THE AUTHORITATIVE LAWSAYING POWER OF THE STATE SUPREME COURT AND THE UNITED STATES SUPREME COURT: CONFLICTS OF JUDICIAL ORTHODOXY IN THE BUSH-GORE LITIGATION

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What did the courts do in the Bush-Gore litigation?[1] Did the United States Supreme Court and the Florida Supreme Court behave in a pure and properly judicial mode? Or did the various justices, state and federal, vying for an illicit power to decide the election outright, act as if they were not judges at all, but ordinary voters stuffing a ballot box? Perhaps most observers will agree that the courts were doing something somewhere between those two extremes,[2] but we will disagree about where the Bush-Gore litigation lies on the continuum that runs from pristine neutral principles to raw political power and whether the United States Supreme Court or the Florida Supreme Court deserves more blame for deviating from the path of judicial orthodoxy.[3]

The United States Constitution enlists the states in the process of electing the President.[4] The Framers considered giving Congress the role of selecting the President but, consistent with a plan of balancing the branches of the federal government, rejected giving so much ***509** power to the legislature. The idea of the Electoral College emerged because of concerns about trusting any ongoing institution with the selection of the President; a group of electors chosen to meet solely to vote for the President (and Vice President), because they would be identified so late in the process, would be difficult to corrupt.[5] This

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1 The reference, of course, is to the litigation that took place in the state of Florida following the very close 2000 presidential election between Republican candidate George W. Bush and Democratic candidate Al Gore, Jr. See, e.g., Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (hereinafter Bush I); Bush v. Gore, 531 U.S. 1046 (2000); Bush v. Gore, 531 U.S. 98 (2000) (hereinafter Bush II).

2 Some commentators have taken the extreme position that the United States Supreme Court Justices in the majority in Bush II did nothing more than vote for President and try to cover it up with legal obfuscation. See, e.g., Randall Kennedy, *Contempt of Court*, in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 337 (E.J. Dionne, Jr. & William Kristol eds., 2001).

3 The commentary is already voluminous. See, e.g., Howard Gillman, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard Epstein eds., 2001); BUSH V. GORE: THE COURT CASES AND THE COMMENTARY, supra note 2; 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).

4 U.S. Const. art. II, § 1.

5 See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 109- 10 (Max Farrand ed., 1966) (July 25, 1787 statement of James Madison).

Electoral College system required a mechanism for choosing the electors. Here, the Constitution gave the state legislatures the task, to be performed independently within each state, of determining how to appoint the electors.[6] It was only over time, at the decision of the various state legislatures, acting one by one, that the approach of using the state's general population to vote for the electors became the uniform method throughout the country.[7]

Underlying this uniformity in the use of a general election to appoint the electors are many complexities and variations among the states in the details about who may vote, the methods and machinery for taking and counting the vote, and the processes for ironing out disputes that arise in the vote taking and counting. The 2000 election shone a sudden bright light on these complexities, forcing us to think about these previously almost invisible matters. We had to try to fathom perplexing legal texts and institutional structures at a time when we were already intensely committed to one candidate or another. An area of law that would have been confusing enough to contemplate at leisure suddenly needed to be seen through the emotional fog of caring deeply about who would win and who would lose.

The statutory law in question came not only from the state's legislature, but from the national level. The United States Constitution gave Congress the role of counting the ballots produced by the Electoral College and declaring the winner.[8] To deal with the questions that can arise about the validity of the ballots in the context of carrying out this constitutionally assigned function, Congress has legislated to set ***510** out procedures to regulate how it will perform this function.[9] This is the statute, 3 U.S.C. § 5, that became so important in the Bush-Gore litigation. Further complicating the written law at issue in the Bush-Gore dispute were provisions of both the Florida and the United States Constitutions.[10]

Perhaps the most troublesome aspect of the legal picture was the courts. All of the written law – statutory and constitutional, state and federal – lies inert on paper pages until the judges bring it to life by applying it, enforcing it, and, necessarily, interpreting it. The judges too were human beings encountering complex and often unfamiliar law, acting under the pressure of time and of caring about who would win and who would lose. But this was not the sort of situation where the judges could recuse themselves, as they might in

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[6] U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors....").

[7] See Judith Best, THE CASE AGAINST DIRECTION ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 16 (1971). Efforts over the years to amend the Constitution to reform or abolish the Electoral College have failed. See, e.g., Ann Althouse, *Electoral College Reform: Déjà Vu*, 95 NW. U. L. REV. 993 (2001) (reviewing Alexander M. Bickel, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM (1971); Best, supra; Lawrence D. Longley & Alan G. Braun, THE POLITICS OF ELECTORAL COLLEGE REFORM (1972)) (describing the history of efforts to reform the Electoral College through 1970).

[8] See U.S. CONST. art. II, § 1; id. amend. XII.

[9] 3 U.S.C. § 5 (2000). The statute provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

[10] See infra text accompanying notes 39-63.

ordinary cases in which they had too much interest in the outcome. *Everyone* cared about the outcome, and someone needed to decide.

At the center of the problem about judges was an exceptionally difficult matter that will be the focus of this Article: a state's highest court is the final, authoritative expositor of a state's statutory and constitutional law, and the United States Supreme Court is the final, authoritative expositor of federal statutory and constitutional law.[11] The state supreme court deals with a case first, and that position enables it to nail down points of state law in ways that may limit what a later court may do. The United States Supreme Court has long recognized the "independent and adequate state ground doctrine," according to which it cannot review a decision of a state court unless its own decision on a question of federal law will have an effect on the outcome.[12] Yet the independent and adequate state ground doctrine is itself a matter of federal law, the interpretation of which lies within the final lawsaying authority of the United States Supreme Court. The United ***511** States Supreme Court, because it deals with a case last, is in a position to shred the insulation of state law grounds that the state court may have used in an effort to protect itself from review. The degree of judicial purity with which the various Justices of the United States Supreme Court and the Florida Supreme Court wielded their respective final interpretive authority is itself a matter of great complexity that court watchers have had to try to think about quickly and through the thick emotional fog of caring all too much about who won the presidency and who did not.

I cannot place myself outside of this emotional fog that has inevitably and understandably distorted the writing that has followed the election. During the legal fight for the presidency, I eagerly embraced the arguments offered by proponents of the man for whom I voted. The arguments made for the other side often seemed incoherent and even outrageous to me. As I pored over the state and federal statutory and constitutional law, read and reread every opinion as it was issued, listened and relistened to the broadcast oral arguments, I saw the dispute through my alternately stimulated hopes that my man would win and fears that he would lose. Now, with the game over and a bit of perspective on the legal battle, I want to look back on the litigation and the central questions it gave rise to about whether the Florida Supreme Court or the United States Supreme Court took the larger step over the bounds of judicial propriety.

Part I of this Article considers the first stage of the litigation in which the United States Supreme Court sought clarification about whether the Florida Supreme Court, when it extended the period for recounting ballots, intended to rely on state statutory law or state constitutional law. The Article shows that the remand was not necessary and that it created an opportunity for the Florida Supreme Court to attempt to insulate itself from further review by stating that it relied only on state statutory law. Demonstrating that *Bush I* involved a subtle variation on the independent and adequate state ground doctrine, the Article contends that precedent would have supported a presumption that the state court relied on the ground for decision that would have presented a federal law question for the

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[11] See, e.g., Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (explaining the need for the independent and adequate state ground doctrine).

[12] See infra text accompanying notes 39-48.

United States Supreme Court to decide. This part of the Article speculates that the United States Supreme Court saw the remand as desirable because it enabled the Court to cue the Florida Supreme Court to rein in its activities without revealing disagreements that were already dividing the Court, thus preserving its own image as a fair and neutral institution, capable and ready to impose order, if needed, at a later, definitive stage of the litigation. ***512***

Part II of the Article looks at the second stage of the litigation as it unfolded in the state court system, leading to the Florida Supreme Court's order of a statewide recount. This Part of the Article contrasts the trial judge's deference to the authority of the individual county canvassing boards and the state supreme court's avoidance of deference to the trial judge. The Article notes the state supreme court's efforts to frame its decision entirely in terms of state statutory law and its off-handed concession in a footnote that the state procedures must yield to the "stringent calendar controlled by federal law,"[13] i.e., December 12. This Part concludes that the Florida Supreme Court's own failure to defer to other state institutions undercuts arguments that the scrutiny it later received from the United States Supreme Court was inconsistent with established ideas about federalism and judicial restraint.

Part III of the Article examines this case – "*Bush II*" – as it first reached the United States Supreme Court, in the Court's opinion granting a stay of the statewide recount. Here, the Article minimizes criticisms that accuse the Court of prejudging the merits of the case, because the likelihood of success on the merits is a proper part of the analysis of whether a stay ought to be granted. This part of the Article does, however, question the analysis of injury, comparing it to the analysis of injury in the standing doctrine cases. Although the Justices' difference of opinion about the injury needed for a stay tracks a conservative-liberal preference for presidential candidate, the Article observes that the Justices' conservative-liberal split can be attributed to different subjective judgments about whether the statewide recount had produced an intolerably chaotic situation that required immediate control. That explanation does not place the Justices at the most desirable level of neutrality, but it does refute the accusation that they resorted to outright political choice.

Part IV of the Article, which considers the final disposition of *Bush II* in the United States Supreme Court decision that ended the recount, concentrates on the question of whether the United States Supreme Court usurped the Florida Supreme Court's authority over state law. Part IV.A analyzes the per curiam opinion, which, by finding equal protection violations, initially avoided entanglements with questions of state law. In the end, however, to determine that the recount could not continue, it needed to identify December 12 as the deadline, and the deadline was a matter of state law. This Part considers ***513*** the argument raised by Justices Breyer and Souter that the case ought to have been remanded to the state court to determine the deadline. Given the state court's authority over state law, one could say that the United States Supreme Court would need to ask the state court whether the state legislature, despite its intent to meet the safe harbor, placed a higher value on the search for additional votes on unread ballots. Emphasizing the concession that the Florida Supreme Court made in a footnote, the Article contends that

[13] Gore v. Harris, 772 So. 2d 1243, 1254 n.11 (Fla. 2000), rev'd sub nom. Bush v. Gore, 531 U.S. 98 (2000) (hereinafter Harris II).

that court had already determined that the recount had to yield to the December 12 deadline. The Article views the United States Supreme Court's reliance on that determination as justified because the interest in ending the controversy outweighed the possible benefits of giving a second opportunity to a court that had generated mistrust of its willingness to interpret state law in a fair and neutral manner.

Part IV.B considers the much more extensive engagement with state law interpretation in the concurring opinion written by Chief Justice Rehnquist, which found that the state court had usurped the role of the state legislature, thus violating Article II, by substituting its own approach to the post-election day proceedings. Here, the Article stresses that the Chief Justice did not claim a power to interpret state law, but rather a power to reject what he found to be a sham assertion about state law. The Article also shows that Justices Souter and Breyer did not disagree with the proposition that it is possible for the state court to distort statutory interpretation to the point where it should be seen as displacing the state legislature. Their disagreement with the Chief Justice was really about whether the Florida Supreme Court did in fact go too far. Part IV.C considers the dissenting opinions of Justices Stevens and Ginsburg, who premised their harsh attacks on assertions that the majority was hypocritical about federalism and judicial restraint. Clearing away the rhetoric, the Article views the crucial disagreement to be about whether the state court *deserved* deference.

I. *BUSH I*

A. How Safely in a Safe Harbor Must One Be to Be Safe? The State's Attempt to Accept the Section 5 Offer

The federal statute, 3 U.S.C. § 5, does not purport to tell the states what they must do to carry out their constitutional responsibilities. Considering that the Constitution directly assigns a role to the states, one ought not to perceive a constitutional grant of power to Congress to regulate the way the states perform their role. The federal statute simply represents Congress restricting itself in the performance of its own role in the constitutional process of selecting the ***514** President.[14] That statute commits Congress in advance to a method of handling the electoral ballots produced by the states' processes.

The states are obligated by the Constitution to produce electors,[15] but they are not obligated to jump through particular hoops Congress might want to set up, and indeed Congress has not demanded that they do so. Congress has, however, exercised a power to affect the process at the state level by making an offer to the state legislatures. Through 3 U.S.C. § 5, Congress has told the states, we will not question the validity of your ballots if you meet our requirements: appoint the electors according to a plan that you have set up before election day and that is completed at least six days before the day when the electors

[14] The role of Congress with respect to the presidential election is described in the United States Constitution. See U.S. CONST. art. II, § 1; id. amend. XII.

[15] Id. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors....").

vote. Thus, the statute defines a "safe harbor" for the states.[16] Congress cannot prevent a state from doing other things, but if a state wants to hold Congress to *its* commitment not to question the validity of the state's certified electors, the state must jump through the federal statutory hoops.

The Florida legislature had set up its plan prior to the 2000 presidential election and, apparently, meant to take advantage of the safe harbor.[17] But the state's statutory election law is complicated; its many parts created gray areas that might only become important in the process of applying the law to particular facts.[18] A court attempting to resolve these ambiguities would therefore invite speculation about whether it was really following the statute or not, yet the state's statutory scheme itself assigns the state's courts a role in the electoral process.[19] The question of whether a court is dutifully following the law or making law of its own is, of course, the subject of longstanding debate among legal scholars and other court watchers. But 3 U.S.C. § 5 gave the old conundrum a new urgency: if the courts were devising their own plan *after* the election, replacing the statutory plan that was put in place *before* the election in accordance with § 5, then the state ***515** would be in danger of losing the safe-harbor treatment, which would permit Congress to question the validity of the state's electoral votes.

The Florida courts in the Bush-Gore litigation were never so bold as to flagrantly substitute a plan entirely of their own making for the state statutory plan. The problem was one of judicial interpretation becoming too creative, raising doubts about whether it truly reflected the legislature's intent or whether it had become an expression of the judges' own preferences. The judges may have pulled away from the securest mooring in the harbor, but had they drifted entirely out into the open sea? There must be an ambiguous area where the state court's work is only creating a *risk* about whether the state has satisfied the requirements of § 5, where one must guess a bit about whether Congress will see the result of the state's processes as having crossed the hypothetical line that separates the harbor from the sea. Assessing that risk is complicated by the extreme importance of the decision: if the point were reached where Congress needed to make a decision about whether the result of a particular state's electoral process had successfully met the requirements of § 5, the various members of Congress called upon to discern the line between the harbor and the sea would make their decision under the immensely powerful influence of their desire to hand the presidency to their own party's candidate.

From this prediction about how Congress would behave we might very well conclude that the Florida legislature, in its effort to meet the § 5 standard, intended to set up a procedure that would obviously and unquestionably demonstrate that the § 5 requirements

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[16] None of the opinions in any of the Supreme Court cases in the Bush-Gore litigation viewed § 5 as a requirement; the interpretation that the statute is only the offer of a safe harbor was unanimous. See Bush II, 531 U.S. 98, 111 (2000) (per curiam); id. at 113 (Rehnquist, C.J., concurring); id. at 124 (Stevens, J., dissenting); id. at 130 (Souter, J., dissenting); id. at 143 (Ginsburg, J., dissenting); id. at 146 (Breyer, J., dissenting).

[17] See infra text accompanying note 88.

[18] See Bush II, 531 U.S. at 116-20 (Rehnquist, C.J., concurring).

[19] See Fla. Stat. Ann. § 102.168(1) (West Supp. 2002) (amended 2002) (providing that "the certification of election or nomination ... may be contested in the circuit court").

were met.[20] According to this conclusion, taking advantage of the safe harbor means mooring securely in the harbor. That is, the legislature meant to exclude the kind of judicial flexibility and creativity that might leave a way for those highly motivated members of Congress to wriggle out of their statutory commitment. The Florida legislature nevertheless wrote a statute that contained ambiguities and that brought the state courts into the process; from that, we might conclude that the ***516** legislature did not choose the securest mooring in the safe harbor.[21] One could still maintain that the Florida courts, as they performed their role in the statutory scheme, ought to have resolved each ambiguity in the statute to leave the least leeway for Congress to avoid its obligation,[22] but the state statutory law itself did not in its terms compel the state courts to adopt this interpretive approach.

B. Lawsaying Orthodoxy: State Courts Are the Final Expositors of State Law; the United States Supreme Court Is the Final Expositor of Federal Law

Even if that state statute could or should be interpreted with an eye toward meeting the safe harbor created by the federal statute, the interpretation of the state statute is a matter of state law. It is axiomatic that the state court has final authority over the interpretation of a state's law. Assume it makes sense to say that the Florida statute *should* have been interpreted to demand strict adherence to every explicit point in the state statutory scheme. Extending a deadline, as the Florida Supreme Court did in the first stage of the litigation,[23] would ***517** violate this interpretive approach because deviating from strict adherence to specified deadlines created the potential for members of Congress to follow their self-interest if, later on, they faced the question whether the state's procedures came within the

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[20] The problem of knowing too much about which candidate is helped and which candidate is hurt by different procedures is exactly the problem that 3 U.S.C. § 5 is supposed to solve: it demands a system put in place before election day, before anyone knows who benefits from one method or another. A well-functioning state legislature should perceive the problem too and want to clearly define procedures in its statute. It should want to do this even without the incentive of § 5. The existence of the federal statute puts even more pressure on the state legislature to nail down the procedures prior to election: now there is not only the force of the best policy choice, but also the benefits offered by the safe harbor.

[21] Because the statute covered all elections, it cannot be read as an all-out effort to respond to § 5. See Fla. Stat. Ann. § 97.021(7) (defining "election" as including any "primary election, special primary election, special election, general election, or presidential preference primary election"). One could infer that the legislature ignored § 5; it was after all only a remote possibility. The more common use of the Florida statutory scheme would be to resolve controversies in the many local elections, and that more present concern should affect the interpretation of the statute that just happened to become so important in the case of this one fluky presidential election.

[22] A remote question, never reached in the litigation, is whether a decision by Congress whether the state's ballots met the safe harbor definition would be justiciable. See infra text accompanying notes 300-301.

[23] The Florida Supreme Court did vary the deadlines. In its opinion of November 21, 2000, Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1220 (Fla. 2000) (per curiam), vacated sub nom. Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000) (hereinafter Harris I), the Florida Supreme Court interpreted the statutory language permitting a hand recount in the event of an "error in vote tabulation" to cover the situation where the machine recount failed to read all of the ballots that might convey the "intent of the voter" to the human eye. Id. at 1229. This interpretation rejected Governor Bush's contention that the statute referred only to a malfunction of the machine. Governor Bush had argued that the machine did not malfunction, but performed as it was designed to do when it missed incompletely punched cards, and thus that it did not make an "error in vote tabulation." See id. The Florida Supreme Court, however, held that the Florida legislature's use of the term "intent of the voter" warranted a broader interpretation of "error in vote tabulation." Id. The Florida Supreme Court also rejected Bush's interpretation of the nature of the deadline for certification. Id. at 1233. The statute provided for certification seven days after the election, but confusingly used the words "may" and "shall" in different places in the statute when assigning the state Secretary of State the task of certifying the election. The Secretary of State, Katherine Harris, had issued an opinion on November 13 that she was required to certify the results of the election on November 14, which was seven days after the election. Id. at 1226. In fact, according to the Florida Supreme Court, she had discretion to extend the deadline and abused her discretion by not extending the deadline to November 18. Id. at 1238-39. On the theory that this abuse set the counting back five days, the Florida Supreme Court added five more days of counting beyond the date of its opinion, thus extending the deadline to November 26. Id. at 1240.

safe harbor. A court truly concerned about the safe harbor would have resisted giving Congress this leverage.

Yet what role can there be for the United States Supreme Court to impose a particular approach to interpreting a state statute? State law means what the state supreme court says it means. If the Florida Supreme Court found a different legislative intent or submerged legislative intent under other concerns, what can be said except that *is* what state law is? The Florida Supreme Court can infuse the statutory text with values about the sanctity of the vote or a generalized notion of the good or any sort of outlandish notion, and, because of its final interpretive authority, that is what state law is. It is "infallible" in the special sense of a court at the top of a hierarchy of interpretation: infallible because it is final.[24] It matters not that the United States Supreme Court may consider the Florida Supreme Court's opinion an abysmal interpretation of state law: it is a simple matter of judicial authority.

For the United States Supreme Court to become involved, a question of federal law must affect the outcome.[25] The question cannot be simply whether the Florida procedure complied with § 5 because § 5 does not even purport to regulate the states. It defines a safe harbor, but the outcome of the case did not depend on what § 5 *really* meant. Section 5 was simply a factor that may have affected how the Florida legislature thought about its own statutory scheme, something that the Florida court may have used as it gave the final, authoritative exposition of the statute pursuant to its own method of interpretation. The state court could follow an approach to statutory interpretation that had as a component the intent of the legislature, but nothing forced it to give any particular weight to legislative intent balanced against other factors or even to give predominance to considerations of legislative intent. Nothing forced the state court to determine that ***518** the legislative intent was in fact to moor as securely as possible in the § 5 safe harbor.[26]

On what federal question, then, did the United States Supreme Court rely? The Florida Supreme Court had laced its statutory interpretation with references to the Florida constitution.[27] The point of these references was not clear. They might have been mere surplusage. They might have been a component of statutory interpretation. But perhaps the Florida Supreme Court meant to trump the provisions of the state statute with state constitutional law. Ordinarily, there would be nothing for the United States Supreme Court to review if the state court issued a decision that relied on state legal texts and asserted the superiority of the state's constitution to the state's statutory law. But the United States Supreme Court perceived a way in which the United States Constitution might, in this one instance, make the state statutory law superior to state constitutional law.[28] The United States Constitution, from its position at the top of the hierarchy of legal texts, presumably has the capacity to rearrange the priority of legal texts that rank lower in the hierarchy.

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[24] Cf. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[25] See 28 U.S.C. § 1257 (2000).

[26] See supra text accompanying notes 20-22 (discussing strong reasons for a state legislature to choose to moor securely in the safe harbor to deprive Congress of the room to maneuver toward its preferred outcome).

[27] See Harris I, 772 So. 2d at 1228, 1230, 1236, 1238.

[28] See Bush I, 531 U.S. 70, 75-78 (2000) (per curiam).

Perhaps here, in designating the process for appointing the electors for the President of the United States, the Constitution gave a final and independent authority to the state legislatures. If it had, and if the Florida Supreme Court had used the state constitution to trump the state statute, there would be a federal question for the United States Supreme Court to decide.[29]

This interpretation of Article II would essentially provide a federal, judicially enforceable, constitutional law of state legislative immunity from state court supervision. The state courts could be used to the extent that the legislature chose to involve them in carrying out the procedures it created. The courts would then apply the statutes, but could not take on any larger role than exactly what the legislature wanted them to do. In this one unusual case, the interpretation of the state legislature's fulfillment of its Article II duty, the division of power between the state legislature and the state courts might be a matter of federal constitutional law, a species of separation of powers law, governing the relationship between the state legislature and the state courts, a matter otherwise covered only by state law. ***519***

In *Bush I*, the United States Supreme Court did not go so far as to declare that Article II in fact does control the way that the state court could interpret the state statutory law. The Court raised this question, relied on it as the reason for its own power to take the case at all, but ultimately remanded the case.[30] The Court, in a unanimous per curiam opinion, asked for a clarification about state law.[31] If the Florida Supreme Court explained that it had used the Florida *constitution* to support its decision to extend the deadline for hand counting the ballots, then a question would arise as to whether the state court had violated Article II by taking away what was an exclusively legislative role.[32]

Even if the Florida Supreme Court had relied on the state constitution, the argument that it had violated Article II might still have failed. One could say that Article II, in assigning the task of determining how to appoint the electors, meant to take the state legislatures as it found them, as institutions embedded in a whole state government, a system that would necessarily include a constitution and a judicial system to confine all acts of the legislature to that constitution.[33] In that light, one could accept as consistent with Article II the state court's use of state constitutional law as a restriction on the meaning of state statutory law – *even* if it meant casting the state out of the safe harbor. The safe harbor statute never had the power to compel the state; it was only an offer that the states could choose to accept. Unlike the federal statute, the federal constitutional provision in Article II does bind the states. Nevertheless, it is quite possible that Article II does not have that special, restrictive meaning that envisions the state legislature acting –for this one purpose – outside of its usual place within a tripartite state government.

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[29] See id.
[30] Id. at 73.
[31] Id. at 78.
[32] See id.
[33] See infra text accompanying notes 261-264, 295-298.

Moreover, even if Article II did endow the state legislature with this special power, a state legislature might nevertheless *choose* to exercise its power subject to the constraints of its own constitution. Even though it may be true that in many cases a legislature might resist the limitations the courts might impose as a matter of state constitutional law, a legislature setting up a voting scheme might affirmatively choose to embed that scheme within the state's constitutional law of voting rights. At oral argument, in the following colloquy with Professor Laurence Tribe, who represented Al Gore, Justice Scalia revealed his doubts that a legislature would intend any such thing: ***520**

> [SCALIA]: Professor Tribe, can I ask you why you think the Florida legislature delegated to the Florida Supreme Court the authority to interpose the Florida Constitution? I mean, maybe your experience with the legislative branch is different from mine, but in my experience they are resigned to the intervention of the courts, but have certainly never invited it.
>
> TRIBE: Well, I'd have to say my experience parallels that.
>
> [SCALIA]: What makes you think the Florida legislature affirmatively invited the Florida Supreme Court?[34]

Ah, but again, it would be the Florida Supreme Court that would have the final authority to decide what the Florida legislature's intent was. Justice Scalia's doubts that it had such an intent might have had some persuasive effect on the Florida court, but it is hard to see how the United States Supreme Court could ever get into a position that would enable it to reject a contrary assessment of the Florida legislature's intent.[35]

The state court on remand could thus give full regard to the suggested interpretation of Article II and still decide that the state's constitution restricted the statute. The court would simply need to say: although Article II frees the state legislature to disregard state constitutional voting rights, we think that the state legislature intended to respect those rights; we interpret the statute to take account of state constitutional rights. Why assume there is a state legislative intent to disregard rights?[36] Does it make sense to attribute to the legislature a low regard for voter rights? It is only after the election that everyone had a preference about the balance between a generous or a restrictive approach to vote counting: at the time the statute was passed, ***521** such things were a neutral matter.[37] Of course,

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[34] Transcript of Oral Argument, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), 2000 U.S. Trans. LEXIS 70, at 65-66.

[35] Justice Scalia's speculation about how legislatures think about judicial review presents a special problem in the context of a state statutory scheme that covered all of the state's elections. It is hard to attribute to the legislature the intent to cut off the state court's state constitutional meddling with respect to the presidential election when it did not set up a separate procedure solely for the presidential election. See supra note 19. Justice Scalia seems to have wanted to impute to the legislature the maximum resistance to judicial constitutional review, even at the price of having the state election code mean two different things depending on whether the election was a presidential one or not, not because the Florida legislature knew of the option or meant to take it, but simply on the general assumption that legislatures do not want constitutional limitations.

[36] The United States Supreme Court frequently interprets federal statutes on the assumption that Congress means to frame statutes within constitutional limits. See, e.g., Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (avoiding a conflict with the Commerce Clause by attributing to Congress an intent to reach only navigable waters in § 404(a) of the Clean Water Act).

[37] One could conceive of partisan maneuvers that could be accomplished by statutory law put in place before the election. For example, one could deliberately assign less reliable voting machinery to the districts that favor one's political opponents. This was not the

when the state court was doing the interpretation, the period of neutrality had passed – the judges knew which candidate they were helping by being restrictive or generous about vote counting.

One might argue that the state courts ought to use a particularly strict interpretation of the state statute at this point in order to preserve the outcome-blindness that existed at the time the state statutes were passed. Any judicial creativity at this point – albeit in the name of state constitutional rights – has too much potential to be infected with the judges' preferences for one candidate over another. Rights are important, and the state legislature should be bound by those rights, but trusting the pre-election scheme may still be better than trusting the judges after they are in a position to know the effect of their decision on particular candidates. This may be a nice theory of interpretation, but who is in the position to impose it? It is a matter of state law, and the state court is the final interpreter of that law.

Because the state court would be exercising its final authority with the blindfold off, and the legislature, because it acted before the election, set terms for resolving disputes without knowing who would be helped by which procedures, one ought to see the legislature as the more trustworthy, legitimate institution for setting the ground rules for the election. Usually the legislature is the institution more influenced by raw political preference, and the court is the institution that we ought to trust to judge the cases of particular individuals in a neutral and fair way. But in the instance of deciding the procedures to govern the resolution of an election dispute, the tables are turned. Yet even if the pre-existing legislation is a more reliable embodiment of the rule of law, that legislation must still be applied. The courts have been designated by the legislation itself to decide the real cases that arise under the statutory scheme, and the role of the state courts in interpreting state law must necessarily follow.

C. The Needlessness of the Remand to State Court

Why did the United States Supreme Court, by vacating and remanding the case, offer the Florida Supreme Court the opportunity to insulate itself from further review? It seemed all too easy for the Florida ***522** Supreme Court to embed the values it had previously derived from the state's constitution in a discussion of the intent of the legislature.[38] If the United States Supreme Court at that point thought the Florida Supreme Court had strategically tried to insulate itself with a false assertion about state law, it would be quite hard to find a way to state a ground for reversal. A straightforward "We don't believe you" would fall short of the conventions of craftsmanship and comity.

Considering the troubles that might lie ahead, one might imagine that some jurisdictional necessity required the United State Supreme Court to remand the case. Yet in fact there was no jurisdictional bar to deciding the federal question, the Article II question,

case in Florida in 2000, however, because the voting machinery was chosen at the local level, a decision-making process dominated by the party that had the greatest hope of benefiting by more votes being counted.

[38] See infra text accompanying notes 87-109.

that the Court found in *Bush I*. The 1984 case of *Michigan v. Long*[39] is instructive. There, it was unclear whether the state court had relied on a federal constitutional ground or a state constitutional ground, as both sources of law offered the criminal defendant a basis for excluding the evidence that led to his conviction.[40] If the state court had made its independent reliance on the state law ground clear, the state law ground would have been adequate to support the result, and it would thus have been irrelevant whether or not the federal law would also support the result. If the state court had made a clear statement, in fact, the United States Supreme Court's opinion about federal law would be an advisory opinion because it would not affect the outcome of the case. Because Article III of the United States Constitution limits the federal courts, including the Supreme Court, to deciding cases or controversies, and the Court's decision on the federal question would overstep the bounds that limit the power of the third branch. This is the "independent and adequate state ground" bar to the Supreme Court's jurisdiction.[41]

When the state court has not made its reliance on the state law ground clear, the Supreme Court does not face a flat constitutional bar to its jurisdiction, though it does face a jurisdictional problem. In *Michigan v. Long*, the Court decided to presume that the state court did not independently rely on the state law ground.[42] It then decided that the Michigan Supreme Court had erred in its decision of federal law and remanded the case for further proceedings.[43] The state court on remand could then have clarified its original decision and asserted ***523** that it really did mean to rely independently on state law, which would change the outcome. It may seem strange that the state court would be in a position to reverse the outcome produced by a decision of the United States Supreme Court, but there is no disturbance of the hierarchies of judicial authority. The state's highest court would simply have asserted its authority over state law, and its decision that the state law has a meaning different from similarly worded federal law is not a decision of federal law.[44] The United States Supreme Court's decision of federal law does not somehow become an advisory opinion retroactively. A federal district court is also subject to the ban on advisory opinions,[45] yet we do not think of federal district court decisions as turning into advisory opinions if they are reversed on appeal. When the United States Supreme Court presumes the nonindependence of the state law ground and issues an opinion on the federal law ground, only to have its presumption rebutted on remand, the United States Supreme Court opinion is not merely advisory. At the point when the Court made its decision, there was still a "case or controversy": the decision had an effect on the position of the parties, and the Court's articulation of the law was not merely an abstract lesson in the meaning of the law.[46]

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[39] 463 U.S. 1032 (1983).

[40] See id. at 1037-38.

[41] Id. at 1040.

[42] Id. at 1044.

[43] Id. at 1053-54.

[44] See Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1506-07 (1987) (explaining that the state court's subsequent opinion interpreting state law does not render the earlier United States Supreme Court interpretation of federal law merely advisory because there was a genuine controversy at the time of that interpretation).

[45] See U.S. CONST. art. III (vesting the "Judicial Power" in both the United States Supreme Court and the inferior federal courts, and defining "Judicial Power" wholly in terms of "cases" and "controversies").

[46] See Althouse, supra note 44, at 1506-07 (noting the absence of mere advisoriness in this situation).

In *Bush I*, the United States Supreme Court was not looking at a state supreme court opinion that had mixed up its discussion of a federal law ground and a state law ground. The Florida Supreme Court had mixed up two state law grounds – the state statute and the state constitution. Nevertheless, one of these grounds was a state law ground that was adequate to support the outcome aside from anything the United States Supreme Court could do, and one was not. If the Florida Supreme Court had clearly rested independently on the interpretation of the state statute, there seemed to be no question of federal law presented in the case that was capable of changing the outcome.[47] If the Florida Supreme Court had rested on the state constitution, the state law ground would not be adequate to support the ***524** result because that basis for decision, even though it is a state law question, necessarily implicates a federal question that is capable of changing the outcome. That federal question is: does Article II's assignment of the task of determining how to appoint the presidential electors exclude the use of the state constitution?

On one interpretation of the Florida Supreme Court's opinion, there is a state law ground that leaves no federal question for the United States Supreme Court to determine. That question had already reached the top of the hierarchy of judicial authority: it is a state law question decided by the state's highest court. On another interpretation of the Florida Supreme Court's opinion, there is a state court decision that has not reached the top of the hierarchy of judicial authority. The Florida Supreme Court is the final authority on the meaning of the state's constitution, but that interpretation of state constitutional law is subject to the United States Supreme Court's authority over the interpretation of Article II, and if Article II excludes the use of the state's constitution, that ground for the result in state court is obliterated. So even though *Bush I* presented an independent and adequate state ground problem more complex than that seen in *Michigan v. Long*, where one ground for the state court decision was federal and one was state law, there is the same problem of a state court's mixing two grounds for its decision, one of which is subject to further decision-making by the United States Supreme Court and one of which is not.

Thus, the United States Supreme Court could have used the *Michigan v. Long* presumption to avoid the trouble of remanding. Indeed, in *Long*, the Court specifically rejected the time-consuming and unwieldy approach of sending the case back to the state court for clarification.[48] The *Long* Court disparaged cases like *Minnesota v. National Tea Co*.[49] for "the unsatisfactory and intrusive practice of requiring courts to clarify their decisions to the satisfaction of this Court."[50] Yet the *Bush I* Court made no mention of the *Long* presumption and quoted *National Tea* at some length:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by ***525** this Court of the validity under the federal constitution of state action. Intelligent

[47] But see infra text accompanying notes 207-252 (discussing Chief Justice Rehnquist's concurring opinion in Bush II, which demonstrates how an Article II question can be salvaged where the state court writes an opinion that purports to be only statutory interpretation).

[48] Long, 463 U.S. at 1038-39.

[49] 309 U.S. 551 (1940).

[50] Long, 463 U.S. at 1041.

> exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.[51]

Given *Long*'s rejection of the *National Tea* approach of sending the case back to the state court, the Supreme Court was surely not "compel[led]"[52] to remand to ask the state court for clarification. The interest in saving time in *Bush I* was far stronger, as the date for the Electoral College vote loomed near. Why not presume the Florida Supreme Court relied on the state constitution, give the answer to the Article II question – can the state court use the state constitution or not? – and send the case back to the Florida Supreme Court for further proceedings? Notably the *Long* Court did reserve its right to decline to use the presumption: "There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action."[53] Apparently, *Bush I* was one of those circumstances, though the Court did not say why.

Perhaps the United States Supreme Court remanded the case without answering the Article II question in order to run out the clock: it wanted to deprive the Florida courts of the opportunity to carry out a recount that would satisfy the various legal requirements. If the United States Supreme Court took its time in revealing, stage by stage, what federal law required, by the time the Florida Supreme Court found out exactly what would be needed to achieve a recount that would hold up to the United States Supreme Court's scrutiny, it would be too late to do it. This view does seem to accord with the per curiam opinion's final resolution of the election in *Bush II*,[54] but its repellent cynicism urges one to look hard for other explanations.

It might be that the Justices wanted very much to produce a unanimous opinion. It is likely that the Justices did not all agree on the effect of Article II,[55] and the remand for clarification enabled the ****526*** Court to present a unified appearance to the public. The Court has an interest in preserving its institutional capital; it has the ability to bring resolution to difficult controversies, but this ability depends on the respect that people have for the Court. The Court needs to preserve the confidence that people have that it is in fact the prestigious, weighty, neutral agent of the rule of law. The Court often splits along a conservative-liberal fault line, but in this very conspicuous case that split matched the conservative and liberal political preferences for George W. Bush or Al Gore with an embarrassing starkness. Even if the split could be justified through sophisticated legal analysis, proving, despite appearances, the Justices' devotion to the rule of law,[56] people

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[51] Bush I, 531 U.S. 70, 78 (2000) (quoting National Tea, 309 U.S. at 557).

[52] Id.

[53] Long, 463 U.S. at 1041 n.6.

[54] Bush II, 531 U.S. 98, 110-11 (2000) (per curiam).

[55] Bush II does not reveal what the Court would say if the Florida Supreme Court had used the state constitution to trump the state statute because it reviewed a decision that did rest on the interpretation of the state statute. In Bush II, the Chief Justice and Justices Scalia and Thomas found an Article II violation in the state court's excessively creative approach to statutory interpretation. See id. at 120-22 (Rehnquist, C.J., concurring). The failure of the other six Justices to join this opinion does not reveal how they would have interpreted Article II if the state court had relied on state constitutional law. Not only would the state court's reliance on constitutional law have presented a stronger basis for finding an Article II violation, but also the per curiam opinion in Bush II, because it found an alternative ground for its result, did not need to reach the Article II question to dispose of the case.

[56] After Bush II, some scholars worked to provide this support for the Court's reputation. See, e.g., John C. Yoo, *In Defense of the Court's Legitimacy*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, supra note 3, at 223. But the American people had long ago figured out a way to think about the Court in the aftermath of the election. Interestingly, people retained a fairly high opinion of the

would never absorb that analysis. The Court's reputation, the resource upon which it must draw to be able to resolve difficult controversies, would decline. The Court may have deliberately chosen to withhold its answer to the federal question in *Bush I* to preserve the power it might need to step in and end a chaotic situation that might develop later in the post-election process. At this point, in *Bush I*, the Court was not in a position to end the entire controversy, so perhaps it was thought best by all concerned to remand the case and keep the Court's split away from public inspection.

Another, similar explanation for the remand is that the Court had taken the case in the first place, not because it was capable of resolving it at this point, but because it wanted to send a warning to the Florida Supreme Court: we are watching you; we stand ready to rein you in if you go too far.[57] It would also remind and assure the American people that the confusion in Florida was subject down the ***527** line to the stabilizing authority of a mature and eminently reliable institution: some temporary instability is being tolerated, but the United States Supreme Court is paying careful attention and will make sure things go right in the end. The Justices had reason to hope that the brief interlude of *Bush I* was all that would be necessary. The Florida Supreme Court might control itself, realize that its too-creative use of state law interpretation would not be permitted to decide the presidential election, and bring matters to a neat conclusion.[58] The United States Supreme Court would then have resolved the controversy, indirectly, by means of the remand. How subtle and palatable!

The term "judicial restraint" may appeal to many as a good shorthand way to explain the decision to remand in *Bush I*. If the Justices thought about the remand as described above, one might be tempted to say they all committed to an attitude of judicial restraint, so that any later departure from judicial restraint deserves to be condemned as hypocritical. A similar use of the umbrella term "federalism" is also tempting: one might say that all of the Justices "deferred" to the Florida Supreme Court in *Bush I*, so any later failure to defer is hypocritical. The dissenting opinions in *Bush II* and the scholarship that follows them indulge heavily in rhetorical accusations of hypocrisy about judicial restraint and federalism.[59] But this sort of rhetoric is inaccurate and exaggerated.

Was *Bush I* based on federalism and a permanent commitment to judicial restraint rather than the Court's own concerns about its political capital and the limitations on the

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Court. See Talk of the Nation: How Americans View the Supreme Court (Nat'l Pub. Radio broadcast, Feb. 7, 2001) (noting nearly the same approval rating for the Supreme Court before and after its involvement in the election controversy). Perhaps lay persons instinctively understand that there is a political element in the Court's work. It is the legal profession that has persisted in hand wringing, demanding answers, and, without them, holding the Court in disrepute. Some scholars have even maintained that the presidency of George W. Bush that resulted from the Court's decision ought to also be held in disrepute, especially with respect to any Supreme Court nominations. See, e.g., Bruce Ackerman, The Court Packs Itself, Am. Prospect, Feb. 12, 2001, at 48 (arguing that Congress should refuse to confirm any appointees to the Supreme Court by Bush, at least until 2004, as rebuke for the manner in which George W. Bush ascended to the presidency).

[57] See Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, supra note 3, at 98, 108.

[58] See id. (asserting that the remand decision in Bush I indicated the Supreme Court's intention "to intervene if it appeared that the state court were twisting or distorting state law").

[59] See, e.g., Bush II, 531 U.S. at 135-43 (Ginsburg, J., dissenting) (arguing that judicial restraint and federalism principles require the United States Supreme Court to defer to the state supreme court); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1725 (2001) (arguing that the United States Supreme Court's Bush II decision deviated inexplicably from the conservative Justices' views on judicial restraint and federalism).

grounds that were available at that point to resolve the case as a matter of federal law? *Michigan v. Long* was a future-looking attempt to train the state courts to get it right the first time and to deprive those courts of the political cover that they had achieved illegitimately through muddling.[60] *Long*'s federalism was a federalism designed to make state institutions work better: by intruding now, we provide an incentive to state courts to make ***528** it clear that they have relied on federal law, in which case they must face United States Supreme Court review, or that they have relied on state constitutional law, in which case, the state legislatures know they can change the result by initiating the state constitutional amendment process.[61] But *Bush I* was a one-of-a-kind situation because it is normally irrelevant that a state court has mixed two forms of state law. The remand told the state court to behave better now. The remand was thus not particularly respectful or deferential, just an acknowledgement of the reality about lawsaying authority and a decision to preserve political capital for later use.

One might have been tempted, influenced by hopes for a Gore victory, to read *Bush I* as instructions to the state court on how to insulate itself from review: just say it the right way and you, a mere state court, can actually hand the presidential election to your preferred candidate! But the Court's recent federalism case law cannot be accurately read to reflect a vision of absolute state autonomy, impervious to the realities of national interests.[62] Perhaps the only respect shown the state court in *Bush I* was a belief that the state court could take a hint, resolve the matter by withdrawing from its foray into national politics and not require a second move by the Supreme Court.[63] ***529**

II. *BUSH II* IN THE STATE COURTS

A. Not Deferring to Deference: The State Supreme Court Looks at the State Trial Judge Looking at the County Canvassing Boards

Before the Florida Supreme Court could respond to the remand in *Bush I*, the deadline for certifying the election, even as extended by the state court,[64] had passed. With George

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[60] See Althouse, supra note 44, at 1510 (speculating that a state court that mixes state and federal law "may have intentionally muddled the state and federal questions in order to prevent their state's democratic branches from recognizing their power to alter the result").

[61] See id. at 1509-10 (viewing Long as rejecting deference to state courts when state courts have produced an unclear mixture of state and federal law interpretation, "because the political branches of state government, if they believe a particular decision was dictated by federal law, will not recognize that they can change the result by amending the state constitution or by affecting the composition of the state courts").

[62] See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1019 (1993) (noting that both the conservative and liberal sides of the Court reject absolute deference to the states and analyze federalism as a structure designed to serve the interests of the people of the states).

[63] Compare the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1971). That doctrine generally forbids federal courts from enjoining an ongoing state court proceeding that embodies state interests, even though federal court plaintiffs rely on federal constitutional rights to challenge those proceedings. The doctrine expresses a trust in the state courts to perform their duty under the Supremacy Clause to apply federal law, but this trust is not absolute. Abstention is not required if the inadequacy of the state court can be demonstrated. Moreover, abstention only temporarily trusts the state court because the state court is subject to Supreme Court review and, if the state court proceeding is a criminal case, to habeas corpus review in a federal district court. See generally Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. Rev. 1051 (1988).

[64] See supra note 23.

W. Bush the certified winner, what the state statutory law designated the "protest" stage no longer had any potential to change the outcome of the election, and a new phase, called the "contest," became the focus of attention.[65] The "contest," under the Florida statutory law, required a trial,[66] which was conducted by Leon County Circuit Judge Sanders Sauls on December 2 and 3.[67] There was intense time pressure, given the approaching dates of December 18, when the Electoral College would vote and December 12, the date by which the electors needed to be certified in order to qualify for safe harbor treatment under the federal statute.

At trial, Vice President Gore only produced evidence that the voting machines, functioning as they were expected to function, would fail to record votes from ballots that had been incompletely punched.[68] Throughout the election controversy, there had been a ***530** difference in the position of the parties about what Florida law required. Governor Bush, who stood to benefit from the preservation of the status quo, took the position that the statutes permitted a recount only if the machines had malfunctioned.[69] Gore, who needed a change from the status quo, took the position that the statutes required a recount if the machines failed to recognize a vote on a ballot that a person, inspecting it, would conclude reflected the "clear ... intent of the voter."[70] Judge Sauls's opinion recognized that the evidence presented at trial showed voter error and inaccuracy in the punchcard machines, problems local officials had long been aware of, but had not corrected.[71] He would not, however, order any recounting now to make up for that deficiency because he found that the county canvassing boards, entrusted with decision-making through the protest phase, had performed their task reasonably and in good faith.[72]

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[65] Harris II, 772 So. 2d 1243, 1247 (Fla. 2000). The protest procedure seeks relief from the county canvassing boards. Id. at 1252. Secretary of State Katherine Harris certified the election on November 26, 2000, which was the extended deadline set by the Florida Supreme Court in the Bush I litigation. At the oral argument in Bush II, Justice O'Connor expressed concern that the Florida Supreme Court had ignored the remanded Bush I case. Transcript of Oral Argument, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), 2000 U.S. Trans. LEXIS 80, at 43. The Florida Supreme Court later that day, one assumes not by mere coincidence, issued its opinion in Bush I. The Florida court's opinion explained what was already obvious from the thoroughly statutory approach taken in its Bush II opinion: its earlier decision also rested entirely on statutory provisions. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1290 (Fla. 2000).

[66] Fla. Stat. Ann. § 102.168 (West Supp. 2002) (amended 2002).

[67] Harris II, 772 So. 2d at 1247. The statute required showing "a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. Ann. § 102.168(3)(c). Judge Sauls held that the Florida statute required a showing, by a preponderance of the evidence, "that but for the irregularity or inaccuracy claimed, the result of the election would have been different." Transcript of Bench Ruling, Gore v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. 2000), 2000 WL 1790621, at 3. That is, Gore had needed to prove he *would* have won, not merely that sufficient votes were in question. Gore's lawyers had only endeavored to prove that the machine had read some ballots as indicating no vote, that, upon human inspection, would reveal the voter's clear intent, and that the number of such ballots in the three counties Gore had "contested" exceeded Bush's margin of victory in the state. Plaintiff's Complaint to Contest Election, Gore v. Harris, No. 00- 2808, 2000 WL 1770257 (Fla. Cir. Ct. 2000), available at http://www.c-span.org/campaign2000/Florida/CV-00-2808a.pdf .

[68] See Jeffrey Toobin, Too Close to Call 216-20 (2001).

[69] Judge Sauls did not take Gore or Bush's side on the statutory standard for when a recount is required, but merely found this evidence could not "support or effect any recounting necessity" in the absence of a showing on the change in the outcome. Transcript of Bench Ruling, supra note 67, at 3. Reversed by the Florida Supreme Court on this point, Harris II, 772 So. 2d at 1255-56, 1260-61, Sauls had thought that it was not enough to show only that the number of uncounted ballots exceeded the difference in the votes the two candidates received. He wanted proof by a preponderance of the evidence that these votes would make Gore the victor. Id. at 1255.

[70] Harris II, 772 So. 2d at 1256 (quoting Fla. Stat. Ann. § 101.5614(5)). Section 101.5614(5) of the Florida election code permitted the county canvassing boards to look for a "clear indication of the intent of the voter" if it performed a manual recount, but it was open to question what would need to be shown before a manual recount was in order.

[71] Transcript of Bench Ruling, supra note 67, at 3.

[72] Id. at 4.

The trial judge thus deferred to the county boards, but the Florida Supreme Court would not defer to the trial judge.[73] The degree of deference owed the county boards was a question of law, and the judge got it wrong, according to the four justices who joined the per curiam opinion in the state supreme court.[74] The contest was not an appeal from the decisions of the county boards that had taken place at the protest stage, they said; it was a new beginning. Deference was error, in their opinion, justifying reversal of most of what the trial judge had decided.[75] On remand, the trial judge was not asked to exercise his discretion in fashioning appropriate relief or given any opportunity to weigh the harms against the benefits of injunctive relief, a function normally left to the trial judge. The Florida Supreme Court itself set the sweeping terms of the relief, beyond anything requested ***531** by the parties and extending to counties whose canvassing boards had not even been made parties to the lawsuit.[76]

Chief Justice Wells, dissenting, thought Judge Sauls was right about deferring to the county canvassing boards' decisions.[77] He thought that state statutory and judicial authority supported this deference to the reasonable judgments of the local election officials.[78] He saw no reason to imagine that the legislature would have set up such an unworkable procedure: a fresh start for the candidate at the contest stage would mean that judges would "hover" over every decision of the local boards.[79] He accused the majority of lacking the "self-discipline" to stay out of the political sphere; according to Wells, it had created "serious separation-of-powers concerns," threatening a "crisis."[80]

Commentary on *Bush v. Gore* often criticizes the United States Supreme Court majority for failing to give sufficient deference to the state supreme court,[81] but if one is going to base a critique on the idea of deference, it is important to view the entire picture. There were many institutions involved – judicial, legislative, and executive – at both the state and national level. Who owed deference to whom and who could properly sanction the failure to give proper deference are difficult questions. Moreover, deference is never absolute. Even where deference is owed, questions remain: How much deference is due? How much deference is deserved? The comity the federal courts owe state courts in the name of federalism hardly entails endless ***532** payment of respect. Justice Hugo Black once wrote that federal courts owe "a proper respect for state functions," a respect grounded in the idea

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[73] Harris II, 772 So. 2d at 1262.

[74] Id. at 1252.

[75] Id.

[76] See id. at 1261-62. The decision of the Florida Supreme Court ordered statewide relief (i.e., recounting of ballots), which was not requested, in addition to permitting relief in two of the three counties requested by Gore. Id. It is quite possible that the Florida Supreme Court was without authority to order recounts in counties not specifically named in the lawsuit. McConnell, supra note 57, at 113.

[77] Harris II, 772 So. 2d at 1263 (Wells, C.J., dissenting).

[78] Id. at 1264 (citing Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967 (1976)).

[79] Id. There is much criticism of the United States Supreme Court's per curiam opinion in Bush II on the ground that it contains a statement that might be read to mean that the decision applies only to this case and that it is not meant to work as a precedent. See, e.g., David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, supra note 3, at 184, 197-99. But the four Florida justices' opinion, as Chief Justice Wells points out, cannot be meant to govern future Florida elections: it is an unwieldy, unworkable approach designed for one-time use. See Harris II, 772 So. 2d at 1268-69 (Wells, C.J., dissenting).

[80] Harris II, 772 So. 2d at 1264 (Wells, C.J., dissenting).

[81] Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1431 (2001); see also Klarman, supra note 59, at 1746-47 (indicating that Chief Justice Rehnquist and Justices Scalia and Thomas normally would have given deference to a state court, and suggesting that their failure to do so in this instance may have resulted from their feeling that the Florida Supreme Court had deprived Bush of his victory).

that “the *National Government* will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”[82] He cautioned that “proper respect” is not “blind deference to ‘States’ Rights.’”[83] Federalism-based deference has never been absolute, despite what some of the Court’s critics seem to believe. That deference has been crafted to give state institutions the incentive to carry out their separate functions well and has provided for intrusions where their autonomy does not function in the federal interest.[84]

To the extent that the Florida Supreme Court itself departed from the usual constraints of deference to other state institutions, it provoked the higher degree of scrutiny it received from the United States Supreme Court. But even if the United States Supreme Court had not taken the case, the boldness of the Florida Supreme Court had already lit a fire under the state legislature, which was preparing to appoint its own rival slate of electors if the mechanisms of state court litigation had led to a slate of electors for Gore,[85] and Congress would have had the final say,[86] if the United States Supreme Court had not intervened, about which Florida electoral votes to use. The state court thus could never have commanded utter deference through the means of its authority over state law. Many other institutions were keeping an eye on its machinations.

B. The Problem of the Statutory Standard: “Clear Indication of the Intent of the Voter”

Even as it seemed to ignore the remanded *Bush I* case, the Florida Supreme Court, in the *Bush II* phase of the litigation, revealed that it had absorbed the message of *Bush I* quite well. The four justices in ****533*** the state court’s majority opinion began their discussion of the “Applicable Law” with Article II’s clause granting authority to the state legislatures, and a simple, declarative sentence: “These statutes established by the Legislature govern our decision today.”[87] The four justices also made what would turn out to be a crucial interpretation of the state legislature’s intent: "We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 ....”[88] That is, the state legislature meant to fit into the federal statute’s safe harbor.

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[82] Younger v. Harris, 401 U.S. 37, 44 (1971) (emphasis added). Younger, which was the first case in the post-Warren Era development of federalism, required federal courts to abstain from enjoining ongoing state court proceedings. It is discussed in more detail, supra note 63.

[83] Younger, 401 U.S. at 44.

[84] See Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 8 (1984) (assuring federal court respect for state court rulings as long as state courts properly respect federal law).

[85] See David A. Kaplan, THE ACCIDENTAL PRESIDENT 229-30 (2001); Cass R. Sunstein, *Order Without Law*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, supra note 3, at 205, 217 (concluding that the Florida legislature "almost certainly" would have sent its own slate of electors in favor of Bush to the Electoral College had the United States Supreme Court affirmed the decision of the Florida Supreme Court in Bush II).

[86] See U.S. CONST. amend. XII; 3 U.S.C. § 15 (2000).

[87] Harris II, 772 So. 2d 1243, 1248 (Fla. 2000) (per curiam).

[88] Id.

Counting all the votes was still important – a "paramount" concern – but now a concern embedded in the state's statutes.[89] The four Florida justices stressed the many statutory provisions that reflected the legislature's intent to provide for accurate vote counting.[90] In overturning the trial judge's verdict and ordering the astonishing remedy of a statewide recount to begin immediately,[91] the majority seemed deliberately to avoid creating the basis for the United States Supreme Court to reverse on the Article II ground. This is all about what the legislature intended, the Florida Supreme Court opinion proclaims: the statutes, though they are meant to take advantage of the federal safe harbor, place the greatest importance on discerning the "will of the voter."[92] The *statutory* principle "that the outcome of elections be determined by the will of the voters" made it "absolutely essential" to conduct a manual recount wherever there was "a concern that not every citizen's vote was counted," which meant in every county where the machines read ballots as containing no vote.[93] As the four justices put it: "The clear message from this legislative policy is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States."[94]

Despite the abundant reliance on the state statute throughout the state justices' opinion, it still contains one reference to the state ***534** constitution. That reference appears within a long quote from an old case:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly *the right to be heard*.[95]

This quote is offered to support ordering a statewide recount even though no party had requested that relief.[96] This same quote was used by the Florida Supreme Court in its protest stage case, although when it was used there, it went on for two more sentences:

> We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of

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[89] Id. The four justices referred to the statutory law and its own cases interpreting statutory law that make "the intent of the voter" a "paramount concern" that "should always be given effect if the intent can be determined." Id. at 1256.

[90] See id. at 1248-52 (noting state statutory provisions and legislative history regarding the importance of accurate vote counts, the use of the courts in procedures for contesting election, and the recounting of votes).

[91] Id. at 1262.

[92] Id. at 1253.

[93] Id.

[94] Id. at 1254.

[95] Id. (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)) (emphasis added).

[96] Id. Note, however, that Bush had relied on the argument that it was unfair to pick only the counties favorable to Gore. Toobin, supra note 68, at 232.

> the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.[97]

After *Bush I*, Article II-inspired faith in "statutory scripture" had rebounded. The Florida majority now found the voter rights it needed in the lines of the newly revered statutory text. Now, the abridged version of the quote would suffice. One might contend that if the Florida Supreme Court really wanted to insulate itself completely with statutory interpretation, it would have jettisoned the entire quote, with its reference to the state constitution, and its potential to stir up memories of its recent disparagement of mere statutory law. But the new use of the old quote works to explain that its previous opinion really is a statutory opinion. Immediately following the abridged version of the quote in its new decision are these statements: ***535**

> For example, the *Legislature* has mandated that no vote shall be ignored "if there is a clear indication of the intent of the voter" on the ballot, unless it is "impossible to determine the elector's choice." *§ 101.5614(5)-(6) Fla. Stat. (2000). Section 102.166(7), Florida Statutes (2000)*, also provides that the focus of any manual examination of a ballot shall be to determine the voter's intent. The clear message from this *legislative policy* is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.[98]

The legislature has now embodied those great ideals, so necessary to the decision, within the statutory law. The statutory law is no longer the enemy to be resisted with the superior hierarchical force of the state constitution; it is now the ally, necessary to fending off the real threat, United States Supreme Court review.

Chief Justice Wells rejected the four justices' opinion as a concoction with "no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion."[99] They had unleashed a recount with "unknown or, at best, ambiguous standards" to be done by persons whose "credentials, qualifications, and objectivity" were "totally unknown."[100] Their arguments for the amazing statewide recount of all ballots the machine had rejected because it detected no vote ("undervotes"), should, according to Wells, equally require a manual recount of the ballots the machine rejected because it detected more than one vote ("overvotes"), so the remedy addressing only the undervotes must be wrong.[101] The majority's reliance on the statutory language "clear indication of the intent of the voter,"[102] Chief Justice Wells noted, should run afoul of equal protection requirements.[103] It was especially bad to avoid answering the question whether to count "dimpled chads," the question the county boards had conspicuously disagreed

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97 Harris I, 772 So. 2d 1220, 1228 (Fla. 2000) (per curiam) (quoting Boardman, 323 So. 2d at 263).

98 Harris II, 772 So. 2d at 1254 (emphasis added).

99 Id. at 1263 (Wells, C.J., dissenting).

100 Id.

101 Id. at 1264 n.26.

102 See id. at 1262 (per curiam).

103 Id. at 1267 (Wells, C.J., dissenting).

about;[104] to ask these boards now to conduct a recount under their inconsistent standards was patently unfair to the voters in the counties that used the stricter standard.[105] The court could not resolve this question without making new law because the statute gave authority only to the local boards to decide on "the ***536** clear indication of the intent of the voter."[106] Because it would be new law, a more particular standard would violate Article II.[107] Not to set a more particular standard, however, would violate equal protection.[108] In Wells' eyes, the Florida Court was cornered: if we override the statutes, we'll be reversed on Article II grounds; if we use the statutes, we'll be reversed on equal protection grounds.[109] The conclusion was clear to Chief Justice Wells: no attempt at insulating the state court opinion with state law will work; and we ought not to bring ourselves into disrepute by trying to avoid the inevitable.

C. The Problem of the December 12 Deadline

The four Florida justices in the majority made a key concession as they marshaled the evidence of legislative intent to support the new recount. They had written at the outset of their discussion that the legislature meant to fit into the federal safe harbor, and the safe harbor provision included the December 12 deadline for completing all of the procedures for appointing the electors.[110] Bush had argued that the need to meet this deadline ought to cause the court to interpret the state statutory scheme to exclude the contest phase entirely in the case of presidential elections.[111] The four justices' rejection of this interpretation reads as follows:

> [T]he Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. *Of course*, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, *the Florida election law scheme must yield in the event of a conflict*.[112]

***537** Thus, in the process of deflecting Bush's argument that the presidential election should be read out of part of the statutory scheme, the Florida Supreme Court majority read into the statutes the very proposition that the United States Supreme Court would rely on to

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104 Id.

105 Id.

106 Id. at 1267-68.

107 Id. at 1268.

108 Id. at 1267.

109 Id. at 1267-68. Chief Justice Wells also faulted the majority for not balancing the relief to be provided by the remedy against the injury the relief itself produces. Id. at 1269-70. Here, the "confusion and disorder" produced by the recount were a serious injury overshadowing the dubious benefits of the remedy. Id. at 1269 (quoting Florida ex rel. Pooser v. Wester, 170 So. 736, 738-39 (Fla. 1936)). Justice Harding, who also dissented, emphasized this point as well, noting that the recount itself, a supposed benefit, would only increase the amount of uncertainty and chaos. Id. at 1273 (Harding, J., dissenting).

110 See id. at 1248 (per curiam).

111 Id. at 1249 n.7.

112 Id. at 1253 n.11 (emphasis added).

end the recount on the night of December 12: the state law procedures "*must yield*" to the federal deadline. "*Of course*"!

The four justices relegated this point to a footnote – Footnote 11. Placement in a footnote may indicate that the court thought very little about the proposition, but it may also indicate that the conclusion was too obvious to require saying in the text. The phrase "Of course" suggests the latter interpretation. Moreover, if the court thought very little about the conclusion, its spontaneity may have lowered its defenses. Though elsewhere the majority took care to construct an opinion impervious to interference by the United States Supreme Court, here it unwittingly deposited a useful nugget conceding the ground that would prove crucial as the United States Supreme Court ultimately ended the case without seeing further need for state court interpretation of state law.[113]

Elsewhere in the opinion, the four justices acknowledged the imminent deadline. They "recognize[d] that time is desperately short."[114] The dissenting justices had criticized the majority for not weighing the harms caused by the relief – the danger of chaos – against the benefits, which were to them meager.[115] The four justices, in response, only criticized the dissenters for being too concerned with "looming deadlines and practical difficulties."[116] This was not a disagreement about whether the deadlines were real, but an assertion that it is important to try to accomplish the recount despite the admitted time pressure. The four justices even "agree[d] that practical difficulties may well end up controlling the outcome of the election."[117] ***538** Although many commentators and, as we shall see, United States Supreme Court Justices viewed some other deadline as the true deadline,[118] the Florida court's opinion does not leave an open question about which deadline controls the operation of the state statutory scheme. The deadline, as a matter of state law interpreted by the state's highest court, is the date on the "stringent calendar controlled by federal law,"[119] i.e., December 12.

Conceding that the December 12 deadline must control was not necessary to the four justices' opinion or required to accomplish the goal, which we might want to attribute to them, of relying entirely on statutory law. The majority could have left open the question what the legislature would intend in the event of a conflict between ongoing state

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[113] The material in the Florida Supreme Court opinion relating to the deadline is rich, yet the United States Supreme Court, which assumed the December 12 deadline, did not exploit this material, even though to do so would have deflected the criticism that it was arrogating to itself a power to decide a question of state law. See infra text accompanying notes 191-206.

[114] Harris II, 772 So. 2d at 1261 (per curiam). The majority also stated:

> [T]he need for accuracy must be weighed against the need for finality. The need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.

Id.

[115] See supra note 109.

[116] Harris II, 772 So. 2d at 1261 n.21 (per curiam).

[117] Id. at 1262 n.21.

[118] See Klarman, supra note 59, at 1745 (suggesting that it would have been appropriate to allow the recount to proceed past December 12 as long as it was completed by December 18t the time when electors had to be appointed for the electoral college); Scheppele, supra note 3, at 1427 (maintaining that the December 12 date did not need to be the Florida deadline because other states had previously waited much longer to appoint electors); infra notes 191-206 and accompanying text (discussing Justice Souter's and Justice Breyer's views on the proper deadline).

[119] Harris II, 772 So. 2d at 1254 n.11 (per curiam).

procedures and the federal deadline; perhaps the legislature's supposed dedication to counting every vote[120] surpassed its interest in meeting the safe harbor. Naturally, it would not make sense to interpret legislative intent to demand vote counting to continue so long as to prevent the inclusion of Florida's share of the electoral vote in the final count presented to Congress, but one could allow it to continue until December 18,[121] the day when the Electoral College would meet, or even January 6,[122] the day when Congress would count the votes.[123] The Florida Supreme Court might have gone that far and still been able to claim that it was all a matter of state statutory interpretation, ***539** about which its word is the last word, thus frustrating any later efforts of the United States Supreme Court to get a federal law grip on the dispute.

The majority also might have responded to Bush's argument for excluding the contest phase by simply concluding that the legislature bungled the matter of presidential elections. The Florida Supreme Court could have asserted that the state legislature, in composing the statutory scheme, thought of the recount procedures only in the context of the sort of local and state elections that normally rely on them, because it did not envision the state ever playing a crucial role in a presidential election. That eminently understandable lack of imagination on the part of the legislature unfortunately left the presidential election subject to many admittedly unsuitable state procedures, yet nothing could be done about it. Indeed, to adjust the procedures to avoid missing the deadline would be to create a new scheme after the election and would itself risk the loss of the safe harbor! The legislature wanted to meet the safe harbor, but it failed, and that is what state law is – in the eyes of the Florida Supreme Court.

If the Florida majority had wanted only, by whatever way possible, to hand victory to Al Gore, it might have considered an interpretation of state statutory law that would break all the federal deadlines. With Florida's votes excluded from the Electoral College, Al Gore would have had a majority of the votes cast.[124] That the court did not go this far, however, ought not to encourage those who hope to salvage the Florida Supreme Court's reputation for neutrality because it is highly unlikely that Congress, which would have controlled the final decision with respect to whether Florida's votes counted, would have allowed Gore to win that way, because the ultimate presidential choice in a conflict would have fallen to the House of Representatives, voting by state, which would have given control to the Republican party.[125] Either they would have accepted the electors appointed by the certified

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[120] "Count all the votes" was the mantra of Gore's post-election effort, repeated so often that it worked as a practical joke for George W. Bush to telephone one of his aides and say: "You know what we ought to do, Joe? ... We ought to count all the votes ... Come on. You call Gore up and work it out. Let's count all the votes. ... C'mon. Let's count all the votes. Count all the votes." Toobin, supra note 68, at 94.

[121] See Bush II, 531 U.S. at 98, 146 (2000) (Breyer, J., dissenting) (arguing that the Court should remand the case to the Florida courts to determine whether time remained to conduct a recount by December 18).

[122] See id. at 144 (Ginsburg, J., dissenting) (arguing that the December 12 deadline does not have "ultimate significance" because Congress does not determine "the validity of electoral votes" until January 6).

[123] After the 1960 election, Congress accepted a slate of electors from Hawaii that had been appointed on January 4. See id. at 127 (Stevens, J., dissenting). Of course, Hawaii's electoral votes did not determine the outcome of that election, but the acceptance of Hawaii's votes does stand as a precedent that would have been used in an argument that Congress must accept late-counted votes from Florida after the 2000 election. See Scheppele, supra note 3, at 1427 n.176.

[124] See Rhodes Cook, This Just In: Nixon Beats Kennedy, Wash. Post, Mar. 25, 2001, at B2 (stating the final Electoral College totals as 271 votes for Bush and 266 votes for Gore).

[125] See Toobin, supra note 68, at 206 (noting that "should it be necessary, the Republicans apparently had the votes in the United States Congress to settle the election once and for all").

vote count from November 26,[126] or they would have accepted the ***540** appointment of Bush electors that the Florida legislature would have made if the recount procedure had led to a Gore victory.[127] Moreover, the more vigorous the effort by the Florida Supreme Court, the more likely the United States Supreme Court would have been to step in.

So does the concession in Footnote 11 support the theory that the Florida Supreme Court did not deviate from judicial orthodoxy, that it was not on an illegitimate mission to thwart United States Supreme Court review? It seems more likely that the Florida Supreme Court had many loose ends to tie together and very little time to do it, and never anticipated that Footnote 11 was ceding so much power to the higher court. The Florida court, indeed, ought not to have tied up every loose end, one can say now in retrospect, if it had wanted to preserve its control over the outcome, because leaving a loose end of uninterpreted state law might have convinced one more Justice to support the remand that Justices Breyer and Souter proposed,[128] which would have changed the outcome in *Bush II*.

III. A STAY SUPPORTED BY A CLOUD

The Florida Supreme Court's unanimity, seen in its first decision, had broken down. Now, the United States Supreme Court's unanimity would fall apart too. I doubt that the United States Supreme Court would have acted differently if the Florida Supreme Court had been able to maintain a united front and issued an opinion that gave every appearance of being an unimpeachably legalistic exposition of state statutory law. Surely, the United States Supreme Court Justices who reversed the Florida Supreme Court were scrutinizing the work of the Florida Supreme Court with a very sharp eye and have no trouble perceiving the ways state court judges write about state law to try to avoid Supreme Court review. But the dissenting state court opinions actively invited review and begged for the majority's work to be looked at with great suspicion.[129] ***541**

The United States Supreme Court's unanimity broke in half upon the granting of a stay of the Florida Supreme Court's order.[130] Just hours after the recount had begun on December 9, the United States Supreme Court stopped it,[131] and the next three days were then consumed with the briefing and arguing of the case and the day-and-a-half wait for the Court's opinion.[132] On the night of the 12th, the last day left for qualifying for safe-harbor treatment, the United States Supreme Court held that the method used for the full-state

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[126] The Florida Supreme Court might have ordered Secretary Harris to retrieve the November 26 certification and barred her from filing a new one at any time. Yet she might not have obeyed that order. Even if she had, Congress would have had the role of interpreting the meaning of a majority of the votes cast and decided Vice President Gore needed a majority of a total that included the Florida votes, in which case he would have had more votes than Governor Bush, but not the needed majority.

[127] See Toobin, supra note 68, at 138-39 (stating that the Florida legislature had the power to instruct its electors how to vote in the Electoral College and "could simply vote to give the election to Bush").

[128] See Bush II, 531 U.S. 98, 134-35 (2000) (Souter, J., dissenting) (arguing that the equal protection issues raised by the petitioner's challenge to the ordered recount could be resolved by a remand conditioned upon establishing a uniform standard).

[129] See Harris II, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting) (stating that the majority opinion "cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution").

[130] Bush v. Gore, 531 U.S. 1046 (2000).

[131] Id.

[132] Bush II, 531 U.S. at 100 (per curiam).

recount violated the Constitution's Equal Protection Clause, and, because a constitutional recount could obviously not be carried out by midnight, the case had come to a close.[133]

It no longer matters to the outcome that the stay was granted because any counting that had been done pending the issuance of the United States Supreme Court's opinion would not have been usable, but those interested in the legitimacy of the Court's actions still have good reason to examine the stay. It turned out to be true that any counting accomplished prior to the *Bush II* decision would not have been usable, but at the time the stay was granted, this uselessness could only have been known if the majority had already reached its decision on the merits.[134] One might very well argue that the few days left until the deadline should have been used to go forward with the count the Florida Supreme Court had ordered because in the event that it were found constitutional, the count might have been completed in time to meet the December 12 deadline. If it turned out not to be seen as a constitutional procedure (as it did), then the count could simply have been tossed out. So if there was a chance of achieving the benefit of accomplishing a recount within the deadline, this argument goes, it should have been pursued. What good was achieved by giving up that chance, and what harm would going forward have done that could not have been remedied by throwing out the count? In other words, how did Bush satisfy the requirement of "irreparable injury"[135] for a stay? Indeed, did the stay not threaten an ***542** irreparable injury to Gore? The stay looked like an additional, illegitimate way to promote victory for Bush: run out the clock.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from the grant of the stay.[136] They criticized the majority for "depart[ing]" from the "venerable rules of judicial restraint."[137] This dissenting opinion set the tone for much of the criticism of the Court that would follow: the conservatives have violated their own credo of restraint![138] Justice Stevens' first rule of restraint – "respect[]" state court opinions of state law – need not be considered a rule of restraint at all. State courts are the authoritative expositors of state law.[139] The United States Supreme Court does not "defer" to their interpretations, it simply recognizes the state court's authority.[140] It is not a process of standing back and judging the state court's work by a special lenient standard, as with abuse of discretion review. Indeed, the state court could make a ridiculous interpretation of state law and that would be state law; it might raise questions of federal law, such as the violation of

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[133] Id. at 110.

[134] See Richard A Posner, Florida 2000: *A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 23 (suggesting that Bush II may have been a case of "judgment in advance of doctrine" – judges having a general sense of how they think the case should come out before deciding on appropriate legal principles).

[135] See Planned Parenthood v. Casey, 510 U.S. 1309, 1310 (1994) (Souter, Circuit Justice) (listing as a requirement for the granting of a stay "a likelihood of irreparable injury").

[136] Bush, 531 U.S. at 1046 (Stevens, J., dissenting).

[137] Id.

[138] See, e.g., Alan M. Dershowitz, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 186 (2001) (discussing how the Supreme Court's decision to grant a stay and then permanently to stop the count "has been widely perceived as so inconsistent with the alleged conservative approach to judging – judicial restraint"). Many commentators, however, have suggested that the Supreme Court's decision in Bush II was consistent with a recent trend toward conservative judicial activism. See, e.g., Larry D. Kramer, *No Surprise. It's an Activist Court*, in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY, supra note 3, at 273, 273-74.

[139] Bush, 531 U.S. at 1047 (Stevens, J., dissenting).

[140] But see Bush II, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (acknowledging that "comity and respect for federalism ... compel ... defer[ence]" to state court decisions based on state law).

constitutional rights,[141] but the interpretation provided by the state courts is authoritative. Justice Stevens' second rule of restraint requires the United States Supreme Court to use a narrow interpretation of its own jurisdiction and to exercise any jurisdiction that it does find "cautiously" when it faces issues "committed at least in large measure to another branch of the Federal Government."[142] Presumably, he intended to refer to the constitutional role ****543*** provided for Congress at a much later stage. The third rule of restraint is that the Court "prudently decline[s]" cases that do not "fairly present" federal constitutional questions.[143] As discussed in Part I of this Article, this notion does not square with *Michigan v. Long*,[144] which set up a doctrine designed to resist efforts of state supreme courts to avoid review by muddling the presentation of issues.[145] Justice Stevens, it may help to note, was the lone dissenter from this aspect of *Long*; he alone argued for respecting the autonomy of a state court that had mixed up its interpretation of state and federal law.[146]

Justice Stevens did not elaborate on why the stay violated the "venerable rules of judicial restraint."[147] He concentrated instead on Bush's failure to make the showing required for a stay: irreparable harm and the likelihood of success on the merits.[148] The only potential harm he perceived was in suppressing the recount, which he wrote will "cast a cloud on the legitimacy of the election."[149] Most of his discussion addressed the likelihood of success on the merits; he summarized the Florida Supreme Court's discussion of state statutory law, cited many Florida cases that favor counting every vote, and noted: "As a more fundamental matter, the Florida court's ruling reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted."[150]

This dissenting opinion provoked Justice Scalia to write his own separate opinion justifying the stay.[151] He noted, without saying why, ****544*** that "the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that

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[141] See supra text accompanying notes 23-27.

[142] Bush, 531 U.S. at 1047 (Stevens, J., dissenting). Contrast this approach with Justice Stevens's dissenting opinion in Allen v. Wright, 468 U.S. 737 (1984), a case brought to force the Internal Revenue Service to adopt a more aggressive approach toward denying tax exemptions to private schools that impede public school desegregation. Justice O'Connor, writing for the majority, had taken the position that separation of powers should affect the analysis of whether the requirements for standing have been met. Id. at 750. In Allen, this meant that the Court took a hard look at whether the IRS's policy caused the plaintiffs' injury (lack of public school integration). Id. at 751. Concern about allowing the IRS a fair range of discretion in determining how to enforce federal law affected the Court's conclusion that the injury was not "fairly traceable" to the policy. Id. at 757. Justice Stevens dissented in that case and expressed puzzlement about why separation of powers concerns should influence standing doctrine. Id. at 790 (Stevens, J., dissenting). Thus, Justice Stevens's invocation of this "venerable rule" of judicial restraint does not seem to be an expression of his own jurisprudence, but rather an attempt to hold the conservative side of the Court to principles it has on previous occasions expressed.

[143] Bush, 531 U.S. at 1047 (Stevens, J., dissenting).

[144] 463 U.S. 1032 (1983). For a discussion of this case, see supra text accompanying notes 39-48.

[145] Long, 463 U.S. at 1041.

[146] Id. at 1065 (Stevens, J., dissenting). Justice Brennan also wrote a dissenting opinion, joined by Justice Marshall, but this opinion rejected the substantive ground, not the jurisdictional ground. Id. at 1054 (Brennan, J., dissenting).

[147] Bush, 531 U.S. at 1047 (Stevens, J., dissenting).

[148] Id. Justice Stevens's opinion does not clearly state that the requirements for a stay include not only irreparable injury but also a likelihood of success on the merits. But see Planned Parenthood v. Casey, 510 U.S. 1309, 1310 (1994) (Souter, Circuit Justice) (listing as a requirement for the granting of a stay "a fair prospect that the applicant will ultimately prevail on the merits").

[149] Bush, 531 U.S. at 1048 (Stevens, J., dissenting).

[150] Id. (citing Reynolds v. Sims, 377 U.S. 533, 544-55 (1964)).

[151] Id. at 1046 (Scalia, J., concurring).

the petitioner has a substantial probability of success."[152] Some of the Court's critics have jumped on this statement as if it revealed an outrageous prejudice,[153] but it simply responded to Justice Stevens' discussion of the "likelihood of success" requirement. The grant of the stay itself implied that the Court believed there was a "likelihood of success," and Justice Scalia, if anything, should be credited with resisting laying out the flaws he perceived in the paragraph of Justice Stevens' opinion that vaunted the correctness of the Florida Supreme Court's opinion.

Justice Scalia did go on to explain what he saw as the irreparable injury in the recounting process:

> The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.[154]

Thus, both Justices expressed concern about a possible "cloud" on the "legitimacy of the election" – the cloud came either from counting or not counting. Justice Scalia's cloud was the cloud on Bush's presidency that would remain if the public were to hear the results of a recount favoring Gore. Even if the votes were not used to change the ***545** result of the election, the votes would cause people to think ill of those results.[155]

Was that enough of an injury in contrast to the harm in not counting? Those who are familiar with Justice Scalia's strict position on Article III standing doctrine, with its injury requirement, may find something amiss: he is the *least* likely of all the Justices to take the position that a plaintiff in a federal case has met the standing requirement of a "concrete and particularized injury,"[156] so why should he be among the first to find an injury here?[157] To read Justice Scalia's finding injury in what he himself labels a "cloud" makes one wonder about all the standing cases in which he has staunchly resisted finding injuries that arose out of mere feelings. For example, in the recent case of *Friends of the Earth v.*

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152 Id. This conclusion is repeated in Bush II, 531 U.S. 98, 109 (2000) (per curiam) ("Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision.").

153 For example, Jeffrey Toobin characterized this statement as showing "the kind of swagger that was characteristic of the Republicans throughout the recount," and meaning "in other words ... that [Scalia's] side already had the game locked up." Toobin, supra note 68, at 250. In fact, it is soundly established that likelihood of success is a requirement for granting a stay, so that the grant of a stay always means the Court has prejudged the merits, a simple legal matter Toobin never mentioned, even as he accused Justice Scalia's opinion of "suggest[ing] a remarkably political view of the Court's role." Id. at 251. Interestingly, Toobin went on to quote the BlackBerry message Gore sent his spokesmen immediately after the stay was granted: "PLEASE MAKE SURE THAT NO ONE TRASHES THE SUPREME COURT." Id. at 252. Toobin, who was critical of Gore throughout his book for not trying hard enough to win, followed Gore's message with a contrasting statement purportedly "muttered" by President Clinton, "The Supreme Court ... Gore ought to attack those bastards." Id.

154 Bush, 531 U.S. at 1046 (Scalia, J., concurring).

155 As Professor Michael McConnell has noted, the Court would have needed to require the destruction of the ballots to avoid this harm, which could have resulted from a recount occurring later. McConnell, supra note 57, at 98-99.

156 See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Servs., 528 U.S. 167, 201 (2000) (Scalia, J., dissenting) (criticizing the majority for "mak[ing] the injury-in-fact requirement a sham" when it accepted "vague, contradictory, and unsubstantiated allegations of 'concern'" about the pollution of a river).

157 The Court has in the past equated the injury required for standing with the irreparable injury required for equitable relief. See, e.g., O'Shea v. Littleton, 414 U.S. 488, 499 (1974).

Laidlaw Environmental Services, Justice Scalia dissented, joined only by Justice Thomas, criticizing the majority for finding sufficient injury in the plaintiffs' mere "'concern' that the water was polluted" and simple "belie[f]" that their property values had declined.[158] So are feelings and impressions really judicially cognizable injuries or not? Moreover, in *Bush v. Gore*, the injury was not even the feelings of the applicant for the stay, but in how *others* would feel *about* him. Why should the Court concern itself with the way the recount might affect the mental state of the American people? Should the Court worry about the loss of political clout that might hurt Bush if he becomes President under a "cloud" of opinion resulting from an improper, unused recount in Florida? There is, theoretically, a loss of political power; but consider *Raines v. Byrd*,[159] a 1997 case, joined by Justice Scalia, that held that members of Congress lacked standing to challenge the Line Item Veto Act. The mere loss of political power asserted by those plaintiffs was not enough to meet the requirements for standing.[160] The power lost by a member of Congress jockeying for his pet item when the President might target it for veto had more ***546** substance than the mere attitude people might have about Bush if they thought the election had been mishandled.[161]

Justice Scalia also worried that if in fact the current count were illegal, the next count would be less accurate, "since it is generally agreed that each manual recount produces a degradation of the ballots."[162] Of course, if the Court were already planning to enforce the December 12 deadline, then it knew there could be no usable second recount. Thus, the choice was between the current recount and no recount at all, and the only interest in preserving the ballots would be to obtain an accurate count, for information only, after the results of the election had been determined.

The granting of the stay, as a matter of judicial orthodoxy, seems to be the most questionable part of everything the United States Supreme Court did in the Bush-Gore litigation. It does not seem to have been treated like just another application for a stay. It can perhaps be justified as a truly unique case. The sudden and extravagant decision of the Florida Supreme Court, so late in the process, after people had come to believe that the post-election uncertainty had reached an end, had produced tremendous excitement.[163] The soaring, resurrected hopes of Gore supporters were matched by the outrage and alarm felt by Bush supporters.[164] The manual counting that had gone on up to this point had been strange and disorderly enough, but the new counting was much larger in scope than any that had gone on before, and it was taking place with a new and extreme degree of time pressure.[165] In this context, one can understand how the majority may have felt that the

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158 Laidlaw, 528 U.S. at 198 (Scalia, J., dissenting).

159 521 U.S. 811 (1997).

160 Id. at 829.

161 Indeed, to some extent, Bush did take office with that cloud over his head. Yet his conduct as President and the polls of public opinion did not seem to evince any serious injury from the usual election. See *Talk of the Nation: How Americans View the Supreme Court*, supra note 56 (noting that early polls rated approval for President Bush at 57%, approximately the same rating received by Bill Clinton at the same point in his first term).

162 Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

163 See David Von Drehle et al., *In a Dark Hour, a Last-Minute Reprieve: Florida's High Court Revived Recount – and the Prospects of a Bush Argument*, WASH. POST, Feb. 2, 2001, at A1.

164 See id.

165 See Harris II, 772 So. 2d 1243, 1261 (Fla. 2000) (noting that the manual recount should proceed despite the time pressures resulting from the federal election law deadline).

Florida Supreme Court really deserved the response it got: someone needed to step in and announce that adults are here and will not tolerate this disarray for another moment. In judicial terms, that translated into a stay.

Even if this unique case did not satisfy the most formal approach to finding the elements necessary for a stay, it may be said to do exactly what a stay is meant to do: provide stability. Gore and Bush supporters ***547** cannot help thinking differently about this idea because they will inevitably have different perceptions about just how chaotic and unstable the situation in Florida was. But this difference in perception shows why the 5-4 vote of the Justices, which looked so much like blatant voting for one's favorite candidate, might not deserve the degree of criticism it provoked. If, as a legal matter, a stay is appropriate to control an out-of-control situation, then those who perceived such a situation could legitimately vote for the stay, and those who did not could legitimately dissent. We might still want to criticize the Justices for failing to make a sufficiently neutral judgment about the degree of disorder that was present: the conservative-liberal split showed that a lofty state of disinterestedness had not been achieved. Yet we need not go so far as to accuse them of making a purely political decision. In any event, if the Court departed from the highest ideals of the rule of law at this point, it does not seem possible to conclude that only the majority went astray. All of the Justices were attempting to make a legitimate judicial decision, I would guess, but the emotional component of their necessarily human reasoning affected how chaotic and destabilizing they perceived the Florida recount to be and consequently how they analyzed the need for the stay.

IV. DID THE UNITED STATES SUPREME COURT USURP THE FLORIDA SUPREME COURT'S AUTHORITY OVER STATE LAW IN *BUSH II*?

A. Equal Protection Analysis

1. The Per Curiam Opinion Finds a Violation of Equal Protection and Ends the Recount

The Court delivered its fractured opinion on the night of December 12.[166] The per curiam opinion avoided dealing with the Article II question altogether and rested entirely, if shakily, on the equal protection ground.[167] According to the Court, once a state legislature has decided to use voting as the method of appointing the presidential electors, the right to vote becomes "fundamental," and subject to the Equal Protection Clause's requirement that each person's vote receive equal weight,[168] even though the state can take back its power of appointment "at any time."[169] Citing cases from the 1960s, the Court wrote that the state may not "debase[] or dilut[e]"[170] a person's vote through "arbitrary and

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[166] Bush II, 531 U.S. 98 (2000) (per curiam).
[167] Id. at 110.
[168] Id. at 104.
[169] Id. The Court here reaffirmed the position taken in McPherson v. Blacker, 146 U.S. 1, 35 (1892).
[170] Bush II, 531 U.S. at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

disparate treatment."[171] ***548** The Court recognized the irony that both parties relied on this principle: Gore saw it as the reason to do the very counting that Bush saw it as the reason to stop.[172]

The Court held that the counting failed to meet the "minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right."[173] The Florida Supreme Court's standard – "intent of the voter" – was too abstract. At a minimum, there should have been a uniform standard for dealing with the "recurring circumstances."[174] It was intolerable, according to the Court, to rely on such a general rule when it was well known that different counties and even different counting teams were coming up with different answers to recurrent questions, such as whether "dimpled chads" should count.[175] The Court also found it arbitrary that some of the recounted votes that the Florida Supreme Court included in the state total came from counties that had examined all of the ballots that the machines had left uncounted, both undervotes and overvotes, while the new recounting process was limited to undervote ballots.[176] Then there was the little-noticed problem of the ballot that contains two marks, each showing the "intent of the voter," thus making it an overvote, that actually was counted because the machine had only recognized one of the two marks.[177] Why did that vote count when other overvotes did not? As to all of these problems, everything other than the failure to resolve the recurring question about the standard for marking the ballots, the Court did not say that they fell below the minimum requirements of the Equal Protection Clause, only that they "exemplifie[d] concerns with the remedial processes."[178] The Court raised "further concerns" about who would do the recounts and how objections would be made.[179] One might criticize the Court for producing such a rambling list of "concerns" without specifying exactly whether they violated the Equal Protection Clause because the power of the United States Supreme Court over the Florida Supreme Court had to flow from the violation of federal law. Yet the Court had its rights violation: not setting a specific standard for the known, recurring ***549** situation. That one clear violation of federal law allowed it to intrude on the Florida Supreme Court. The rest of the "concerns" seemed to function only to support the Court's prediction that no recount could possibly satisfy constitutional law.[180]

The Court referred to "yet a further equal protection problem": the Florida court had provided no "assurance" that the final count would be complete.[181] The Court interpreted the Florida Supreme Court's opinion to "permit" the use of partial recounts in the event that the attempted recount was incomplete because the Florida court's opinion ordered the immediate inclusion of a partial recount that had already occurred in Miami-Dade County

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171 Id. at 104 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966)).
172 Id. at 105.
173 Id.
174 Id. at 106. This is the problem identified by Chief Justice Wells in his dissenting opinion below. Harris II, 772 So. 2d 1243, 1267 (Fla. 2000) (Wells, C.J., dissenting).
175 Bush II, 531 U.S. at 106 (per curiam).
176 Id. at 107-08.
177 Id. at 108.
178 Id.
179 Id. at 109.
180 See id. at 111.
181 Id. at 108.

and also recognized that the recount might not be completed by the December 12 deadline.[182] But that "problem" lay in the future, and, indeed the counting, at the time it was stopped by the United States Supreme Court, was on schedule to finish two days before the deadline. Why talk of "problems" and "concerns" instead of real violations unless you are trying to muddle, rather like the Michigan court in *Michigan v. Long*?[183] The Court nevertheless made assertions as to the *necessity* of its role: it was "forced to confront" the case because of the presence of federal questions, and its jurisdiction was not the result of an act of will, but an "unsought responsibility."[184]

The Court summarized:

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.[185]

The Court showed very little concern for its own embarrassment when, as it wrote an opinion criticizing the Florida Supreme Court for putting together a supposedly messy and haphazard recount, it strung together a rambling list of "concerns," with no specific analysis, made a general conclusion that the whole enterprise could not be done well ***550** enough, and then tacked on a sentence calling attention to just how ad hoc it thought equal protection analysis could be. What does this passage mean? It seems to bunch together all the "concerns" and "problems" and convert them, taken together, into a rights violation.[186]

It makes some sense to say that when a court conducts a recount at the state level, it becomes practicable to have a uniform and coordinated recount, and therefore the Equal Protection Clause imposes a higher standard than what is required of executive officials who operate on a decentralized level. The Court did seem to rely on this idea:

> The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.[187]

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[182] Id.

[183] 463 U.S. 1032 (1983); see also supra text accompanying notes 60- 61 (characterizing Michigan v. Long's presumption as designed to deprive state supreme courts of the ability to avoid review by muddling the issues of state and federal law).

[184] Bush II, 531 U.S. at 111 (per curiam).

[185] Id. at 109.

[186] This style of analysis, listing many considerations and then drawing a conclusion based on the entire undifferentiated group, is not unique to Bush v. Gore. See, e.g., Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring) (relying on a multitude of factors to draw a conclusion about whether the Establishment Clause had been violated).

[187] Bush II, 531 U.S. at 109 (per curiam).

One should perhaps read the "limited to the present circumstances" line to refer to a higher duty that comes into being in a centralized, court-supervised recount, but there is no analysis of why disuniformity becomes tolerable when it is squirreled away in the operations of the County Boards of Elections. The suggestion seems to be that when it is practicable – when there is judicial supervision of the whole operation – the Equal Protection Clause demands more responsibility for avoiding arbitrariness, but there is so little explanation of why this is so that many commentators feel no compunction to acknowledge this level of coherence. The Court's failure to write in a doctrinal, structured fashion that makes for usable precedent and its explicit if enigmatic warning *not* to use the case as precedent opened the Court up to the criticism that it had no rational ground for what it did.[188] ***551**

One might offer the excuse that the Court was pressed for time, but if time pressure is an excuse for sloppy work, the Florida Supreme Court ought to have gotten a pass as well. Moreover, the time pressure may have let slip a usefully revealing statement. How do the Justices make their decisions? One may like to think that they work through the legal reasons before deciding. If that is what is occurring, then whenever a decision is reached, it should be a simple enough matter to reveal those reasons in writing. If the reasons are generated after the decision is made, however, time pressure permits that reality to show. If time pressure forces the Justices to jot down their actual thoughts, we the readers have the opportunity to see the real quality of the ideas that went into the decision. One might compare the *Bush II* per curiam opinion to the "excited utterance" exception to the hearsay rule in evidence: it is the official policy of the federal courts to consider a statement made spontaneously and under stress as more reliable than a statement a person has had time to think through and phrase carefully.[189] The reason is obvious: there is less risk that the statement has been crafted to serve goals other than the truth. The per curiam opinion gives us a rare opportunity to look at the real content of a decision, precisely because there was so little time to craft an opinion that would create the impression the Court has such a great interest in conveying: that it is a truly disinterested, impeccably legal, legitimate institution.[190]

2. Justices Breyer and Souter's Proposal for a New Recount: The Elusive True Deadline Problem.

The per curiam's equal protection analysis gained credibility from the fact that two Justices from the liberal side of the Court – Justices Souter and Breyer – agreed with it in part. Both of these Justices thought that not setting a specific standard for the known, recurring questions about particular types of ballot marks rose to the level of an equal protection violation.[191] Justice Breyer was a bit vague about how to think about this rights violation in future cases. It is only "in these very special circumstances" where there is so

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[188] See Dershowitz, supra note 138, at 81 (interpreting the Court's precedent-limiting language to mean, "don't try to hold the Court to what it said in this case, because it decided this case not on general principles applicable to all cases, but on a principle that has never before been recognized by any court and that will never again be recognized by this court").

[189] See Fed. R. Evid. 803(2) (excepting from the general rule against hearsay evidence "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

[190] The work of the Florida Supreme Court provides us with another opportunity.

[191] Bush II, 531 U.S. at 134 (Souter, J., dissenting); id. at 145-46 (Breyer, J., dissenting).

much time pressure, where the recount was ordered by a central authority, and where the decision-makers knew which standards helped which candidate that the failure to provide a single standard violated equal protection.[192] ***552**

Justices Breyer and Souter had a very substantial disagreement, however, with the rest of the per curiam decision over what should be done about the equal protection violation.[193] The remaining members of the per curiam majority – the five conservative Justices – took the position that there was no time remaining for solving the equal protection problems and conducting a constitutional recount. Not only would substantial work need to be done to set up a proper procedure,[194] but there was simply no time at all remaining for meeting the safe harbor: it was already the night of December 12.[195] Justice Souter wrote that the Court should "take account of" the December 18 date set for casting the electoral votes, which would leave six days.[196] Yet he gave no explanation why this extension would be justified in view of the state court's interpretation that December 12th was the end of the line.

Because the endpoint for the state's processes is itself a matter of state statutory interpretation,[197] the Supreme Court would need to answer a question of state law before it could move the endpoint to the 18th. The decision on that question of state law was avoidable through a remand: one could have sent the case back to the state court to make an interpretation of the date of the true deadline. The ***553** Florida Supreme Court could have considered whether the state legislature meant to elevate the acceptance of the offer of a safe harbor over the interest in counting every vote. But didn't the Florida Supreme Court already commit itself to the December 12 deadline?[198] Justice Souter entirely ignored that hitch. The Florida Supreme Court's past creativity in support of recounting supplied good reason to think that that court, given a chance to rethink the deadline issue, would find a way to a new answer, but none of the Justices speculated in writing on that subject.[199] One might attribute the dearth of discussion on the crucial issue of the deadline to the majority's

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192 Id. at 145-46 (Breyer, J., dissenting).

193 Justice Souter also disagreed with the decision to take the case. He thought that, left alone, the Florida Supreme Court might have dealt with the various equal protection problems. Id. at 133 (Souter, J., dissenting). If it had not, according to Justice Souter, Congress could have addressed the problem. Id. at 129. Similarly, Justice Breyer thought that the great national interest in the presidency was basically a political matter, which could be resolved in the end by Congress as it performed its constitutional tasks relating to the selection of the President. Id. at 153 (Breyer, J., dissenting). In Justice Breyer's view, the legal issues in the case were insufficient to overcome principles of judicial restraint that come into play when a court is faced with a "strange[] ... intractab[le] ... momentous[]" decision. Id. at 157 (quoting Alexander M. Bickel, THE LEAST DANGEROUS BRANCH 184 (1962)). Even though the United States Supreme Court was also confronted with the work of a state court that had also faced a "strange[] ... intractab[le] ... momentous[]" decision and had gone ahead and decided it, according to Justice Breyer, the Court still ought to worry about its own "unbalance[d] judicial judgment" and "the inner vulnerability" arising from its lack of political accountability. Id. (quoting Bickel, supra, at 185). Justice Breyer took the position that issues involving fundamental rights are more worthy of the Supreme Court's attention than the mere structural constitutional matters, such as the one relied on by the Chief Justice. Id. He did find one equal protection violation, and admitted it involved "a basic human right," yet he thought it was not substantial enough for the Court to risk exposure to the criticisms it would attract because Congress would be in a position in the end to control the outcome of the election. Id. at 153.

194 Id. at 110 (per curiam). The Court noted in particular that the machines were not designed to identify and sort out the unread undervotes and overvotes and would require new software. Id.

195 Id.

196 Id. at 134-35 (Souter, J., dissenting).

197 No one took the position that 3 U.S.C. § 5 imposed the deadline. See supra note 16.

198 See Bush II, 531 U.S. at 113 (Rehnquist, C.J., concurring) (noting that the Florida Supreme Court "acknowledged" that the state legislature took the federal safe harbor statute "into account").

199 After the United States Supreme Court's final remand to the Florida Supreme Court, Justice Shaw revealed his willingness to rethink the deadline. See Gore v. Harris, 773 So. 2d 524, 528 (Fla. 2000) (Shaw, J., concurring) (stating that "December 12 was not a 'drop-dead' date under Florida law" and "question[ing] whether any date prior to January 6 is a drop-dead date under the Florida election scheme").

unwillingness to come out and say that the Florida Supreme Court could not be trusted and the consequent lack of an opportunity for Justices Souter and Breyer to take them to task for failing to trust the state court.

The per curiam opinion should be faulted for its failure to take a clear position asserting that the Florida Supreme Court had established December 12 as the deadline. Its silence made it possible for Justice Souter merely to assert that there was "no justification for denying the State the opportunity to try to count all disputed ballots now."[200] Justice Souter's opinion should be faulted too, however, for not admitting that he was giving the state courts a chance to change the deadline or explaining why the state court should be given that chance. He faulted the majority for not "tak[ing] account of" the December 18 date,[201] but where is his account? It is not enough to float the other date and not to explain why there is any reason to switch to it, other than the desire for more time. Yet with no response from the per curiam opinion on the problem, it is no wonder that he did not attempt what would have been a difficult explanation.

Justice Breyer also found "no justification" for ending the case without giving the Florida Supreme Court a chance to conduct a proper recount.[202] He did concede that if December 12 was the deadline, "it is too late" as a matter of law, but if a later deadline applied, he considered the question whether there was enough time a factual ***554** one that ought to be left to the state court.[203] He did say that the equal protection "deficiency ... could easily be remedied,"[204] which is quite a bit more sanguine than the majority's attitude, and he did find fewer deficiencies than the majority,[205] but if the deadline were really December 12, those differences would be irrelevant. Yet again, we find no analysis of why December 12 was not the deadline. Like Justice Souter, he did not go back to the state court opinion and try to demonstrate that it had left the issue open.

Justices Souter and Breyer's position depended on the openness of the true deadline issue, yet they did not offer any discussion or make any concession that the Florida Supreme Court seems to have already resolved the issue. This failure makes their opinions as susceptible as all of the other opinions to the criticism that they were constructed backwards from a desired outcome. Perhaps they were not, and perhaps none of the others were either, but there is no reason to place the Souter and Breyer opinions on a higher plane of judicial orthodoxy than those written by the other members of the Court. They too denied absolute respect to the state court's authority over the interpretation of state law. While they may have avoided expressing disrespect for the state court by not discussing their disregard of the state court's position on the deadline, to ignore the work of the state court on this point of state law is also a form of disrespect. In a sense it is worse than the supposed disrespect shown by Chief Justice Rehnquist's concurring opinion, which found that the state court distorted its interpretation of state law,[206] because no federal law basis

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200 Bush II, 531 U.S. at 135 (Souter, J., dissenting).
201 Id. at 134.
202 Id. at 146 (Breyer, J., dissenting).
203 Id.
204 Id. at 147.
205 Id. at 145.
206 Id. at 115 (Rehnquist, C.J., concurring).

existed for ignoring the state court's state law interpretation that placed meeting the December 12 deadline above the interest in attempting to count every vote.

B. Article II Analysis

1. Chief Justice Rehnquist's Concurring Opinion: The Florida Supreme Court Has Gone Too Far.

The concurring opinion written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas avoided much of the haziness that shrouded the per curiam opinion.[207] These three Justices did not, however, disassociate themselves from the per curiam opinion, which they joined,[208] though one might imagine ***555** their having a certain distaste for it both because of its haziness and because of its reliance on a nontextual exposition of individual rights.[209] Without their votes, the per curiam opinion had only four votes, at most, and only two votes with respect to the remedy and much of the equal protection analysis. Thus, without the added votes of the Justices who joined the concurring opinion, the lack of support for the per curiam opinion would have increased the vulnerability of the Court as it determined the outcome of the election. Of course, there was an uproar after *Bush II*,[210] but imagine if the Court's critics had been able to say that the Court gave the presidency to Bush citing two completely different reasons, both of which were rejected by a majority of the Justices!

Generally, the conservative side of the Court has been more enthusiastic about enforcing the structural parts of the Constitution, and the liberal Justices have been more enthusiastic about enforcing individual rights.[211] It was probably necessary for the per curiam to speak in terms of rights to draw the votes of Justices Souter and Breyer, which were so valuable to the Court's appearance of legitimacy, because they rarely find structural constitutional arguments appealing.[212] But the structural constitutional path taken in the concurring opinion led to particularly serious problems because of the United States Supreme Court's need to respect state court decisions of state law. The Florida Supreme Court had taken care to word its opinion to immunize it from the Article II attack. Following the helpful instructions the United States Supreme Court had provided in *Bush I*, the Florida Supreme Court had expressed itself in completely statutory terms; it acknowledged the legislature's full control over the appointment ***556** of electors, but it

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[207] Id. at 111.

[208] Id.

[209] See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (rejecting the notion of a living Constitution).

[210] See, e.g., Gillman, supra note 3, at 163-64. A full-page ad in the New York Times, containing the names of six hundred law professors, stated "the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law." Id.

[211] See, e.g., Alden v. Maine, 527 U.S. 706 (1999) (enforcing state sovereign immunity, with four liberal justices dissenting); Printz v. United States, 521 U.S. 898 (1997) (enforcing constitutional federalism limitation, with four liberal justices dissenting).

[212] See, e.g., Alden, 527 U.S. at 760 (Souter, J., dissenting) (joined, inter alios, by Justice Breyer, rejecting constitutional sovereign immunity defense); Printz, 521 U.S. at 970 (Souter, J., dissenting) (rejecting constitutional federalism argument and finding federal power to use local government officials to enforce federal program); id. at 976 (Breyer, J., dissenting) (rejecting argument for local autonomy in favor of "the practical need for central authority").

attributed to the legislature all the ideas it needed in support of the relief it gave.[213] If the state is the final expositor of state law, then that is what the legislature meant, and that interpretation, one might argue, ought to have thwarted the Article II attack.

The Chief Justice began with a reminder of the obvious – this is an election for President of the United States[214] – which aptly set the tone by implying: this is a matter that, if it is to be determined by a court, ought to be determined by the Supreme Court of the United States. The functions performed by state institutions flow from the United States Constitution and "implicate a uniquely important national interest."[215] The Chief Justice acknowledged that "comity and respect for federalism ... compel ... defer[ence]" to state court decisions based on state law.[216] Note the use of the idea of comity, deference, and respect, which suggest a flexible policy, not an absolute matter of authority, not the idea that if the state court says this is state law, it simply *is* state law. The Chief Justice attributes this "practice" to the "understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."[217]

But federalism has to do not just with deference to the judicial institutions of the state; there are other institutions as well. Sometimes, to defer to the state court is to deny deference to another component of state government; principles of federalism may, for example, demand that the state court be intruded upon out of deference ***557** to the state legislature. Indeed, that was the case in *Michigan v. Long*.[218] There, the state court, by muddling its interpretation of state and federal law, had created a dysfunctional sort of insulation for itself: the United States Supreme Court seemed not able to review it, yet the state democratic processes could not clearly see that they could undo the results of the court's decision.[219] *Long* thus found deference to the state court unwarranted.

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213 Harris II, 772 So. 2d 1243, 1248 (Fla. 2000) (per curiam) ("These statutes established by the legislature govern our decision today.").

214 Bush II, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

215 Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983)).

216 Id.

217 Id. Justice Stevens's dissenting opinion refers to "our settled practice" of deferring to the state court's final interpretive authority over state law. Id. at 123 (Stevens, J., dissenting). The word "practice" suggests that it is just the Court's habitual way of behaving, as opposed to a mandatory requirement stemming from dual sovereignty. Interestingly, the Chief Justice makes a "cf." reference to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Bush II, 531 U.S. at 112 (Rehnquist, C.J., concurring). Erie announced that federal courts sitting in diversity jurisdiction must apply state law, including the state court's decisions interpreting common law. Erie, 304 U.S. at 78. When the state court says what the common law is, according to Erie, it is not merely using its powers of reason to come up with the right answer, it is using the power of the government that has put it in a position to bind the parties that appear before it. Id. at 79. Courts, then, in Erie's view, are not just legally trained answer-finders, they are agents of a particular sovereign. Id. Because they act for the state, the answers they come up with – even through common law methodology – are the law of a particular state, not any sort of general law. Id. This view of state courts could be taken to require the United States Supreme Court to accept any interpretation of state law the state court uses its power to make, undercutting the position the Chief Justice takes in Bush II, which finds a way to reject a state court opinion claim of reliance on state law.

218 463 U.S. 1032 (1983).

219 The state's legislature and people were led by the state court's muddled lawsaying into thinking that the result was imposed by federal law, about which they could do nothing on the state level. See id. at 1041. With the Long presumption, the United States Supreme Court can review the case, but the state court can avoid the presumption by making a clear statement of its intent to rely on state law. Id. If the clear statement of reliance on state law is made, the state court is able to avoid Supreme Court review, but the state's legislature and people can now see the democratic paths toward changing the result, either by setting the processes of state constitutional amendment in motion or by retaliating against the state judges at their next election. See Althouse, supra note 44, at 1509.

The Chief Justice acknowledged that ordinarily issues of state separation of powers can be resolved through state law.[220] With respect to the appointment of presidential electors, however, he noted that the Constitution gives a particular role to one particular component of the state, the state legislature.[221] Thus, Article II federalized an aspect of state separation of powers law, making it a matter open to United States Supreme Court review.[222] Here, the Florida Supreme Court had made an assertion about what the state legislature intended, yet it might have been quite wrong. Ordinarily, a state court's being wrong about the meaning of a statute has no remedy (other than amendment of the statute by the legislature, which would come too late to affect the case). The state court's wrong answer binds as tightly as a right answer: the court is "infallible ... because [it] is final."[223] But Article II, by interposing a federal question, makes the state court no longer the final court. Article II does not, under the Chief Justice's theory, completely open up the state court opinion to review; but the United States Supreme Court can look at whether the state court is too far out of line.[224] If the state court has made a "significant departure from the legislative scheme," its decision is not the work of the state legislature but the work of the state court, and the ***558** legislature has then been deprived of the role Article II explicitly assigned to it; the state court has usurped that role, in violation of Article II.[225]

The Chief Justice accordingly analyzed the Florida Supreme Court interpretation of state law in this effort to determine whether the state court had gone so far afield as to violate Article II. The Chief Justice noted first that the Florida Supreme Court "acknowledged" that the state legislature intended to take advantage of the federal statutory safe harbor.[226] Interestingly, he trusted the lawsaying competence of the state supreme court that far, but then did not go on to trust that the state court knew the state legislature's intent when it came up with some of its other ideas about what the legislature meant. The Chief Justice then used the state court's opinion that the legislature meant to moor in the safe harbor as a basis for rejecting the state court's interpretations that might frustrate that one goal.[227] Other goals found by the state court in the state statutes – notably the importance of counting ballots that reveal a "clear indication of the intent of the voter" – did not qualify as bona fide interpretations of state law.[228] The Chief Justice examined the state statutory provisions and concluded that the state court had gone too far and has "wholly change[d]" their meaning.[229]

This "independent, if still deferential, analysis of state law,"[230] appropriate here where there is such a high national interest in the presidential election and a specific federal

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[220] Bush II, 531 U.S. at 112 (Rehnquist, C.J., concurring). As the Chief Justice notes at this point, the Guarantee Clause, U.S. Const. art. IV, § 4, imposes some limit on the state's choices about how to allocate power among the branches of state government.

[221] Bush II, 531 U.S. at 112 (Rehnquist, C.J., concurring).

[222] Id. at 113.

[223] See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[224] Bush II, 531 U.S. at 113 (Rehnquist, C.J., concurring).

[225] Id. at 112-13.

[226] Id. at 113.

[227] See id.

[228] Id. at 118.

[229] Id. at 114.

[230] Id.

constitutional provision affecting state separation of powers, had precedent in United States Supreme Court case law, the Chief Justice noted.[231] He discussed two cases from the Warren Court's civil rights oeuvre, *NAACP v. Alabama ex rel. Patterson*[232] and *Bouie v. City of Columbia*,[233] which found ways to stop state courts from using state law to thwart United States Supreme Court review.[234] In *Patterson*, the Alabama state court had found the NAACP in contempt for failing to comply with a discovery order to produce the names of its members.[235] The NAACP, which had asserted ***559** the federal constitutional right to freedom of association as its basis for refusing to comply with the order, sought review in the Alabama Supreme Court through a writ of certiorari.[236] The Alabama Supreme Court relied on a procedural ground to bar its review: mandamus, not certiorari, was the proper writ to use to seek review of the judgment.[237] When the NAACP then sought review in the United States Supreme Court, Alabama argued that the procedural ground provided independent support for the outcome in state court, thus barring United States Supreme Court review under the independent and adequate state ground doctrine.[238] The United States Supreme Court, using its authoritative control over the scope of the independent and adequate state ground doctrine, shaped that doctrine with an eye toward preventing the state court from trumping up a state law ground to "thwart" Supreme Court review.[239] Under the doctrine, the Court would thus not view as adequate a state law ground that was "without any fair or substantial support."[240] With the doctrine thus interpreted, it became the proper work of the United States Supreme Court to analyze the quality of the state court's state law interpretation. Parsing the state supreme court's reasons for requiring a writ of mandamus, the Court analyzed many earlier state law cases. Even though it could perceive a "consistent pattern ... in retrospect," it declared that pattern too obscure to expect the petitioner to have perceived it and too insubstantial to deprive the Supreme Court of its power.[241] The advantage of going first and the authority over state law would not be allowed to provide endless control over what the United States Supreme Court saw as its important role with respect to constitutional rights. The Court did not write a word about the role it perceived for itself in protecting the NAACP from the southern courts, but it is easy enough for readers to infer that the Court's refusal to take a position of supine deference to state courts was strengthened by its perception of the realities of the world beyond the immediate text of the opinions it reviewed. ***560***

In *Bouie*, the state court had made a strained interpretation of a state criminal trespass statute: it read a state statute that banned "entry upon the lands of another ... after notice

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231 Id.
232 357 U.S. 449 (1958).
233 378 U.S. 347 (1964).
234 See Bush II, 531 U.S. at 114-15 (Rehnquist, C.J., concurring).
235 Patterson, 357 U.S. at 454.
236 Id.
237 Id. at 454-55.
238 Id.
239 Id. at 457.
240 Id. at 455 (citation omitted).
241 Id. at 457. Justice Frankfurter's statement in the conference on this case is helpful on this point: "The state procedure is so doubtful that this is, in effect, retroactive. The state procedure is so uncertain that the NAACP's federal right is being lost." THE SUPREME COURT IN CONFERENCE, 1940-1985, at 311 (Del Dickson ed., 2001). More bluntly, Justice Black said, "The state ... should not be allowed to defeat the federal courts." Id.

from the owner or tenant prohibiting such entry ..." to cover a situation where persons invited to enter had failed to leave when requested.[242] This contorted interpretation was used to convict black civil rights proponents who had engaged in a sit-in at a whites-only lunch counter.[243] The United States Supreme Court, desirous of overturning the result but nevertheless respectful in general of the rights of private property owners against trespass, found a way to achieve its end: the interpretation of the state statute was so strained it deprived the petitioners of the fair warning required by constitutional due process.[244] The Court relied on "the standards of state decisional consistency" used to review the state court decision on the state law ground in *NAACP v. Alabama*.[245] Accordingly, the United States Supreme Court, looking deeply into state law precedent, denounced the state court's state law interpretation as "so clearly at variance with the statutory language" and lacking "the slightest support in prior South Carolina decisions."[246] Again, the case arose in a context of state courts that had earned the suspicion of the United States Supreme Court,[247] and the Court found a way to use federal law to prevent the state court from using its authority over state law interpretation to immunize itself from review.

The Chief Justice saw the *Bush* case as "precisely parallel."[248] The state court's strained, result-oriented interpretation of the state statutory law was so "impermissibly distorted ... beyond what a fair reading required" that it violated Article II.[249] Like the United States Supreme Court in *Bouie*, the Chief Justice did not purport to substitute his interpretation of state law for the state court's interpretation of state law; rather, he found that the high degree of distortion in the interpretation made for a violation of federal law.[250] Those who say there was ****561*** no "deference" to the state court in the concurring opinion fail to acknowledge this point. The deference is there, but it is not endless; it is not "blind deference."[251] It ends where the state court's interpretation is too distorted. Thus, the Chief Justice analyzed the various relevant provisions of the state statutory scheme in an effort to discern not the actual meaning, but only to establish that the state court's interpretation is far enough off the mark to overcome the usual acceptance of the state court resolution of the case, to rebut the presumption that the state has acted in good faith in its role as final expositor of state law.[252] When a question of state law is plugged into a federal law issue, the United States Supreme Court has the power to reject a sham interpretation. It has the

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[242] Bouie v. City of Columbia, 378 U.S. 347, 349-50 (1964).

[243] Id. at 350.

[244] Id. at 362.

[245] Id. at 354.

[246] Id. at 356.

[247] See Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994) (noting that during the 1950s and 60s, the Supreme Court shaped jurisdictional doctrine to increase access to the federal courts because it saw some state courts as "lack[ing] good faith in handling the federal claims of civil rights demonstrators" and "unmistakably hostile to the constitutional claims of African-American litigants").

[248] Bush II, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

[249] Id.

[250] Id.

[251] See Younger v. Harris, 401 U.S. 37, 44 (1971); supra text accompanying notes 81-84 (discussing Younger).

[252] See Bush II, 531 U.S. at 111-23 (Rehnquist, C.J., concurring). For example, the Chief Justice writes:

> No reasonable person would call it "an error in the vote tabulation," ... or a "rejection of legal votes," ... when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.

Id. at 119 (footnote and internal citations omitted). That is, the Florida Supreme Court's interpretation was not just incorrect, it was not rational – it was "inconceivable." Id. at 119 n.4.

responsibility, one might say, as it makes this connection between state and federal law, to ensure that the "plug" is not defective.

It is important to acknowledge that this is what the opinion says, but that naturally does not entirely shield the Chief Justice from criticism. Did the Chief Justice himself act a bit like the Alabama court discovering the wrong writ problem or the South Carolina court discovering a strange meaning for the trespass statute? Did he strain Article II to reach his preferred outcome? As the Chief Justice pointed to the state court's distortion of state law and used that to detect a federal question in the tangle of state law out of which the state court may have manufactured an illicit power, he exposed his own work to the criticism that he distorted the law to manufacture an illicit power.

Quite aside from how one might resolve the questions about whether any of the judges used sham interpretation to seize illicit power, it is apparent that in conflicts of judicial authority, one can easily see the advantage to going first and the advantage to going last. The state court in going first can use the interpretation of state law to shield itself from the review of the United States Supreme Court, and that advantage in going first frequently works. The United States Supreme Court in going last, however, gets to have the final say in shaping ***562** the doctrine that determines the effectiveness of state law insulation from Supreme Court review, and it can use that position of going last to produce an opinion that, however strained, cannot be reversed.

2. Justices Souter and Breyer: The Florida Supreme Court Has Not Gone Too Far.

Justices Souter and Breyer, who dissented from the position taken in the concurring opinion, did not disagree with the proposition that it is possible for the state court to distort the law so far that it should be viewed as having "displaced" the decisions of the state legislature.[253] The question was whether the state court's work deserved to be considered actual statutory interpretation or some new, judicial creation. They dissented because, to them, the state court's opinion was not so unreasonable as to lose its quality of being statutory interpretation.[254] The opinion lay "within the bounds of reasonable interpretation."[255] There was thus no "displacement" of the legislature's choice and, consequently, no Article II violation.[256] Justice Souter acknowledged that other interpretations were possible and even better, but the point was only whether the Florida Supreme Court had gone *too far*.[257] Similarly, Justice Breyer parsed the Chief Justice's analysis of the Florida court's purported statutory interpretation and asked: "[W]here is the 'impermissible' distortion?"[258]

Justices Souter and Breyer disagreed with the concurring opinion over the *degree* of distortion in the state court's interpretation. They did not say whether it was unreasonable

253 Id. at 130-31 (Souter, J., dissenting).
254 Id. at 131.
255 Id.
256 Id.
257 Id.
258 Id. at 152 (Breyer, J., dissenting).

for the Chief Justice to find that the state court's interpretation was distorted to the point of unreason, but they did not need to do so in order to reach their decision: they only needed to decide that the state court decision did not go too far afield in its interpretation of state law.[259] ***563**

C. The Attacks Premised on Hypocrisy About Judicial Restraint and Federalism

1. Justice Stevens and the Rhetoric of Respect.

Justice Stevens began his dissenting opinion by stating the central premise that state courts have final interpretive authority over state law.[260] Despite the intense national interest in presidential elections, in Justice Stevens's view, only state law had any significance.[261] To Justice Stevens, the federal questions were trumped up trivialities, asserted in an attempt to avoid the overwhelming reality that the federal Constitution made the appointment of presidential electors a state law matter, and the state court thus controlled the outcome.[262] In this view, Article II gave no entrée into this thoroughly state law issue because it gave power to the state legislatures, not as entities torn out of the whole fabric of state government, but as they really exist, "as creatures born of, and constrained by, their state constitutions."[263] Florida's constitution provided for judicial review, and the state legislature, even as it performed a task assigned to it by the federal Constitution, cannot escape that review.[264] As Justice Stevens saw it, whether the state court had claimed to be using statutory interpretation or had openly applied state constitutional law, the result would be an interpretation of state law immune to federal review.

Although Justice Stevens rejected the per curiam opinion's equal protection analysis, he did note that if he thought the Equal Protection Clause justified interference with the state court's state law interpretation, he would say that it required a continuation of the recount, not a stop to it, because the Equal Protection Clause, as the majority itself admitted, should be understood as protecting "the right to have one's vote counted."[265] For Justice Stevens, the Florida Supreme Court deserved autonomy here, where it simply "did what courts do": it operated within the *Marbury* "province ... to say what the law is."[266] The state court's lawsaying did not cross the line into an illegitimate use of legal interpretation to achieve a political end.[267] Having taken this position, Justice Stevens could indirectly compliment

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[259] Justices Souter and Breyer's mode of expression is notably more moderate than that of Justices Stevens and Ginsburg. See infra pt. IV.C (discussing the tone and substance of the dissenting opinions written by Justices Stevens and Ginsburg). Of course, the four liberal justices all wrote opinions and all joined each other's opinions, which makes the stark differences in both tone and substance among the four opinions difficult to fathom.

[260] Bush II, 531 U.S. at 123 (Stevens, J., dissenting).

[261] Id.

[262] Id.

[263] Id.

[264] Id. at 123-24.

[265] Id. at 126.

[266] Id. at 128 & n.7 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[267] See id. at 128.

himself for ***564** believing in the impartiality of the state courts by accusing the majority of the Court of assuming otherwise:

> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges.... The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land.[268]

Of course, the reader need not believe that Justice Stevens reached his decision because he genuinely thought the Florida Supreme Court was playing it straight. If he in fact sought only to achieve his own personal preference, he would not have admitted it, but would have covered up his illegitimate use of power by adopting the pose of judicial restraint, deferring to the state court that had conveniently presented him with his desired outcome. The majority found itself in the more awkward position of having to reject the state court's interpretation of state law, which left it with no option but to engage in the sort of disparagement of another court that it too avoids when it can. But one could fairly think that the Florida Supreme Court's work deserved disparagement. That is, rejecting what that court did could have resulted from a nonpolitical assessment just as it could have come from pure political preference. My point here is only that there is nothing about Justice Stevens's ability to say that he and not the majority believes in the good faith of the Florida Supreme Court that proves that he and not the majority was acting apart from political preference. It is possible that all were pursuing political ends and possible that none were.

Justice Stevens ended his opinion with prophetic sermonizing that caught the attention of many of the journalists covering the *Bush v. Gore* litigation:

> It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[269] ***565**

But what is this really saying? To decide the case my way would preserve the illusion that people have that courts do their work in a properly pure spirit? Yet the statement itself openly invites people to cast aside that illusion. The per curiam and the concurring opinions were crafted, however hastily and imperfectly, to give the appearance, whether true or false, that the law demanded a particular outcome. That is what judicial opinions, including the Florida Supreme Court's opinion, usually do. If Justice Stevens were really worried about the injuries to the nation caused by breeding mistrust for the courts, he would have expressed his anxieties only in closed chambers. Indeed, he could have joined the majority to help give people confidence that the Court was the neutral, prestigious agent of the rule

[268] Id.
[269] Id. at 128-29.

of law that people would like it to be. The decision to print that paragraph, then, has at least as much significance as the words' literal meaning.

Justice Stevens and the other liberal Justices do not make a general practice of showing deference to state courts. Many of their opinions are highly critical of the work of state courts; a vigorous enforcement of constitutional rights, for example, in habeas cases, requires that one take a hard look at their work.[270] In such cases, these Justices are not swayed by platitudes about state courts being "the true backbone of the rule of law."[271] The most fundamental aspect of judicial comity is that one keeps the argument at the legal level, even when, because one is applying a standard that looks for abuse of discretion or unreasonableness or "impermissible distortion,"[272] one cannot avoid sounding critical of the other court. Justice Stevens's final statement is a criticism about creating the *impression* the state court ***566** was acting politically. If the "rule of law" were really about the appearance that there is a rule of law, everyone would have a duty to keep up those appearances; perhaps no one should ever write a dissenting opinion. But plainly, that is not the system we have. Comity demands that one address the legal reasons given by the other side as if they were the real reasons and respond to legal arguments, however bad, with more legal arguments. The rule of law, quite independently, demands that legal reasons actually support the decisions.

The per curiam and the concurring opinions, to reach their conclusions, could not avoid criticism of the state court, but these opinions adhered to the practices of comity and focused only on the quality of the legal reasoning. They did not accuse the state court of political bias, even though they may have been fueled by suspicion about the state court's partiality. Justice Stevens himself did not accuse the per curiam or the Chief Justice of partiality: he only accused them of making people think the Florida Supreme Court was not impartial. There was room for his disagreement with the legal grounds used by the per curiam and by the Chief Justice, to be sure, but the rhetoric about respect for state judges, effective though it was in winning attention in the press,[273] added nothing of legal substance. Talk about respect for state judges is only meaningful in the context of true engagement with the question whether they deserve respect.

2. Justice Ginsburg: The Rhetoric of Restraint and Federalism.

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[270] See, e.g., Williams v. Taylor, 529 U.S. 362 (2000). In Williams, Justice Stevens, joined in the key Section II portion of the opinion by Justices Souter, Breyer, and Ginsburg, interpreted an amendment to 28 U.S.C. § 2254 (2000), made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), to preserve the role of the federal courts on habeas:

> When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." ... At the core of this power is the federal courts' independent responsibility – independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.

Williams, 529 U.S. at 378-79 (internal citations omitted).

[271] Bush II, 531 U.S. at 128 (Stevens, J., dissenting).

[272] Id. at 152 (Breyer, J., dissenting).

[273] The search "complete certainty identity winner and loser perfectly clear" in the Nexis News Group File, Most Recent Two Years, produced 362 hits on November 4, 2001.

In her dissenting opinion, Justice Ginsburg, like Justices Stevens, Souter, and Breyer, accepted the Florida Supreme Court's interpretation of state law as real statutory interpretation.[274] But, like Justice Stevens, Justice Ginsburg also took the opportunity to expatiate on the importance of respecting state court decisions.[275] She considered it relevant to point to the deference shown by federal courts to state court decisions of *federal* law in habeas cases,[276] in which federal courts can only review state court decisions about constitutional law that have flouted the case law in existence at the time of the trial[277] and may only review Fourth Amendment decisions if the state court has failed to provide a full and fair opportunity to litigate.[278] ***567***

The United States Supreme Court's habeas jurisdiction is complicated and controversial. It is also largely unknown even to most lawyers. But it is important for those attempting to understand Justice Ginsburg's criticism to understand that on habeas, a federal district judge assesses the constitutionality of the custody of a prisoner. The liberal side of the United States Supreme Court has long characterized the district judge in a habeas case as a surrogate for the United States Supreme Court.[279] The notion is that the criminal defendant deserves federal review of his federal rights, and, with the United States Supreme Court unavailable to review every such case, that the federal district judges are called into service to cover for it. This position has long been rejected by the majority of the Court, which sees habeas not as the equivalent of Supreme Court review, but as a different kind of inquiry into the justice of continued custody, which takes into account the interests in finality that come into being after a conviction and after all of the opportunities for appeal, including petition to the United States Supreme Court, have expired.[280]

Justice Ginsburg's *Bush II* opinion repeated a quote from Professor Paul Bator: "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.'"[281] She used this quote to suggest that if we trust state ***568*** courts

[274] Bush II, 531 U.S. at 135-36 (Ginsburg, J., dissenting).

[275] Id. at 136-43.

[276] Id. at 136-37.

[277] See Butler v. McKellar, 494 U.S. 407, 414 (1990).

[278] See Stone v. Powell, 428 U.S. 465, 481-82 (1976).

[279] This position was championed by Justice Brennan in his dissenting opinion in the case Justice Ginsburg cited, Stone v. Powell:

> The Court, however, simply ignores the settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Art. III of the Constitution, has effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts. ... [T]o the extent Congress has accorded the federal district courts a role in our constitutional scheme functionally equivalent to that of the Supreme Court with respect to review of state-court resolutions of federal constitutional claims, it is evident that the Court's direct/collateral review distinction for constitutional purposes simply collapses.

Id. at 511-12 & n.10 (Brennan, J., dissenting).

[280] See, for example, Teague v. Lane, 489 U.S. 288 (1989), in which Justice O'Connor quotes Warren Era dissenter Justice Harlan:

> Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Id. at 306 (quoting Mackey v. United States, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)).

[281] Bush II, 531 U.S. at 136-37 (Ginsburg, J., dissenting) (quoting Stone, 428 U.S. at 494 n.35 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963))). A Lexis check reveals that Justice Ginsburg is the first Justice since Stone to repeat that Bator quote. The unpopularity of this pithy and conspicuous quote is due, one suspects, to the fact that none of the Justices, including Justice Ginsburg, believes it.

with *federal* law, surely we ought to trust them with state law.[282] But let us look more closely at what Professor Bator meant. He emphasized the idea that state courts are *courts* over the idea that state courts are part of the state government.[283] The notion is that all courts are committed to an orthodox judicial method that requires them to consult and analyze the appropriate legal texts and precedents and to resolve any conflicts in the sources of law by putting legal authority in its proper hierarchy. Thus, state judges like federal judges may, indeed must,[284] apply federal constitutional rights and give them priority over state law. If it were not so, state courts could not be trusted with criminal cases, the overwhelming majority of which they must handle.[285] We accept that many people are in prison as a result of state court interpretations of federal law, and the federal district courts are not called into action to redo all of their work. The doctrines of habeas corpus govern this area of federal court jurisdiction. A habeas corpus case, as viewed by the Supreme Court's majority, is a new case seeking to undo the results of an earlier case, an exception to the usual effect of res judicata doctrine.[286]

But the United States Supreme Court in *Bush II* did not face the reopening of an old case, so it did not need to balance the interest in finality. It was an instance of appellate review on questions of federal law, and the United States Supreme Court is in a hierarchically superior position to the Florida Supreme Court with respect to the interpretation of federal law. A forthright performance of its authority to interpret federal law did not implicate the matters that concerned Professor Bator. It was not an assertion that the United States Supreme Court is "more competent, or conscientious, or learned"[287] than the Florida Supreme Court about federal law, but only an assertion that it is the final authority. As Justice Jackson once aptly wrote ***569** about the role of the United States Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."[288] It is simply obfuscation to characterize Supreme Court review on questions of federal law as inherently insulting to the state courts.

Of course, the concurring opinion scrutinized the state court's interpretation of state law because of the way it was linked to the Article II question.[289] And, indeed, Justice Ginsburg acknowledged that sometimes the Court must "examine state law in order to protect federal

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[282] See id. at 136 (stating that "not uncommonly, we let stand state-court interpretations of federal law with which we might disagree").

[283] See Bator, supra note 281, at 509. This is exactly the opposite emphasis from that expressed in Erie, which the Chief Justice discussed. Bush II, 531 U.S. at 112 (Rehnquist, C.J., concurring). See supra note 217 (discussing the Erie citation).

[284] See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States ... shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby ... .").

[285] Michigan v. Long, 463 U.S. 1032, 1043 n.8 (1983).

[286] See Mackey v. United States, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part).

[287] Bator, supra note 281, at 509.

[288] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Consider the lines that precede Justice Jackson's famous quote:

> Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.

Id. Justice Jackson was, it should be noted, writing about habeas corpus and distancing himself from the majority's approach, which envisioned the federal district judge as a stand-in for the United States Supreme Court.

[289] Bush II, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

rights."[290] "But," she added, "we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court."[291] Nothing in this statement, however, amounts to a valid objection to what the concurring opinion did because one must still ask: *How much* respect is owed? *When* is that respect-measuring cup full? Again, it should be apparent that the real disagreement is what we have seen throughout the analysis of the dissenting opinions: Did the Florida Supreme Court go too far? Just how bad was the Florida Supreme Court's interpretation? Was it within a reasonable range of defectiveness that still implies genuine interpretation of the state statutes? Or was it unreasonable – so distorted that it was right to see it as a substitution of the state court's own preference for the statute? Talk about the "full measure of respect" is rhetoric that we should not permit to distract us from seeing that the real disagreement is about what to infer from the degree of distortion in the state court's opinion.

Justice Ginsburg explained *Patterson* and *Bouie* through their "historical context."[292] As she saw it, the Court really meant to express suspicion about the good faith of the southern state courts in those ***570** civil rights era cases.[293] Those cases were very unusual departures from the usual practice of the Court, according to Justice Ginsburg.[294] But *Bush v. Gore* – was *it* not an unusual case? Did the Florida Supreme Court stand out in the long history of courts the United States Supreme Court has had to deal with? Perhaps it did. Perhaps our view of whether it did or did not depends, for each of us, on whether we felt joy or anger when that final statewide recount was ordered.

Justice Ginsburg cited the Guarantee Clause[295] to show that the Framers viewed the state in a context that included judicial review.[296] She argued that it is wrong to read Article II as speaking to the legislatures outside of their place within a republican form of government. In this light, it is wrong, she wrote, for the United States Supreme Court to interpose itself between two branches of the state government.[297] Even if Article II did "implicate a structural constraint," she contended, "Congress, not this Court, is likely the proper governmental entity to enforce that constraint."[298] *Congress* is "likely" to have the

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[290] Id. at 137 (Ginsburg, J., dissenting).

[291] Id.

[292] Id. at 140.

[293] See id. at 140-41.

[294] Id.

[295] U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

[296] Bush II, 531 U.S. at 141 (Ginsburg, J., dissenting) (comparing the Article IV notion of a "Republican Form of Government" to the Framers' understanding of the role of Article III federal courts and concluding that "Article II can hardly be read to invite this Court to disrupt a State's republican regime").

[297] Id.

[298] Id. at 142 n.2. Justice Ginsburg cited case law holding that the Guarantee Clause presents only a "a nonjusticiable political question." Id. In Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916), one of the cases cited by Justice Ginsburg, state election officers had unsuccessfully sought a writ of mandamus from the state supreme court to bar the use of the results of a referendum affecting that state's apportionment of legislative districts. Id. at 566. In that case, the Court refused to consider the state court's rejection of challenges premised on state law, considered and rejected a federal statutory challenge, and rejected the challenge based on the Guarantee Clause relying on its longstanding position that the Guarantee Clause "presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution." Id. at 568- 69. That is, the Constitution vests "exclusive authority to uphold the guarantee of a republican form of government" in Congress. Id. at 570. The conclusion that the Guarantee Clause presents only a political question has been widely discussed and criticized. See, e.g., Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (finding that the Guarantee Clause does not fit the political question doctrine). But in recent years, the Court has used the Equal Protection Clause to avoid many of the problems that would otherwise be caused by placing the Guarantee Clause beyond judicial purview. See Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause? – A*

role of enforcing constitutional law? *Why*? The Court does view some constitutional matters as nonjusticiable political questions when it ***571** finds a "textually demonstrable commitment to a coordinate branch,"[299] but it would be odd to use the political question doctrine to prevent the Court from dealing with a *state court* that had itself violated federal constitutional law. A matter is a political question when it comes up within the context of a function that the Constitution has assigned to Congress or the Executive – the only branches "coordinate" to the judiciary. Thus, in the only recent case finding a new political question, the Court could not reconsider a constitutional question that arose with respect to the way the Senate had carried out its constitutionally assigned task of trying an impeachment.[300] It would be quite another thing if the Bush-Gore controversy had continued into January and Congress had made a go of resolving it as it performed its constitutionally assigned role of counting the electoral votes. If at that point Governor Bush or Vice President Gore had sought judicial relief from the result produced by the processes in Congress, some of the "symptoms"[301] of a political question would have been present. But the Florida Supreme Court's decision presented none of the classic symptoms of a political question. Even if one were to decide to start using the political question doctrine for tasks the Constitution assigns to the state, the only state institution with a constitutionally assigned task was the state legislature. It would ***572** take some serious doctrinal juggling to turn that "textual commitment" into a reason for leaving the state *court* alone, as *it interfered* with the operation of the *state* legislature. Preventing the United States Supreme Court from reviewing a state court violation of federal constitutional law would seem to be the least appropriate place for the political question doctrine.

When Justice Ginsburg wrote that "Congress, not this Court, is likely the proper governmental entity to enforce that constraint,"[302] it is possible that she did not mean to suggest that Article II raised only a nonjusticiable political question, even though she did follow this statement with citations to cases that relied on the political question doctrine.[303] The United States Supreme Court can avoid cases by simply denying certiorari,[304] so it has

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Response to Professor Chemerinsky, 65 U. COLO. L. REV. 881 (1994) (arguing that the availability of the Equal Protection alternative has removed the pressure to overrule longstanding precedent).

[299] Nixon v. United States, 506 U.S. 224, 229 (1993).

[300] Id.

[301] Chief Justice Warren Burger, when he was a circuit court judge, used the term "symptoms" to describe the factors listed in Baker v. Carr, 369 U.S. 186, 217 (1962). See Powell v. McCormack, 395 F.2d 577, 593 (D.C. Cir. 1968), rev'd, 395 U.S. 486 (1969). The "symptoms," as listed in Baker, are:

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

369 U.S. at 217. According to Baker, if all of these factors were absent, there is no political question. Id. Baker did not say when the presence of one or more factors would make a question into a political question. In Powell, then-Judge Burger had diagnosed a political question. 395 F.2d at 596. The United States Supreme Court reversed this finding, giving a notably narrow meaning to the doctrine. 395 U.S. at 548. It emphasized the first of the Baker factors, id., as did the Rehnquist Court, many years later in Nixon, 506 U.S. at 229. The idea of using the political question doctrine as a *general* way to keep courts out of political areas or to show deference for the political branches is not supported by the case law.

[302] Bush II, 531 U.S. at 142 n.2 (Ginsburg, J., dissenting).

[303] See id.

[304] See 28 U.S.C. § 1257 (2000).

no *duty* to decide questions of constitutional law even when they are justiciable. In deciding whether to vote to grant certiorari, the Justices might very well take into account whether the Court ought to remain aloof from a hot political controversy that may resolve itself in some other manner. Looked at in terms of cert policy, the dispute between Justice Ginsburg and the concurring opinion becomes a difference of opinion about how unreasonable and chaotic the recount actually was, the matter most susceptible to subjectivity influenced by one's preference for Gore or Bush.

In addition to criticizing the majority for deviating from its usual practices of judicial restraint, Justice Ginsburg criticized it for betraying its usual interest in federalism: "Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."[305] This sounds weighty, but it is yet another way of saying what is said repeatedly throughout the dissenting opinions: we disagree with the majority about whether the state court *deserves* deference. No one believes in endless, blind deference. To the extent that Justice Ginsburg's statement reads as an accusation of hypocrisy, it reflects both ways. Why is the liberal side of the Court so "mindful" of federalism now? What amount of deference did the Florida Supreme Court deserve for its actions? Perhaps the majority underestimated it, but perhaps the dissenters overestimated it. General imprecations about federalism and deference do not get us any closer to the answer. ***573***

Clearing away the rhetoric, the crucial part of the discussion of Article II in *Bush II* is the scrutiny of the state court's discussion of specific provisions of the Florida statutes and the analysis of whether the Florida Supreme Court stretched too far. Surely, people will disagree about whether or not the Florida Supreme Court went over the line, but we should see that that was the crux of the dispute between the concurring and the dissenting Justices. It was a judgment call, and the judgment of some, all, or none of them was influenced to some unknown degree by their preference for Bush or Gore. We simply cannot know, and we must acknowledge that our own judgment is influenced by our own preference.

CONCLUSION

Among courts, the United States Supreme Court goes last. With no higher court, it cannot be reversed. It has the pseudo-infallibility of finality.[306] Yet the United States Supreme Court is not insulated from criticism, and of course, criticism has been aimed at its work in the Bush-Gore litigation. Much of that criticism deserves its own criticism because it too can rationalize and distort to serve the preferences of the writer, who, one can assume, preferred one of the candidates in the 2000 election. That criticism of criticism, to which I add my little part here, can go on ad infinitum, unlike litigation, which has to come to an end, especially when there is a presidential inauguration that must take place and a nation with urgent interests in a smooth transition to a new administration.

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[305] Bush II, 531 U.S. at 142-43 (Ginsburg, J., dissenting).

[306] See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Many of those who were hoping to see a shift in the votes that would elect Al Gore contended that we could afford several more weeks of uncertainty and a political fight in Congress to make the final determination. Justices Souter, Breyer, Ginsburg, and Stevens all thought the United States Supreme Court ought to have sat out the dispute and left it to Congress to right any wrongs that the various efforts in Florida might have caused. In 2000, we lived in a golden era of peace and prosperity, and the nightly news showing Floridians holding ballots up to the light in search of degrees of chad detachment made a somewhat entertaining TV show. But as Justice Stevens wrote in *Printz v. United States*: "[S]ince the ultimate issue is one of power, we must consider its implications in times of national emergency."[307] *Printz* held that Congress may not "commandeer" the executive branch officials of state and local government, in a case that ***574** involved the use of local law enforcement officials to do background checks on gun purchasers.[308] Dissenting, Justice Stevens stressed the seriousness of finding a lack of power to do something that might be extremely important in an emergency.[309] With chilling prescience, which might lead some of those who approved of *Printz* to rethink, Justice Stevens wrote:

> Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.[310]

Could we have endured the instability and delay of waiting until January if the terrorist attacks of September 11, 2001 had occurred on Election Day? Perhaps it is enough of an answer to say, without doubt, Al Gore would have conceded the election immediately. Perhaps the answer suggested in *Printz* was enough: in an emergency, state and local officials would instantly and actively cooperate.[311]

Did the members of the Court who managed to end the election controversy on December 12 go wrong? The concurring opinion dared to take a close look at the state court's statutory interpretation and declare it a sham. That could be seen as taking over the state court's role of saying what state law is, but there must be some limit to the extremes to which a state court can go in calling things state law. The United States Supreme Court has a duty to defend its own lawsaying role. Did the per curiam opinion arrogate a power to determine state law by assuming there was nothing more to decide about the deadline? But the Florida Supreme Court had committed itself to the December 12 deadline, and one can well understand the good sense in denying that court a chance to reconsider.

The per curiam opinion's closing paragraph is a plea for belief:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's

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[307] 521 U.S. 898, 940 (1997) (Stevens, J., dissenting).

[308] 521 U.S. at 935.

[309] Id. at 940 (Stevens, J., dissenting).

[310] Id.

[311] 521 U.S. at 905-17 (noting the ability of state and local government officials to voluntarily participate in carrying out a federal government program).

> design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our ***575** unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[312]

Just as the Florida Supreme Court had cloaked itself in the language of statutory interpretation in what seems to have been an effort to protect itself from the United States Supreme Court, the United States Supreme Court, though it had no higher court from which it needed shielding, wrapped itself in the language of judicial restraint in what seems to have been an effort to protect itself from the attack to which it is exposed: criticism in "the political sphere."[313] In a stroke of poetic justice, even as the Florida court's references to statutory interpretation could not protect it from the attack of a United States Supreme Court that is determined to reverse it, the United States Supreme Court's references to the unwilled, apolitical nature of its role could not shield it from the attacks of those who are determined to criticize. The Supreme Court's critics themselves use the cloak of language and are subject to rejection when people do not take their writings at face value.

In the end, *Bush v. Gore* works best as a rich and revealing case study of the human mind in action. Everyone who talks about *Bush v. Gore* without admitting that they are engaged in the same kind of cloaking and advancing of personally preferred ends is still an active participant in that larger display. If I could only get outside of it myself, I would love to be able to describe the whole picture; but for now, I will end my effort, having attempted to show something of the interplay between the Florida Supreme Court and the United States Supreme Court as both courts, though they were staffed by human beings who had to have cared about who became President, struggled within a system of separated state and federal legal authority and orthodoxy about the role of judges. Myself, I do not doubt that they meant to use their power constrained by this authority and orthodoxy. The inevitable imperfection of their work does not deserve outraged accusations. At the very least, those who would criticize ought to see how the judges who voted for the outcome the critics liked were all doing something that they would have found a way to criticize if they had felt so motivated.

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[312] Bush II, 531 U.S. 98, 111 (2000) (per curiam).

[313] Id.