sup>110</sup> In the alternative, the lawmaking body may use the rule to reserve more discretion for others. For example, the one-person, one-vote rule could be said to limit the discretion of lower courts while protecting the influence of the political branches. The question, therefore, is not merely whether there is reason to distrust a political actor or to disqualify the actor from making a decision. Instead, the issue is whether the actor whose power will be limited is more or less competent than the entity whose power will be preserved or enhanced through implementation of the legal directive. Just as rules are promulgated out of distrust of an actor, there is reason for a lawmaker to question her own competencies and biases and those of the people whose power is enhanced through a particular rule.

Indeed, the debates regarding the Supreme Court's use of rules or standards to regulate its intervention in the political process implicate the Court's vision of the jurisdictional role of the judiciary in relation to the more political branches of government. An anti-majoritarian impulse favors a flexible standard that would give courts broader discretion to identify political failure in various contexts and check abuses by democratic majorities that disenfranchise minorities.<sup>111</sup> A majoritarian impulse, on

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<sup>108</sup> Cf. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1012 (1995) (“[A] system of rules might be adopted as the best way, overall, to control the agent’s discretion, at least if there is a measure of distrust of some or all agents.”).

<sup>109</sup> See SCHAUER, *supra* note 8, at 161 (finding that “the ‘No vehicles in the park’ regulation . . . allocates power away from the park-user and to the rule-makers”).

<sup>110</sup> See Hasen, *supra* note 5 (asserting that the danger of rules is that they “enshrine the current Court majority’s political theory. . . [which] is precisely what happened in the one person, one vote cases”).

<sup>111</sup> Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice

the other hand, favors bright-line rules that limit judicial oversight.<sup>112</sup> The Court's attempt to limit or expand judicial oversight of the political process is related not only to its vision of the judiciary,<sup>113</sup> but also to its vision of the role of the judiciary within a democracy.

While the role of the judiciary in determining the form of a legal directive deserves special attention,<sup>114</sup> legislators and election administrators also often interpret and promulgate legal directives in the form of rules or standards, as the earlier example involving Legislators Smith and Rodriguez illustrates. We should therefore analyze form when we consider legal directives promulgated by both judicial and non-judicial decisionmakers. Legislators, secretaries of state, and canvassing boards all make decisions regarding the utility of rules and standards based, in part, on their own individual assumptions of democracy. As clarified by the Court's discussion of the clear intent standard—the standard arguably devised by the Florida Legislature for manually counting ballots—the form of legal directives promulgated by non-judicial lawmakers in the election context is subject to criticism with regard to uniformity, clarity, the allocation of responsibilities, and applicability to context-specific situations.<sup>115</sup>

### B. *Connections in Bush v. Gore*

The positions taken in *Bush v. Gore* are consistent with the proposition that one's understanding of democracy sometimes influences the form of legal directives. Two interesting connections between form and assumptions about democracy arise from the case: (1) the state supreme court's interpretation of legal directives as standards to promote inclu-

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against discrete and insular minorities . . . which seriously tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”); ELY, *supra* note 78, at 103 (observing that political malfunction occurs when “representatives beholden to an effective majority are systematically disadvantaging some minority . . . and thereby denying that minority the protection afforded other groups”).

<sup>112</sup> Cf. ELY, *supra* note 78, at 124 (explaining that the Court could avoid the “unadministrability thicket” problem posed by reapportionment by either “stay[ing] out of the area altogether,” or by adopting a one-person, one-vote rule).

<sup>113</sup> See Sullivan, *supra* note 10, at 112.

<sup>114</sup> See, e.g., ISSACHAROFF ET AL., *supra* note 16, at iii (“[T]here are obvious difficulties with deferring to the political process to redress the defects [of elections] . . . . There is little reason to believe that partisan officials will cease to be that if they are given the chance to interpret or even alter the rules of the game after the election has occurred. [Further], this is an area in which courts . . . must continue to act with tremendous circumspection . . . . The adjudication of claims that will alter the outcomes of high-profile elections threatens significant damage to the integrity of courts.”).

<sup>115</sup> Granted, officials from different branches have varying institutional experiences, incentives, and competencies. Rather than being a reason to disregard non-judicial lawmakers and decisionmakers, however, these different backgrounds are worthy of analysis, as they might shape assumptions about democracy, and ultimately choices between rules and standards.

sionary conceptions of democracy contrasted with the majority of the federal Justices' interpretations of legal directives as rules to curtail a process they believed to be arbitrary and subject to manipulation, (2) the standard-like holding of the majority, through which the Court reserved extensive discretion for itself as a player in the political process.

### *I. A Rule Excluding the Undervotes*

The Florida Supreme Court, the Rehnquist concurrence, and the majority opinion in *Bush v. Gore* harbored different conceptions of democracy with respect to the responsibilities of citizens, courts, and government administrators in the voting process. The different groups of Justices interpreted legal directives in different forms that reflected their respective assumptions regarding these responsibilities.

According to the Florida Supreme Court's interpretation of Florida's statutory scheme, legitimate votes included not only ballots completely punched through, but also all ballots that expressed the clear intent of the voter. Further, the statute expressly had empowered the circuit court with the discretion to "fashion such orders" as the court "deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked . . . and to provide any relief appropriate under such circumstances."<sup>116</sup> The Florida Supreme Court interpreted the statutory scheme as a standard that gave discretion to the judicial branch to order "necessary" investigations and to provide "appropriate" relief to ensure the counting of every ballot that reflected the "clear intent" of the voter. The Florida Supreme Court stated that the "clear message from" the legislature was "that every citizen's vote be counted whenever possible,"<sup>117</sup> thereby imputing an inclusionary understanding of democracy to the Florida Legislature.<sup>118</sup> The Florida Supreme Court's finding was, not surprisingly, similar to its own descriptive and inclusionary conception of democracy that "every vote counts."<sup>119</sup> In implementing the Florida Su-

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<sup>116</sup> FLA. STAT. ch. 102.168(8) (2000) (provision of the contest statute).

<sup>117</sup> *Gore v. Harris*, 773 So. 2d 524, 535 (Fla. 2000).

<sup>118</sup> The legislature may have believed that, in light of the varied types of voting technologies used throughout the state, individual counties were best positioned to determine the "clear intent" of the voter on a case-by-case basis.

<sup>119</sup> *Gore*, 772 So. 2d at 1261 n.20 ("This presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts."). A descriptive theory of representation views the elected official as "'descriptive' of the larger group, a microcosm of the collective." ESKRIDGE & FRICKEY, *supra* note 71, at 123. The Florida Supreme Court may have also been motivated by democratic theories that understand voting as a reflection of full membership in society, or view decisionmaking as most reasoned and comprehensive when it affirmatively includes as many perspectives as possible. For a description of such theories see JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2* (1991) (arguing that "[t]he ballot has always been a certificate of full membership in society" and an indicator of "social standing" that confers social dignity on those who have it); *see generally* CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the*

preme Court's order to manually count the undervotes using the clear intent standard, the circuit court appointed teams of state judges to interpret the ballots,<sup>120</sup> perhaps in an attempt to suppress claims that politically biased county canvassing boards would manipulate the malleable standard to their own partisan advantage.

Although six Justices either accepted or found it unnecessary to challenge the definition of a vote articulated by the Florida Supreme Court,<sup>121</sup> Rehnquist, Scalia, and Thomas rejected the reading. The Florida Supreme Court's construction of the clear intent standard "plainly departed from the legislative scheme,"<sup>122</sup> their concurrence stated, because precincts provide instructions on how to "properly cast a vote," and because machinery was not alleged to have miscounted "properly" cast ballots.<sup>123</sup> According to the concurrence, the statutory scheme instead contemplated a bright-line rule that required only the counting of ballots whose chads had been punched out completely.<sup>124</sup>

Justice Rehnquist's rule-like interpretation, which excluded the undervotes, is consistent with a particular conception of democracy. The democratic ideal that Rehnquist imputed to the state legislature is that the right to vote is satisfied by the simple opportunity to follow instructions and cast a vote.<sup>125</sup> Under this interpretation, government should not intervene to remedy the failings of individuals; government does not have the requisite authority, competence, or objectivity to make efforts to include some votes.<sup>126</sup> Indeed, government has a responsibility to those who cast

*Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994).

<sup>120</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots.").

<sup>121</sup> *See Bush v. Gore*, 531 U.S. at 105 ("For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition."); *id.* at 123 (Stevens, J., dissenting) (accepting the Florida Supreme Court's interpretation, observing that "[w]hen questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers").

<sup>122</sup> *Id.* at 118 (Rehnquist, C.J., concurring).

<sup>123</sup> *Id.* at 120 (Rehnquist, C.J., concurring) (arguing that "there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots").

<sup>124</sup> *See id.*

<sup>125</sup> In interpreting a legal directive, judges and others sometimes impute their own democratic ideals to the entity that promulgated the legal directive.

<sup>126</sup> Such a perspective is not inconsistent with the concept of democracy manifested by Justices Thomas and Scalia in their condemnations of applications of the Voting Rights Act. *See Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring) (asserting that the "terms [of the Voting Rights Act] reach only state enactments that limit citizens' access to the ballot"); Guinier, *supra* note 102, at 121 ("For Justice Thomas, the [Voting Rights] Act is equally compatible with an alternative theory of democracy, one in which the right to vote conveys only symbolic, not necessarily real privileges. In such a 'republican ar-

a machine-readable vote to refrain from special efforts to count ballots marked in ways that are not machine-readable. By suggesting that a legitimate “vote” is limited only to ballots punched in a manner consistent with the instructions, Justice Rehnquist may be revealing a theory of democracy that values individual merit<sup>127</sup> and the administrability of rules over the inclusionary advantages of standards.

Justices Kennedy and O’Connor shared similar concerns about the authority, competence, and impartiality of the Florida Supreme Court to manage the manual count of undervotes conducted by different county committees.<sup>128</sup> These two Justices, however, were concerned that the Court would be exceeding its role if it displaced the Florida court’s interpretation of the state statutory scheme with the bright-line rule advocated by Justices Rehnquist, Thomas, and Scalia. Consequently, Justices Kennedy and O’Connor signed on to a per curiam opinion that used rules to limit the state court’s discretion in two other ways. First, the majority claimed that the clear intent standard violated equal protection, and that more uniform rules of counting ballots were necessary because the structure created by the Florida court could not determine the clear intent of voters with the requisite uniformity.<sup>129</sup> Second, the majority per curiam

rangement,’ as long as minorities can vote, they have all the political power they are due; if voting is the extent of political rights, the government should not intervene when ‘numerical minorities lose.’”).

<sup>127</sup> Cf. Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 28 FLA. ST. U. L. REV. (forthcoming 2001) (observing that the Rehnquist concurrence in *Bush v. Gore* embraced merit-based rather than inclusionary assumptions about democracy that require that an “individual citizen rather than government has a responsibility to secure or meet the conditions necessary for his or her political participation”); Cynthia Tucker, *For Christmas, GOP Gives Jesse the Perfect Cause*, ATLANTA J. & ATLANTA CONST., Dec. 17, 2000, at G14 (noting that as a GOP lawyer in the 1960s, Chief Justice William Rehnquist assisted Republicans in enforcing the literacy test requirement). *But cf.* *City of Rome v. United States*, 446 U.S. 156, 215 (1980) (Rehnquist, C.J., dissenting) (“The Court [in *Oregon v. Mitchell*] found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests . . .”). Conversely, Justices Stevens and Ginsburg would have upheld the Florida Supreme Court’s use of the clear intent standard to include the undervotes. These two justices have expressed inclusionary assumptions about the workings of democracy in the past. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) (joined by Ginsburg, J.) (“Today the Court construes the First Amendment as a limitation on a State’s power to broaden voter participation in elections conducted by the State. The Court’s holding is novel and, in my judgment, plainly wrong.”); Pildes, *supra* note 101, at 704 (“[T]he value of voter participation is central in Justice Stevens’s dissent [in *California Democratic Party*] . . . [H]is dissent would make the entire structure of constitutional analysis turn on whether regulations of politics expand or constrict voter participation . . .”).

<sup>128</sup> *See* *Bush v. Gore*, 531 U.S. at 128 (Stevens, J., dissenting) (asserting that the majority endorsed “an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed”).

<sup>129</sup> The majority per curiam did not interpret the appointment of the state court judges to count the ballots as a safeguard to promote impartiality in counting, but instead used the appointment to question the competence of the vote counters. *See id.* at 109 (“The county canvassing boards were forced to pull together ad hoc teams comprised [sic] of judges from various Circuits who had no previous training in handling and interpreting ballots.”).

used the state court's earlier dicta to craft a firm, rule-like deadline of December 12 that would prevent the state court from exercising any further discretion in counting additional ballots.<sup>130</sup>

Interestingly, the five Justices who prohibited the counting of the undervote in *Bush v. Gore* also made up the five-Justice majorities in both *Miller v. Johnson* and *Shaw v. Reno*.<sup>131</sup> Concerned with protecting the individual rights of the white plaintiffs, in both *Miller* and *Shaw* the majorities announced standards aimed at limiting the government's efforts to more fully realize the political strength of African American voters through the creation of predominantly minority legislative districts.<sup>132</sup> In preventing any further attempts by the Florida Supreme Court to recognize the undervotes,<sup>133</sup> the majority in *Bush v. Gore* effectively protected the ballots counted by machines from the possibility of dilution. The majority also protected the political results arising from the ballots counted by machines from possible rejection by Congress. In all three cases, the same five Justices used legal directives to limit the discretion of entities that attempted to further political inclusion.<sup>134</sup>

## 2. A Standard Allowing Judicial Discretion

While the Court in *Bush v. Gore* stated that the clear intent standard resulted in the arbitrary treatment of voters,<sup>135</sup> it refused to announce a bright-line rule that defined the point at which election procedures are so arbitrary that they are unconstitutional. Instead of articulating a clear rule that could be applied in various contexts, the Court limited its analysis "to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."<sup>136</sup> Even Justice

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<sup>130</sup> See *id.* at 111.

<sup>131</sup> *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630, 632 (1993).

<sup>132</sup> See *Miller*, 515 U.S. at 920 (stating that strict scrutiny is applied in districting cases when the use of race is the "predominant" factor, and limiting race-conscious districting to that which avoided retrogression); *Shaw*, 509 U.S. at 655 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1618–19, 1633–34 (2000) (interpreting *Shaw* as announcing an overbroad prophylactic rule that guards against violations of individual equal protection rights in drawing districts).

<sup>133</sup> African American precincts comprised a disproportionately large percentage of the uncounted undervotes in Florida following the 2000 election. See Josh Barbanell & Ford Fessenden, *Racial Pattern in Demographics of Error-Prone Ballot*, N.Y. TIMES, Nov. 29, 2000, at A25; cf. Overton, *supra* note 127 (using race as a lens to examine the decision to disregard thousands of imperfectly perforated punch card ballots in Florida following the 2000 presidential election).

<sup>134</sup> See Overton, *supra* note 127 (discussing the rejection of inclusionary theories of democracy by the majority per curiam in *Bush v. Gore*).

<sup>135</sup> *Bush v. Gore*, 531 U.S. at 103.

<sup>136</sup> *Id.* at 109.

Scalia, a self-described advocate of rules,<sup>137</sup> joined majority and concurring opinions that retreated from announcing a clear rule.

In reviewing the Florida Supreme Court's order, the Court used a measure not unlike that announced in *Baker v. Carr*. In *Baker*, the Court said that the judiciary could review legislative districts using "well developed and familiar" judicial "standards under the Equal Protection Clause," which allow courts to invalidate actions they deem arbitrary.<sup>138</sup> Like the Court in *Baker*, the Court in *Bush v. Gore* avoided the articulation of a clear, workable rule that would explain when a method of recording or tabulating votes was sufficiently rule-like.<sup>139</sup> In other words, the Court's call for precision lacked precision.<sup>140</sup> Just as in the 1962 case, the Court's interpretation in *Bush v. Gore* allowed the Court to maintain its own discretion for future cases by refusing to announce a clear rule that could be applied in other situations, such as the inequities flowing from the use of different machines in different counties. The lack of a clear rule also resulted in a failure to clearly define the federal judiciary's role in relation to more political branches and the states, and left lower courts and others without manageable tools to determine equal protection violations in the political context. *Bush v. Gore* represents a clear departure from the Court's more rule-like approach in *Reynolds v. Sims*, the case in which it had initially articulated the one-person, one-vote rule.

The Court's endorsement of a standard-like, case-by-case examination of equal protection violations in the political context is consistent with other cases in which the Court has reserved extensive discretion for the judiciary through nebulous standards. For example, in its 1986 decision in *Davis v. Bandemer*, the Court adopted an indefinite standard by which partisan gerrymandering violates equal protection only when "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>141</sup> Similarly, in determining whether majority-minority districts

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<sup>137</sup> See, e.g., Scalia, *supra* note 105.

<sup>138</sup> 369 U.S. 186, 226 (1962).

<sup>139</sup> See Aleinikoff & Issacharoff, *supra* note 77, at 621–22 (explaining that "*Baker* announced the justiciability of claims of unconstitutional malapportionment" without articulating a clear rule to adjudicate such claims, and two years later in *Reynolds* the "Court announced the one-person-one-vote benchmark"); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 587 (1993) (observing that "*Baker* became meaningful once *Reynolds v. Sims* translated it into the one-person-one-vote" rule).

<sup>140</sup> Cf. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 312 (2d ed. 2001) ("The question of how specific is specific enough to adequately protect the relevant right, cannot itself, of course, admit of any—we hesitate to say it—specific answer").

<sup>141</sup> *Davis v. Bandemer*, 478 U.S. 109, 133 (1986); see also *id.* at 156 (O'Connor, J., dissenting) (arguing that the standard adopted by the plurality will "prove unmanageable and arbitrary" and result in "greater judicial intrusion into the apportionment process"); Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of*

are drawn in such a way as to infringe upon the rights of white voters, the Court initially adopted an indeterminate “bizarreness” standard,<sup>142</sup> which later evolved into a similarly manipulable “predominant factor” standard.<sup>143</sup> The Court has also made use of vague standards in the area of campaign finance, suggesting that the test for determining whether a contribution limit is unconstitutionally low is whether candidates are impeded in their ability to “amass the resources necessary for effective advocacy.”<sup>144</sup>

The arbitrariness standard used in *Bush v. Gore*, like the other standard-like tests for reviewing the electoral process adopted in recent years, reflects a democratic ideal that reserves an important role for the judiciary. Specifically, it gives courts the duty to oversee the regulatory details of politics.<sup>145</sup> Judges retain some discretion to employ their own assumptions about how the political process should work in deciding cases. By retaining discretion, the courts limit the ability of other branches of government to determine the meaning of democracy.<sup>146</sup> According to the

*Politics*, 87 COLUM. L. REV. 1325, 1334 (1987).

<sup>142</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (considering question of whether a district is so bizarre on its face that it is unexplainable on grounds other than race, and determining that “appearances do matter”); Pildes & Niemi, *supra* note 139, at 508 (observing that judicial review of expressive harms of racial considerations in redistricting recognized in *Shaw* is “fraught with complexity and unlikely to yield determinate, single right answers”); Saunders, *supra* note 132 at 1633–34 (interpreting *Shaw* as announcing an overbroad prophylactic rule that guards against violations of individual equal protection rights in drawing districts while avoiding case-by-case assessment, but asserting that the decision’s imprecision causes confusion and compliance difficulties).

<sup>143</sup> See *Miller v. Johnson*, 515 U.S. 900, 910, 916 (1995) (requiring a showing, to establish a wrongful districting claim, “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district” and that the state had not “demonstrate[d] that its districting legislation is narrowly tailored to achieve a compelling interest”). See also *Bush v. Vera*, 517 U.S. 952, 1012 & n.9 (1996) (Stevens, J., dissenting) (observing that “determining the ‘predominant’ motive” of the legislature “is not a simple matter,” and may be impossible) (citing *Palmer v. Thompson*, 403 U.S. 217, 225 (1971)); Karlan, *supra* note 82, at 300–02 (discussing the standard-like nature of the Court’s “bizarreness” and “predominant factor” tests in determining the existence of wrongful districting in *Shaw v. Reno* and *Miller v. Johnson*).

<sup>144</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), asking whether a contribution limit was so low as to “render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless”). But see Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMMENT. 483, 497 (2000) (asserting that *Shrink*’s test to establish that contribution limits are unconstitutionally low “will be exceedingly difficult for challengers to meet” and therefore suggesting that the test essentially functions as a rule); but cf. *Buckley*, 424 U.S. at 143 (establishing an absolute rule against restrictions on political expenditures in the campaign finance context).

<sup>145</sup> See Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 28 FLA. ST. U. L. REV. (forthcoming 2001) (arguing that *Bush v. Gore* “eviscerated th[e] distinction between nuts-and-bolts questions of elections and the big picture,” and that courts could use the decision to justify “further entry in the political thicket [in a way that] threatens both democracy and the legitimacy of courts”).

<sup>146</sup> Cf. Karlan, *supra* note 82, at 289 (“The current incarnation of wrongful districting claims gives insufficient weight to the political branches’ determination of what a republi-

cases using standard-like tests for reviewing the electoral process, a court should have the discretion to determine when a voting procedure is “arbitrary,”<sup>147</sup> when an electoral system “consistently” disadvantages the influence of certain voters,<sup>148</sup> at what point race becomes the “predominant” factor in districting,<sup>149</sup> and what constitutes “effective” advocacy in a political campaign.<sup>150</sup>

Certainly, these standards give a judge the flexibility to adapt to unforeseen contexts and to consider all relevant factors. The standards may also discourage undesirable behavior by not drawing a bright line between permissible and prohibited conduct. But they also attract the criticisms that advocates of rules commonly articulate.<sup>151</sup> The standards allow judges to introduce political biases into their deliberations and thus do not clearly confine the decision-making power of judges. Further, standards fail to send clear, predictable, and easy-to-understand messages as to what type of behavior is prohibited. Thus, standards may discourage behavior that some may see as desirable, such as the creation of majority-minority legislative districts, lower contribution restrictions, or local control of elections. The Court’s standards may therefore suppress the implementation of conceptions of democracy originating in the political sphere.

Although there may be similarities between the use of standards in *Baker v. Carr* and *Bush v. Gore*, there are also important differences. Questions of political bias were less menacing in *Baker v. Carr*. In *Bush v. Gore*, the Court determined an election’s winner, the person who would make future appointments to the Court. The political consequences of the Court’s decision in *Baker v. Carr* were less clear, and the decision shaped the composition of political bodies that did not directly influence the Court’s composition. Additionally, the Court in *Baker v. Carr* announced the principle that redistricting claims were justiciable, a principle that could be applied in other contexts and that could benefit actors of various

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can form of government means in a multi-racial, pluralistic society.”).

<sup>147</sup> See *Bush v. Gore*, 531 U.S. at 105 (finding that the recount procedures did “not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right” of voting).

<sup>148</sup> See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (claiming that an equal protection violation occurs when “the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”).

<sup>149</sup> See *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (requiring a showing, to establish a wrongful districting claim, “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”).

<sup>150</sup> See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000) (determining constitutionality of campaign contribution limitation by asking whether the limit was so low as to “impede the ability of candidates to ‘amas[s] the resources necessary for effective advocacy’” and “render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

<sup>151</sup> See *supra* Part I.B.

political ideologies. In contrast, although the majority in *Bush v. Gore* employed a standard of arbitrariness, it confined its analysis “to the present circumstances,”<sup>152</sup> and thus limited the possibility that actors of different political ideologies would be able to benefit from its analysis. Legal directives governing the democratic process are less likely to be perceived as ad hoc, political decisions when they are generally applicable to a diverse group of political actors in various contexts.<sup>153</sup>

### C. Raw Power Politics Driving Choice of Form

One might argue that raw power politics, rather than notions about how democracy should and does work, explain the Court’s decision in *Bush v. Gore*.<sup>154</sup> By this argument, the outcome of the case would have been different if the positions of the candidates had been reversed so that George W. Bush trailed by five hundred votes with the majority of under-votes coming from Republican precincts. Justices O’Connor, Kennedy, Rehnquist, Thomas, and Scalia would have interpreted federalism and political question doctrines as bright-line rules that prevented the Court from interfering with a manual recount in an attempt to bring about a victory for Bush. At the very least, a majority of the Court would have determined the “clear intent of the voter” standard to be a reasonable means of ensuring equal protection principles. This argument presupposes that judges, election administrators, legislators, and other officials initially make a political assessment about which political actors they want to benefit, and then select the type of legal directives that will allow them either to justify or to implement their political decision.<sup>155</sup>

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<sup>152</sup> 531 U.S. at 109.

<sup>153</sup> Some commentators might argue that the Court’s holding did not even establish a precedent in which equal protection violations in the election law context are determined on a case-by-case basis, but rather constituted an arbitrary, ad hoc decision that can be described as neither a rule nor a standard. See, e.g., Hasen, *supra* note 145 (arguing that the Court in *Bush v. Gore* did not intend for its opinion to have precedential value based on “the limiting language in the opinion, the lack of seriousness with which the Court undertook its own analysis, and the inconsistency of the opinion with other jurisprudence by this majority of Justices”).

<sup>154</sup> See *supra* note 64. See also, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001) (“*Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship [in that] the five conservatives installed a President who would appoint their colleagues and successors and would stock the federal judiciary with like-minded conservatives.”); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 679 (2001) (observing that many Americans suspect that the Justices deciding *Bush v. Gore* “were prompted to their actions by a prior personal preference for a Bush victory”).

<sup>155</sup> See SCHAUER, *supra* note 8, at 192 (arguing that “[t]he Realists believed that decision-makers . . . initially make an ‘all things considered’ judgement about who ought to win” and then rationalize “the decision in terms of some legal rule”); Balkin, *supra* note 154, at 1442–43 (asserting that the “conservatives used whatever arguments were available to promote George W. Bush’s election, while the liberals offered the arguments that would have helped Al Gore,” and that this was “a more overt collapse of the boundary between

Rules and standards do not restrict or grant discretion, according to this argument, but rather serve as political mechanisms to camouflage decisions made in the absence of neutral legal principles. This phenomenon is most common when a decisionmaker has previously conceived a strong opinion on a subject and can choose among a number of persuasive but conflicting legal directives.<sup>156</sup> Rules and standards, therefore, are seen simply as weapons to achieve political motives. When either conservatives or liberals win using rules, they favor rules, and when they win using standards, they favor standards.<sup>157</sup>

Certainly, one's conception of how democracy works is not a magic formula that exclusively determines the choice between rules and standards. Other variables affect the selection. Elected and appointed officials regularly weigh a number of competing political variables, such as the appearance of unfair partisanship or how the form of a legal directive will likely impact political outcomes.

Explanations based on power politics and those based on assumptions about democracy are not necessarily mutually exclusive, however. Both explanations acknowledge that legislators, judges, and administrators look at factors external to the legal directives themselves when they decide what form a particular directive should take. One may be motivated both by her understanding of the meaning of democracy and by power politics, and the two might interact in complex ways. For example, a judge might rationalize a politically motivated choice of form because it accords with her democratic sensibilities. Conversely, a judge's interests in particular substantive political outcomes might shape her vision of how democracy is supposed to work. The objective of this Article is not to justify *Bush v. Gore* through the use of apolitical rationalizations, or to suggest that political incentives were not at play. Rather, the point is that simple political interest alone does not always determine the choice of legal form, and that sometimes conceptions of how democracy works, or how it should work, influence the choice of form.

### III. THE IMPORTANCE OF FORM TO DEMOCRACY

Academics, politicians, and activists have given extensive attention to the shortcomings of existing laws governing the political process and proposed reforms,<sup>158</sup> but often overlook important issues related to the

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law and politics than Critical Legal Studies would normally predict, although it is perhaps consistent with cruder forms of legal realism").

<sup>156</sup> Cf. SCHAUER, *supra* note 8, at 196 ("Where the decision-maker has strong views, whether on morals, politics, personality, or economics, and where the case implicates those views, then the former mode may prevail, with the moral, political, psychological, or economic view dominating the desire to work out the best internally coherent answer.").

<sup>157</sup> Sullivan, *supra* note 10, at 98–99.

<sup>158</sup> See, e.g., Seelye, *supra* note 7; *Election Panel Calls for More Money for Equipment and Training*, *supra* note 7.

form of legal directives. Rules and standards in the context of the law of democracy, however, directly allocate discretion among various decisionmakers and are worthy of further analysis.

The substantive implications of the structural allocation of power in the context of political processes are well established. The founders envisioned unrestrained factionalism as a threat to the stability and growth of the United States,<sup>159</sup> and designed government structures to control competing interests.<sup>160</sup> More recently, commentators have conceived of democratic politics as a product of laws, procedures, and institutional arrangements carefully orchestrated by various courts, legislatures, executive officials, and regulators at the federal, state, and local levels.<sup>161</sup> They have recognized that democracy does not consist simply of individual citizens exercising political liberties in a neutral, pre-political world; rather, democracy is also shaped by institutional and legal structures that determine the boundaries of possible political outcomes.<sup>162</sup>

The form of legal directives governing elections directly shapes the allocation of discretion among various decisionmakers within these institutional arrangements, and thus plays an important role in defining both procedural fairness and substantive outcomes in democracy. Answers to questions about form (e.g., Will a clear intent standard or two-corner chad perforation rule be used?) shape answers to questions about democratic procedure (e.g., How will the undervotes be counted?), which in turn influence substantive political issues (e.g., Who will be the next President?).

Familiarity with the rules versus standards debate is critical to a better understanding of the institutional arrangements that comprise the democratic process. The choice between rules and standards is a structural determination about who will make decisions. Indeed, form is as relevant to the law of elections as are issues of federalism, separation of

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<sup>159</sup> See THE FEDERALIST NO. 10, at 42 (James Madison) (Buccaneer Books 1992) (unrestrained factionalism may do significant damage to the fabric of government).

<sup>160</sup> See ISSACHAROFF ET AL., *supra* note 79, at 211; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 254–55 (1992); THE FEDERALIST NO. 10, at 45 (James Madison) (Buccaneer Books 1992) (“[T]he causes of faction cannot be removed; . . . relief is only to be sought in the means of controlling its effects.”).

<sup>161</sup> See ISSACHAROFF ET AL., *supra* note 79, at 1–2 (“The kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures” which “limit and define the decisions available through democratic politics itself.”).

<sup>162</sup> See Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (observing that the restructuring of the discussion of election law “has broadened our understanding of how various electoral rules affect individual interests, and . . . has led us away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements”); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2198 (1990) (“Political institutions and decision procedures must create the conditions out of which . . . a political community can forge for itself a collective will [and] specify whose views will be counted in determining the collective will . . .”).

powers, voting rights, equal protection, and the Electoral College; moreover, form is a crucial component of more comprehensive discussions about any of these issues.<sup>163</sup> An analysis of form can also provide better insight into how best to use legal directives to give democracy meaning, rather than simply using legal directives as tools to implement immediate political objectives.

Additionally, rules and standards are important because both can be said to advance democratic principles. On the one hand, one might argue that clear rules promote democratic stability by preventing politics from disintegrating into a confusing and endless disarray of heated disputes, including litigation and violence. With regard to the law governing democracy, bright-line rules are especially important because the border between law and politics is vulnerable, and the discretion afforded through standards clouds the boundary by allowing for partisanship, favoritism, arbitrariness, suspicion, distrust, and uncertainty.<sup>164</sup> Political interests are relative,<sup>165</sup> and firm rules are needed to clearly establish im-

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<sup>163</sup> Legal commentators have discussed various aspects of *Bush v. Gore*. See, e.g., JESSE H. CHOPER, WHY THE SUPREME COURT SHOULD NOT HAVE DECIDED THE PRESIDENTIAL ELECTION OF 2000 (U.C. Berkeley Public Law and Legal Theory, Working Paper No. 65, 2001); ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001); Balkin, *supra* note 154; Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Richard D. Friedman, *Trying to Make Peace With Bush v. Gore*, 29 FLA. ST. U. L. REV. (forthcoming 2001); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming 2001); Harold J. Krent, *Judging Judging: The Problem of Secondguessing State Judges' Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. (forthcoming 2001); Hasen, *supra* note 145; Richard L. Hasen, A "Tincture of Justice:" *Judge Posner's Failed Rehabilitation of Bush v. Gore*, 80 TEX. L. REV. (2001); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001); Michelman, *supra* note 154; Pildes, *supra* note 101; Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. (forthcoming 2001); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 79 N.C. L. REV. (forthcoming 2001); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001).

<sup>164</sup> See Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35, 39 (George Loewenstein & Jon Elster eds., 1992) ("Unchanging rules facilitate the change of majorities, without which democracy has little substance."); Radin, *supra* note 42, at 781 (noting the argument that "[t]he ideal of 'the rule of law, not of men' calls upon us to strive to ensure that our law itself will rule (govern) us, not the wishes of powerful individuals" and that "government must be by 'settled, standing Laws,' not by 'Absolute Arbitrary Power'").

<sup>165</sup> Cf. Guinier, *supra* note 102, at 122–23 ("[R]epresentative democracy is neither exclusively individual nor discrete but is relational and inherently group-based.").

portant rights and obligations.<sup>166</sup> Clear, unchanging rules allow for a firm commitment to a certain course before an election occurs, and thus ensure that after the election, short-term interests in acquiring political power do not overtake long-term goals of maintaining political stability.<sup>167</sup> Unfortunately, mistakes, misfortune, and unanticipated events—including but not limited to spoiled ballots—are bound to happen in the chaos of elections. Firm, clear, uncompromising rules provide order and “keep things from reeling out of control.”<sup>168</sup> Through clarity, neutrality, certainty, and consistency, rules allow for a democratic process that both political winners and political losers can accept as legitimate. Rules thus promote political stability.

On the other hand, one might assert that enslavement to electoral rules often leads to gross unfairness.<sup>169</sup> Rigid rules can never anticipate all contingencies,<sup>170</sup> and are often used as political tools of exclusion.<sup>171</sup> Political victory does not instill the confidence and perception of legitimacy necessary to govern when it is based on rule-like technicalities that subvert fairness and equality. The anger, resentment, disillusionment, and frustration that result from the unfairness of rigid rules can promote political alienation, factionalism, political instability, and a decline of

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<sup>166</sup> See Rose, *supra* note 44, at 577–78 (“We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.”).

<sup>167</sup> See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 37–47 (1979) (discussing precommitment theory); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 235–36 (Jon Elster & Rune Slagstad eds., 1988); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *TEX. L. REV.* 1643, 1665 (1993) (“At the extreme, a precommitment strategy removes all choices from an actor, binding him to follow a preconfigured path regardless of subsequent developments.”).

<sup>168</sup> Emery, *supra* note 94, at 25.

<sup>169</sup> Cf. SCHAUER, *supra* note 8, at 47–52 (discussing the over- and under-inclusiveness resulting from application of rules); Sullivan, *supra* note 10, at 58 (1992) (“A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness.”).

<sup>170</sup> For discussions regarding the problems of unanticipated consequences, see Fitts, *supra* note 100, at 1128; Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705, 1707 (1999); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. REV.* 505 (1982) (observing that the direct lawmaking process is driven by as many special interests as ordinary lawmaking); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1072–73 (1996); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 *COLUM. L. REV.* 1390, 1411 (1994) (“[R]egulation—consisting of rigid mandates and flat bans—is peculiarly likely to be futile or self-defeating . . . . Because of their rigidity . . . [mandates] tend to have unintended adverse consequences.”).

<sup>171</sup> See Overton, *supra* note 127 (observing how rules conditioning membership in the political community upon payment of a poll tax, property ownership, passage of a literacy test, or ability to produce a machine readable ballot run counter to an inclusionary vision of democracy).

commitment to societal mores and laws generally.<sup>172</sup> Standards provide preset guidelines as to how to facilitate democracy, one might argue, but allow decisionmakers to accord the political rights of each citizen individualized importance while avoiding the unfairness caused by a mindless application of mechanical rules.<sup>173</sup>

The lesson from these two sets of arguments is not that it is best to apply either rules or standards in every situation.<sup>174</sup> Clearly, structure and a defined commitment to legal directives before an election are needed to curtail the biases of election officials and judges, and legal institutions governing the political process will require a large number of rules to

<sup>172</sup> See Rose, *supra* note 44, at 593 (describing the argument that “it would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules and rational ex ante planning, particularly if those rules covertly serve the wealthy and powerful”).

<sup>173</sup> Cf. Klarman, *supra* note 89, at 496 (arguing that the “precommitment account of constitutionalism and judicial review” is objectionable because of “the problem of context-dependent preferences”); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962) (observing that standards allow for a “particularized, rational account of how” a decisionmaker arrives at a conclusion, “more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history”); Michelman, *supra* note 59, at 76 (observing that “every norm, every time, requires explanation and justification in context”).

<sup>174</sup> Similarly, although racial inclusion is an important topic when discussing the law of democracy, it is not clear that rules or standards consistently benefit racial minorities. On one hand, firm rules may be good for minorities because, in limiting the discretion of decisionmakers, they may provide less opportunity for the exercise of personal bias and discrimination. On the other hand, rules can also be used to disenfranchise people of color. See Kristen N. Keiser, Recent Decision, *United States v. Stanfield*, 109 F.3d 976 (4th Cir. 1997), 57 MD. L. REV. 1208, 1208–09 (1998) (“[I]n . . . *Stanfield* . . . the Fourth Circuit created a bright-line rule allowing police officers, during lawful traffic stops, to open the doors of cars with heavily tinted windows whenever ‘it appears in their experienced judgment prudent to do so’ . . . . The decision in *Stanfield* creates a greater potential for police abuse of discretion and discrimination.”); Beth A. Levene, *Comment: Influence-Dilution Claims Under the Voting Rights Act*, 1995 U. CHI. LEGAL F. 457, 458 (“Although there is some disagreement among courts, most have concluded that [Voting Rights Act] claims are not cognizable if the minority group cannot constitute more than 50 percent of a single-member district . . . . Although there is a legitimate need for a workable standard for assessing influence-dilution claims, a simple bright-line rule cannot appropriately balance judicial efficiency and the need to redress injuries to political participation.”); James L. McAlister, *Comment, A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia’s Color-Blind Rule*, 77 MARQ. L. REV. 327, 353 (1994) (“Because almost all racial classifications would be struck under a color-blind rule, it is a simple rule to implement . . . . Of course, the result of a race neutral rule when applied to affirmative action plans will offend some groups.”). Further, some standards have benefited minorities. See David L. Eades, Recent Development, *Section 2 of the Voting Rights Act: An Approach to the Results Test*, 39 VAND. L. REV. 139, 143 (1986) (“The revised section 2 [of the Voting Rights Act, which is more standard-like] has succeeded in easing the burden for plaintiffs . . . .”); cf. Beth M. Weber, Note, *The Effect of O’Connor v. Consolidated Coin Caterers Corp. on the Requirements for Establishing a Prima Facie Case under the Age Discrimination in Employment Act*, 29 RUTGERS L.J. 647, 661–62 (1998) (“The use of this standard allows courts to evaluate the evidence on a case-by-case basis to determine if age discrimination is actually present. Analyzing evidence in this way allows courts flexibility in that what is required to succeed in one case will not necessarily be sufficient in another . . . . Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.”).

serve as a baseline.<sup>175</sup> It is too simplistic, however, to say that the solution to better elections will always be rigid, uniform rules. All contingencies cannot be anticipated, and attempts to do so often result in an unworkable maze of exceptions and sub-rules. Indeed, it is likely that an excessively rule-like electoral structure, in its brittleness, would shatter upon itself. Some standard-like elements are needed to provide a little play in the joints.<sup>176</sup> The Court and other decisionmakers have oscillated back and forth between rules and standards in the law of democracy in part because the choice often comes down to difficult judgments about which form of legal directive most precisely implements specific background principles in particular contexts.

*Bush v. Gore* should not be read to mandate a mindless embrace of inflexible electoral rules that dismiss pragmatic concerns about individualized justice. Instead, the opinion should prompt the use of the rules versus standards debate as a framework through which to contemplate issues of form. Those who create and interpret legal directives governing the political process should explicitly consider both the advantages and disadvantages of rules and standards in light of the particular issue before them, their understanding of the world, and their objectives. A critical part of this analysis involves consideration of the effect of the rule or standard in shaping the behavior of candidates who run for office and contest elections, officeholders who make and execute legal directives, and judges who apply and interpret legal directives. While the forms that legal directives take do not predetermine all political outcomes, form can have a very real impact, as evidenced by the events surrounding the 2000 presidential election.

Of course, perpetual differences of opinion regarding the objectives and workings of democracy, as well as allocation of responsibilities in democracy, will prevent unanimity with regard to the choice between rules and standards. Nevertheless, a more conscious appreciation of the relationship between the form of legal directives and assumptions about the workings of democracy will provide a better understanding of the law of democracy and how it should be reformed.

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<sup>175</sup> Cf. *Florida Election Officials Call for Voting Standard*, N.Y. TIMES, Jan. 24, 2001, at A17 (reporting that “Florida’s 67 county election supervisors . . . called on the Legislature . . . to adopt uniform voting technology throughout the state . . . [and] voted . . . for a single set of standards on how to conduct a recount”).

<sup>176</sup> See *Bush v. Gore*, 531 U.S. at 126 (Stevens, J., dissenting) (stating that the interpretation of constitutional principles must not be too literal because “the machinery of government would not work if it were not allowed a little play in its joints”) (quoting *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931)).